

Professionalism for Prosecutors, Seven Names You Never Use When Referring to Opposing Counsel

- I. Professionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and civility are the mainstays of our profession and the foundations upon which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it. *Wisner v. Laney*, 984 N.E.2d 1201, 1204 (Ind.2012).
- II. It is important that attorneys not lose control of their passion for their client or cause and become too emotionally involved and make the cause personal. In such circumstances they risk harm to their client, their reputation, and our profession. *Id.*
- III. Attorneys charged with law enforcement responsibilities must conduct themselves at all time in a manner that promotes public confidence in the justice system. Prosecutors are not simply advocates, but they are also ... ministers of justice.... As such, we hold prosecutors to a high standard of ethical conduct. *Matter of Winkler*, 834 N.E.2d 85, 90 (Ind.2005).
- IV. A blatant betrayal of the public's trust by a county prosecutor, coupled with subsequent untruthfulness at disciplinary hearing, necessarily requires disbarment, not only for the immediate protection of the public from the respondent, but also to protect the public and profession generally by demonstrating that actions such as these by elected judicial officials will not be tolerated. *In Re Riddle* 700 N.E.2d 788 (Ind.1998).
- V. A lawyer's Creed of Professionalism. Several states including Ohio, Pennsylvania, Georgia, Arizona and New Mexico have enacted creeds of professionalism that are ideals on how attorneys should interact professionally with clients, opposing counsel, the courts and the public regarding our system of justice.

- a. Arizona Preamble: As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, I will comply with the letter and spirit of the disciplinary standards applicable to all lawyers and I will conduct myself in accordance with the following Creed of Professionalism when dealing with my client, opposing parties, their counsel, tribunals and the general public.
- b. Georgia Preamble: The Creed and Aspirational Statement cannot be imposed by edict because moral integrity and unselfish dedication to the welfare of others cannot be legislated. Nevertheless, a public statement of principles of professionalism can provide guidance for newcomers and a reminder for experienced members of the bar about the basic tenets of our profession.
- c. Ohio Preamble: As professionals we need to strive to meet lofty goals and ideals in order to achieve the highest standards of a learned profession. To this end, the Court issues A Lawyer's Creed and A Lawyer's Aspirational Ideals, which have been adopted and recommended for the Court's issuance by the Supreme Court Commission on Professionalism. In so doing, it is not the Court's intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers, judges and legal educators. It is the Court's hope that these individuals, their professional associations, law firms and educational institutions will utilize the creed and the aspirational ideals as guidelines for this purpose.
- d. The Arizona Supreme Court adopted their creed in 1989 and it is set forth below:

A. With respect to my client:

- 1. I will be loyal and committed to my client's cause, but I will not permit that loyalty and commitment to interfere with my ability to provide my client with objective and independent advice;
- 2. I will endeavor to achieve my client's lawful objectives in business transactions and in litigation as expeditiously and economically as possible;
- 3. In appropriate cases, I will counsel my client with respect to mediation, arbitration and other alternative methods of resolving disputes;
- 4. I will advise my client against pursuing litigation (or any other course of action) that is without merit and I will not engage in tactics that are intended

to delay the resolution of the matter or to harass or drain the financial resources of the opposing party;

5. I will advise my client that civility and courtesy are not to be equated with weakness;
6. While I must abide by my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with effective and honorable representation.

B. With respect to opposing parties and their counsel:

1. I will be courteous and civil, both in oral and in written communication;
2. I will not knowingly make statements of fact or of law that are untrue;
3. In litigation proceedings, I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
4. I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;
5. I will not utilize litigation or any other course of conduct to harass the opposing party;
6. I will not engage in excessive and abusive discovery, and I will comply with all reasonable discovery requests;
7. I will not utilize delay tactics;
8. In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and not be rude or disrespectful;
9. I will not serve motions and pleadings on the other party or the party's counsel at such a time or in such a manner as will unfairly limit the other party's opportunity to respond;
10. In business transactions I will not quarrel over matters of form or style but will concentrate on matters of substance and content;
11. I will identify clearly, for other counsel or parties, all changes that I have made in documents submitted to me for review.

C. With respect to the courts and other tribunals:

1. I will be an honorable advocate on behalf of my client, recognizing, as an officer of the court, that unprofessional conduct is detrimental to the proper functioning of our system of justice;

2. Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;
3. I will voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit;
4. I will not file frivolous motions;
5. I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;
6. I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
7. When scheduled hearings or depositions have to be canceled, I will notify opposing counsel and, if appropriate, the court (or other tribunal) as early as possible;
8. Before dates for hearings or trials are set - or, if that is not feasible, immediately after such dates have been set - I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;
9. In civil matters, I will stipulate to facts as to which there is no genuine dispute;
10. I will endeavor to be punctual in attending court hearings, conferences and depositions;
11. I will at all times be candid with the tribunal.

