

Prosecutorial Error



Updated January 20, 2010

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Prosecutorial Error

Professional Rules and Standards of Conduct

The beginning point in discussing prosecutorial error or misconduct is the *Minnesota Rules of Professional Conduct (MRPC)*, which state the ethical rules that apply to all lawyers and litigators, including civil litigators, prosecutors and criminal defense attorneys. A special rule applies just to prosecutors--Rule 3.8: Special Responsibilities of a Prosecutor.

The *ABA Standards for Criminal Justice* also are important to Minnesota prosecutors because our Minnesota Supreme Court has expressly relied on them in stating the standards to which prosecutors and defense attorneys will be held. In *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993), the Court, “[i]n the interest of educating both prosecutors and defense attorneys,” reprinted in their entirety the Standards dealing with closing arguments by defense attorneys and prosecutors.

The Court has noted that the ABA Standards apply to both prosecutors and defense counsel alike and that defense attorneys also “are governed by rules of professional ethics and decorum.” *State v. Ramey*, 721 N.W.2d 294, 300-01 (Minn. 2006). “In *Salitros* we also noted that because only convicted defendants can ordinarily appeal following trial, our opinions tend to focus on prosecutorial misconduct but that we are aware that the problem of trial misconduct is not limited to the prosecution.” *Id.* at 301.

A reading of the *MRPC* and the *ABA Standards for Criminal Justice, the Prosecution Function* (“*Prosecution Standards*”) yields the following, though not exhaustive, list of prohibited conduct:

General Rules

- Pursuing a case, or making an argument to a judge or jury, that lacks a good faith basis in law and fact.
 - MRPC 3.1 (meritorious claims and contentions); 3.8 (a) (charge not supported by probable cause)
 - *Prosecution Standards* 3-3.9 (a) (bringing a charge without probable cause, or pursuing a case without sufficient admissible evidence needed to convict)
- Knowingly making a false statement, or offering false information, to a judge or jury.
 - MRPC 3.3 (candor towards tribunal); 4.1 (truthfulness in statements to others)
 - *Prosecution Standards* 3-5.6(a)
- Subpoenaing a lawyer in a grand jury or other criminal proceeding about a past or present client unless the prosecutor reasonably believes the information sought is essential and not privileged.
 - MRPC 3.8 (e)

- Communicating with a represented party.
 - MRPC 4.2
 - *See* William J. Wernz and Wendy Willson Legge, “Contacting Represented Parties: Ethical Considerations,” *Minnesota Trial Lawyer* (Summer 1991)

Discovery

- Failing to disclose relevant evidence and information.
 - MRPC 3.4(d) (fail to make a reasonably diligent effort to comply with proper discovery requests); 3.8(d) (fail to timely disclose all evidence or information that tends to negate guilt or that mitigates offense, including as to sentence)
 - *Prosecution Standards* 3-3.11(a) (fail to make timely disclosure)
- Obstructing defense access to, concealing, or failing to seek, documents or evidence.
 - MRPC 3.4(a); 3.4(f) (request a person to not give relevant information to another party)
 - *Prosecution Standards* 3-3.1(d) (request a person to not give relevant information to another party); 3-3.11(c) (prosecutor failing to seek evidence that may damage case or that will aid accused)
- Using methods of obtaining evidence that violate the legal rights of a third person.
 - MRPC 4.4(a)
- Failing to notify the sender upon receiving a document that the attorney knows or should know was inadvertently sent.
 - MRPC 4.4(b)

Public Statements

- Making an extrajudicial statement that the prosecutor reasonably should know would have a substantial likelihood of prejudicing a proceeding.
 - MRPC 3.6(a); cf 3.6(b) (but lawyer may protect client from prejudicial effect of publicity not initiated by the lawyer or the lawyer’s client)
 - *Prosecution Standards* 3-1.4(a)
 - *See* Edward J. Cleary, “Trial Publicity: Lawyers And The Media,” *Bench & Bar of Minnesota* (February 1999)
- Failing to exercise reasonable care to prevent employees or law enforcement personnel from making prohibited extrajudicial statements.
 - MRPC 3.6(c) (covering lawyers who work for government)
 - *Prosecution Standards* 3-1.4(b)

Opening

- Failing to confine statement to relevant issues or evidence.
 - MRPC 3.4(e) (allude to any matter not reasonably relevant)
 - *Prosecution Standards* 3-5.5

- Alluding to evidence without good faith basis to believe it will be admitted.
 - MRPC 3.4(e)
 - *Prosecution Standards 3-5.5*

Trial and Examination of Witnesses

- Referring to facts outside the record.
 - MRPC 3.4(e)
 - *Prosecution Standards 3-5.9*
- Knowingly offering inadmissible evidence.
 - MRPC 3.4(e)
 - *Prosecution Standards 3-5.6(b)*
- Permitting evidence to be displayed to fact finder where there is substantial doubt about its admissibility without first seeking ruling.
 - *Prosecution Standards 3-5.6(c), (d)*
- Calling a witness in jury's presence who the prosecutor knows will claim a valid privilege to not testify.
 - *Prosecution Standards 3-5.7(d)*
 - See Kenneth L. Jorgensen, First Assistant Director, Minnesota Office of Lawyers Professional Responsibility, "Calling a Witness Whom You Know Will Claim the Fifth," *Minnesota Lawyer* (September 10, 2001), found at: <http://www.courts.state.mn.us/lprb/fc091001.html>
- Asking a question that implies a fact without a good faith basis.
 - *Prosecution Standards 3-5.7(d); 3-5.9 (facts outside the record)*
- Asserting personal knowledge of facts.
 - MRPC 3.4(e)

