

What Would the Lone Ranger Do?

Preventing Ethical Problems While the Good Guys Still Win

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Synopsis

Unfortunately, in today's public climate, prosecutors are increasingly seen by the public as possessing a "do whatever it takes to win" attitude. To some extent, we are judged by what the worst of our brethren do during the course of their jobs. The judiciary is not immune to this shift in public opinion which means judges are more likely to give greater scrutiny to prosecutorial action and entertain defense arguments that would have been rejected out of hand just a few years ago. To more effectively serve our communities, much less to improve our reputation among the public at large, today's prosecutors need to understand why the public feels as they do, what can be done to survive the increased scrutiny we'll all receive in the future and that improving our ethical practices will actually improve our overall service to our communities.

I. **Recent Prosecution Mistakes – Why The Public Is P.O.'ed**

When prosecutors make mistakes, people pay attention. The stakes we deal with – liberty or freedom or even life and death – are too high for people not to pay attention. We need to understand why the recent public ethical lapses of prosecutors are both frightening and angering to the public so we can make sure we communicate that understanding in our good ethical conduct. By

communicating a sense of fairness, forthrightness, lack of politics and that we are generally competent in everything we do, the public will be reassured that we're the right people for the job.

A.) Mike Nifong and the wrongful prosecution of three Duke University students for rape in 2006 provides the recent public narrative for prosecutorial misconduct. Why was this so bad for prosecutors in general and how has it made our jobs harder?

- a. The story is easy to understand: Unlike many other ethics related cases involving prosecutors, the basic facts of *North Carolina v. Evans, Finnerty & Seligmann* as it relates to the ethical problems of the prosecution do not involve arcane legal minutia or tricky ethical predicaments. Essentially, the D.A. charged three people with a crime they didn't commit in what, for all the world, looked like a political motivated prosecution. Throw in a helping of race and class conflict and every fifth grader in America can understand what happened.
- b. The case was questionable from the start: Most prosecutors will start their prosecution by looking at the evidence first and seeing where it leads. Time and again, Mr. Nifong looked at the desired result first (prosecuting three white Duke students for raping an African-American woman) and attempted to obtain evidence that buttressed the desired result while ignoring (or worse, hiding) evidence that detracted from that result.
- c. Everyone hates politicians: The fact that Nifong had been appointed District Attorney of Durham and was in a close election battle that year was the elephant in the room in this case. Most folks believe politicians will say or do anything to get elected – when that politician also happens to be the chief law enforcement officer in a given jurisdiction the results can be disastrous (as we've seen).
- d. Public confidence in prosecutors is directly related to how fair they believe us to be: There is nothing more important as a prosecutor

than to be fair. We hold an extraordinary amount of power.

Everything in the American democratic tradition tells us that those who hold such power must exercise it fairly. So when Mr. Nifong used his extraordinary power in a patently unfair manner, it offended us as Americans.

- e. The curtain has been drawn back to the general public (or so they believe): Many of you have probably had potential jurors comment on the prosecutorial misconduct in *North Carolina v. Evans, et. al.* Because of all the foregoing, most people mistakenly believe that they understand what goes on in prosecutor's offices in high profile cases. Our job is to communicate that we do things the right way.

B.) The prosecution, trial and subsequent exoneration of former Senator Ted Stevens of Alaska in 2008 came on the heels of the disbarment and jailing of former Durham prosecutor Mike Nifong. Why does this case touch a nerve for Americans?

