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PROSECUTORIAL JEOPARDY

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Prosecutorial Misconduct: What you don't know can hurt everyone

The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. ... 'While he may strike hard blows, he is not at liberty to strike foul ones. 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. [1]

Berger v. United States, 295 U.S. 78, 88 (1935)

Prosecutorial misconduct

Prosecutorial misconduct is anything that the prosecutor does, or fails to do, that tends to deprive the defendant of a fair trial.

The reviewing courts will look only to the official record to assess what happened. You will not be able to rely on memory, unrecorded conversations in chambers, or any agreements made outside the record.

Arizona courts have stated that mere mistake or negligence does not constitute prosecutorial misconduct.[2] Nevertheless, the trend shows that the courts *will* find prosecutorial misconduct even when the prosecutor's error appears to be mistaken rather than deliberate. Better to be safe than sorry.

The Unlevel Playing Field

If a defendant's trial counsel is ineffective, the defendant can get post-conviction relief under Rule 32 of the Criminal Rules. The responsibilities of a prosecutor go beyond the duty to convict defendants. Pursuant to its role of "minister of justice," the prosecution also has a duty to see that defendants receive a fair trial.[3]

The Consequences of Prosecutorial Misconduct

Misconduct alone is not sufficient to award a new trial.[4] However, when a court determines that a defendant was denied a fair trial, it can take one of several actions:

1. Reverse a conviction[5]
2. Grant a mistrial (state may then be barred from retrying the defendant)
3. Dismiss the case with prejudice

In addition to the effect on the defendant's case, a finding of prosecutorial misconduct can negatively impact the prosecutor. A judicial determination of prosecutorial misconduct can not only tarnish a prosecutor's reputation, it can lead to disciplinary action by the State Bar, including disbarment.[7]

[2] *State v. Aguilar,* 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court,* 139 Ariz. 98, 108-09, 677 P.2d 261, 271-71 (1984)
[3] *State v. Rodriguez,* 192 Ariz. 58, 64, ¶ 33, 961 P.2d 1006, 1012 (1998)

[4] *State v. Atwood,* 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *quoting State v. Hansen,* 156 Ariz. 291. 296-97, 751 P.2d 951, 956-57 (1988)
State v. Velazquez, 216 Ariz. 300, 311, ¶45, 166 P.3d 91, 102 (2007)
[6] *State v. Irani,* 200 Ariz. 383, 384, ¶ 6, 26 P.3d 1154, 1155 (App. 2001)
[7] *State v, Peasley,* 208 Ariz. 27 (2004)

The ethical rules are codified in the Rules of the Arizona Supreme Court, Rule 42.

Ethical Rule 3.8 states the ***special*** *responsibilities of the 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 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;

(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) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and

(3) 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 ER 3.6 or this Rule.

THE TOP TEN Dos and Don'ts of Prosecutorial Misconduct

I. DO Make every effort to ensure the defendant has a fair trial

There are two fundamental aspects of the U.S. criminal justice system: The presumption that the defendant is innocent, and the burden on the prosecution to prove guilt beyond a reasonable doubt. The essential ingredients for a fair trial are the rights to remain silent, confront witnesses, have a public trial, have a jury trial, have a speedy trial, be represented by a competent attorney and receive adequate representation.

Some other rules to consider: Ethical Rule 3.1 forbids filing "frivolous" motions, that is, motions that are not supported by existing law or by a good faith argument for changing existing law. And Ethical Rule 3.3(a)(2) also requires lawyers to cite case law and other authority that is against their position.[8] Additionally, prosecutors should not take advantage of *pro per* defendants.

II. DO be open and honest—disclose *everything!*

Under *Brady v. Maryland,* due process requires disclosure of *exculpatory* evidence (favorable to accused), regardless of good or bad faith of prosecutor.[10] Rule 15 of the Rules of Criminal Procedure goes far beyond *Brady* because it requires the State to disclose *inculpatory* evidence as well – such as the police reports and 911 call recordings.

Consider filing a notice of witnesses divided into two categories – witnesses the State is *likely* to call, and witnesses the State is *not* likely to call. This will keep the options open. Rule 15 of the Criminal Rules requires disclosure of such things as witnesses' prior felony convictions for Evidence Rule 609 impeachment purposes, and sets strict time limits for the State to comply.

If the State does not make timely disclosure of everything that needs to be disclosed, the court may impose sanctions on the prosecution, which can include precluding the use of witnesses, evidence, or argument; dismissing the case with or without prejudice; granting a continuance or declaring a mistrial; holding a witness, party, or counsel in contempt; imposing the costs of continuing the proceedings; or "any other appropriate sanction" that the court deems necessary.[11]

The Victim's Bill of Rights provides victims with the ability to refuse defense interviews. That is the victim's right; it is not the prosecutor's right. If the defendant requests a victim interview, the prosecutor must contact the victim to ascertain the victim's position. The State does not have the authority to decide whether it would be in the victim's best interest to decline an interview.[13]

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[8] Ethical Rule 3.3(a)(2)
[9] *State v. Cornell,* 179 Ariz. 314, 331, 878 P.2d 1352, 1369 (1994) [10] *Brady v. Maryland,* 373 U.S. 83 (1963)
[11] Arizona Criminal Rules of Procedure 15.7
[12] Arizona Criminal Rules of Procedure 15.8
[13] *State v. Rasch,* 188 Ariz. 309, 312. 935 P.2d 887, 890 (App. 1996)

III. DO avoid even small mistakes - they can add up to prosecutorial misconduct.

The *"Cumulative Error Doctrine"* applies to claims of prosecutorial misconduct. Even though any one error in itself might not be reversible, the Courts will consider the overall effects of all the errors combined and determine if the incidents combined show a pattern of persistent and pervasive misconduct and the prosecutor's intent to prejudice the defendant.[14]

1V. DO NOT retaliate!