Closing Argument

- Intentionally misstating evidence or misleading jury as to permissible inferences.
 - MRPC 3.1; 3.3(a)(1); 4.1(truthfulness in statements to others)
 - *Prosecution Standards 3-5.6(b); 3-5.8(a); 3-5.9 (facts outside the record)*
- Expressing personal opinions as to credibility of testimony or evidence or the guilt of defendant.
 - MRPC 3.4(e)
 - *Prosecution Standards 3-5.8(b)*
- Making an argument calculated to appeal to jury's prejudices or divert it from deciding the case on the evidence.
 - MRPC 3.4 (e) (alluding to irrelevant matters)
 - *Prosecution Standards 3-5.8(c), (d)*

Admonitions by the Board of Professional Responsibility

- **Prosecutorial Misconduct.** An assistant county attorney tried a defendant on two felony counts of terroristic threats and one gross misdemeanor count of obstructing arrest. During cross-examination of the defendant, the prosecutor attempted to elicit testimony about the defendant's juvenile record, which was prohibited by the Rules of Evidence. The attorney also made closing and rebuttal arguments to the jury that: belittled the defense's use of its right to subpoena witnesses; referred to another trial in an attempt to impassion the jury; and implied the jury should convict complainant because the victims were police officers. After the jury convicted the defendant, the judge granted a motion for a new trial based on prosecutorial misconduct. The attorney's conduct violated Rules 3.4(c) and 8.4(d), MRPC. Edward J. Cleary, Director, Minnesota Office of Lawyers Professional Responsibility, "Summary of Admonitions," *Bench & Bar of Minnesota* (March 2002), also found at: <http://www.courts.state.mn.us/lprb/02bbarts/bb0302.html>
- **Prosecutor's Contact with Represented Defendant.** A represented defendant sent messages to the prosecutor to meet with him in jail. The prosecutor arranged the meeting and had certain minimal communications. Before the meeting he determined that the defendant's Sixth Amendment rights would not be affected by the meeting, but did not consider the restrictions of Rule 4.2, forbidding contact with a represented party. Violation of Rule 4.2 does not depend on who initiated the contact. William J. Wernz, Director, Minnesota Office of Lawyers Professional Responsibility, "Summary Of Admonitions," *Bench & Bar of Minnesota* (March 1990).
- **Improper Use of Subpoenas by Defense Counsel.** An attorney represented a defendant on criminal sexual conduct charges arising out of the alleged sexual abuse of two adolescent girls. The attorney subpoenaed records of the girls from 20 medical providers for *in camera* review by the court. In the cover letter accompanying the subpoenas, the attorney stated the provider could send copies of the requested documents to the attorney's office. This procedure allowed the attorney an advance look at documents that should have been initially viewed by the court to determine materiality. The court admonished the attorney for this improper procedure, imposed restrictions on his cross-examination of the victims, and collected all documents that had been sent directly to the attorney's office. The attorney's conduct violated Rules 3.4(c) and 4.4, MRPC. *See* Cleary, *id.*
- **Failure to Disclose Exculpatory Evidence to Grand Jury.** A grand jury was meeting to consider possible criminal charges against an individual. A juror asked the prosecutor whether any arrangements had been made with testifying witnesses. The prosecutor informed the jurors that no deals whatsoever had been made with witnesses. Later, a grand juror inquired further, and the prosecutor advised the jurors that at least one witness testified subject to use immunity. The attorney's conduct in saying that no deals had been made violated Rules 3.4(c) and 8.4(c), MRPC. Edward J. Cleary, "Summary of Admonitions," *Bench & Bar of Minnesota* (March 2001), also found at: <http://www.courts.state.mn.us/lprb/01bbarts/bb0301.html>

Case Law and Criminal Rules

While the *Rules of Professional Conduct* and the *ABA Standards* give the basic rules, case law and the Minnesota Rules of Criminal Procedure give greater details on prosecutorial error or misconduct as applied to specific factual situations.

General Duty of Prosecutors

State v. Penkaty, 708 N.W.2d 185, 196 (Minn. 2006). “We have repeatedly stated that a ‘prosecutor is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public.’ The duty of a prosecutor is to see that justice is done on behalf of both the victim and the defendant. Therefore, a prosecutor does not ‘represent’ the victim. A prosecutor represents the public interest and the sovereign and his goal is to see that justice is done.” <http://web2.westlaw.com/find/default.wl?SerialNum=1935123854&FindType=Y&AP=&fn=top&rs=WLW6.05&mt=Minnesota&vr=2.0&sv=Full> Citations omitted.

"Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial." *State v. Henderson*, 620 N.W.2d 688, 701-02 (Minn. 2001). When considering allegations of prosecutorial misconduct, the court’s primary concern is whether such misconduct deprived the defendant of his right to a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

Misconduct as distinct from error

Minnesota case law usually uses the phrase “prosecutorial misconduct” to discuss improper conduct by a prosecutor in trial, pretrial or case preparation. In common usage, “misconduct” generally means intentional wrongdoing or deliberate violation of a law or standard. Where there is no evidence that the prosecutor intentionally and deliberately violated a law or standard, prosecutors believe the conduct should be called “prosecutorial error,” just as a mistake by a judge in admitting evidence or instructing the jury is labeled “error,” not “judicial misconduct.” See *State v. Leutschafft*, 759 N.W.2d 414, 418 (Minn. Ct. App. 2009) (explaining the distinction between prosecutorial misconduct and prosecutorial error), *review denied* (Minn. Mar. 17, 2009); *State v. Fauci*, 917 A.2d 978, 983 n. 2 (Conn. 2007) (explaining Connecticut Supreme Court’s decision to use the term “prosecutorial impropriety” rather than “prosecutorial misconduct,” and citing numerous cases from other jurisdictions that use terms other than “prosecutorial misconduct”).