- a. What the prosecutors did wrong is easy to understand: While the ultimate issue in the Stevens' prosecution (whether or not the former senator violated federal law in receiving certain benefits from a contributor and not reporting them) is somewhat arcane, how the prosecutors screwed up is far easier to understand. Hiding evidence or failing to disclose material differences in the statements of the key prosecution witness automatically strikes at our sense of right and wrong.
- b. The judge called them out: U.S. District Judge Emmet Sullivan's public admonishments to the prosecutors clearly rings loudly with the public. The average person (read: the average potential juror) believes the judge is responsible for keeping both sides honest. When the judge hammers the prosecution as Judge Sullivan did, it cannot fail to resonate.
- c. The fear that prosecutors "head hunt": Former Senator Ted Stevens was a giant on Capitol Hill and when a probe of corruption in Alaska

began in early 2004 there was no greater “head” to be “hunted” than that of Stevens. While the public will laud us for ferreting out true corruption, their sense of fairness kicks in when they believe we’re simply going after someone to “make a name” for ourselves.

C.) It’s a common media strategy: big stories beget more stories. If the national news is leading with the Duke lacrosse case or the Ted Stevens’ prosecution then suddenly a local public defender who moves to exclude evidence on the basis of prosecutorial misconduct gets a lot more local attention than she would have gotten just a few years before. Unfortunately, many of these stories are already written (and guess what: they aren’t about how fair and reasonable you’re being) by the time your local reporter asks you for comment. Most, if not all, of these kinds of stories have very little merit and many of these kinds of motions are filed and routinely denied. But simply by reporting that they occur, the media reinforces a narrative that prosecutors nowadays cannot be trusted or – at the least – much be watched closely. And our friends in the black robes are not immune to that narrative.

II. **Those With Axes to Grind Are Happy to Grind Them On Our Heads**

It’s no surprise to us that whenever we make a mistake those who are naturally opposed to us in the judicial system sense opportunities to improve their respective positions. Defense attorneys, defense experts and defense-oriented judges combine with some plaintiff’s lawyers and anti-capital punishment advocates to highlight our faults in an attempt to advance their own political interests. We need to understand that sometimes their attacks are not necessarily fair but we, as a profession, have invited them by the conduct of the worst among us. It is worth contemplating that whenever we commit an ethical lapse it does not just affect that case it affects our entire criminal justice system.

A.) The National Research Council Report: While this report clearly concerns forensic sciences in criminal jurisdictions across the United States it has gotten increased currency because of our recent ethical problems. Increasingly, some people feel that they can’t depend on

police or prosecutors to be honest and so they turn to physical evidence (or the lack of it) in determining guilt or innocence. This report has some very sharp criticism for agencies who collect, secure and test evidence; since we are the people who are advancing these witnesses (and vouching for the veracity of their methods and overall trustworthiness) this criticism dovetails with overall public discomfort over recent botched prosecutions.

B.) Attacks on prosecutorial immunity: It used to be an article of faith that prosecutors who indicted individuals for criminal activity and then handled those cases could not be personally liable (or their offices corporately liable) if the prosecution was unsuccessful. It cannot be a surprise that this sentiment too has been eroded by recent public ethical lapses by prosecutors. In *Van de Kamp v. Goldstein*¹ the U.S. Supreme Court was forced to decide whether or not supervisors in the Los Angeles County District Attorney's Office were liable for actions of a line prosecutor in withholding *Brady* material. While the Court upheld the immunity for supervisors in that case the water for prosecutors in facing these kinds of civil actions is getting increasingly warm. The U.S. Supreme Court is set to hear arguments in *Pottawattamie County v. McGhee* this term regarding a civil suit against two prosecutors from Iowa who are being sued for violating the defendant's rights by procuring false testimony in a homicide case.² The Eighth Circuit of the U.S. Court of Appeals has already ruled that the prosecutors in question are not entitled to immunity given their actions in the case.³

C.) Political activists are using these scandals for political advantage: However one feels about capital punishment in America, it can come as no surprise that those who are opposed to the death penalty have

¹ 129 S.Ct. 855, 172 L.Ed.2d 706 (2009); *see also* Slip Opinion 07-854

² *certiorari granted* 129 S.Ct. 2002, 173 L.Ed.2d 1083 (April 20, 2009)

³ *McGhee v. Pottawattamie County*, 547 F.3d. 922 (8th Cir. 2008)

used recent scandals as ammunition to advance their political position. Most recently, Judge Gilbert Merritt of the U.S. Court of Appeals for the Sixth Circuit offered a harangue of prosecutors at the University of Tennessee. Some choice quotes:

- i. “The basic point I want to make today is that the greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance...”
- ii. “Absolute prosecutorial immunity and the reluctance of bar associations, judges and legislators to do anything simply encourages more malfeasance.”
- iii. “Can we bring our long history of prosecutorial wrongs to a close and salvage something from all that has shamed us?”

