

Lies, Deceit and the Ethical Rules, Can Prosecutors Lie for the Public Good?

A. A prosecutor is held to a higher standard of ethical conduct because of his role in the administration of justice.

1. The tenor of the case law discussing the role of prosecutors makes clear that prosecutors are held to the highest standard because of their unique powers and responsibilities. A prosecutor has responsibilities beyond that of an advocate, and has a higher duty to assure that justice is served.
2. The responsibility of a public prosecutor differs from that of the usual advocate. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute.... Code of Professional Responsibility, Ethical Consideration 7-13. Where those whose job it is to enforce the law break it instead, the public rightfully questions whether the system itself is worthy of respect. *Matter of Oliver*, 493 N.E.2d 1237 (Ind. 1986)
3. The court in *Oliver* found that a prosecutor's duty to conform his behavior to the law does not arise solely out of his status as an attorney. As an officer charged with administration of the law, his own behavior has the capacity to bolster or damage public esteem for the judicial system different from that of attorneys otherwise in practice. *In Re Roche* 540 N.E.2d 36 (Ind. 1989).
4. "As a public officer charged with the administration of justice, respondent's behavior had the capacity to bolster or damage the public's perception of the criminal justice system. *Matter of Seat*, 588 N.E.2d 1262 (Ind.1992)." *In re Ryan*, 824 N.E.2d 687 (Ind. 2005) [Municipal prosecutor formed business to sell international driver's license that resulted in lesser charges for defendants]

5. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice. This alone compels the responsible and ethical exercise of this power. *In re Doe*, 801 F.Supp. 478, 480 (D.N.M.1992).
6. A prosecutor's responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility. *People v. Reichman*, 819 P.2d 1035 (Colo. 1991).
7. Prosecutors held to higher standard for ethical violations. '[A]n attorney who is a public official is held to a high standard of conduct because of his or her (1) professional and (2) public trustee responsibilities.' 177 W.Va. at 288, 352 S.E.2d at 38. (Citation omitted) "Lawyer insensitivity to ethical impropriety [or perceived ethical impropriety] is one of the primary sources of this lack of public confidence in the Bar. The problem is exacerbated when ethical violations are committed by an attorney holding an important public office." ' 177 W.Va. at 289, 352 S.E.2d at 38. (Emphasis added)." 181 W.Va. at 265, 382 S.E.2d at 318.
8. Prosecutor argued that Judicial Branch could not discipline prosecutor because his function was within executive branch of government and any discipline would violate separation of powers. Court rejected arguments stating, "All parties recognize that unlike other constitutional officers, prosecutors must perform their constitutional function nearly exclusively in the forum of another branch of government, the judiciary. They must also be licensed to practice law by that other branch of government, and in effect, they must depend upon that other branch for proper recognition of their role." *Massameno v. Statewide Grievance Committee*, 663 A.2d 317, 234 Conn. 539 (Conn. 1995).

B. The rules of professional responsibility require a prosecutor to be honest with the court, with defense counsel and those not represented by counsel.

C. RULE 3.3: CANDOR TOWARD THE TRIBUNAL

- D.** (a) A lawyer shall not knowingly:
- E.** (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- F.** (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Cases interpreting this rule: In civil action, attorney who was defendant in civil suit did not answer request for admission in truthful manner. Court found that he violated rule 3.3 (a) (1) when he did not answer truthfully that he composed harassing e mail of another attorney that allegedly contained nude film clip of female attorney. *In Re Usher* 987 N.E.2d 1080 (Ind. 2013)

2. Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; ***

- A. Attorney violated 3.4 (a) when representing a criminal defendant he observed the State's witness list that included the mother of his client. He told his client's mother to leave town for two weeks in order that she could avoid State's subpoena. *In Re Putsey* 790 N.E.2d 436 (Ind. 2003).
- B. By failing to make a reasonably diligent effort in the criminal action to comply with the legally proper discovery requests of an opposing party, prosecutor violated Prof.Cond.R. 3.4(d). *Matter of Miller*, 677 N.E.2d 505 (Ind. 1997).

Rule 3.8, The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- d) 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; ***

2. Rule 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 by law to do.

3. RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented

person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

- A. Attorney in personal injury action changed medical release by adding name of unnamed doctor. Attorney obtained relevant information after changing this document. Attorney violated this rule by: "Acting in a manner such that an unrepresented person might misunderstand the lawyer's role in the matter, by soliciting patient medical records from plaintiff's doctor using an altered consent form and without identifying herself as counsel adverse to the doctor's patient." *In re Blumenthal*, 825 N.E.2d 374 (Ind. 2005)

4. Rule 8.4. Misconduct

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;***

- A. Attorneys advertised in Yellow Pages that one of the attorneys was a prosecutor. Court found that advertisement violated 8.4 (d). Darren and Scott violated Prof.Cond.R. 8.4(d), which prohibits conduct prejudicial to the administration of justice, by suggesting in the advertisement that, due to Scott's identification as the Johnson County Prosecutor, employing the Cole Law Offices to defend criminal matters could result in more favorable treatment by the state in its prosecution. *In re Cole*, 738 N.E.2d 1035 (Ind. 2000).