Defense attorneys may try to goad prosecutors into misconduct as a means of freeing their clients from conviction. But remember, two wrongs never make a right. The prosecution cannot retaliate in kind to defense misconduct. "Even if the defense had been guilty of serious misconduct, the prosecutor would not have been entitled to engage in abusive, argumentative and harassing conduct."[15]

V. DO NOT comment on a defendant's silent. Period.

A prosecutor may not comment on the defendant's post-arrest or *post-Miranda* warnings silence as evidence of guilt.[18] Commenting on such silence violates both constitutional and statutory law.[17] Similarly, when the defendant does not testify at trial, it is improper to argue about his demeanor in the courtroom.[18]

Prosecutors would be prudent to warn and remind their officer witnesses not to mention the defendant's silence. This is an *easy* pitfall and should simply be eradicated from all arguments and questioning.

VI. DO NOT be vindictive

Due process prohibits prosecutors from punishing the defendant by filing additional charges in retaliation for his exercising any of his legal rights — such as hiring private counsel, filing discovery requests, demanding interviews, and the like.[19]

The prosecutor may refuse to plea bargain for reasons of policy, but may NOT do so out of dislike for the defense attorney.[20]

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[14] *State v. Hughes,* 193 Ariz. 72, 78-79, ¶ 25, 969 P.2d 1184, 1190-91 (1998)
[15] Pool v. *Superior Court,* 139 Ariz, 98, 103, 677 P.2d 261, 266 (1984)
[16] *State v. Ramirez,* 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994)
[17] See Ariz. Const. art. 2, § 10; A.R.S. § 13-117(B) (1989); *State v. Schrock,* 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986)." *Id. atl* 63.
[18] *State v. Smith,* 122 Ariz. 50, 51, 592 P.2d 1316, 1317 (App. 1979)
[19] *State v. Hinton,* 123 Ark. 575, 601 P.2d 338 (App. 1979)

VII. DO NOT vouch for the State

It is improper for the prosecution to vouch for the credibility of a government witness.[21] There are two main kinds of improper vouching:[22]

1. When the prosecutor places the prestige of the government behind its witness, and
2. When the prosecutor suggests that information not presented to the jury supports the witness's testimony.

The prosecutor must not state their personal opinion on *any* matter. Argument containing personal opinion is improper because it is not based on the evidence or reasonable inferences that may be drawn from the evidence.[23]

VIII. ALWAYS keep a record!

"The palest ink is stronger than the strongest memory"

Documentation and record-making are key to insuring that the State has the ability to properly rebut claims of prosecutorial misconduct.

IX. DO NOT present false or misleading evidence

If the prosecutor knows a witness is presenting false testimony, the prosecutor must inform the court accordingly.

In addition, prosecutors should not comment on evidence not presented to the jury.[25]

[21] *State v. Martin,* 139 Ariz. 466, 481, 679 P.2d 489, 504 (1984)
[21] State v. *King,* 180 Ariz. 268, 276, 883 P.2d 1024, 1032 (1994), *quoting United States v. Roberts,* 618 F.2d 530, 533 (9th Cir. 1980)

[22] State v. *Dumaine,* 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989)

[23] *State v. Dunlap,* 187 Ariz. 441, 463, 930 P.2d 518, 540 (App. 1996)
[24] *State v. Donald,* 198 Ariz. 406, 10 P.3d 1193 (App. 2000)
[25] *State v. Gonzales,* 105 Ariz. 434, 436-37, 466 P.2d 388, 390-91 (1970)

You cannot and should not quote case law to the jury. An appellate court opinion "is neither competent nor relevant evidence in a jury trial."[27]

Prosecutors are also not permitted to refer to matters of sentencing and disposition as it is irrelevant and the jury should not take it into account.[28]

X. DO NOT call the defense attorney or defendant bad names

Jury argument that impugns the integrity or honesty of opposing counsel is improper.[29]
While prosecutors may comment on the vicious and inhuman nature of the defendant's acts, the prosecutor may not make arguments that appeal to the passions and fears of the jury.[33]

Prosecutors may talk about what the defendant did, not about who he is. For example, a prosecutor may say that what the defendant did was bad, but cannot call the defendant names or refer to his miserable character to prove action in conformity with such character.[31] Nor can the prosecutor attack the defense attorney or make accusations about defense tactics without proof.[32]