D.) Those groups – whether they be criminal defense attorneys associations, plaintiffs attorneys or political activists – will not simply go away and certainly they are entitled to press the advantage whenever opportunity comes their way. But by not giving them any opportunities to question our ethics we blunt their chances to make our jobs harder – and deny victims long overdue justice – by fomenting public distrust of us and our motives.

III. **What’s In That File, Anyway? – Preventing Ethical Lapses in Discovery**

One of the most frequent issues in prosecutorial ethics cases – and the area most fraught with ethical peril – is when a prosecutor does not turn over exculpatory material. Every prosecutor who has been one for longer than ten minutes is aware of our obligations under Brady but what are some practical strategies for dealing with these issues?

A.) We need to remember that we’re the good guys: Our obligation and responsibility is to do justice in every case. We are the appointed “good guys” in the criminal justice system. Much like my childhood hero, the Lone Ranger, we must always remember that if the good

guys break the rules we're all in a lot of trouble. In examining the criminal discovery process it is tempting to take advantage of the ambiguity of the rules but it is important to remember that our obligation extends beyond simply obeying the letter of the law. We need to think more creatively than that and anticipate potential issues so we can respond to them before they occur.

- B.) We need to read the file: It sounds silly. And for most of us, it isn't a problem. Yet in the Ted Stevens prosecution, one of the things the prosecution was faulted for was having boxes and boxes (and boxes) of investigative documents that had never been reviewed.⁴ There were suggestions that some material was never turned over to the defense because members of the prosecution team had never reviewed the material. However, we can read the file not only to see what it does contain but sometimes to see what it *doesn't* contain. Are their investigating officers that appear in some reports who didn't file their own supplement report? (Are you sure about that?) Are there other agencies who were involved in looking at the case? Can we confirm that they didn't make reports either?
- C.) Document, document, document: One of the most wonderful advancements of the last twenty years has been the invention and widely accepted use of e-mail. Use it. E-mail the defense attorneys regarding discovery issues. E-mail the investigating officers regarding access to reports or evidence. Save all of the e-mails you write with a hard copy in the file. One assistant in my office prints out virtually every e-mail she writes that concerns a case and then asks our secretary to file those hard copy e-mails in the file. More than once having those hard copies has been useful in determining whether or not a defense attorney has received a piece of material or been provided access to evidence or a witness or in determining whether

⁴ "Holder Asks Judge to Drop Case Against Ex-Senator" *The Washington Post*, A01, Carrie Johnson & Del Q. Wilber, April 2, 2009.

an investigative officer took a requested action. In serious cases I will routinely send discovery letters summarizing to the defense attorney what has been provided, what has yet to be provided or describing my position on why something should not be provided with an invitation to take it up with the court. In a death penalty case, I sent approximately fifteen such letters to defense counsel (filing a copy of each with the court). These documents are no substitute for ethically following the rules but, upon being provided to the court, they can show a long record of compliance with the rules – and in many cases, provision of materials in addition to what’s required by the rules – that will give the court confidence that you have acted ethically in discovery.