Standard on Appeal

1.) Prosecutorial misconduct that was objected to by the defense

The standard of review of alleged prosecutorial misconduct depends on whether an objection was made at trial. When an objection was made and the prosecutor

committed misconduct, a two-tiered harmless-error analysis is applied, called the *Caron* two-tiered approach. Specifically, in cases involving unusually serious prosecutorial misconduct, the conduct is reviewed to determine whether it was harmless beyond a reasonable doubt. *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009), citing *State v. Wren*, 738 N.W.2d 378, 390 n. 8 (Minn. 2007) and *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974). For less serious misconduct, the conduct is reviewed to determine whether it likely played a substantial part in influencing the jury to convict. *Id.*

The more serious the misconduct, the more likely the misconduct was harmful. *State v. VanWagner*, 504 N.W.2d 746, 749 (Minn. 1993). “The error and its impact are to be examined within the context of the record as a whole, considering the strength of the state’s evidence and the weaknesses of any defense evidence.” *Id.* Misconduct is harmless beyond a reasonable doubt, “[if] the verdict actually rendered was surely unattributable to the error.” *State v. Ashby*, 567 N.W.2d 21, 28 (Minn. 1997).

See also State v. McCray, 753 N.W.2d 746, 754 n. 2 (Minn. 2008) (leaving “for another day” the question “whether the *Caron* analysis remains viable or whether a different analysis applies in determining whether objected-to prosecutorial misconduct warrants a new trial”).

2.) Where defendant did not object—modified plain error analysis under *Ramey*

Plain error analysis allows an appellate court to consider unobjected-to error that affects a criminal defendant’s “substantial rights.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *State v. Reed*, 737 N.W.2d 572 (Minn. 2007). This analysis involves consideration of four factors. The first three factors are stated in Minn. R. Crim. P. 31.02. That Rule provides, “[p]lain errors or defects affecting substantial rights may be considered by the court * * * although they were not brought to the attention of the trial court.” Thus, the first three factors are that there must be: (1) an error, (2) that was plain, and (3) that affected the defendant’s substantial rights.

An error is “plain” if it was “clear” or “obvious.” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002); *United States v. Olano*, 507 U.S. 725, 734 (1993). “Usually [clear or obvious error] is shown if the error contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). There is no plain error where the law is unsettled, with no “binding precedent.” *See State v. Jones*, 753 N.W.2d 677, 688-89 (Minn. 2008), quoting *United States v. Whab*, 355 F.3d 155, 158 (2d Cir, 2004).

Under the third plain error factor, an error affects substantial rights where there is a “reasonable likelihood” that the absence of the error would have had a “significant effect” on the jury’s verdict. *Ramey* at 302, citing *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005); *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). In assessing whether there is a reasonable likelihood that absence of the misconduct would have had a significant effect on the jury’s verdict, appellate courts consider the strength of the evidence against the defendant, the pervasiveness of the improper

suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). If these three factors (error that is plain and that affects substantial rights) are satisfied, the appellate court then considers the fourth factor: whether the error should be addressed “to ensure fairness and the integrity of the judicial proceedings.” *Griller*, 583 N.W.2d at 740.

As to prosecutorial misconduct, the Minnesota Supreme Court made a major change in plain error analysis in *State vs. Ramey*, 721 N.W.2d 294, 301-02 (Minn. 2006). When the plain error doctrine is applied to unobjected-to prosecutorial misconduct, the defendant bears the burden of showing there was error that was plain. **Once the defendant has made a showing of plain error, the burden shifts to the state to show lack of prejudice; that is, that the error did not affect the defendant’s substantial rights.** *Id.* at 302, citing *Griller*, 583 N.W.2d at 741 and *Minn.R.Crim.P.* 31.02. Three of the Justices stated in concurrences that they did not agree with this shift of the burden to the prosecution. See *Ramey, Concurrence of Paul H. Anderson, J.* and *Concurrence of Gildea, J., joined in by G. Barry Anderson, J.* *Id.* at 303-07.

Before *State v. Ramey*, a defendant generally bore the burden of showing that an unobjected-to plain error affected a substantial right. 721 N.W.2d at 301-02. See *United States v. Olano*, 507 U.S. 725, 734 (1993). In explaining its reason for the increased burden on the prosecutor, the court stated that despite considerable attention to prosecutorial misconduct from both the court and the *ABA Standards*, “we continue to see cases in which prosecutors persist in clearly proscribed conduct,” citing as an example *State v. Mahorn*, 720 N.W.2d 776 (Minn. 2006).” *Ramey*, 721 N.W.2d at 301.

In reading the cases that follow, it is important to keep in mind that, as a result of *Ramey*, the standard of review and state’s burden on appeal have been raised for the prosecution. As a result, it is possible that some of the state court cases that were affirmed in the past would be reversed if appealed today.

Types of Prosecution Error

Presentation to Grand Jury

1.) Not seeking removal of grand juror who was familiar with facts and witnesses

State v. Penkaty, 708 N.W.2d 185, 198-200 (Minn. 2006). Where one of the grand jurors was a police officer who knew nearly all the witnesses, many of whom were fellow police officers, and already was familiar with the witnesses’ versions of the facts, the prosecutor committed misconduct by failing to seek to excuse the grand juror before evidence was presented. However, despite this and other instances of prosecutorial misconduct in the grand jury proceedings, the Minnesota Supreme Court declined to dismiss the indictment because there was sufficient admissible evidence of probable cause and the grand jury was repeatedly reminded of its independence.

2.) Making an argumentative closing statement to the grand jury

State v. Penkaty, 708 N.W.2d 185, 198 (Minn. 2006). The prosecutor summarily discounted a possible defense and in other ways made a closing statement that “bordered on being argumentative.” This was misconduct but the Supreme Court declined to dismiss the indictment on these grounds because the prosecutor repeatedly reminded the grand jurors of their independence.

3.) Eliciting testimony that defendant invoked his right to counsel

State v. Penkaty, 708 N.W.2d 185, 199 (Minn. 2006). Prosecutor elicited testimony from officers that defendant invoked his right to counsel after being advised of his *Miranda* rights. This was misconduct because it created an inference of culpability, stated the Supreme Court. The court declined to dismiss the indictment, however.