- B. When attorney won election as prosecutor, he bought new set of West Indiana Code with public funds and kept it updated. When he left office he took books with him. Court found 8.4 (C) violation for dishonest conduct. *In re Montgomery*, 919 N.E.2d 1146 (Ind. 2010).
- C. Court found 8.4 (b) and (C) violation when attorney who was also prosecutor for several years failed to disclose his entire prior criminal record and lied under oath regarding prior criminal record. *In re Blickenstaff*, 807 N.E.2d 741 (Ind. 2004)

A. Disciplinary Cases where a prosecutor or attorney was accused of unethical conduct based upon deceitful conduct.

- a. Defendant represented by counsel and intended to fire his attorney and work as informant in order to obtain favorable treatment on drug convictions. Defendant told prosecutor that his attorney represents many drug defendants and it would be best if his attorney was not told about informant status. Defendant did not fire attorney and assistant prosecutor lies to defense attorney about meetings with defendant.
 - a. Florida Supreme Court finds 4.2 violation for speaking with person represented by counsel.
 - b. 8.4(c) violation for from engaging in deceitful conduct.
 - c. 8.4(d) violation for engaging in conduct that is prejudicial to the administration of justice.
 - d. Prosecutor given public reprimand. (Florida Bar recommended 3 year suspension). *Florida Bar v. Feinberg* 760 So.2d 933 (Fl. 2000).
- b. Custom agents investigating child pornography had informant, Adair Jackson, pose as 13 year old girl and gave her alias, Gracie Griggs. After defendant was arrested, Asst. U.S. attorney Cox did not disclose witnesses' true identity and had her identify herself on witness stand as Gracie Griggs. Court and defense counsel did not learn of her identity until midtrial and court granted mistrial. After trial defense counsel learned that Ms. Adair had criminal record.

A. Florida Disciplinary violations included:

- a. 4-3.3(a)(1) (lawyer shall not knowingly make false statement of material fact or law to a tribunal);
- b. 4-3.3(a)(4) (lawyer shall not knowingly permit any witness to offer testimony that the lawyer knows to be false);
- c. 4-3.4(a) (lawyer shall not unlawfully obstruct another party's access to evidence or otherwise conceal other material that the lawyer knows or should know is relevant to pending proceeding, nor assist another person to do such an act);
- d. 4-3.4(b) (lawyer shall not fabricate evidence, or counsel or assist a witness to testify falsely).

- e. The public expects and deserves fairness and candor from attorneys, especially from a prosecutor who has the power and responsibility derived from representing the government.

- f. Prosecutor Cox was suspended for one year and placed on one year probation. *Florida Bar v. Cox*, 794 So.2d 1278, 26 Fla. L. Weekly S331 (Fla. 2001)

- c. An attorney in Oregon represented chiropractors and believed that company reviewing insurance claims was engaging in fraudulent activities. In order to investigate claims, he called company and falsely represented himself a chiropractor who was interested in employment with company indicating he saw patients, performed independent medical examinations, that he performed file and case reviews. After obtaining information from company he filed a civil suit against company.
 - a. Attorney charged with violating DR 1-102(A)(3) provides that "[i]t is professional misconduct for a lawyer to * * * [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.
 - b. Also charged with DR 7-102(A)(5) which provides that, in the course of representing a client or the lawyer's own interests, "a lawyer shall not * * * [k]nowingly make a false statement of law or fact."
 - c. Attorney claimed that there was investigative exception to ethical rules where he could misrepresent identity to uncover fraudulent conduct.

- d. The State Attorney General and United States Attorney filed amicus briefs indicated that the Court should adopt an exception to this rule that government attorneys can advise law enforcement officers regarding deceptive conduct without violating rule.
- e. Court rejected any “investigatory exception” to ethical rules indicating that exception must be written into rules and not judicially imposed. *In Re Gotti* 8 P.3d 966 (Or. 2000).
- f. Soon thereafter, Oregon amended its version of Rule 8.4 to authorize any attorney—public or private—to direct clients or other persons to engage in deception or misrepresentations “in the investigation of violations of civil or criminal law or constitutional rights” so long as the attorney otherwise complies with the *Model Rules* and has a good-faith belief that “unlawful activity has taken place, is taking place or will take place in the foreseeable future.”
- d. William Neal had just brutally murdered three women and raped a third woman at gunpoint after having her watch him cleave up the body of one of his victims. He released two hostages and told them to contact the police and gave them his pager number. The police spoke to Mr. Neal for three hours and he agreed to surrender if he could talk to a public defender before his surrender. Afraid that the ax murderer was an immediate danger to the public, Chief Deputy District Attorney Mark Pautler agreed to impersonate a public defender. He spoke to Mr. Neal and told him his name was Mark Palmer and he agreed to be present when Mr. Neal surrendered. He never spoke to Mr. Neal again and never told Mr. Neal about the impersonation after he surrendered.
- a. Colorado’s Office of Attorney Regulation Counsel charged Pautler with violating Colorado’s equivalents to Rules 4.3 and 8.4(c) for how he dealt with the unrepresented Neal and for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- b. The Court rejected Pautler’s defense that there was a public harm exception to the ethical rules.