D.) The case for “open file” discovery in serious cases: It is tempting for the reasons described below for prosecutors to use the rules as both a sword and a shield. We may manipulate the flow of information to defense attorneys for a variety of reasons, some with absolutely pure intentions and others in order to exact trial advantage. It is precisely in those situations however that we open ourselves up to charges of failing to disclose favorable evidence, allegations of *Brady* violations, exclusion of evidence, granting of new trial motions and potential suits for prosecutorial misconduct. By providing the defense attorney virtually our entire investigative file we circumvent legions of potential problems in the most serious cases.

- i. Provide the defense attorney and the court with a notice of your intentions: You may choose to simply include a statement such as “it is the State’s intent to allow the defense access to the State’s file (excluding attorney work product or personal information that would potentially endanger witnesses) in this case” in your standard response to the Defendant’s Request for Discovery. You may chose to write a letter (and file a copy with the court) to the defense attorney describing your intentions.

Either way, it is important to have written notice to the defense (that the court also has access to) that you plan to open your entire file. Notice how the onus then shifts to the defense; you're essentially saying to them: "I'll show you everything, now come get it." How powerful is that to the trial court (and appellate court)? It is also a signal that you have nothing to hide and nothing to fear in proceeding with your case.

- ii. Make sure the discovery occurs: In some cases you may be dealing with a less-than-zealous defense attorney. In those cases, the burden might be on you to contact them and set up the discovery exchange. This where the aforementioned documentation can be important. It is a very nice thing to show the trial court that you have sent the defense attorney six or seven e-mails regarding discovery after they complain to the court that they aren't getting something they believe they're entitled to. A copy of a letter confirming your appointment with the defense attorney to provide access to your file (subsequently filed with the court) is also useful to have.
- iii. Have the defense attorney document that they have in fact seen the entire file: The easiest way to make sure that happens is to have them initial each page as they read it. That way, there is no later question about whether or not the defense attorney has seen the entire file.
- iv. Be responsive to later defense attorney requests: In some cases – particularly death penalty cases or high profile cases – the provision of your discovery may take weeks or even months. There will be witness statements to copy, additional materials to request from your investigating agencies and all manner of things that the defense attorneys ask for that you haven't even thought of. Being responsive to those requests will save you large measures of heartache later.

- v. “Over provide” in discovery: We’ve all said it. “That’s not my job to get that information.” And, guess what: you’re probably right. It isn’t. But that will be a miserable answer to provide a federal judge ten years later when it turns out in a federal habeas proceeding that the information it wasn’t your job to provide turned out to be exculpatory for the defendant. Again, if you “over provide” materials that you are not required by rule to disclose, the trial judge will be much more inclined to give you the benefit of the doubt on discovery issues (for the contrary version, see Judge Sullivan’s comments in the Stevens trial.)⁵.
- vi. Be diligent in your search for other materials: A recurring nightmare for prosecutors (especially in cases involving multiple investigating agencies) is the document that is prepared by an investigator that is not provided to the District Attorney’s Office (who then, of course, cannot provide it to the defense) and is later ruled to be exculpatory. Since we represent the awesome majesty of the State of Tennessee, we’re responsible for documents that we don’t even have personal knowledge of if they are prepared by an investigating officer or agency and we could find it with reasonable due

⁵ Judge Sullivan made multiple comments (outside the jury’s presence) regarding how he believed the prosecution had handled their discovery responsibilities. A sampling of those comments: “I find it very, very disturbing that this has happened, and am concerned about the appearance of propriety, or impropriety,” Sullivan said “After all, this is the search for the truth, and people ought not to forget about that.”; “How does the court have confidence that the Public Integrity Section has public integrity,” Sullivan said. “This is not a trial by any means.”; “Prosecutorial Missteps from Trial of former Senator Ted Stevens”, *Los Angeles Times*, box section, Staff Reports, April 2, 2009.

diligence.⁶ So under the *Hicks* standard, “due diligence” becomes key. The most important thing we can do to show “due diligence” to the trial court is to *ask for any investigation material* from the investigating agencies. As noted earlier, documenting these requests (and perhaps copying the court) will shield you from any future issues when suddenly your DCS worker provides the audio taped interview with the defendant that you, heretofore, knew nothing about.

