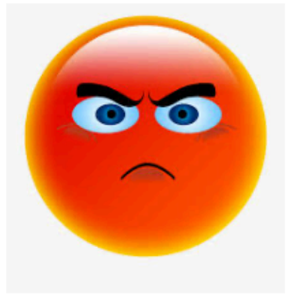
Garden State CLE Presents:

12 Angry Credits



Ethical Challenges for New Jersey Prosecutors & Defense Attorneys

Lesson Plan

Instructor

Robert Ramsey

Part I
Criminal Conduct by Prosecutors

R.P.C. 8.4

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;

Generally speaking, a conviction of criminal or disorderly persons' offenses constitutes conclusive proof of a violation of R.P.C. 8.4(b). Rule 1:20-13(c).

In re Bissel, 144 N.J. 324(1996)
(Indefinite Suspension)

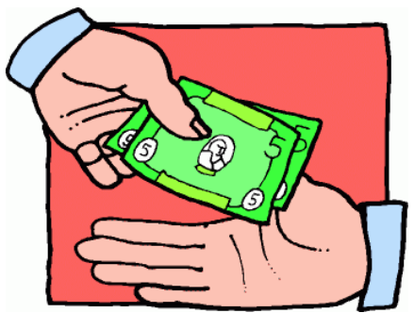
Bissel was appointed county prosecutor in 1982 by Governor Tom Kean. He held that position for 13 years. His specialty was civil forfeiture. At one point, the value of the assets he seized were the highest in the state, even though Somerset County is the eighth-smallest county in New Jersey.

In 1990, a forfeiture case proved to be Bissell's downfall. On May 10, 1990, James Giuffre was arrested on charges of selling $700 worth of cocaine. Bissell said he would drop the charges if Giuffre forfeited two plots of land to the prosecutor's office, valued at $174,000. They were sold at auction below their appraised value to a friend of Bissell's chief of detectives. Giuffre filed a civil suit against Bissell (which the Somerset County Freeholders later settled for $435,000) and also then contacted the Internal Revenue Service and the FBI. Forensic accountants with the IRS discovered that Bissell skimmed cash from a gas station of which he was part owner. The FBI discovered that Bissell had destroyed a suspect's written request for a lawyer and threatened to frame his gasoline wholesaler for cocaine possession. [See Guiffre vs. Bissell, 31 F.3d 1241 (3d Cir.1994).]

In September 1995, Bissell was indicted on 30 federal charges of mail fraud, tax evasion and abuse of power, and was promptly fired by Governor and Somerset County resident Christine Todd Whitman. In May 1996, he was convicted on all charges and faced a minimum sentence of six to eight years in federal prison and a maximum of ten years. He was released under the condition that he wear an electronic bracelet until he was sentenced. He abruptly cut it off on November 18, 1996 and fled to Nevada, leaving a note in which he stated that he intended to commit suicide. He was tracked by his cell phone.

He fatally shot himself after a 10-minute standoff in his hotel room, while members of the United States Marshals Service tried to lure him out of his room.

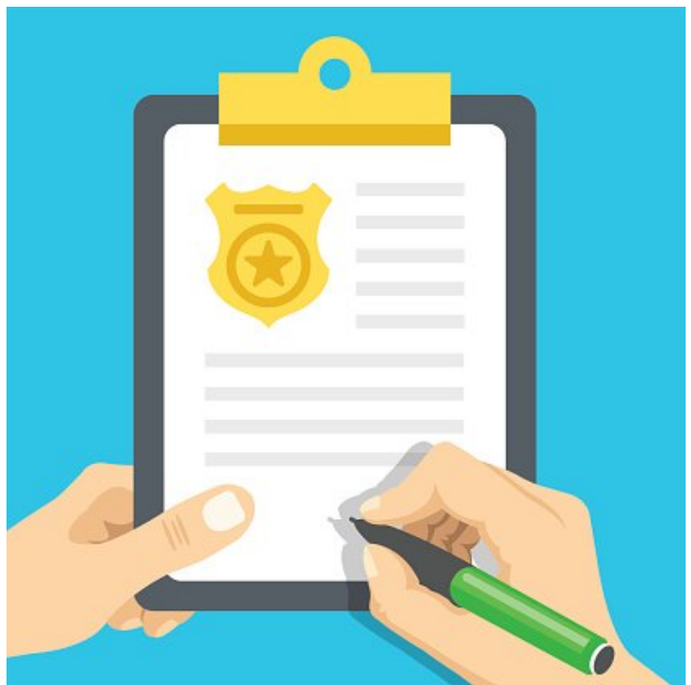
[https://en.wikipedia.org/wiki/Nicholas_L._Bissell_Jr.]



