

# Ethics in Child Abuse Prosecutions

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# Ethics in Child Abuse Prosecutions

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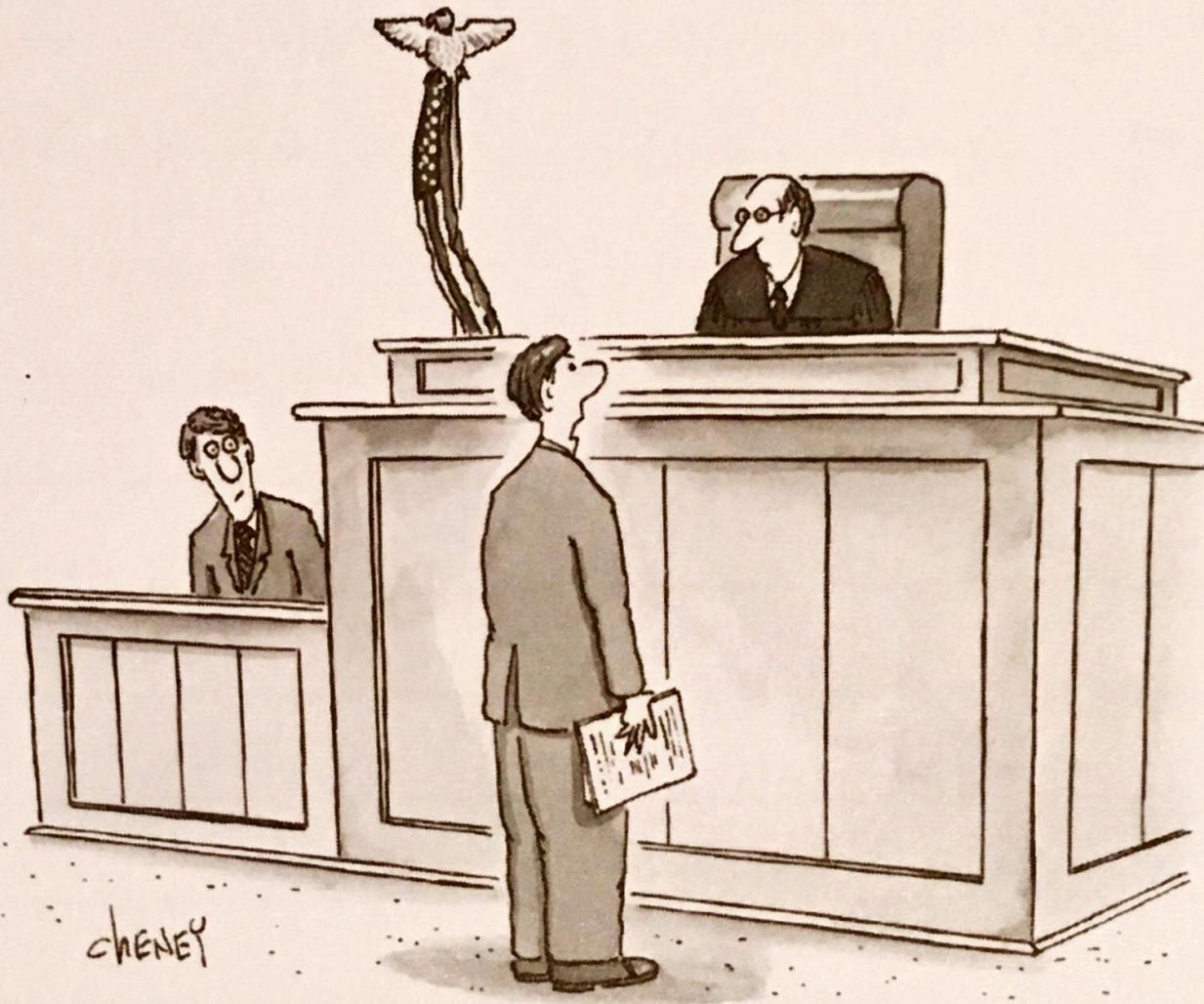


