

PROFESSIONAL RESPONSIBILITY FOR PROSECUTORS (BUT THIS CAN APPLY TO ALL ATTORNEYS)

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THREE QUICK QUESTIONS:

1. How many believe that you will confront a serious ethics/PR dilemma in your first years of practice?
2. How many believe that one or more classmates will commit an ethics violation in the first years of practice?
3. How many believe that one or more classmates will commit a serious ethics violation in their legal career?

Scenario No. 1: CANDOR TOWARD THE TRIBUNAL (Rule 3.3)

First federal narcotics case – prepare for and conduct a pretrial motions hearing with new government agent that appears to go fine, despite lengthy cross-ex by defense – Magistrate Judge will issue findings soon

Next morning – Agent and his supervisor appear in my office to disclose that agent mistakenly testified falsely about a material matter at the hearing – Supervisor then tells me privately that we both know the defendants are guilty as sin and that if I disclose this mistake, it could well end the agent's career

WHAT ARE THE OPTIONS? VOTE re HOW YOU PROCEED

Scenario No. 2: ADDRESSING UNCONSCIOUS RACIAL BIAS

Prosecuting a narcotics case where the defendant is Black and everyone else in the courtroom likely will be White – federal court practice in MN is that the judge does the entire voir dire of the jury venire

Defense counsel requests to conduct brief attorney voir dire on issue of racial bias – Court asks for government's position

WHAT ARE THE OPTIONS? VOTE re HOW TO PROCEED

Scenario No. 3: PROSECUTOR AS A MINISTER OF JUSTICE (Rule 3.8)

Trying a bank robbery case indicted by another AUSA with very unusual facts – Homeless defendant, dressed in a t-shirt and shorts, visited the same bank two weeks in a row and orally demanded to make a “withdrawal” of \$5000 each time, without a weapon, demand note or a disguise – two of three male tellers said they felt intimidated and gave him \$5000 on each occasion (the other teller refused) – grand jury indicted defendant for two counts of bank robbery

Defense counsel wants to argue bank theft as a lesser-included charge – Court is very reluctant to permit and asks for the government’s position

WHAT ARE THE OPTIONS? VOTE re HOW TO PROCEED

Scenario No. 4: SHOULD A PROSECUTOR EVER ALLOW PERSONAL VIEWS OR EXPERIENCES TO INFLUENCE HIS OR HER DECISIONS?

Assigned to prosecute an attorney who embezzled about \$75,000 from two disabled clients for whom he served as trustee. After exhausting all their funds, attorney then befriended an elderly woman dying of cancer and convinced her to make him a co-trustee of her estate. After her death, attorney then embezzled \$500,000 from her estate to maintain a lavish lifestyle.

This was Minnesota's third major attorney embezzlement case in two years. With office approval, I offered harsh plea terms that included money laundering. My motivations were several, but I thought often of his last victim since my first wife had died of brain cancer four years earlier. I could not forget that dying victim's vulnerability.

Question: Should I have recused myself from the case?

Scenario No. 5: EXERCISING PROSECUTORIAL DISCRETION (TO CHARGE OR NOT)

Background: How many are aware of the Enron-related prosecution of Arthur Anderson?

This accounting firm was charged by the DOJ with obstruction of justice – the firm disintegrated and more than 20,000 lost their jobs – years later the firm's conviction was reversed by US Supreme Court – this led to some soul-searching by myself and other DOJ prosecutors

My last case as a federal prosecutor again raised the question of how much one should consider collateral consequences in deciding whether to charge a corporation

MN corporation investigated by Dept. of Commerce for three separate export violations involving the sale of nuclear testing equipment to India – U.S. agency HQ in D.C. wanted felony convictions to send a national message – I had the evidence to charge the company with felonies and likely obtain convictions, which probably would have put the company out of business and caused the loss of more than 1,000 jobs of mostly innocent employees

WHAT ARE THE OPTIONS? VOTE re HOW TO PROCEED

FINAL THOUGHTS – WHAT IS THE BEST THING ABOUT BEING A PROSECUTOR?

Every day you do not only have the opportunity, but the obligation, to do the right thing.

At the end of the day, the only question that matters is this – did I serve the cause of justice in every way possible today?

If not, the next day you can, you should, you must do something about it.

Questions?

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