In re Asbell, 135 N.J. 446, 457-58(1994)
(Two-year Suspension)

(4th Degree filing a false police report – PTI and three years probation)

Here, respondent planned a fictitious assassination attempt on his own life for his own personal gain. He meticulously prepared for the incident by retrieving an unregistered .45-caliber pistol, loading it, and taking it with him to the Parkade Building. Then, he fired seven rounds of his weapon into his county-owned car, causing $6,500 in damages. He knowingly gave erroneous information to police investigators and filed a false report, a fourth-degree crime in violation of N.J.S.A. 2C:28-4a, with the purpose to implicate others and with the effect of instigating a costly investigation. He called a press conference, at which he related the fabricated events to the media with the vain hope of winning public sympathy in an attempt to encourage his reappointment as a county prosecutor. As evidence mounted against him, he adhered to his fabricated story, finally revealing the truth only when the police informed him that they had a search warrant for his home. This evidence clearly and convincingly establishes misconduct, dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the administration of justice in violation of R.P.C. 8.4(b), (c), and (d). Balanced against respondent's otherwise unblemished record, his misconduct, although aberrational, requires an extended period of suspension. [We conclude that] respondent's faked assassination attempt reflects adversely on all prosecutors.



In re Hoerst, 135 N.J. 98, 103(1994)
(Six-month suspension)

(Third degree theft – PTI)

As was the DRB, we are impressed by the evidence of respondent's long and distinguished career both at the bar and in public service, and particularly by the outpouring of support as disclosed in the many letters attesting to respondent's character and legal ability. We are mindful as well of the respondent's cooperation with law-enforcement authorities from the beginning of the investigation into the forfeiture account. We recognize also that respondent has been rehabilitated.

Despite all the foregoing, however, we are left with the fact that in the discharge of his public duties, respondent, the chief law-enforcement officer of Salem County, violated the very law that he had sworn to uphold. He admits having committed a third-degree theft offense. Respondent's brief argues that given the prior use of forfeiture funds to pay for the attendance of spouses and guests at prosecutors' conventions, his conclusion that the trip to California was "not an inappropriate use of forfeiture funds" amounted to a "judgmental error." Aside from the obvious differences between attendance at an in-state convention and a journey to the west coast with a three-day side trip sandwiched in, the offense to which respondent entered a plea represents far more than an error in judgment. Moreover, we are not free to disregard a conviction because of some perceived weakness in the underlying proofs; it is the judgment of conviction that establishes the gravity of the offense.

In re Farr, 115 N.J. 231, 103 (1989)
(Six-month suspension)
(later disbarred for other violations, 178 N.J. 458 (2004))

(PTI)

Respondent was admitted to the bar in 1977, and in 1978 he became an assistant prosecutor in Somerset County. Described by his superiors in the prosecutor's office as "one of the most-committed" and "hardest-working" prosecutors, he was also characterized as naive, immature, and susceptible to manipulation by others. Against that background, he became involved with [two people] who served as informants in an investigation of a residential-treatment center for disturbed youths. Both informants were described as "street-wise," and [the male] was a convicted criminal. In the course of his involvement with the couple, respondent became infatuated with [the female informant]. To ingratiate himself with her, he committed a series of gross improprieties.

These included:

Stealing marijuana and PCP from the prosecutor's office and sharing consuming CDS with the informants;

Ordering police to stop a search of the informants' residence;

Attempted to increase the bail of the male informant to spend more time alone with the female;

Wrote an appellate brief that resulted in the suppression of evidence against the informants;

Falsely introduced the female informant to the police as part of his legal team;

As this sorry state of affairs reveals, respondent betrayed the confidence reposed upon him, as a prosecutor, by the members of the public, whose interests he swore to protect. By developing a personal relationship with [the informants], a relationship which exceeded the bounds reasonably necessary to obtain cooperation from an informant, respondent's responsibilities to the public were greatly compromised.

He knew the Prosecutor's Office prohibited attorneys to be directly involved with informants, without the aid of detectives, who are specially trained to conduct investigations. Yet, he deliberately violated that policy, refusing to comply therewith even after an admonition by the then Prosecutor.

He deliberately placed his personal interests above the duties required of him as an attorney and as a public official. He repeatedly forsook his client, the public, for his own interests and those of [the informants], criminal defendants from whom he had the duty to protect the public. He breached the public trust when he traded loyalties and turned counsel for [the informants] by assisting them in the preparation of their motion to suppress; when he vigorously pursued the reduction of [the male informant's] bail and played "musical courts", thereby deceiving the judicial system; when he personally made it possible for [make informant] to be released by providing his bail money; and when he stole evidence-illegal substances-from the State, for his own use and that of his friends.

