

CRIMINAL LAW

Demanding Individual Accountability for Prosecutorial Misconduct

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Column Editor

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“Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.” -- Model Code of Professional Responsibility EC 1-2 (1981).

Last year, there was an overwhelming number of reports of prosecutorial misconduct, abuse and overreaching. These cases varied from the KPMG white collar case, in which the judge denounced the overzealous prosecutors for their antics, to the notorious Duke University Lacrosse case, which was amplified around the world by the media and ultimately led to the disbarment and imprisonment of the prosecutor (*which is exceptionally rare*).

These cases, while factually different, had one common theme: the defendants had the social and financial ability to defend themselves against overzealous prosecutors, who in their blind ambition hurt their own cases and brought about (*rightfully so*) disdain from the courts and public opinion. See, “Stop Prosecutorial Abuses,” *National Law Journal* (Dec. 17, 2007).

Indeed, prosecutors bear one of the most difficult balancing challenges – balancing the pursuit of the guilty against the protection of the innocent, while respecting our Constitution. The prosecutor must somehow combine protecting the public welfare with protecting the individual citizen. *Foute v. State* (1816) 4 Tenn. (3 Hayw.) 98, 99. Their job is not to win, but to do justice. *Berger v. U.S.* (1935) 295 U.S. 78, 88.

With the prosecutor, and the prosecutor alone, rests the ultimate decision to prosecute (to bring someone into the system emotionally, physically and financially) and the authority to employ “the most terrible instruments of government” against an individual. *United States v. Shaw* (D.C., 1967) 226 A.2d 366, 368. As the most pervasive and dominant force in criminal justice, the prosecutor wields an immeasurable amount of influence over victims, defendants and the larger community. Gershman, “The New Prosecutors,” 53 U. Pitt. L. Rev. 393, 448 (1992).

As former Attorney General and Supreme Court Justice Robert Jackson remarked, “The prosecutor has more control over life, liberty, and reputation than any other person in the United States.” See, U.S. Attorney General Address to Second Annual Conference (Apr. 1, 1940), 31 *Journal of Criminal Law & Criminology* 3-6 (1940) and 24 *Journal of the American Judicature Society* 18 (1940), available at www.roberthjackson.org.

Prosecutorial misconduct may include such actions as overcharging defendants, vindictive prosecution, grand jury abuse, suborning perjury, discovery violations (withholding exculpatory evidence), vouching for witnesses, and using improper information or innuendo at trial and during

closing arguments. Unfortunately, prosecutorial misconduct is more common than we would like to believe. Courts rarely sanction the conduct, given the difficulty of establishing intent. However, the following are two recent, high profile cases in which such misconduct was exposed through the substantial resources available to the defendants, resulting in the courts harshly criticizing the prosecutors for their misconduct.

In the KPMG case, *United States v. Stein*, S105 Crim. 0888 (July 16, 2007), the government indicted 19 KPMG employees on conspiracy and tax evasion, and claimed that KPMG was a co-conspirator. The government accused the defendants of conspiring to make, sell, and use bogus tax shelters that cost the United States Treasury billions of dollars in unpaid taxes from the late 1990s through recent years.

Under the threat of indicting KPMG itself, prosecutors from the Southern District of New York succeeded in pressuring KPMG to first limit, and then cut off, its payment of legal fees to its employees (a common occurrence in white collar cases when employees were working for the benefit of the corporation at the time of the alleged offenses). After charges were dismissed against 13 of 16 defendants, Judge Lewis Kaplan said of the prosecutors, “Their deliberate interference with the defendants’ rights was outrageous and shocking in the constitutional sense, because it was fundamentally at odds with two of our most basic constitutional values – the right to counsel and the right to fair proceedings.” *United States v. Stein, supra*, at 38. The judge threatened to dismiss all or part of the high-profile case on the ground of prosecutorial misconduct. *Id.*

But there was no talk about individual sanctions against the prosecutors themselves for such strong-arm tactics. Court appointed remedies, such as retrials and dismissal, exist for certain misconduct by the prosecutor. However, **personal accountability** is the only way to ensure deterring such conduct. Harsh criticisms from the bench should result in automatic referrals to the state Bar (*in this author’s opinion*).

In the Duke University Lacrosse case, the world witnessed firsthand the breadth of prosecutorial power in the American criminal justice system and its impact on public trust and community relations. An African-American exotic dancer accused three members of the Duke Lacrosse team of rape and sexual assault. The case grabbed headlines, as its elements of race, class, and gender captivated the general public. National media descended on the city. As racial tensions flared within the community, the local district attorney, Michael Nifong, conducted a barrage of media interviews and continually assured the public that a crime had occurred. The evidence that surfaced over time, however, failed to confirm his initial statements. Nifong had long known DNA tests did not support the charges, but rather showed the defendants were innocent. He had withheld evidence in violation of discovery law and Constitutional guarantees of due process. While the case crumbled, the District Attorney’s actions came under scrutiny and Nifong faced allegations of prosecutorial improprieties, including failure to disclose the exculpatory evidence, inflammatory extrajudicial statements, and charges that he pursued the case for political gain.

In an unprecedented action by the North Carolina State Bar, a disciplinary investigation was conducted into the case and the North Carolina Attorney General was requested to take jurisdiction of the case and investigate further. The prosecutor, Michael Nifong, was disbarred. The Duke University Lacrosse case was a high profile case which put the State’s attorney disciplinary body and the judicial system under the spotlight. The national exposure of that case and the misconduct by the prosecutor, who attempted to litigate against the three young men in the court of public opinion, ultimately was tried by the same court of public opinion and was found guilty.

The media attention on these cases magnified conduct that occurs unfortunately almost every day in American courthouses. A prosecutor's violation of the obligation to disclose exculpatory evidence accounts for more miscarriages of justice than any other type of malpractice, but it is rarely sanctioned by the courts and almost never disciplined. See, "Prosecutor Becomes Prosecuted," *The New York Times* (June 24, 2007), quoting Gershman, *Prosecutorial Misconduct* (2d ed. 2005).

In these two cases, the defendants had the means to fight the accusations of the government. But when the system goes awry for those without the social and financial means to overcome the misconduct, what happens to the individual who is poor and has less social savvy? One's "day in court" cannot be available only for those who can afford it. Justice needs to be available for those who are rich or poor, powerful or powerless. Justice needs to be blind. Prosecutors, defense attorneys and members of the bench who witness such deviation from the integrity of professional responsibility must address it and demand individual accountability. It is our professional duty – and the integrity of our very system of justice depends on it.