- vii. The Grimace Test for *Brady* Material: When you read something in your file does it make you grimace? Is it a particularly bad fact or disconnect between eyewitness statements? It is something good on behalf of the defendant? If it makes you grimace when you read it, it’s a good rule of thumb to conclude that it’s *Brady* material and you need to disclose it. A closely related test: The Roll Your Eyes Test. If you come across something that makes you “roll your eyes” because it sounds like such an apparent play for sympathy, or an attempt by the defendant to minimize his or her conduct, you probably want to turn that over too. Because it is possible that such information – which is theoretically favorable to the accused – may be found to be material: “there is a reasonable probability that had the evidence been disclosed the result would have been different”⁷
- viii. Exceptions to an “open file discovery” policy and the use of *in camera* review: Like any good policy, the open file discovery policy I suggest has some exceptions. No one is suggesting that you turn over personal information (like names, social security numbers, addresses, birthdays, etc.) of victims to the person

⁶ *State v. Hicks*, 618 S.W.2d 510, 513-514 (Tenn. Crim.App 1981)

⁷ *Hartman v. State*, 896 S.W.2d 94 (Tenn. 1995), quoting *United States v. Agurs*, 427 U.S. 97, 106, 96 S.Ct. 2392 (1976)

who is accused of raping them. Or, in gang related cases for example, providing the personal information of witnesses may put them in danger. Clearly, Rule 16 of the Tennessee Rules of Criminal Procedure carves out any work product such as notes you may have taken during your review of the file. In cases however where there is sensitive information that you don't wish to disclose to the defense it may be useful to file a copy of such documents under seal with the court to permit an *in camera* inspection. This way you will have the trial court's imprimatur of fairness when the defense does not receive your victim's medical records instead of that trial court having to decide after the fact whether or not such records were exculpatory and material.

IV. Understanding Pressures that Bring Prosecutors to Compromise Ethics

No prosecutor wakes up one morning and says: "You know what I'm going to do today? I'm going to get this triple child murderer released and turned into a hero, completely devastate the family of the victims, ruin my professional reputation, possibly lose my job and my law license and potentially get held civilly liable for my actions!" The choice to make an ethical lapse (and it is a choice, whether or not we want to acknowledge it) comes from a competing set of interests which manifest themselves in pressure on a prosecutor. Sometimes those pressures come from inside ourselves or inside our offices, other times they come from outside. Being on the look out for those pressures will give us some room to handle them appropriately and make good ethical choices as we go forward.

A.) Desire for conviction: We all got into this business to do the right thing. We want to help victims of crime and we want the bad guy to get punished. The more terrible the crime the defendant has committed, the more we crave for a public accounting of his wrongs and the punishment that attends that accounting. We all want justice and most times, justice means that the defendant gets convicted of

what he's charged with. It is in these kinds of cases – where the defendant has committed unspeakable evil – that the temptation to become lax in our ethical standards becomes almost palpable. *Do I really need to provide this report about this child killer defendant's prior admission to the hospital for schizophrenia when it's totally obvious that he's faking? Does it really make a difference that the rape and murder victim was out at the local honky tonk that night flashing passers by? Who cares if my eyewitness statements to this four year old child's abduction don't match exactly – they all basically say the same thing!* We always have to remind ourselves that we're the good guys. In wanting that conviction what we want for society to condemn the defendant for their actions and to announce to the victims that their suffering is not in vain; we can only do that if we go about it the right way.