Approximately nine years ago, respondent-then a young, even immature, but hardworking assistant county prosecutor-went through a period of extreme personal stress. During that period, he lost his ethical compass and went astray. In the interim, he has found his bearings. When, as here, ethics transgressions are remote in time, we may consider intervening events and current circumstances in determining the appropriate sanction. As offensive as was respondent's conduct, we are persuaded that "the root of his transgressions is not intractable dishonesty, venality, immorality, or incompetence. We generally acknowledge the possibility that the determinative cause of wrongdoing might be some mental, emotional, or psychological state or medical condition that is not obvious and, if present, could be corrected through treatment."

Part II
Misconduct During Trial

a) Applicable Rules of Professional Conduct

1) R.P.C. 3.4(e) Fairness:

A lawyer shall not:

(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; or

2) R.P.C. 3.8 Special Responsibilities of a Prosecutor

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 post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence 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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

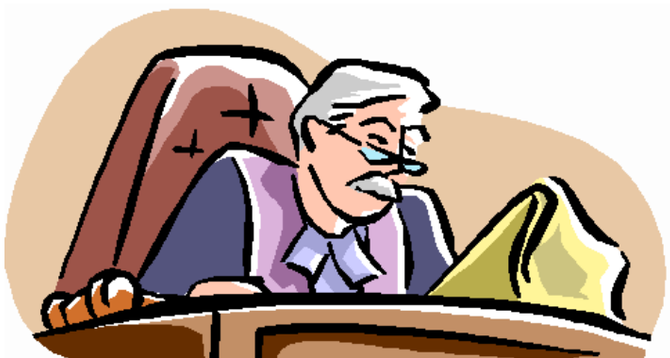
(1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and

(2) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under R.P.C. 3.6 or this Rule.

b) Case Law Commentary

Apart from R.P.C. 3.8, New Jersey case law recognizes the practical problems associated with intense advocacy in a criminal trial. As a result, the case law has repeatedly stated that prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented. Indeed, prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries. As the late Justice Clifford reminded us,



Criminal trials are emotionally charged proceedings. A prosecutor is not expected to conduct himself in a manner appropriate to a lecture hall. He is entitled to be forceful and graphic in his summation to the jury, so long as he confines himself to fair comments on the evidence presented.

Nevertheless, the primary duty of a prosecutor is not to obtain convictions, but to see that justice be done. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (Berger vs. United States, *295* U.S. 78, 88 (1935)).

As an adjunct to R.P.C. 3.8, the Supreme Court has provided some important and useful commentary in the appendix to the Rules of Court. These remarks have been part of the Rules since 1990 and are of critical importance:

The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice [be] done and truth [be] revealed in each individual case. The goal should be to achieve individual justice in individual cases. In discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges. Further, the prosecutor should have the ability to amend the charges to conform to the proofs.

Synthesizing the RPC's and the Supreme Court's commentary from 1990, three principles regarding the ethical responsibilities of New Jersey's prosecutors have emerged from the published case law:

1) The primary duty of a prosecutor is not to obtain convictions, but to see that justice be done.[1]

2) It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[2]

[1] State vs. Ramseur, 106 N.J. 123, 320, 524 A.2d 188(1987).
[2] State vs. Farrell, 61 N.J. 99, 105, 293 A.2d 176 (1972) (quoting Berger vs. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321(1935)).

3) Because the prosecutor represents the government and people of New Jersey, it is reasonable to say that jurors and the public fairly expect that he will fairly fulfill his duty to see that justice be done whether by conviction of the guilty or acquittal of the innocent.[3]

c) Discipline

Although the Supreme Court has threatened public discipline in prosecutor trial misconduct cases, to date the usual sanction has been a reversal of the defendant's conviction. The standard is that prosecutorial misconduct can be a ground for reversal where the prosecutor's misconduct was so egregious that it deprived the defendant of a fair trial. In the reported case law, this occurs almost exclusively during opening and closing statements.

Specifically, where there has been prosecutorial excess during an opening or closing argument, an appellate court will consider:

(1) whether defense counsel made timely and proper objections to the improper remarks;

(2) whether the remarks were withdrawn promptly; and

(3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial.

The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. The failure to object also deprives the court of an opportunity to take curative action.[4]

Among the important published cases that resulted in a new trial for the defendants are:

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[3] State vs. Spano, 64 N.J. 566, 568, 319 A.2d 217(1974).
[4] State vs. Murphy, 412 N.J.Super 553, 560, 991 A.2d 872(App.Div.2010).

State vs. Frost, 158 N.J. 76(1999) (The prosecutor (in his first jury trial) disparaged defense counsel's efforts to mount a defense, indicated that the cops had no reason to lie and misled the jury about unavailable evidence. Discipline in the form of a letter of reprimand from the AG was deemed sufficient by the Court).