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# Topics

- *Prosecutor Ethics*
  - *Including Charging Decisions*
- *Difficult Cases vs. Cases We Shouldn't Prosecute*
- *Social Media & Ethics*
- *Always Keeping an Open Mind: Case Study*



*“If it pleases the Court, Your Honor,  
I'd like to quit the defense and join the prosecution.”*

# *Berger v. United States*

295 U.S. 78 (1935)

***[W]hile 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.***

# Ethics in Charging Decisions

# Borderline Cases

- How do we determine which borderline cases we should charge?
  - Case by case determination
  - **My Rule: I must be convinced before I ask a jury**
- Important to remember the other side- Defendant:
  - Ethical to put him/her in jeopardy?
  - Consequences of Formal Charges
    - May not be able to restrict record after indictment in some states
  - Societal Backlash – no matter what the jury outcome
  - Family / Personal Repercussions

# Should We Charge?

## In Georgia

### Statutory Rape

- *Vaginal Sex*
- *Female Under 16*
- *Male 17-21:*
  - *1-10 Sentence Range (probation allowed)*
- *Male Over 21*
  - *10 – 30 Sentence Range (no probation on first 10)*

### Agg Child Molestation

- *Oral or Anal Sodomy*
- *One Party Under 16*
- *Other Party Over 17*
  - *No Romeo & Juliet Exception*
- *Consent Immaterial*
- *Sentencing:*
  - *25 years (no parole) plus life on probation*

Is this fair? Equal Protection Argument?

# Physical Abuse Cases

- Abuse or Accident?
  - First issue that must be addressed
  - Quality of your medical opinion –
    - Child Abuse Pediatrician?
    - ER Doctor / Orthopedic Doctor?
    - Pediatrician?
    - Other Medical Professional
  - Continuing to communicate with medical professionals!
    - Their opinions can change over time with new medical information
- Considering Accident Possibility
  - Your responsibility to consider all sides, **even if it can quickly be dispelled**
  - Does accident fit with physical evidence, scene, any statements?

# Physical Abuse Cases

- With non-verbal victims, how can we identify correct perpetrator?
  - Multiple adults could be in home or have access to child
  - Often, family point finger at someone else in home
  - Could someone outside home have inflicted harm
    - Child Care Worker, Teacher, etc.
- Not sufficient to make best guess
- Not appropriate to charge everyone, and see where chips land
  - But may be able to charge neglect

# Disclosure

# ABA Rule 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**;

(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...

# Disclosure Responsibilities

**Rule 3.8(d) is more demanding than the constitutional case law**, in that it requires the disclosure of evidence or information *favorable* to the defense *without regard to the anticipated impact of the evidence or information on a trial's outcome*. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.

[Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense](#), American Bar Association's Standing Committee on Ethics and Professional Responsibility (2009)

# What would you do?

- Witness X is an essential witness for the prosecution. Cannot prove the case with the witness.
- Would you notify the defense if:
  - Witness Recanted Statement
  - Witness Died
  - Witness Was Missing Leading Up to Trial

# Non-Evidentiary Information

- Discovery rules may not require information to be disclosed
  - Not Exculpatory; Not Relevant to Guilt/Innocence or Punishment
- State ethical rules may also not require disclosure:
- But **should** we disclose information?

# Competing Interests

- Don't want defendant to "get away" with crime because of unforeseen circumstances
- Outcome potentially inconsistent with seriousness of crime
- Is that really justice?
- But defendant making life choices based upon all information known to him/her.
- If we have higher ethical obligation, do we have obligation to provide information we may not be required to disclose?