- B.) Desire to help the victim or the victim's family: We've all had victims that, for one reason or another, sink into our hearts. Maybe it is a particularly abused child, maybe it is a family dealing with the murder of a high school athlete who had just signed a full scholarship to a great school. We want justice for that family so badly that the pressures to attain convictions can be intense. It is during that intensity that our ethics must be the strongest. In the end, we want to protect that family from the devastation of having a conviction overturned because of an ethical lapse on our part. Making a hard choice may prevent total heartbreak for that family in the future.
- C.) Desire to beat the defense attorney: We all have particular defense attorneys that we don't care for. Maybe we think they're unethical (and we're probably not alone in that assessment within our courthouse). Maybe we think they're just jerks. But whenever we have a case against that particular defense attorney we have to be particularly on guard against ethical lapses. More saliently, the defense attorney might be so inept that they're not even hitting on the

main defense issue that would make the case challenging. Our job is to be the good guys and sometimes that means doing the defense's job for them – by over providing in discovery or virtually forcing them to come look at the evidence.

D.) Internal office pressures: Even in district attorney's office with a positive office culture about doing the right thing, most prosecutors want to be seen as capable and talented attorneys who succeed in helping victims obtain justice and putting the bad guys away where they can't hurt us. We may feel like our career advancement depends on how many convictions we can rack up. Or conversely, that our job security may be in jeopardy depending on how many cases we lose. These professional pressures are legitimate and they are, to some extent, unavoidable. We have to be cautious when we find ourselves thinking about how our colleagues will react if we lose a particular trial or fail to obtain a particular result.

E.) External pressure from the public: Some crimes strike a public chord for a particular reason, some become more newsworthy because of what is at stake for the defendant. In either case, attendant media coverage creates a pressure all its own. In both the Duke case and the Stevens case, the media spotlight has to be somewhat at fault for creating a charged environment where ethical lapses became justifiable choices to those involved. And it is in those instances that we have to be on guard to protect ourselves from the same kinds of temptations.

V. Dealing with Pressures to Prevent Ethical Lapses

Once we understand what kinds of pressures lead prosecutors to make poor ethical choices we can begin to deal with those pressures in an attempt to create an environment where good ethical choices can be made. It should not come as a surprise that communication, breathing room and some courage are required in dealing with the pressures that most seriously challenge our ethics.

A.) Dealing with the desire for a conviction: First let's acknowledge that most often, a desire for a conviction is a good thing. It's our internal recognition that a defendant is guilty of what he's charged with and that justice would be achieved if the defendant was convicted. But in dealing with terrible cases or particularly terrible defendants we just want to make sure our desire for a conviction doesn't lead us down a bad road to a poor ethical choice. Here are some strategies that will help:

- i. Bring in another prosecutor to help work the case: It's more difficult to make bad decisions as a team. If you can share all of your internal case decisions with a trial partner, your chances of making a poor ethical decision (even an inadvertent or unintentionally one) decrease substantially.
- ii. If you have to ask if it's unethical...you're most of the way to your answer: Conscience is a funny thing, especially with people who value an oath to uphold the law. When we get that twinge of conscience that maybe we should turn that piece of evidence over that twinge is there for a reason. Don't hesitate to ask several other prosecutors for advice but also don't ignore your instinct to avoid ethical lapses.
- iii. Talk to non-lawyers about your dilemma: Remember all those people who were upset about the Duke case or the Stevens prosecution? You're probably married to one or have one as a relative or a close friend. People who aren't in the every day trenches of criminal justice necessarily don't have the experiences we have that can blind us to ethical dilemmas. Talk to them and see what they think about what you should do. You're essentially talking to the folks who will judge you if your decision goes poorly and you're charged with prosecutorial misconduct.