State vs. Acker, 265 N.J.Super 351(App.Div.1993), a case that charged the defendant with second-degree sexual assault upon two females less than thirteen-years old, the prosecutor characterized the defense attorney and the defense as "absolutely preposterous" and "absolutely outrageous." The prosecutor also argued that it was the jury's function to protect young victims of alleged sexual offenses; that defendant was intoxicated in one instance, despite knowing that the accusation was baseless; and that if the jury believed one of the victims, it essentially had to believe the other.

State vs. Staples, *263* N.J.Super 602(App.Div.1993). This case involved a narcotics conviction stemming from an undercover officer's alleged purchase of cocaine from the defendant. The Appellate Division held that "in personally vouching for the credibility of the State's witnesses, in suggesting that police witnesses are believable because of their status as policemen and in suggesting that an acquittal could significantly jeopardize their professional careers, the prosecutor violated fundamental restraints against prosecutorial excesses."

d) Vouching for the Credibility of Police Witnesses

Our courts have consistently held that such statements by a prosecutor about a police officer's credibility are wholly inappropriate. State vs. Goode, 278 N.J.Super 85, 90(App.Div.1994) *(*recognizing that it was improper for prosecutor to tell jury that police had no motive to lie);

State vs. Staples, 263 N.J.Super 602, 623(App.Div.1993) (recognizing impropriety of prosecutor asking officer "is your career and the penalties that you would sustain for perjuring yourself worth the conviction for a $20.00 bag of cocaine?" during direct examination);

State vs. Engel, 249 N.J.Super 336, 381(App.Div.1991) (recognizing that it was improper for prosecutor to tell jury that investigators were "good men who leave their family [and] work day and night" and would not "jeopardize their careers" over defendants);

State vs. West, 145 N.J.Super 226, 233–34(App.Div.1976) (finding improper prosecutor's statements that police officer would not lie because "[t]here is a lot of harm that could come to him" and because "the police officer's career would be finished in a minute");

State vs. Jones, 104 N.J.Super 57, 65, 248 A.2d 554(App.Div.1968) (stating that it is "obviously improper" to imply that police testimony should be accepted, "not because of its believability but because the witnesses were policemen").

e. Name-Calling

[B]y no stretch of the imagination can it be said that describing defendant as a "coward," "liar," or "jackal" is not derogatory.... It is not fair to employ degrading epithets such as "[a] cancer," and "parasite upon society," "animal," "butcher boy," "young punk," "hood," "punk," and "bum [.]" Epithets are especially egregious when, as here, the prosecutor pursues a persistent pattern of misconduct throughout the trial. State vs. Pennington, 119 N.J. 547, 576–77 1990).

We have also condemned references to a defendant as the "guest of honor," an "equal opportunity shooter," and, in respect of an African–American capital defendant, a "brother." State vs. Long, 119 N.J. 439, 484 (1990).

We have, therefore, "caution[ed] prosecuting attorneys that derogatory name-calling will not be condoned[,]" and we have "admonish[ed] prosecutors to be circumspect in their zealous efforts to win convictions." State vs. Williams, 113 N.J. 393, 456(1988).

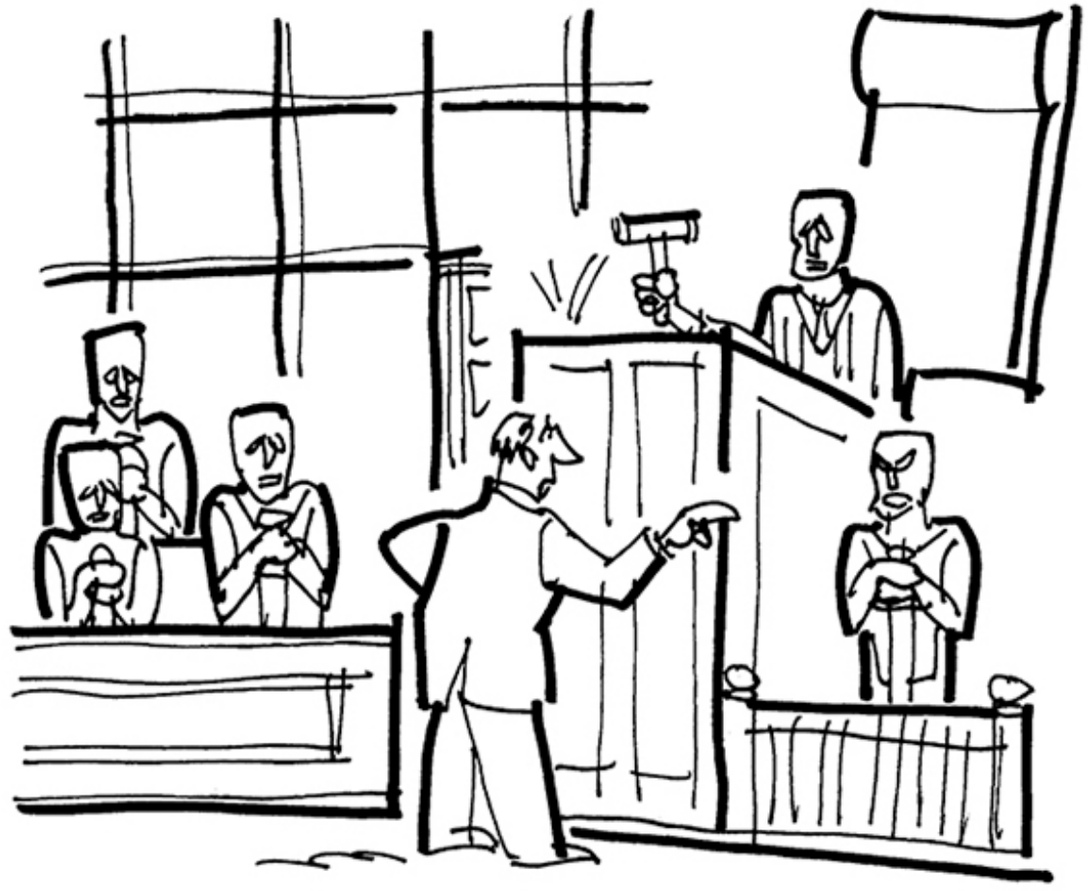
f) Arguing Conviction Warranted Based Upon the Angelic Character of the Victim