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[26] *State v. Gonzales,* 105 Ariz. 434, 436-37, 466 P.2d 388, 390-91 (1970)

[27] *State v. Martinez,* 175 Ariz. 114, 854 P.2d 147 (App. 1993)
[28] *State v. Cornell,* 179 Ariz. 314, 878 P.2d 1352 (1994)

[29] *State v. Hughes,* 193 Ariz. 72, 86, ¶ 59, 969 P.2d 1184, 1198 (1998)

[30] State v. Henry, 176 Ariz. 569, 581, 863 P.2d 861, 873 (1993)
[31] Rule 404 (Li), Ariz. R. Evid.
[32] *State v. Cornell,* 179 Ariz. 314, 878 P.2d 1352 (1994)
[33] *Sullivan v. State,* 751 So.2d 128, 129 (Fla. 2000)

Prosecutor Checklist: Avoiding Prosecutorial Misconduct

Charging

- ☐ **I did not alter my charges in retaliation of defendant exercising his legal rights or** because **or a like/dislike for defense counsel**
  Due process prohibits us from punishing a defendant by filing additional charges in retaliation for his exercising any of his legal rights—such as hiring private counsel, filing discovery requests, demanding interviews, etc.

Plea Negotiations

- ☐ **I asked the victims if they will submit to defense's interviews**
  While victims have the right to refuse defense interviews, you need to ask them whether they will submit to a defense interview anyway.
- ☐ **I made all decisions relating to the plea negotiations**
  A victim has the right to confer with the prosecutor before plea is entered, but remember, the victim does not make the plea decisions.
- ☐ **I made a record of what offers were made to the defendant and whether or not he/she accepted or rejected them.**
  State v. Donald, 198 Ariz. 406, 10 P.3d 1193 (App. 2000) the Court held that when defense counsel failed to explain a plea offer properly to the defendant—so that the defendant couldn't make a reasoned decision whether to accept the offer or not—and went to trial and LOST, the court could make the State re-extend the original plea offer!

Discovery

- ☐ **I have disclosed all exculpatory evidence (favorable to defendant) to the defense**
  Under *Brady v. Maryland,* 373 U.S. 83 (1963), due process requires disclosure of evidence favorable to accuse, regardless of good faith or bad faith of prosecutor.
- ☐ **I have disclosed all inculpatory evidence (unfavorable to defendant) to the defense**
  Rule 15 of the Rules of Criminal Procedure requires us to disclose inculpatory *and* exculpatory evidence.

Pretrial

- ☐ **I have made my role as a prosecutor clear to all parties concerned**
- ☐ **I strictly instructed my officer witnesses not to mention the defendants post-arrest or post-Miranda silence**
- ☐ **I have not filed any frivolous motions**
  Ethical Rule 3.1 forbids us from filing frivolous motions (those not supported by existing law or by a good faith argument for changing existing law)
- ☐ **I have not surreptitiously recorded any witness interviews (all parties must be made aware of taping)**

Trial

- ☐ **I have not presented any false or misleading testimony**
- ☐ **I have not placed the prestige of the government behind my witnesses**
  Ex-"I promise you that I'm going to tell you the truth"
- ☐ **I have not referred to information not presented to the jury**
  Ex-"There are some things I can't tell you, but that witness is lying..."
- ☐ **I have not inappropriately commented on defendant's character**
  Ex-"The defendant is a "monster, filth, and the reincarnation of the devil"
- ☐ **I have not commented on defendant's post-arrest, post-Miranda silence, or defendant's refusal to testify**
  Ex-"defendant had an answer for everything, but when the cops asked him a question he didn't like, he stopped talking and asked for a lawyer"
- ☐ **I have not asserted my personal opinion regarding any witnesses, evidence, or testimony given at trial**
  Ex-"*I think* he was an honest man, but *I think* he made an honest mistake"
- ☐ **I have not suggested other acts of the defendant, or defense misconduct, without proof**
  Ex-"the doctor knows the result he's looking for, and that's it. Subject comes in with schizophrenic-potential schizophrenic diagnosis, and $950 later, yes, that's what he got"
- ☐ **I have not appealed to the "passion or prejudice" of the jury**
  Ex-'When Mr. Henry was testifying, did the word psychopath ever come to mind?"
- ☐ **I have not denigrated the defense attorney or the defendant**
  Ex- "there are two liars in this case—defense counsel and the defendant"
- ☐ **I have not forced/tricked defendant into calling my witnesses liars**
  Ex-Prosecutor asks defendant, "Is there any reason that the officer would come to court and perjure himself and risk fourteen years on the police force?"
- ☐ **I did not call the jury's attention to punishment or other improper matters**
  Ex-"Ms. Smith deserves peace—to know for certain that the defendant is locked up for life--never to harm her again"
- ☐ **Even though defense made untimely disclosure, I took the high road and let the evidence in (if not, the could be seen as overzealous advocacy)**
- ☐ **I did not suggest that the jurors needed a "reason" to acquit**
  Ex-"the State submits to you that if you find the Defendant not guilty you need to have a reason in order to find reasonable doubt"
- ☐ **I did not purposely say or do anything that deprives the defendant of a fair trial**