B.) Dealing with desire to help the victim or their family: Again, let's remind ourselves that this, too, is a good thing. We are, by definition, public servants. We want to try and help people. All we want to avoid is becoming so blinded by our desire to help these folks that we make a poor ethical decision. Here are some things to try and help you negotiate this ethical thicket:

- i. Communicate with the victim/victim's family about your goals: If you promise convictions, you can't help but disappoint them. If you promise that you care about what happened to them, that you're on their side and that you'll work as their advocate it is much easier to have a conversation about why you may be required to do something that is contrary to their individual interest. If you work to build trust with your victim or their family and a hard ethical situation comes down the line you'll be better prepared to explain yourself or to comfort them when things don't go as they wish.
- ii. Remember what ultimately happens if you make bad ethical choices: If you think the family is heartsick now, wait until the state supreme court or federal appeals court reverses the defendant's conviction because of something you did or didn't do.
- iii. Don't take it personally: Victims and their families are dealing with their own set of issues and, based on their background, intelligence or life experience, they may be poorly equipped to handle those issues. It's not your fault. They didn't ask for you to represent them and if they had their choice they wish they never had to meet you (because that means that whatever awful thing happened to their family that requires you to prosecute would never have happened). If they are disappointed in an outcome that followed from you following the ethics guidelines it may be personally difficult to deal with

but it is not ultimately your fault – you simply did your job. But if you create a poor ethical situation that results in a bad outcome for them (defendant’s release, a new trial, etc.) than it would be your fault.

C.) Dealing with the desire to beat a defense attorney: As this is usually the pressure that least concerns prosecutors and least often leads to ethical lapses the strategies for dealing with it are straightforward and not earth shattering. We just need to remember that, as a prosecutor, we’re the good guys. And we’re mature adults even when our opponent is not.

D.) Dealing with internal office pressures: We can do a number of things to relax pressure from within our own office and can prevent potential ethical lapses (even in things that have nothing to do with our own cases). Here are some things to think about:

- i. Cultivate a culture of doing the right thing: It doesn’t matter if you are a first year assistant, a veteran prosecutor, a supervisor or an elected official – every action by every prosecutor in an office contributes to that office’s culture. If the first thing a new assistant learns is based on an ethic of doing the right thing all the time that will be the first thing she teaches to a new assistant when she becomes a supervisor. Also, we have the opportunity to encourage each other to make good ethical decisions and to support each other when a difficult (but correct) ethical decision leads to an outcome we don’t want (like suppression of evidence or a new trial). If the members of a given office are supportive of other members within that office in doing the right thing and putting their ethical responsibilities first then the office culture will help make the office a “pressure free” zone when it comes to ethical decisions.

- ii. Communicate with your elected District Attorney or your direct supervisor early and often: Like all elected officials, elected District Attorneys are not immune to public pressure. They have to be responsive in some way whenever there is public outcry or criticism. If you are in early communication with your supervising attorney (or the elected DA herself) then you can give yourself the chance to take their advice about handling an ethical situation, come up with a plan together and then execute that plan in an ethical way. It is human nature that supervising attorneys are more “on board” with a decision that they had some say in; and elected DAs are more comfortable defending your decisions when they knew about them in advance (and presumably approved them). If you realize that you’ve made an ethical lapse, communicate with your supervisor or the elected DA *immediately*. It will be easier for you to make the situation right (and hopefully retain your reputation and career) if you’re open and honest with your elected DA about your issue.
- iii. Don’t be afraid to ask for help and don’t be afraid to give it when asked: If you find yourself in an ethical conundrum, don’t suffer in silence. Chances are there is someone in your office who has dealt with a similar issue in the past; perhaps they will have good advice on how to handle it (or at least a war story of “what not to do”.) If another assistant asks for your help in an ethical issue take the time to listen to their problem and sincerely try to assist them. You may learn something that may be of use to you in the future and you also are helping to contribute to that positive office culture mentioned earlier.

E.) Dealing with external pressure from the public: As described earlier in the Duke case and the Stevens case, a high profile, high media attention case can bring with it extraordinary pressure. And, as also

seen in those cases, that pressure can lead to some very poor ethical choices. There is probably no other situation in being a prosecutor that makes the temptation to be unethical so great; the case is most likely one with terrible facts or a sympathetic victim, the victim's family may have unreasonable expectations in light of the amount of attention their case has received and everyone wants to be seen by the public at large in a positive light (it's just human nature). So what are some strategies that will help us make good decisions in these kinds of pressure cookers?