Discovery Violations for Failing to Disclose Evidence

Brady v. Maryland, 373 U.S. 83 (1963). Failing to disclose evidence favorable to accused upon request violates due process when evidence is material to guilt or punishment, regardless of prosecutor’s good faith.

Giglio v. United States, 405 U.S. 150 (1972). Prosecutor’s nondisclosure of a plea bargain made to a witness by his office but not disclosed to the prosecutor required a new trial where the credibility of the witness was an important issue.

United States v. Agurs, 427 U.S. 97 (1976). Prosecutors have duty to disclose any obviously exculpatory information, even without request by the defense.

United States v. Bagley, 473 U.S. 667 (1985). Exculpatory information under *Brady* can be impeachment evidence. The state court standards are higher than *Bagley*, as discussed in *State v. Kaiser* below.

Kyles v. Whitley, 514 U.S. 419 (1995). Prosecutors are responsible to disclose all exculpatory evidence, including evidence known to police but not to the prosecutor.

Strickler v. Greene, 527 U.S. 263 (1999). Three-prong test of *Brady* violation: (1) evidence was exculpatory; (2) it was suppressed, and (3) resulted in prejudice to the defendant.

State v. Miller, 754 N.W.2d 686, 705 (Minn. 2008). The Court affirmed defendant’s conviction of first degree murder even though the state failed to disclose impeachment evidence and summaries of contacts with one of the state’s witnesses, finding that the violations were harmless. A new trial is warranted when the discovery violations are inexcusable and so serious and prejudicial as to deny the defendant’s right to a fair trial.

BCA agents failed to memorialize in writing all their contacts with a witness. The court noted that the mandatory language of Rule 9.01 requires the state to disclose the substance of every oral statement by a witness that relates to a case, even if the information does not disclose new information, citing *State v. Palubicki*, 700 N.W.2d 476, 490 (Minn. 2005). However, in this case no new trial was required because nothing new as to the case was discussed by the witness during those contacts. The State also inadvertently provided the defense with a criminal history of a witness that omitted four felony convictions. This was a Brady violation because the evidence was exculpatory as impeachment evidence, regardless of whether the failure was inadvertent. However there was no prejudice, the court held, because the witness was successfully impeached by the defense through other means.

State v. Kaiser, 486 N.W.2d 384 (Minn. 1992). The complainant originally identified the defendant as her assailant, but later saw another man, not the defendant, whom she identified as her assailant. She signed an affidavit of her changed identification and informed the prosecutor several days before trial, but the prosecutor had her sign a second affidavit saying she was certain the defendant was the assailant and recanting the original affidavit. The prosecutor did not provide defense counsel with the original affidavit or the content of the information. The court found that this misconduct, even though possibly harmless, warranted a new trial in the interests of justice.

State v. Smith, 541 N.W.2d 584 (Minn. 1996). The prosecutor failed to discover and disclose that one of the witnesses had made a plea bargain with another prosecutor in his office, although the defense counsel already was aware of it. The court found that while the prosecutor should have known about the plea bargain, it would not have changed the jury's decision. The conviction was affirmed.

State v. Hunt, 615 N.W.2d 294, 301-02 (Minn. 2000). The State failed to timely disclose the results of a competency evaluation of its key witness who was deemed incompetent to stand trial. The failure to disclose the competency evaluation results prejudiced the defendant and demanded reversal.

State v. Williams, 593 N.W.2d 227, 235 (Minn. 1999). The prosecution's failure to disclose evidence of a former boyfriend's past acts of abuse against the victims was not reversible error because neither the evidence itself nor the state's failure to timely disclose it were material to the case. The court noted that whether the state's failure to disclose evidence was done in good or bad faith does not control a *Brady* analysis because the prosecutor has an affirmative duty to learn of evidence favorable to the accused. Moreover, stated the court, "Minnesota's Rules of Criminal Procedure . . . obligate prosecutors to disclose material exculpatory information 'in the possession or control of * * * the prosecution staff and of any others who have participated in the investigation * * * of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office.' Minn.R.Crim.P. 9.01, subd. 1(7)."

Rules of Court regarding Disclosure:

Minn.R.Crim.P. 9.01, subd. 1, Disclosure by Prosecution Without Order of Court. This rule is especially important because it **goes beyond disclosing exculpatory evidence** and instead requires disclosing all information relating to the case. See e.g.:

- Subd. 1(1)(d) (all persons having knowledge relating to the case);
- Subd. 1(2) (all relevant written or recorded statements that relate to the case within the prosecution's possession or control, and the substance of any oral statements that relate to the case);
- Subd. 1 (3) (documents or objects that relate to the case);
- Subd. 1(4) (reports and records of examinations, comparisons and tests made in connection with the case).

Minn.R.Crim.P. 9.03, subd. 1 states that **neither prosecution nor defense may impede the investigation**. Thus the attorneys and their personnel may not advise persons (except defendant) having relevant information to refrain from discussing the case with or showing materials to opposing counsel, or otherwise impede opposing counsel's investigation.

R. 9.03, subd. 2 provides that **the duty to disclose is a continuing duty**, including all times before and during trial.

Practice tips:

- Document fully in your file what specific materials were disclosed to the defense, when and by what method (inspection, mail, delivery). Use affidavits of service or signed certificates of service so you can prove, even years later in case of a post-conviction proceeding, that disclosure was made.
- Ask the police to send you any new or additional police reports, photos or documents.
- If you interview or meet with witnesses, if possible have someone else present to take notes or prepare a memo in case the witness changes his or her story or provides additional information. Do not make yourself a witness. Disclose such notes or memos to the defense.

Opening Statement

1.) Misstating burden of proof in opening statement

State v. Bailey, 677 N.W.2d 380 (Minn. 2004), *rehearing denied* (Minn. Apr. 22, 2004). It is misconduct in the opening statement to equate DNA evidence and DNA probability statistics with proof beyond a reasonable doubt. New trial ordered-- not specifically for this misconduct, but the court commented extensively on it in dicta.

