

# DON'T GET CUTE

Ethics for trial prosecutors

Chris McMullin

Chief Deputy District Attorney

Tenth Judicial District

# Supreme Court Rule 161

- When present during a court proceeding, an attorney or party must—through conduct, demeanor, and attire—show respect for the dignity and authority of the court, and the proceedings must be maintained as an objective search for the applicable facts and the correct principles of law.

# National Prosecution Standards

- 1-2.1 Standard of Conduct
- A prosecutor should conduct himself or herself with a high level of dignity and integrity in all professional relationships, both in and out of court. Appropriate behavior includes, but is not limited to, the following:

# National Prosecution Standards

- **2-6.1 Judicial Respect**

- A prosecutor shall display proper respect for the judicial system and the court at all times.

- **2-6.2 Respect in the Courtroom**

- A prosecutor should vigorously pursue all proper avenues of argument. However, such action must be undertaken in a fashion that does not undermine respect for the judicial function.

# NPS Standard of Conduct

- A prosecutor should act with candor, good faith, and courtesy in all professional relationships.
- A prosecutor should act with integrity in all communications, interactions, and agreements with opposing counsel. A prosecutor should not express personal animosity toward opposing counsel, regardless of personal opinion.
- A prosecutor should at all times display proper respect and consideration for the judiciary, without foregoing the right to justifiably criticize individual members of the judiciary at appropriate times and in appropriate circumstances.

# Do the right thing. Always

- Rule 3.8 “SPECIAL RESPONSIBILITIES OF A PROSECUTOR”

# We are special. Don't let it go to your head

- A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions.

# National Prosecution Standards

- **1-1.1 Primary Responsibility**
- The prosecutor is an independent administrator of justice. The primary responsibility
- of a prosecutor is to seek justice, which can only be achieved by the representation and
- presentation of the truth. This responsibility includes, but is not limited to, ensuring that the
- guilty are held accountable, that the innocent are protected from unwarranted harm, and that
- the rights of all participants, particularly victims of crime, are respected.

# It starts with the charge

- A prosecutor SHALL
- Refrain from prosecuting a charge that the prosecutor knows is not supported by PROBABLE CAUSE (3.8(a))
- Which means... you have to know the difference between reasonable suspicion, PC and beyond a reasonable doubt
- Which means...

# Rule 1.1 “Competence”

- “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”
- We represent:
  - The PEOPLE
  - The STATE OF KANSAS
  - Our ELECTED OFFICIALS

# PPPPP

- Proper
- Preparation
- Prevents
- Poor
- Performance

# The responsibility is yours

- Know the law
- Know your facts!
- Staff the case
- You will be the one to enter your appearance
- It is your reputation, and your license on the line

# Discovery

- Rule 3.8 (d) The prosecutor in a criminal case SHALL
  - make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
  - Much broader than Kansas statute or case law

# Discovery

- 22-3212
- *Brady*
- *Giglio*
- *Numerous* Kansas cases

# National Prosecution Standards

## **2-8.4 Disclosure of Exculpatory Evidence**

- The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct.

# National Prosecution Standards 4-9.1

- A prosecutor should, at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to:
  - minimize surprise
  - afford the opportunity for effective cross-examination
  - expedite trials
  - meet the requirements of due process

# CLM Life Rule

- “OH SHIT” = *Immediate disclosure*

# The responsibility is yours

- “Prosecutors are under a **positive duty**, independent of court order, to disclose exculpatory evidence to a defendant.” *State v. Stevens*, 285 Kan. 307 (2007)
- If at *any point* in the pretrial or trial proceedings the prosecutor discovers additional witnesses, information, or other material previously requested or ordered which is subject to disclosure or inspection, the prosecutor should promptly notify defense counsel and provide the required information. (NPS 4-9.3)

# Don't get cute

- The prosecutor's relationship with defense counsel or his or her opinion regarding the defendant is not a factor in the discovery process. (Comment to NPS 4-9)

# Be professional in dealing with others

- Rule 4.1: Cannot make false statements of material facts or law to a third person;
- Example: Don't lie about witness availability!
- Better yet: DON'T GET CUTE
  - We do not get to play games with the truth

# Represented persons: Rule 4.2

“...shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter...” (Absent consent of the other lawyer)

\*Pretty easy when it is the defendant

\*More challenging when it is a victim or a witness

\*We teach to err on the side of caution

# National Prosecution Standards

- 2-7.1 (excerpt)
- A prosecutor should respect a suspect's and defendant's constitutional right to the assistance of counsel. A prosecutor should also take steps to ensure that those persons working at his or her direction respect a suspect's and defendant's constitutional right to the assistance of counsel.
- A prosecutor may communicate with a witness who is also charged as a defendant in an unrelated criminal matter about the witness's upcoming testimony without the advance permission of the witness's attorney so long as the prosecutor does not discuss the criminal charges pending against the witness and the communication does not violate any rules or laws of the jurisdiction.