"Beverly Mitchell had so much to live for. Bright, beautiful, educated, religious, a member of her church choir. Beverly taught school in the Trenton school system. She taught special education. She was working part-time as a receptionist at the Bellevue Care Center to earn some extra money. You see, Beverly was due to be married in 1983. That very day, December 30, 1982, Beverly and her mother spent the day before Beverly went to work at the Bellevue Care Center, they spent the day looking for an apartment, an apartment that Beverly and her husband-to-be would share when Beverly started her new life. Beverly looked forward to 1983 with such joy, such hope, such promise. But it was not to be. The defendant, James Edward Williams, changed all of that. He changed it brutally, savagely, permanently. In a few moments of unspeakable horror, the defendant destroyed all of Beverly's dreams. In a few moments of unimaginable terror, the defendant destroyed all of Beverly's plans. In those few moments of a living nightmare, the defendant destroyed all of that joy, all that hope, all that promise. In those few moments, he destroyed Beverly Mitchell. She would never live to see her wedding day." State vs. Williams, 113 N.J. 393, 448, 550 A.2d 1172(1988).

The passage quoted at length above contains nothing that would aid the jury in determining the defendant's guilt or innocence. Rather, the inflammatory statements could likely result not only in unduly prejudicing the jury against defendant but also in confusing it over whether its deliberations should be influenced by the sterling character of the victim. There is no place in a capital case for such confusion and prejudice. The prosecutor's remarks were clearly improper and should have been stricken from the record and the jury properly instructed to disregard them. State vs. Williams, 113 N.J. 393, 452, 550 A.2d 1172(1988).

g) Comments on Issues Not in Evidence

In reviewing the prosecutor's remarks in the context of his summation as a whole, we are convinced that these remarks did have the capacity to unfairly influence the jury and deprive defendant of a fair trial. The prosecutor repeatedly referred to defendant as "drunk" or "blotto" when the evidence did not support the inference that defendant met the legal standard for intoxication. Nor was there any evidence in the record from which the jurors could answer the prosecutor's question "[w]hat does cold do to smell?" That question called for speculation on the part of the jurors. Moreover, we are particularly offended by the prosecutor's comment: "he's closing in on the kill." There was no evidence whatsoever that defendant acted intentionally or that he was in any way focused on hitting the victims, as this remark suggests. Indeed, the prosecutor's remarks would, by themselves, have led to reversible error in this case. State vs. Atwater, 400 N.J.Super 319, 337, 947 A.2d 175(App.Div.2008).



Part III
Pretrial Preparation & Investigation

a) In re Helmer, 237 N.J. 70 (2019)

R.P.C. 3.4(g)

A lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

Statement of Facts

NFI and Trident Dispute Over Past Due Monies

[The Chief of Major Crimes Prosecutor] discussed the NFI/Trident matter with Helmer, and Helmer urged [him] to pursue criminal charges. [This prosecutor] assigned the case to a line prosecutor who had been with the office for three years and had little prior experience handling white collar cases.