Practice tip:

- Defense counsel is prohibited from stating in the presence of the jury: (1) defendant's attorney has advised defendant not to testify; (2) defendant did not testify because his attorney told him not to, or defendant testified because his attorney advised him to; or (3) defendant's testimony will be presented by others testifying about what defendant told them. *See State v. Harris*, 333 N.W.2d 873, 876 (Minn. 1983); *State v. Taylor*, 258 N.W.2d 615 (Minn. 1977).

2.) Attempting to inflame the passions of the jury in opening statement

State v. Torres, 632 N.W.2d 609, 618 (Minn. 2001). The court concluded it was not misconduct when the prosecutor told the jury in the opening statement that they were "going to hear about a cold blooded killing with the death gasp of Jesse Springer" and that "Jesse Springer was... slaughtered, quite literally, butchered alive," because the statements were accurate.

Testimony

1.) Eliciting inadmissible evidence

State v. VanWagner, 504 N.W.2d 746, 749-50 (Minn. 1993). It was improper for the prosecutor to repeatedly try--over objections sustained by the trial court--to elicit inadmissible hearsay testimony of a witness, and then in final argument to argue by implication the inadmissible testimony. Even though the prosecutor's misconduct was possibly harmless, the court reversed the conviction for prophylactic reasons.

State v. Ray, 659 N.W.2d 736, 744-746 (Minn. 2003). Eliciting inadmissible hearsay testimony with leading questions designed for that purpose is improper. The prosecutor there persistently asked leading questions aimed to elicit testimony that the district court had previously ruled inadmissible.

State v. Pendleton, 706 N.W.2d 500, 509 (Minn. 2005). It was prosecutorial misconduct to include inadmissible hearsay in a question asked of a witness, but where objection to the question was sustained, the jury was instructed to disregard the question, and the instruction was repeated at the close of the case, the misconduct, when considered in light of the whole record, did not impair defendant's right to a fair trial.

2.) Asking a question that implies a fact without a good faith basis

State v. Kelly, 668 N.W.2d 39, 43 (Minn. Ct. App. 2003). Prosecutor engaged in misconduct when he asked defendant on cross-examination if his acquaintances (spectators in the courtroom) matched a witness' description of the attackers, asked if the defendant himself matched a description of one of the attackers, and insinuated highly prejudicial facts not supported by evidence. Held to be plain error and a new trial was ordered.

3.) Referencing the Public Defender's office

State v. Aguirre, 2006 WL 1737870, 4 (Minn. Ct. App. June 27, 2006) (unpublished). The prosecutor improperly questioned a witness about whether he was interviewed "by an investigator from the public defender's office." The court found that while this was improper, the prosecutor did so inadvertently and rarely, and so the error was not prejudicial, citing *State v. Bonn*, 412 N.W.2d 28, 30 (Minn. Ct. App. 1987), *review denied* (Minn. Oct. 21, 1987).

4.) Referring to Miranda warnings where defendant did not talk to police

State v. Beck, 289 Minn. 287, 183 N.W.2d 781 (1971). The prosecutor elicited testimony from a police officer that the defendant was given a Miranda warning, but not whether the defendant gave a statement. The court held that the officer's testimony was prejudicial because it would lead to the inference that the defendant remained silent. Since it is impermissible for the prosecution to comment on the defendant's decision to remain silent, it is equally impermissible to allow mention of the Miranda warning unless it is foundation for a voluntary confession, stated the court.

State v. McCullum, 289 N.W.2d 89, 92 (Minn. 1979). The State may not generally refer to or elicit testimony about a defendant's post-arrest silence or request for counsel.

Compare State v. Combs, 292 Minn. 317, 321-22, 195 N.W.2d 176 (1972). Where the defendant talked to a police officer after being given a Miranda warning and testified in court, the testimony about the giving of the Miranda warning was properly used as a foundation for admission of the defendant's statement to the officer. *See also State v. Waukazo*, 374 N.W.2d 563 (Minn. Ct. App. 1985), *review denied* (Minn. Nov. 1, 1985).

See also State v. Jones, 753 N.W.2d 677, 688 (Minn. 2008). The court noted that the United States Supreme Court has long "held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination" and that in such circumstances, "the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility." Quoting *Jenkins v. Anderson*, 447 U.S. 231, 236 n. 3, 238 (1980).

Practice tip:

- Make an in limine motion before trial prohibiting the defendant from eliciting testimony regarding his statements to the police until such evidence is introduced by the State. The defendant's statements are hearsay and self-serving. *State v. Taylor*, 258 N.W.2d 615 (Minn. 1977).

5.) Asking defendant if he is a liar

State v. Mayhorn, 720 N.W.2d 776, 786 (Minn. 2006). During the prosecutor's cross-examination of the defendant, she asked, "You wouldn't know the truth if it hit you in the face, would you, Mr. Mayhorn?" Just as a prosecutor may not give his or her own opinion about the credibility of a witness in closing argument, so is it improper in cross-examination, held the court.

State v. Jones, 753 N.W.2d 677, 688 (Minn. 2008). The prosecutor asked the defendant on cross-examination, "would you agree that . . . a reasonable person might well conclude that you would rather climb a tree and tell a falsehood than stand on the ground and tell the truth?" The court noted that it is well settled that a prosecutor may not give his own opinion of the credibility of a witness, citing *Mayhorn*, 720 N.W.2d at 786. Here, stated the court, the prosecutor's question was extremely argumentative, and the court rejected the State's justification that it was linked to the perspective of a reasonable person. But the court held that this conduct did not prejudice defendant's right to a fair trial because his credibility and trustworthiness already had been seriously damaged by his own admissions.