- i. This is the most important time to remember you're one of the good guys: Once a case is popular in the media it will, to some level, always be such. Your actions (or inactions) in these cases can be judged for years and even decades to come. In everything you do you want to be contemplative of the fact that ten years from now someone will be looking at your decisions to judge whether or not they are objectively fair or reasonable. Everything you do must be imbued with the spirit of the "good guy" so that when it's judged years from now the "goodness" speaks for itself.
- ii. Don't right checks that your butt can't cash: One of the biggest lessons from Mike Nifong is, predictably, a lesson in what not to do. Early on in the investigation of the three Duke University students on allegations of rape, Mr. Nifong made repeated public condemnations of the accused students.⁸ These statements had the effect of boxing the chief prosecutor in to a hopeless narrative; he either had to convict the accused students (which became impossible as the evidence evaporated) or publicly admit he had jumped the gun. Whenever talking to the media, less is more. Since we are so

⁸ "Nifong Accepts Merits of Criticism", *The News & Observer (Raleigh-Durham)*, Benjamin Nicolet, July 29, 2006.

limited in what information we can provide to the public via the news media anyway, lowering expectations regarding a pending investigation or indicted offense serves multiple purposes. Most importantly, we want to convey a sense of fairness to all parties involved – because remember, more than anything the public wants prosecutors to be *fair*. And in most people’s mind, being fair is more important than being right.

iii. Allow the media to see as much of the process as possible:

Since most of us are familiar with the strictures that govern what we can tell the media outside of court we need, instead, to focus the media attention on what happens in court. This should be easy to do since the media want to hear from the eyewitnesses to a crime anyway. Several jurisdictions employ a communications director who updates local media on upcoming cases of interest. If that is not possible in your jurisdiction, simply updating a website with that information may be more viable. Many attorneys in many jurisdictions know the local courthouse reporter (who often doesn’t need to be reminded of important upcoming hearings). If the process is transparent enough (i.e., witnesses testify at a preliminary hearing or motion to suppress who outline the State’s case) then the need for out-of-court commentary by the prosecutor dissipates considerably. And so does the potential for trouble.

iv. Communicate with your victims early and often: At the end of the day, how your victims feel about how you handled your case and how you handled them personally will often matter more to them than the outcome of the case itself. Many victims are realistic enough not to expect miracles. What they do expect is your professionalism, your time for their questions or concerns and a sense from you that you’re invested in the outcome. Constant communication with victims in a high

profile case will give you the freedom to make good ethical choices without worrying about the outcome. Share your concerns with them, help them understand why you have to do what you have to do. Let them be angry as long as they understand. If you provided a piece of evidence to the defense that is particularly damaging to your case, and that piece of evidence is instrumental in a bad outcome they will be more publicly forgiving if they trust that you care about them and that they understand why what happened had to happen. If your victims will take up for you in the aftermath of a bad outcome, the public outcry against you will be considerably dampened.

VI. **Conclusion**

In light of all the recent ethical lapses prosecutors have shown the public mood towards prosecutors is quite uncertain. Understanding why ethical lapses in prosecutors are so problematic for our profession is necessary to take the steps to restore not just our public reputation but public faith in the criminal justice system. With judges increasingly critical of prosecutors and more inclined to narrow the bounds of prosecutorial immunity we have more than a philosophical interest in sharpening our ethical wits. Certainly, we have the obligation to be fair to defendants in litigation but just as certainly there are public benefits that can be derived from planning to confront ethical pressures head on. In other words, we stand to do well by doing good. By confronting the pressures that lead to ethical lapses with strong strategies to overcome those pressures we will not only get ultimately better case outcomes we will restore the public faith in our profession. We must have faith, as the Lone Ranger did, that good always wins and evil is always vanquished; part of keeping that faith is to act ethically and to do the right thing all the time.