The following plan was agreed on at the meeting: the CCPO would seek a sealed indictment against [the two named corporate officers], arrest them in New Jersey by surprise; request high bail amounts; allege that the bail money represented the proceeds of a crime at a bail source inquiry; and arrange for the bail monies to be used as restitution for NFI. Under the plan, defendants would be required to post cash bail and would be offered Pre-Trial Intervention (PTI) if they agreed to pay restitution as a condition.

In essence, the plan was designed to obtain restitution for NFI through the arrests of [the corporate officers]. Had the plan worked, NFI, an unsecured creditor in the bankruptcy proceeding, might have received payment for its business losses outside of the bankruptcy process.

[The line prosecutor] conducted no independent investigation of NFI's allegations against Trident. The following events took place instead. Two weeks after the group meeting, Helmer sent [him] an email dated June 11, 2009. Helmer suggested that the CCPO seek an indictment on June 17, 2009, before the current, seasoned grand jury expired. In the email, Helmer outlined a brief narrative summary for the grand jury presentation and noted that he would provide more details to the grand jury "in accordance with our previous conversation." Helmer also sketched out ten criminal charges for an indictment. The assistant prosecutor, in turn, directed his secretary to draft a ten-count indictment that followed Helmer's outline.

[The line prosecutor] presented the case to the grand jury on June 17, 2009 with Helmer as the sole witness. [The prosecutor] testified [at the disciplinary hearing] that he would have preferred to call [the company's investigator], a former State Trooper and, by then, a former NFI employee.

Helmer appeared before the grand jury and claimed he testified as a victim advocate/navigator. He had previously spoken with certain employees at NFI and reviewed information they supplied, but he did not conduct an independent investigation.

The grand jury indicted [both corporate officers] on all ten proposed counts, including second-degree charges of conspiracy, theft by deception, theft of services, and issuing bad checks. The following day, a Superior Court Judge signed arrest warrants against [them] which listed bail at "$ 150,000 Full Cash."

Neither [corporate officer] had a criminal record or any history of flight. [The major crimes prosecutor] testified that, at the time of the indictment, the standard amount of bail for the crimes charged ranged from $ 35,000 to $ 75,000, with an option to post ten percent. He admitted that the higher bail was sought, among other reasons, "to get as close to the restitution amount as possible .... [Y]ou have at least $ 168,000 of bad checks." Helmer later claimed 1.8 million in restitution was due his client

At various times afterward, [the prosecutors and] Helmer discussed the arrest plan. [The corporate officers], who lived outside New Jersey, would be arrested in Gloucester County on August 6, 2009, at a mediation session in the civil lawsuit. They would then be lodged in the Cumberland County Jail.

The plan fell apart when CCPO detectives refused to carry out the arrests, and the Chief of Detectives discussed the matter with the First Assistant. The First Assistant directed [the line prosecutor] to apply to reduce [the] bail and have [the corporate officers] released on their own recognizance (ROR). Soon after, a Superior Court Judge cancelled the arrest warrants and directed that [they] be released ROR.

Discussion

Two preliminary issues seemed to have had a huge influence on the Court.

a) The first is that none of the prosecutors or judges who participated in this case was singled out for professional discipline. Reading between the lines, it appears the Justices felt this was unfair.

b) Secondly, under our statutory law and constitutional doctrine, a victim of an offense can seek restitution through the court system. Victims can pursue restitution in both the civil and criminal arenas. N.J.S.A. 2C:44-2(b) expressly empowers judges to sentence defendants to pay restitution. Section (f) of that statute acknowledges that defendants can also seek to be made whole through the civil process. N.J.S.A. 2C:44-2(f) (noting that an order of restitution in a criminal matter "shall not operate as a bar to the seeking of civil recovery by the victim," but the amount due shall be reduced to avoid double recovery.)

c) As to RPC 3.4(g): Neither the Special Master not the DRB found sufficient evidence to support a violation of this RPC. The Special Master stated that the proofs did not demonstrate how Helmer's conduct could have given rise to an improper advantage in a civil matter. He observed that the CCPO, not Helmer, indicted the corporate officers, that Helmer could not control the arrest or the setting of bail; and that no advantage could have been gained in the bankruptcy proceeding in any

event. The DRB majority explained that a violation of RPC 3.4(g) requires proof of intent to gain an improper advantage in a civil matter -- which the majority found lacking. Because the OAE did not cross appeal on this discrete issue, the Supreme Court elected not to review these findings.

d) The core issue is not whether private counsel could pursue restitution through the criminal process but rather the manner in which he sought to do so. To be clear, it would be unacceptable -- and prejudicial to the administration of justice -- for a private attorney to manipulate the criminal process by drafting charges, causing prosecutors to present them, and causing an inappropriately high bail to be set to serve as restitution for the attorney's client. In the unlikely event that might happen, it would amount to a perversion of the justice system. Helmer's conduct here pushed the envelope, but we cannot conclude from the record that he orchestrated or induced such a scheme. Although he actively encouraged a criminal prosecution and advocated for restitution for his client, to place primary responsibility on Helmer for what occurred overlooks the role and decision-making authority of the prosecution team.