# Withholding Brady and Pleas

- Some federal circuit courts have held that withholding *Brady* material will violate the “voluntarily and intelligent” requirement of the guilty plea
  - United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998)
  - Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995)
  - White v. United States, 858 F.2d 416, 422 (8th Cir. 1988)
  - Campbell v. Marshall, 769 F.2d 314, 321 (6th Cir. 1985)
- So withholding evidence and “dumping” a case with a plea could come back

# Is this Brady?

- DNA doesn't match defendant
- Victim recanted
- Child told classmates who heard rumors about case that nothing happened, but maintains to authorities acts occurred
- Victim molested by defendant over several years, and gets some details mixed up in pre-trial prep
- Child has made previous allegations against 3<sup>rd</sup> party
  - False Allegation
  - True Allegation
- Concerns about credibility of witness in front of jury
- Criminal histories of witnesses
- Non-offending caregiver doesn't believe victim, and says she lies a lot

# “Winning”

- How many prosecutors in this room like to lose?
- Trained to “win at all costs” in law school
- Sometimes may have good intentions
  - “See what jury will do”
  - Get caught up in the case
  - Not taking step back to remember bigger obligation

# How Misconduct Affects Profession

"[O]ur system of...justice suffers when any accused is treated unfairly."

*Brady v. Maryland*, 373 US 83 (1963)

- Affects how jurors / public view the criminal justice system
  - Currently seeing massive distrust in certain communities
- Affects other victims of crime – may not get justice in their case
- Affect other's prosecutors' ability to obtain convictions by the rules

# Effects on the Profession

**Judge Rules Prosecution Team Cheating  
Marred A Bizarre Homicide Trial**

**Uncertainty over DA's conduct**

*Prosecutor in Duke Case Is Disbarred for Ethics Breaches*

**Did Platte County Prosecutor Overstep Legal  
Bounds In Child Molestation Case?**

UPDATE: Prosecutors knew molestation accusations  
were false



# Prosecutor Quotes

- “[Your] true purpose is to convict the guilty man who sits at the defense table, and to go for the jugular as viciously and rapidly as possible...You must never forget that your goal is total annihilation” ~Senior prosecutor to other prosecutors.
- “Case law says that the object of selecting a jury is to get one that’s competent, fair and impartial. Well, that’s ridiculous. You’re not trying to get that. If you go in there thinking you’re some noble civil libertarian, you’ll lose. You’re there to win, and the only way to do that is to get jurors that are unfair and likely to convict.” ~Training tape from major metropolitan D.A.’s office

Difficult Cases  
vs.  
Cases We Shouldn't  
Prosecute

# Difficult Cases

- Nothing suggests that you should decline a case just because it is too difficult
  - These cases are inherently difficult
- Often will be confronted with:
  - ~ Delayed Disclosure
  - ~ Memory Issues
  - ~ Family Issues
  - ~ Juror Doubts
  - ~ Recanting Victims
  - ~ No Physical Evidence
  - ~ Victim Credibility Issues
  - ~ Uncooperative Families

# What's the Difference

- Are there Red Flags?
  - Family Issues?
  - Mental Health Issues with Victim?
    - *But this may make for perfect victim!*
  - Conflicting Physical Evidence?
  - Exculpatory Evidence?
- **Look at Big Picture**

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# Looking at all the Pieces



# Would you Prosecute?

- Delayed disclosure
  - 7-9 when abused
  - Outcried at 15
- Defendant was stepdad
  - Mom divorced him several years ago
  - Minimal recent contact
- Outcried to paternal grandma, but didn't want parents to know
- No physical evidence
- Limited details in forensic interview because:
  - Time that lapsed
  - Multiple incidents over 2 years
- Mom & Defendant shared biological child
  - But no real custody issues

# Social Media & Litigation



# How This is Often Seen

- Researching the Defendant
  - Before Charges
  - After Charges
- Researching Witnesses
- Researching Jurors

# Benefits of Social Media Research

- Attorneys are charged with being “zealous advocates” of their clients.
- Social Media can be great avenue to learn new information:
  - Inculpatory statements
  - Witness Tampering
  - Incriminating Photos and Videos

Tappendorf, J., Attorney Ethics and Social Media, American Bar Association 2015 Annual Meeting.