# Unrepresented persons 4.3/3.8(b)(c)

- Cannot claim to be disinterested
  - Must make efforts to make sure they understand this
- Must make efforts to make sure defendant knows they have a right to a lawyer and how to get one
- Shall not seek to obtain from an unrepresented person a waiver of important pretrial rights
  - Pro se litigant? Proceed with caution

# National Prosecution Standards 2-7.2

- ...the prosecutor should make certain that the defendant is treated with honesty, fairness, and with full disclosure of his or her potential criminal liability in the matter under discussion. If a prosecutor is engaged in communications with a charged defendant who is not represented by counsel and the defendant changes his or her mind and expresses a desire to obtain counsel, the prosecutor should terminate the communication to allow the defendant to obtain counsel, or to secure the presence of counsel.

# Candor toward the tribunal 3.3

- SHALL NOT knowingly
- Make a false statement to the court
- Fail to correct a previous false statement to the court
- Fail to cite adverse legal authority
- Offer evidence known to be false

# Candor toward the tribunal

- This is an ongoing obligation of all lawyers
- Especially true of “ministers of justice”

# Fairness to opposing party and counsel 3.4

- SHALL NOT
  - Obstruct another party's access to evidence
  - Falsify evidence
  - Knowingly disobey a court rule
  - Make frivolous discovery request or fail to comply with proper discovery request
  - Make a trial statement unsupported by evidence
  - Counsel a person not to give relevant info to opposition
  - Encourage someone else to do any of these things

# Trials are not always fair

- We **MUST** play by the rules even if it seems like the other side is not

# Respect for third parties: 4.4

- Shall not “use means that have no substantial purpose other than to embarrass, delay or burden a third person”
- Shall not “use methods of obtaining evidence that violated the legal rights of such person”
  - We have many ways of compelling people to do things they do not want to do and should be careful of how and when we use them

# Pre-trial publicity

- 3.8 “...refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused...”
- Take reasonable care to prevent others in your sphere from doing same
- See also Rule 3.6 which restricts the statements all lawyers can make
- Rule of thumb: no comment until after sentencing

# TRIAL ISSUES

- Do not state a personal opinion!
- Rule 3.4 (e)
- in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

# No opinion arguments

- Avoid first person:
- “I believe” vs. “the evidence shows”
  - Use your advocacy skills to argue your case not your opinion
- Object when defense does the same! 3.4 applies to defense counsel as well
- But...you cannot violate 3.4 in response to a defense argument
- Always take the high road

# National Prosecution Standards

- Comment to Standard 2.8 (Relationship with defense counsel)
- The courtroom is not a stage but a forum, and uniformity of trial decorum by defense and prosecuting attorneys should be maintained by the court to prevent undue influence on judge and jury that might result from theatrical behavior. The prosecutor should be able to bring to the court's attention the failure to maintain such uniformity and should maintain the high standards of conduct befitting a professional advocate in public service.

# No unsupported questions

- Trial is not the place to go on a fishing expedition
- You MUST have a good faith basis to ask a question ESPECIALLY on cross-examination, i.e “reasonable belief.”
- “Reasonable belief” “denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” (KRPC 1.0 definitions)

# No unsupported arguments

- All arguments should be based on the evidence
- Can draw reasonable inferences
- No scripted narratives or dialogue
- Be careful with analogies or stories

# DON'T GET CUTE

- No name-calling
- No tissue-box throwing
- No mocking
- Mind your time limits— you set them!
- BE A PROFESSIONAL PROSECUTOR
  - Consider contrasting yourself to the defense lawyer's methods

“GOOD”

- <https://www.youtube.com/channel/UCkqcY4CAuBFNFho6JgygCnA>