e) Advice to prosecutors: When a prosecutor is recused from a private attorney's cases because of a significant personal, financial, professional, business, political, or other relationship, the prosecutor should not participate in any aspect of a matter the attorney is handling. Likewise, if defense counsel knows that a particular prosecutor is recused from a matter, counsel should not approach the prosecutor to discuss the case in an official capacity.

f) Advice to defense attorneys: It is not at all inappropriate for private counsel to make a presentation to the prosecutor's office on behalf of a victim. The prosecutor represents the public and should independently assess the allegations presented. If, in the prosecution's judgment, further action is warranted, prosecutors and law enforcement officers ordinarily conduct an independent investigation. At a minimum, prosecutors have an obligation to review evidence with care and ensure early on that it satisfies the threshold requirement of probable cause.

g) Grand jury proceedings: Hearsay testimony is permitted before the grand jury. In white collar cases, prosecutors routinely call investigators who are familiar with the facts to testify. Of course, witnesses with firsthand knowledge can also be summoned.

It is highly unusual for a victim's attorney -- who lacks firsthand knowledge and, in this case, stood to gain if restitution was obtained through the criminal process -- to appear as the sole witness before a grand jury. But the prosecutor, not private counsel, ultimately made the unorthodox decision to proceed in that way here. To ensure that accurate and reliable information is presented to the grand jury, when witnesses with firsthand knowledge do not testify, the better practice is to call witnesses who have participated in an investigation or reviewed its results with care. The record also raises a question about grand jury secrecy. In a departure from that principle, the line prosecutor admitted that he discussed the grand jury's vote with his supervisor and Helmer soon after the return of an indictment and after it had been sealed. If such a discussion took place, it would have been improper.

h) Final thoughts: In those instances where a defense attorney seeks to make voluntary restitution to a victim prior to the entry of a plea, the attorney should withhold any payment until a hearing has been held on the record where the judge and prosecutor can consider the amount of the restitution and determine that its payment is in the interest of justice. See In re Friedland, 59 N.J. 209(1971). Following this procedure will also help avoid a prosecution for the crime of Compounding under N.J.S.A. 2C:29-4.

b) State vs. Martinez, N.J. Super (App.Div. 2019)

RPC 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.

This novel case concerns a prosecutor's office's use of body wires on a paid informant, an anticipated trial witness for the State in a narcotics case, to secretly monitor and record a criminal defense attorney's pre-trial interview of that informant.

An assistant prosecutor authorized the surreptitious taping based upon information – which turned out to be untrue – that the attorney might offer the witness a bribe. When the prosecutor's office supplied the recording and a transcript of it to the attorney in discovery three days before his client's trial, he moved to dismiss the indictment, or, alternatively, to bar the witness's testimony for the State.

In its oral ruling, the trial court remarked that the secret recording in this case "should send a chill down the spine of any criminal defense attorney or prosecutor [who] has ever interviewed a witness." The court found the prosecutor's office lacked reasonable suspicion that "evidence of criminal conduct would be derived from [the] interception." Nonetheless, the court concluded the defense's trial strategy had not been sufficiently divulged during the taped interview "to the extent that would justify" the dismissal of indictment or preclusion of the witness's testimony. The court adopted a more limited remedy, barring the State from using the taped interview as evidence at trial. Defendant moved for leave to appeal, which we granted.

The ABA Investigation Standards in the section entitled, "PROSECUTOR'S ROLE IN ADDRESSING SUSPECTED MISCONDUCT BY DEFENSE COUNSEL provides the following guidance:

The prosecutor's office should take reasonable steps to assure the independence of any investigation of a defense counsel [suspected of wrongdoing] including, if appropriate, the appointment of a pro tem or special prosecutor or use of a "fire-wall" within the prosecutor's office. At a minimum, an investigation of defense counsel's conduct should be conducted by a prosecutor who has not been involved in the initial matter or in ongoing matters with that defense counsel.

The failure in this case to establish and maintain such a "fire-wall" or "taint team" within the prosecutor's office was a critical omission that requires remedial action.

The overall thrust of these ethical standards is that prosecutors should exercise caution when using surreptitious means to investigate defense attorneys. They must take care to balance legitimate investigative needs against concerns of privacy violation, the potential for harassment and abuse, and the need to keep an investigation of potential attorney misconduct wholly separate from the underlying prosecution(s) being defended by that attorney.