## ABA Model Rule 8.4

- Prohibits attorneys from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.”
- Sometimes this may directly conflict with the charge of advocacy.
- Attorneys must be careful not to engage in unethical behavior even if it would benefit the client.

So Where Is  
The Line?

# “Friending” ... Too Far?

- Philadelphia Bar Association held that it was an ethical violation to “friend” a party or witness without disclosing the attorney’s identification, regardless of whether or not the party or witness would usually accept friend requests without any disclosure
  - *This was in reference to civil case*
    - Phila. Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Op. 2009-02 (Mar. 2009).

# Is “Friending” Deceptive?

- New York Bar Association held that “friending” an individual under false pretenses to obtain evidence was an unethical deception
- Often, prosecutors and DA investigators will have fake profiles – is this unethical? Or good investigation?
- And is there a difference between simple “Friend Request” and actively lying by active communication to get access to profile??

# Won't You Be My Friend

- Pennsylvania Bar Association and the New York State Bar Association:
  - Lawyers may use information obtained by viewing an adverse party's profile for use in the lawsuit so long as the "lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the network."
- Philadelphia Bar Association extended an additional ethical obligation to lawyers when it concluded that an attorney will violate the rules of professional conduct **when the attorney asks a non-lawyer employee to "friend" another party.**

# Opposing Party / Defendant

- San Diego Bar Association held that “friending” a represented party could not be done with the intention to deceive the witness and could be considered an improper *ex parte* communication.
  - Applies when privacy settings active
  - Ok if privacy settings not active
  - San Diego County Bar Legal Ethics Comm., Op. 2011-2 (May 24, 2011).
- Is it different if we are “friending” the defendant before vs. after formal charges have been brought?

# But the Police Do It...

- This may be a grey area...
- May be difference between what we can do, and what police can do
- Police allowed to lie to obtain an outcome
  - We aren't allowed to lie to the court to obtain a certain outcome
- May not be a constitutional violation, but should we strive for a higher code?
  - Are there situations where we may need to suspend this for the greater good?

# Friends with the Judge

- Model Rule 3.5 prohibits attorneys from contributing to a violation of the ABA's Model Code of Judicial Conduct.
- States vary as to whether or not judges can be “friends” with attorneys on social media sites, so attorneys should consult the bar association opinions in their particular jurisdiction before accepting or soliciting a friend request with a judge.

## Potential “Friend” Issues with Judge

- Florida case:
  - Appellate court disqualified judge in a criminal case because he was Facebook “friends” with the prosecutor.
  - Court looked to a bar association opinion prohibiting judges from “friending” lawyers who appear before the judge on social media sites and from allowing lawyers to add judges as friends.
  - The court found the motion to disqualify well-founded because it raised sufficient facts to **“prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.”**