D. With respect to the public and to our system of justice:

1. I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
2. I will keep current in the areas in which I practice and, when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;
3. As a member of a self regulating profession, I will be mindful of my obligations under the Rules of Professional Conduct to report violations of those Rules;
4. I will be mindful of the need to protect the integrity of the legal profession and will be so guided when considering methods and contents of advertising;
5. I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement or administration of justice, and the contribution of uncompensated time and

civic influence on behalf of those persons who cannot afford adequate legal assistance.

VI. Cases involving professional misconduct.

- a. *State v. Martinez* 282 P.3d 409 (2012): Court criticized prosecutor for facial expressions and rolling of eyes during criminal trial and cited to lawyers creed. Arizona attorneys pledge to "maintain the respect due to courts of justice and judicial officers, "to" abstain from all offensive conduct," and to adhere to "a lawyer's creed of professionalism" Ariz. R. Sup.Ct. 31 (The Oath of Admission to the Bar).
- b. Eye-rolling, dramatic sighing, and other expressions of displeasure in a courtroom violate these standards. This is unacceptable behavior from any attorney, but especially from a prosecutor who serves as a "minister of justice."
- c. By threatening to renew a long-dormant criminal investigation against a political candidate seeking the office occupied by incumbent prosecutor Richard M. Holmes, unless the candidate opted to forgo his bid to seek the office, Holmes and his chief deputy, Mark S. Christoff, violated the Rules of Professional Conduct for Attorneys at Law. *In Re Mark S. Christoff and Richard M. Holmes* 690 N.E.2d 1135 (Ind. 1997)
- d. Indiana Supreme Court found that this conduct was prejudicial to the administration of justice in violation of Ethical Rule 8.4 (d) Court found that record supported hearing officer's findings that, statements made by Holmes and Christoff to the lawyer on February 15, 1994, contained a "thinly veiled" threat that if the lawyer ran for Holmes' office, he could expect investigation by a special prosecutor and other detrimental legal action to ensue, despite the fact that the investigation had lain dormant for about 15 months prior to the lawyer's announcement that he would run for office. Court ordered public reprimand. *Id.*

VII. Ethical Rules involving professional conduct.

- A. Prof. Cond. R. 1.8(l) provides that "a part-time prosecutor or deputy prosecutor authorized by statute to otherwise engage in the practice of law shall refrain from representing a private client in any matter wherein exists an issue upon which said prosecutor has statutory prosecutorial authority or responsibilities."
- a. By accepting employment to represent the custodian of the deceased child in this case while serving as a deputy prosecuting attorney, the respondent violated the Rules of Professional Conduct. *Matter of Miller*, 678 N.E.2d 1117 (Ind. 1997).

B. Prof. Cond. R. 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

- a. Prosecutor given 90 day suspension when speaks directly to represented defendant in order to communicate offer on plea bargain. *In Re Bray* 490 S.W.2d 115 (Wis. 1992).
- b. Prosecutor given public reprimand for violating this rule when after depositions were scheduled for two represented defendants, one of the attorneys indicated that they could not be at deposition. Defendant wanted deposition to go forward and prosecutor questioned defendant without attorney being present. "One purpose of Rule 4.2 is to prevent lawyers from taking advantage of uncounseled laypersons. See, *Matter of Uttermohlen*, 768 N.E.2d 449, 451 (Ind.2002). "The Rule applies even though the represented person initiates or consents to the communication." Admis. Disc. R. 4.2, cmt [3]." *State v. Edwards* 894 N.E.2d 552 (Ind.2008).
- c. In divorce case, where attorney represented husband, attorney violated Disc. R. 4.2 when he relied on client to indicate that his wife was not represented by counsel. By failing to confirm whether wife was still represented by counsel, attorney violated 4.2 when he had client communicate with wife

and did not communication through wife's attorney. *In Re Capper* 757 N.E.2d 138 (Ind. 2001).

- d. Indiana Supreme Court indicates the rationale behind 4.2 and the reasons why an attorney should not speak to a client who is represented by counsel. "For example, where a lawyer seeks to undermine an adverse party's confidence in the party's own lawyer, where a lawyer tries to by-pass opposing counsel and negotiate a settlement directly with the adverse party, or where a lawyer attempts to persuade the adverse party to disclose privileged information." *In Re Uttermohler* 768 N.E.2d 449 (Ind. 2002).

C. RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order; ***

Committee comment number 2:

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

1. "Ex parte communication between the prosecution and the court, without notice to opposing counsel of record, should not be done as matter of course." *In Re Atanga* 768 N.E.2d 1253 (Ind.1994).
2. Prosecutor had improper ex parte communication with judge when prior to sentencing he had defense attorney leave room and gave judge information to enhance sentence of defendant. *In Re Riley* 691 P.2d 695, 142 Ariz. 604 (1984).

3. "It is unprofessional conduct for a prosecutor to engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge." *Id.*

4. At the heart of our adversarial system of justice is the opportunity for both sides of a controversy to be fairly heard. "Improper ex parte communications undermine our adversarial system, which relies so heavily on fair advocacy and an impartial judge. Such communications] threaten not only the fairness of the resolution at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice." *Matter of Marek*, 609 N.E.2d 419 (Ind.1993).

4. *Disciplinary Counsel v. Stuard*, (2009), 121 Ohio St. 3d 29. Ohio assistant prosecutor in Capital case asked by Judge to prepare findings sentencing defendant to death. He prepared findings and met with Court four times without defense counsel being aware of contact.
 - a. Court held that ex parte collaboration between the judge and prosecution to prepare the court's sentencing opinion was "wholly inconsistent" with ethical rules.

 - b. Assistant prosecutor given public reprimand for violating DR 1-102(A)(5) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice) and 7-110(B) (prohibiting, ex parte communication on the merits of a cause with a judge before whom the proceeding is pending).

D. Rule 4.4--Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. ***

1. Prosecutor found to have violated 4.4 by writing the words "waste of sperm" and "scumbag" on the inmate control board referring to inmate he was prosecuting. *Idaho State Bar v. Warrick*, 44 P.3d 1141, 137 Idaho 86 (Idaho 2002).

2. Although Warrick claims he meant the words for humor, the conduct was inappropriately aimed at Calfee, a party in a pending action being prosecuted by Warrick on behalf of the State. Despite the fact that Calfee did not see the words, nor were the words conveyed to Calfee, their purpose could only have been to demean Calfee in the eyes of others. The evidence shows that Warrick clearly used means that had no substantial purpose other than to embarrass Calfee and was intended to engender bias in the local law enforcement personnel. *Id.*
3. Indiana attorney who represented insurance company violated 4.4 when a third person made a claim against insurance company, asserting that an insured had caused personal injury to him. Before any legal action had been filed, attorney served the third person on three separate occasions with a subpoena duces tecum commanding the third person to appear for an examination under oath with specified documents citing Indiana Trial Rule 45(B)" and purported to be issued " pursuant to the provisions of Trial Rule 34(C) and 45(A)(2) of the Indiana Rules of Procedure." *In Re Anonymous* 896 N.E.2d 916 (Ind. 2008).

H. RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

I. MAINTAINING THE INTEGRITY OF THE PROFESSION
RULE 8.4 MISCONDUCT

a. It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation
- (d) engage in conduct that is prejudicial to the administration of justice;***

b. Prosecutor had conflict of interest and committed conduct that was prejudicial to the administration of justice when as assistant prosecutor he collected 25% of proceeds from civil forfeiture as part of private civil practice while prosecuting defendant as public prosecutor. *In Re McKinney* 948 N.E.2d 1154 (Ind. 2011).

c. Court found that “it would doubtless be evident to such a defendant, and to his or her attorney if represented, that prosecutorial discretion in how to proceed with the criminal case was held by one who stood to reap personal financial gain if the defendant agreed to the forfeiture of his or her assets. Respondent's misconduct created an environment in which, at the very least, the public trust in his ability to faithfully and independently represent the interests of the State was compromised.” *Id.* At 1161.

d. Prosecutor violated Ethical Rule 8.4 by hiring a ghost employee for seven months and the attorney while obtaining a salary for the State did no work for the prosecutor's office but worked in the prosecutor's private law firm. Court also found 8.1 violation because prosecutor lied to commission at disciplinary proceedings indicating that attorney did work for prosecutor. Court ordered disbarment. *In Re Riddle* 700 N.E.2d 788 (Ind.1998).

- e. Prosecutors and their deputies must follow the Rules of Professional Conduct in plea bargaining and other acts involving prosecutorial discretion, and they may be disciplined by this Court when they fail to do so. See *Matter of McKinney*, 948 N.E.2d 1154 (Ind.2011); Prosecutor violated 8.4 (d) by allowing victim to dictate terms of plea bargain and set forth terms of restitution. *In Re Moore* 959 N.E.2d 788 (Ind. 2012).