- c. "Pautler cannot compromise his integrity, and that of our profession, irrespective of the cause."
 - d. The court also disliked the fact that Pautler never informed Neal to retain an attorney, and more troubling, purported to represent Neal in the matter even though Pautler's only goal in the matter was to arrest and prosecute Neal.
 - e. "District attorneys in Colorado owe a very high duty to the public because they are governmental officials holding constitutionally created offices. This court has spoken out strongly against misconduct by public officials who are lawyers. The respondent's responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility." (Citations omitted).
 - f. Court ordered three-month suspension, which was stayed during twelve months of probation. *In Re Pautler* 47 P.3d 1175 (Colo. 2002).
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- e. New York Inspector General received information from prison guard that inmate had been beaten by other guards for no reason. In order to keep the identity of the guard a secret and to protect the guard against retaliation, the Inspector General took his sworn statement in secret and then instructed this prison guard to lie under oath when he gave a statement in front of the other prison guards. Disciplinary charges were brought against the prison guards and the informant guard testified and explained that he had given a false statement under oath at the direction of the Inspector General.
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- a. Respondent charged with professional misconduct in violation of DR 1-102 that states "A lawyer shall not: * * * Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."
 - b. Rejected Respondent's argument that his conduct was not unethical because it was motivated by a desire to protect informant guard and prompted by his responsibilities as Inspector General indicating the end does not justify the means.
 - c. Ethical canons cited by respondent in support of his conduct, requiring competent and zealous representation of clients, cannot in and of themselves overcome the proscription against directing another to give false testimony.

- d. Holding a public office, such as Inspector General, is not a shield behind which breaches of professional ethics, otherwise warranting disciplinary action, are permitted. Rather, a lawyer who holds public office must not only fulfill the duties and responsibilities of that office, but must also comply with the Bar's ethical standards.
- e. Attorney was given public censure. *Matter of Malone*, 105 A.D.2d 455, 480 N.Y.S.2d 603 (1984).
- f. Undercover police officer believed his identity had been discovered and elected prosecutor arranged to have officer arrested for possession of drugs and marijuana in order to continue undercover operation. As part of the plan, fictitious charges were lodged against the officer. The prosecutor either personally or through his agents, filed a false criminal complaint against officer charging him with the illegal possession of a firearm and of marihuana. Other documents filed by or on behalf of the prosecutor included a surety bond and an offense report, falsely stating "the officer's name and address, and falsely stating that he had committed certain criminal offenses. The officer appeared in county court and made false statements to the county judge, who was unaware of the deception.
- a. Prosecutor charged with violations of DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).
- a. DR 1-102(A)(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice);
- b. DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law).
- c. Prosecutor cited several criminal sting operations where court did not find prosecutorial misconduct in criminal case.
- d. Court rejected argument stating, "Prosecutorial deception may not always constitute prosecutorial misconduct for purposes of determining whether a criminal complaint or indictment must be dismissed. It does not necessarily follow, however, that prosecutorial deception of a type which results in directly misleading a court should be exempted from the proscriptions of the Code of Professional Responsibility simply because the deception is not such as to warrant the dismissal of a criminal case."
- e. Court publicly reprimanded Prosecutor and assessed him the costs of proceedings in the amount of \$4,851.28. *People v. Reichman*, 819 P.2d 1035 (Colo. 1991).

- g.** The chief of the criminal division of Cook County Prosecutor's Office, Mr. Friedman, received information that a defense attorney had offered to bribe a police officer. Prosecutor instructed the police officer to cooperate with the defense attorney and to accept the bribe as part of a sting operation. The prosecutor instructed the police officer to lie under oath that the breathalyzer officer was not present to testify. The case was dismissed and the officer was paid a \$50 bribe by the attorney. The Court was told about the false testimony after the sting operation. In another case, Mr. Friedman had a police officer lie under oath that witnesses were unavailable and that officer was paid \$250. The court was subsequently told about the false testimony.
- a.** Prosecutor charged in part with violation of Disciplinary Rule 1-102(A)(4), "conduct involving dishonesty, fraud, deceit, or misrepresentation.
- b.** Disciplinary Rule 7-102(A)(4),(A)(6), which provide: In his representation of a client a lawyer shall not: (4) Knowingly use perjured testimony or false evidence, (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."
- c.** Prosecutor Friedman argued that the ends justified the means and that there was no other way to prosecute corrupt attorneys.
- d.** The Court rejected that argument stating, "The integrity of the courtroom is so vital to the health of our legal system that no violation of that integrity, no matter what its motivation, can be condoned or ignored."
- e.** Although Court found disciplinary violation, Court did not impose sanction. *In re Friedman*, 76 Ill.2d 392, 30 Ill.Dec. 288, 392 N.E.2d 1333 (1979).