# Juror Research

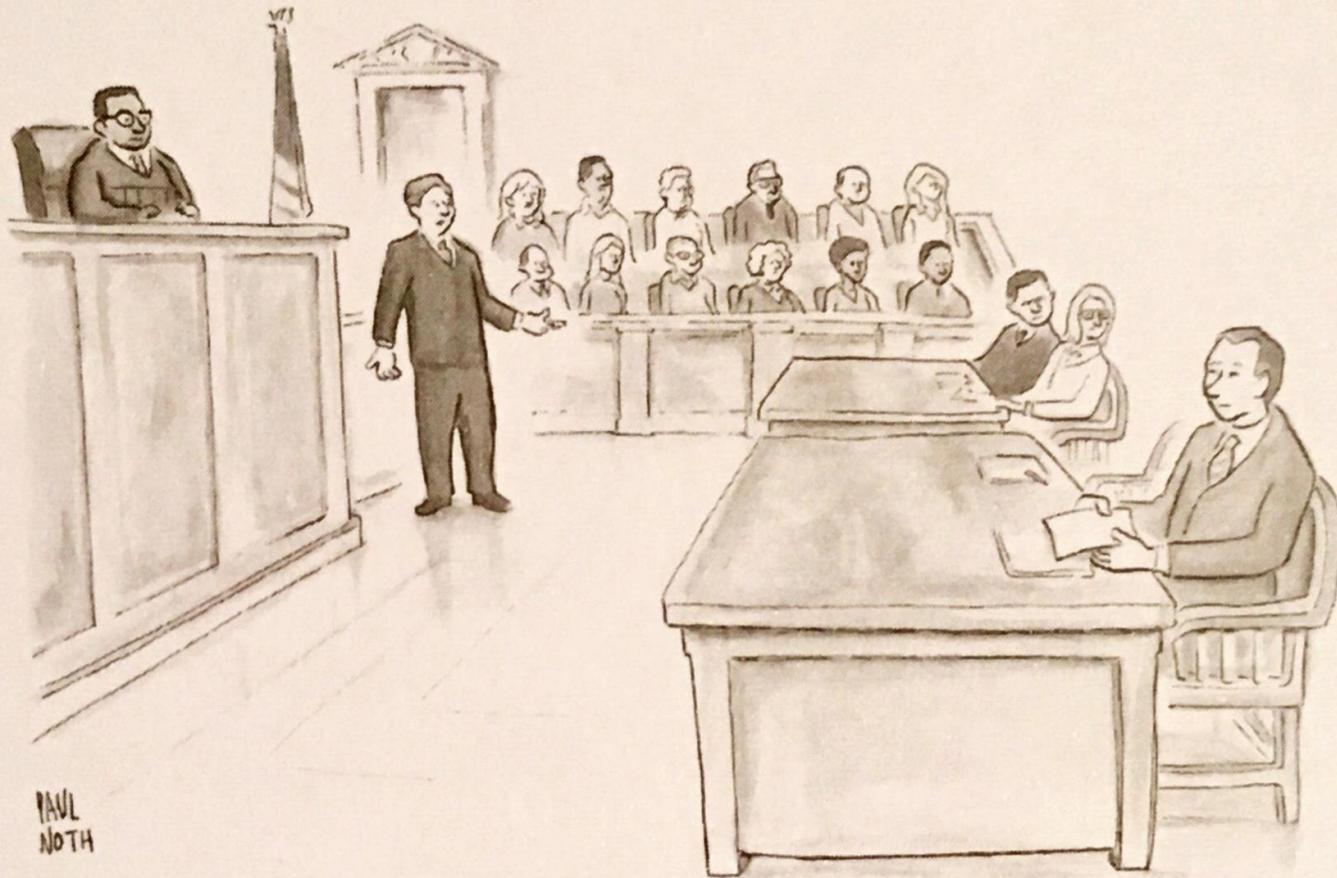
- ABA Opinion in 2014, it is ethically permissible for lawyers to research potential jurors online with no repercussions, so long as they do not send an access request when the privacy settings are active.

American Bar Association, “The Minefield of Social media and Legal Ethics: How to provide competent representation and avoid the pitfalls of modern technology,” Ethics & Professional Responsibility Committee Midwinter Meeting (2017).

## Some Guidelines on Juror Research

- ABA provided a few ethical limitations to lawyers seeking to use social media for this purpose:
  - a) no ex parte communications with jurors, which is prohibited by Rule 3.5 of the ABA Model Rules for Professional Conduct
  - b) no deception can be used by an attorney to gain access to a juror's website or to obtain information
  - c) lawyers have an obligation to report any juror misconduct that may be revealed during their social media searches, especially if the misconduct specifically violates the court's instructions

# Keeping an Open Mind



*“Could my client be innocent? Probably not. My point is it's interesting to think about.”*