We make no determination as to whether the prosecutor's office in this novel situation violated any ethical standards, and there is no ethical ruling by the trial court for us to review. What we can say is that the general principles underlying the ethical standards reinforce our concerns about the alleged interference with defendant's constitutional rights of fair access to a witness. They also punctuate our concerns about the revelation of attorney work product to the prosecutorial employees involved in the underlying narcotics case.

Having detailed the known facts and various guiding principles, we proceed to address their implications. The following aspects of the record are most critical to our assessment:

• In compliance with the Wiretap Act, an assistant county prosecutor authorized the consensual intercept of defense counsel's interview of Cruz, a paid confidential informant.

• Cruz wore two body wires during his interview with defense counsel, devices which recorded and apparently transmitted the interview simultaneously to prosecutorial agents.

• The interview was transcribed, and the rough transcript and the recording were not turned over to defense counsel until three days before trial, by the assistant prosecutor handling the Martinez narcotics case.

• The recorded interview revealed, at least to some extent not yet fully uncovered, the defense counsel's work product, which could be advantageous to the prosecutors handling the narcotics case.

• One or more detectives in the prosecutor's office took part in both the investigation of alleged attorney misconduct and the narcotics case, without the office maintaining ethical screens preventing such dual involvement.

• The assistant prosecutor handling the Martinez case was evidently exposed to the contents of the consensual intercept, and he was not screened from that material.

• The trial court found that because some amount of work product was divulged, the appropriate remedy was to disallow the prosecutor from affirmatively placing into the evidence the contents of the Mazraani interview, although defendant was free to use the interview contents if he so desired.

• The trial court denied defendant's requests for more stringent remedies, such as dismissal of the indictment or preclusion of trial testimony by Cruz in the State's case.

We conclude from these circumstances that the joint involvement of prosecutorial representatives in both the confidential intercept conducted in the attorney misconduct investigation and in the narcotics case, coupled with the disclosure to the Martinez assistant prosecutor of Cruz's recorded interview, infringed upon defendant's constitutional rights.

c) In re Segal, 130 N.J. 468(1992)
R.P.C. 1.1

A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

Facts and Decision of the Court

The seminal case dealing with gross negligence by a prosecutor is In re Segal. In Segal, the respondent was a municipal prosecutor who was tasked with prosecuting a traffic accident that involved a fatality. At his disciplinary hearing before the District Ethics Committee (DEC), he testified that when he first received the letter, he believed the matter was an ordinary traffic violation:

I assumed that I was going to be handling this case at the initial time that I got this letter but I also assumed that it was a run-of-the-mill-traffic case, the only difference being that it involved a Supreme [sic] Court judge and that I would have to prosecute it in the same fashion I had prosecuted all the other cases that I had prosecuted over the years and I would go to court and if there were witnesses to be subpoenaed they would be there. I would go over with them whatever the testimony was and prosecute the-present the prosecution on behalf of the State, that's how it works in municipal court.

The prosecutor did not interview witnesses or arrange for their subpoenas prior to the designated trial date nor did he take any steps to prepare for trial. The record before the [District Ethics Committee] revealed that there had been twelve witnesses to the accident, three of whom had given sworn statements to the Cherry Hill Police Department indicating that

the defendant's vehicle had been driven without functioning headlights at the time of the accident. Through all this, the prosecutor made no effort either to prepare for trial or to inform the trial court of his intention to seek an adjournment. The trial took place despite the prosecutor's request for an adjournment ending in an acquittal.

In imposing a reprimand, the Supreme Court observed that:

As with any trial attorney, a municipal prosecutor has the duty adequately to prepare for trial. The prosecutor must select the State's witnesses and prepare and present the State's evidence in court. (Citation omitted.) Because the State is the municipal prosecutor's client, a failure to discharge the obligations of his office is a violation of a prosecutor's professional responsibility to represent the client diligently. When a prosecutor has available relevant evidence bearing on a prosecution, and the prosecutor's failure to present that evidence in the course of trial results in acquittal, that prosecutor has not diligently discharged his or her duty to prepare and present the State's case. Furthermore, when the failure to prepare for trial and present relevant evidence prejudices the State's case, the prosecutor's deviation from that duty may be so severe as to constitute gross negligence.

Discussion

The Segal decision was intended by the Court to communicate the message that prosecutors on both the county and municipal level have complete responsibility for the preparation of their cases in a comprehensive and thorough manner. Gross negligence has the clear capacity to deny the public of a just outcome to a case and thus will subject the offending prosecutor to public discipline.

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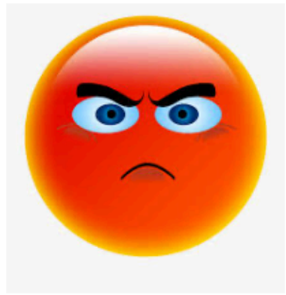

Ethical Challenges for New Jersey Prosecutors & Defense Attorneys

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