Compare *State v. Washington*, 725 N.W.2d 125, 134 (Minn. Ct. App. 2006). The prosecutor "could properly point out to the jury that a person who has lied in the past is more likely to lie again" and thus is not misconduct, the court ruled. *Id.* at 134. Here defendant was impeached with his prior conviction for providing false information to the police, so the prosecutor's statement had a clear basis in the record.

6.) Asking a witness to comment on another witness' veracity

State v. Mayhorn, 720 N.W.2d 776 (Minn. 2006). The Minnesota Supreme Court reversed the defendant's conviction for multiple instances of prosecutorial misconduct. Among them was the prosecutor asking defendant "were they lying?" about other witnesses.

Van Buren v. State, 556 N.W.2d 548, 551-552 (Minn. 1996). Prosecutor elicited improper vouching testimony as to whether others believed complainant's story about the sexual assaults. Because credibility was a central issue, there was a reasonable likelihood that the error substantially affected the verdict and a new trial was ordered.

But see State v. Pilot, 595 N.W.2d 511, 518 (Minn. 1999). Here the prosecutor asked the defendant on cross-examination to evaluate other witnesses' veracity by

asking, "were they lying?" The prosecutor's questions, stated the Supreme Court, could have assisted the jury in weighing the defendant's own veracity and in evaluating defendant's conspiracy theory (that everyone was lying except for him). The Court expressed concern as to "were they lying" questions in general; however, since defense counsel failed to object, the Court was restricted to determining whether it constituted plain error. The Court concluded that the question was improper, but not plain error, and did not require reversal.

7.) Accusing defendant of tailoring his testimony to fit evidence

State v. Davis, 735 N.W.2d 674, 679, 681-82 (Minn. 2007). It is prosecutorial misconduct to cross-examine defendant about his opportunity to tailor his testimony to fit the evidence, though in this case the misconduct did not affect defendant's substantial rights and did not require reversal. The prosecutor asked a series of questions of defendant on cross examination, including that defendant had access to all the police reports and discovery, was present throughout the court proceedings and listened to all the witnesses' testimony, while other witnesses were sequestered. These questions were misconduct because they implicated defendant's confrontation rights and there was no evidence that defendant tailored his testimony to fit the evidence, held the court.

Compare State v. Ferguson, 729 N.W.2d 604, 616-17 (Minn. Ct. App. 2007). When there is actual evidence of tailoring, the prosecutor is permitted to raise issues of a defendant tailoring his testimony. Here defendant changed his story at trial from what he initially told police after he obtained discovery of the State's evidence.

8.) Committing numerous errors in cross-examination of defendant

State v. Dobbins, 725 N.W.2d 492 (Minn. 2006). The prosecution, held the court, engaged in prosecutorial misconduct when it: (1) asked questions that were directed at the defendant's presence at the trial and his ability to tailor his testimony; (2) questioned the defendant about his pretrial silence and his right to counsel; (3) asked the defendant a series of "Are they lying?" questions; (4) asked defendant if he was the father of his girlfriend's son and was faithful to his girlfriend; (5) asked defendant if in his world people don't tell the truth; (5) during closing said that "I would be honest when I testify." However, a new trial was not warranted because the objected-to misconduct was harmless error and the unobjected-to misconduct did not affect the defendant's substantial rights, held the court.

State v. Mayhorn, 720 N.W.2d 776 (Minn. 2006). The Minnesota Supreme Court reversed the defendant's conviction for multiple instances of prosecutorial misconduct. Among them was the prosecutor's cross-examination of the defendant in which she asked, "You wouldn't know the truth if it hit you in the face, would you, Mr. Mayhorn?" The prosecutor also questioned defendant about his opportunity to tailor his testimony and asked a "were they lying?" question.

She asked him about his multiple romantic relationships with women, which the court held to be an improper attack on his character. Other misconduct was the prosecutor's cross-examining defendant on his failure to call an alibi witness, her misstatement of evidence, references to threats not in evidence and attempts to highlight cultural and racial differences between the predominantly white jury and defendant ("white girls you were hanging around with in Fargo-Moorhead"). The court stated the prosecutor also attempted to inflame the jury's passions by asking 13 times about an improperly admitted prior shoot-out between the defendant and the victim ("You didn't kill anyone there. At least you didn't tell us about it, right?").

9.) Improper prosecutorial threats

Opsahl v. State, 677 N.W.2d 414, 424 (Minn. 2004). Defendant was granted an evidentiary hearing as to possible prosecutorial misconduct when witnesses in affidavits recanted their testimony and claimed prosecutors had threatened to revoke their probation if they did not testify favorably. The court stated that if true, these allegations would constitute prosecutorial misconduct and require a new trial unless the error was harmless. The court remanded the case to the trial court for an evidentiary hearing on his petition for post-conviction relief.

Opsahl v. State, 710 N.W.2d 776, 783 (Minn. 2006). Inaccurate and misleading threats of possible perjury consequences were improper in this case, even though it did not lead to reversal of the denial of post-conviction relief. This was an appeal from the district court's denial of Opsahl's petition following the remand by the Supreme Court (see above). Witnesses who claimed they were pressured by prosecutors to provide favorable testimony at trial were interviewed by a detective at the request of prosecutors. Several contradicted or undermined their affidavits. Opsahl alleged the detective committed prosecutorial misconduct because he told the witnesses, first, that making two contradictory statements under oath is necessarily perjury, and second, they could be subject to perjury prosecutions for their trial testimony, even though probably the statute of limitations had expired. The Supreme Court stated that the detective's statements were inappropriate. However, the conduct did not deny petitioner's right to a fair hearing. Witnesses were not so intimidated that they did not testify at the evidentiary hearing and some testified favorably to Opsahl. In addition, the detective was cross-examined at the hearing.

Compare State v. Caine, 746 N.W.2d 339, 359 (Minn. 2008). A warning by prosecutors of the consequences of perjury is not prosecutorial misconduct, held the court, relying on *State v. Opsahl*, 710 N.W.2d 776, 783 (Minn. 2006).