# Keeping an open mind

- Cynicism:
  - Prosecutors sometimes become cynical as to not be taken for a fool
- Not everything the defense presents is false or misleading
  - To think this way is to shirk our own ethics
  - We must evaluate all evidence presented to us – no matter the source

# State v. Step-Dad

- 15 year old victim
- Alleged step-father raped her when home sick from school
- Couldn't give specific date
  - Indictment alleged March – May 2012
- Outcry September 2012
- Outcry to friend
  - Victim thought she was pregnant
- Mom & Step-Dad divorcing around time of outcry
  - Custody issues over younger biological child
- Victim gave relatively detailed account of abuse in forensic interview
- Also spoke with law enforcement
- Some inconsistencies noted...

# Inconsistencies

## *Placement of Defendant & Victim During Incident:*

- Originally told outcry witness victim went to room step-father was in & he he told her to come in
- To LEO and FI, victim said she was asleep and defendant came into her room
- *Maybe didn't want to tell friend everything?*

## *Removal of Clothing:*

- Victim told LEO that while sleeping, defendant removed her clothing
- Told FI, when step-dad came into room, told her to remove clothes
- *Unintentional inconsistency? Trauma Related?*

# Inconsistencies

## *Initiation of Sexual Contact:*

- Victim told outcry witness defendant threw her on bed & raped her. No mention of threats
- Told FI defendant threatened harm on mother if didn't take clothes off, & defendant then raped her
- *Just didn't mention threats?*

## *Contact After Assault:*

- Told FI no contact after defendant after that day
- Evidence showed she did have contact
- *Maybe misunderstood and thought sexual contact?*

# “Inconsistencies” Common

- Some “inconsistencies” are common in ALL cases
- Human brain doesn’t work like a video recorder
  - Child victims’ memories especially prone to “inconsistencies” b/c of development
- Trauma can affect how we physically are able to store and recall memories
- ***Knew this would be difficult case, but at outset, decision made to indict***

# Post-Indictment Investigation

## *Defense Evidence:*

- Polygraph

### Examination:

- Results indicated he was not lying when denying sexual contact with victim
- But how reliable?  
What weight (if any) should be given?

- Forensic Interviewer:

- Didn't note any signs of coaching, and victim was quite detailed.
  - But didn't know anything about other statements
- Did find it somewhat odd that:
  - No grooming
  - Step-Father left state later that day

# Post-Indictment Investigation

- Date of Incident:
  - Per what she described, date could only have been one day (March 2012)
  - But told outcry witness it occurred just a few weeks before (September 2012)
  - Defendant had alibi for most of that day
    - *Only 30 minute period where could have occurred, and mom en route home*
  - Flew to Africa that night (photo)

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\*Not Actual Photo

# Post-indictment Investigation

- Victim's Mental Health History:
  - *Long history of mental health, pre-dating the sexual assault*
  - *Per records, history of lying about "major and minor stuff"*
  - *Denied sexual abuse in admission, but this was just before outcry to friend*
  - *Doctor describes victim as, "Quasi-psychotic feel to patient. She shows little affect, is highly suspicious"*

# Post-indictment Investigation

- Ethical Questions:
  - Is this a lying victim or perfect victim?
    - Who is going to believe her?
  - Are the inconsistencies lies? Or a result of the trauma?
  - Is the photo good evidence? Or easily explainable.
  - Mother was adamant that we present this case to jury
    - *Red flag or passionate mother??*

# What Should We Do?

- One philosophy is if victim says it happened, we present case to jury and let them decide
  - But is that ethical?
  - Where is the line?



# BAR ASSOCIATION ETHICS RESOURCES

AMERICAN BAR ASSOCIATION:

[www.americanbar.org](http://www.americanbar.org)

# **EDWARD CHASE**

## **Director of Litigation & Training**

### **DeKalb County District Attorney's Office**

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[www.ChildAbuseProsecution.org](http://www.ChildAbuseProsecution.org)

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