Final Argument

"With respect to claims of prosecutorial misconduct, we consider the closing argument as a whole rather than focus on particular 'phrases or remarks that may be taken out of

context or given undue prominence.”” *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000), quoting *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

“A closing argument must be proper, not perfect. Unartful statements inevitably occur in the midst of a heated and impassioned closing argument, even among the best of orators.” *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996).

A prosecutor is not required to make a colorless closing argument, and “has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences drawn therefrom.” *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998).

“The determination of the propriety of a prosecutor’s closing generally is “within the sound discretion of the trial court.”” *Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008), quoting *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004).

1.) Making improper references to defendant’s character

State v. Roman Nose, 667 N.W.2d 386 (Minn. 2003). Prosecutor’s improper comment on a picture found on the defendant’s wall of a suspended human form with arms extended, as indicative of his character, was misconduct but harmless beyond a reasonable doubt because of the overwhelming evidence of defendant’s guilt of murder while committing criminal sexual conduct.

State v. Bradford, 618 N.W.2d 782, 800 (Minn. 2000). The prosecutor’s reference to the defendant’s “twisted thought process” was an improper attack on defendant’s character. New trial was not granted, as the misconduct was harmless error.

2.) Using Spreigl and impeachment evidence as character evidence, rather than for their limited purposes

State v. Duncan, 608 N.W.2d 551 (Minn. Ct. App. 2000). It is misconduct for a prosecutor to comment in closing argument on the defendant’s five prior sex offense convictions while clearly insinuating that defendant was following his nature in committing the present offenses. In addition, the prosecutor called the defendant a “predator,” disparaged the defense, injected personal opinions, and urged the jury to protect society. A new trial was ordered because of an accumulation of errors in the trial including this misconduct, but the misconduct alone was not considered prejudicial in light of the final argument as a whole. *Id.* at 556.

State v. Plantin, 682 N.W.2d 653, 661 (Minn. Ct. App. 2004). It was not prejudicial prosecutorial misconduct when the prosecutor failed in closing argument to adequately differentiate between testimony offered as substantive evidence and testimony offered only for impeachment purposes.

3.) Calling the defendant names

State v. Buggs, 581 N.W.2d 329, 342 (Minn. 1998). The court expressed its distaste for the prosecutor calling the defendant a "coward" with a "twisted" thought process and called the comments "improper," but concluded that defendant was not denied a fair trial.

State v. Ives, 568 N.W.2d 710, 715 (Minn. 1997). Prosecutor's statement that the defendant was a "would-be punk" with a "pathetic little life," was misconduct but did not require a new trial because the comments were not so prejudicial that they denied defendant a fair trial.

4.) Inflaming the passions of the jury

(a) Misconduct found

State v. Porter, 526 N.W.2d 359 (Minn. 1995). The prosecutor gave a closing argument implying that the jury would be "suckers" if they acquitted the defendant, telling them there would be no "salve" to put on their conscience if they made the wrong decision, and stating that the prosecution's expert witness was credible and her credentials were "impeccable" and "unimpeached." The court found that these constituted misconduct by appealing to the passions of the jury, arguing the consequences of the jury's verdict, bolstering the credibility of the state's expert witness, and distorting the state's burden of proof. The court awarded the defendant a new trial because the misconduct was reversible error and could not have been remedied by the trial court's jury instruction.

State v. Myrland, 681 N.W.2d 415 (Minn. App. 2004). During closing arguments in this possession of child pornography case, the prosecutor stated that once a child is put on the Internet, the child is victimized again every time the image is viewed. The prosecutor also stated that only children who have been molested or abused would be involved in child pornography. The court found this distracted the jury from whether the defendant was guilty or not, and was aimed to inflame their passions. The conviction was reversed because the evidence was insufficient to warrant conviction, but prosecutorial misconduct and other trial errors were noted as additional other possible grounds for reversal.

(b) No Misconduct found

State v. Atkins, 543 N.W.2d 642, 648 (Minn. 1996). It was not misconduct for the prosecutor to argue in closing that it would be an "unspeakable injustice" to convict defendant of a lesser-included offense.

State v. Nunn, 753 N.W.2d 657, 661-62 (Minn. 2008). The prosecutor argued in his final argument, “Remember also the defense’s attempt to make the victims in this case look like there’s something wrong with them or they are bad people. [They] are victims of a brutal crime. Their lives deserve the protection of the law.” In denying post-conviction relief, the Minnesota Supreme Court noted that though a prosecutor may not appeal to the jury’s passions, it is proper for the prosecutor to discuss what the victim suffered and discuss accountability, to help persuade the jury not to return a verdict based on sympathy for the defendant. Here, the court noted, the argument was in the context of refuting the insinuation that the victims were undeserving of protection. It constituted only three lines of a 37 page closing argument, so was an isolated statement. Finally, the Supreme Court deferred to the district court, which had overruled a defense objection at trial to the prosecutor’s argument.

State v. Torres, 632 N.W.2d 609, 618 (Minn. 2001). Prosecutor’s argument in closing statement that the victim was “slaughtered alive” and “butchered” was not an attempt to inflame the jury, distinguishable from *Porter*. The Supreme Court said it considered these to be forceful yet apt descriptions of the manner in which the victim was killed. A new trial was not warranted.

State v. Bradford, 618 N.W.2d 782, 799 (Minn. 2000). The prosecutor asked the jury to not “look away” from the facts and to render a “true and just verdict.” The prosecutor also discussed the tragic nature of domestic abuse. The Court said this was distinguishable from *Porter* and not misconduct. It also was not prosecutorial misconduct meant to inflame the jury’s passions in the closing argument when the prosecutor compared and contrasted the victim’s high school graduation photo with her autopsy photo.

State v. Robinson, 604 N.W.2d 355, 363 (Minn. 2000). Prosecutor, who stated that the defendant was not of the same world as the jurors and clearly not a businessman, and brought up Pope John Paul and Mother Theresa, did not engage in prosecutorial misconduct and did not improperly appeal to the prejudice and passion of the jury.

State v. Gates, 615 N.W.2d 331, 340 (Minn. 2000). The court concluded that the statement by the prosecutor, “Truth is something you use when you run out of excuses” was more likely to confuse the jury than to inflame. No misconduct found and no new trial ordered. (The case was overruled on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004) on the issue of admissibility of out-of-court statements of witnesses.)

5.) Appealing to law and order or accountability

State v. Hoppe, 641 N.W.2d 315, 319-20 (Minn. Ct. App. 2002). The prosecutor urged the jury to protect society with its verdict, stated that the defendant had an alcohol problem, and could not abstain from drinking and driving as evidenced by six convictions. This argument was improperly meant to inflame the passions of

the jury in a DUI prosecution, and thus constituted misconduct. A new trial was granted.

State v. Peterson, 530 N.W.2d 843, 848 (Minn. Ct. App. 1995). In her closing argument, the prosecutor committed misconduct by asking the jury to do something about the societal problem of child abuse. Prosecutorial misconduct combined with other errors required reversal.

State v. Bailey, 677 N.W.2d 380, 404 (Minn. 2004), *rehearing denied* Apr. 22, 2004. A new trial was ordered, not specifically for misconduct, but the court commented extensively on misconduct in dicta. The court stated in dicta that the prosecutor's statement, "the prosecution brought this back up, to right a wrong...this family deserves resolution to this case," was misconduct meant to inflame the jury's passions and should be avoided in the new trial.

State v. Powers, 654 N.W.2d 667, 679 (Minn. 2003). It is not misconduct and a prosecutor does not improperly seek justice beyond the parameters of the case when he asks the jury to "seek justice for the people of Minnesota." However, the prosecutor's use of a quotation from Edmund Burke, "The only way for evil to triumph is when good people do nothing," sought justice beyond the parameters of the case and was deemed improper, but did not warrant a reversal or new trial in this case.

State v. Duncan, 608 N.W.2d 551, 556 (Minn. Ct. App. 2000). The prosecutor urged the jury to protect society, called the defendant a "predator," disparaged the defense, and injected personal opinions. A new trial was ordered because of a culmination of errors in the trial including this misconduct, but the misconduct by itself was not considered prejudicial in light of the final argument as a whole.

6.) Asking jurors to place themselves in shoes of victim

State v. Thompson, 578 N.W.2d 734, 742-43 (Minn. 1998). Asking jurors in final argument to imagine "your own daughter killed right before your eyes" was improper. This and the prosecutor's invitation to the jury to speculate as to events at the homicide scene, caused the court to comment in dictum:

As a final note, it is difficult to understand why a prosecutor would engage in clear misconduct as is present in this case, particularly when the evidence of guilt is so overwhelming that a simple review of the facts substantiated by the evidence spins out a web of guilt more persuasive than anything that could be added through the prosecutor's inappropriate conduct. With the high risk of a new trial at stake, the gamble hardly seems worthwhile.

Id. at 743. Though improper, the conduct did not result in reversal because of the overwhelming evidence of defendant's guilt, the court held.

7.) **Over-emotionalizing the victim**

State v. Merrill, 428 N.W.2d 361 (Minn. 1988). In closing argument of a murder trial, the prosecutor pointed to victim's empty wheelchair to emphasize that he was not there to give his version of the facts, called the defendant an "animal," and urged the jury to "send a message" to the defendant that "vigilante-type" justice would not be tolerated. The court found that the comments were improper, but that the overwhelming evidence against the defendant showed they would not have affected the jury's verdict. The court, however, strongly warned prosecutors that such impropriety in closing arguments would in the future result in reversal.

8.) **Commenting on defendant's failure to testify or call witnesses**

State v. Russell, 282 Minn. 223, 164 N.W.2d 65 (1969), *cert. denied*, 396 U.S. 850 (1969). It was improper for the prosecutor to comment on a co-defendant's failure to answer questions asked by the police and to ask what harm there is in talking if one is "honest and above board" with "nothing to hide." The error was cured by an instruction to disregard.

State v. Fields, 306 Minn. 521, 522, 237 N.W.2d 634 (1976). It was improper for the prosecutor to say the defendant did not produce evidence corroborating his testimony. There are two reasons for this rule, stated the court: the argument suggests that defendant bears some burden of proof and suggests that defendant did not call the witness because the testimony would be unfavorable. However, in this case the evidence against the defendant was so strong the error did not require reversal.

State v. Hoppe, 641 N.W.2d 315, 320-321 (Minn. Ct. App. 2002). The prosecutor engaged in prejudicial misconduct when in his closing argument in a DUI prosecution commented on defendant's failure to rebut the evidence against him. The prosecutor noted that the defendant would attempt to give an explanation as to why his eyes were bloodshot and could not maintain his balance during the traffic stop but he had not even attempted to refute evidence of his having failed breath and horizontal gaze nystagmus tests. New trial granted for misconduct.

Compare State v. Gassler, 505 N.W.2d 62, 69 (Minn. 1993). It was permissible for the prosecutor to argue in closing that defendant's claim in his opening statement of an alternative perpetrator was not supported by the evidence.

See State v. Haynes, 725 N.W.2d 524, 530 (Minn. 2007). It was not plain error for the prosecutor to cross-examine defendant about whether others could have seen him where he claimed to be at the time of the homicide, in reference to his alibi claim. The prosecutor did not comment directly on defendant's failure to call

witnesses, the questioning was brief and not mentioned in the closing, noted the court.

See also State v. Graham, 764 N.W.2d 340, 356 (Minn. 2009). It was not improper for the State to argue that the defense had not, based on the evidence, presented a solid case.

Practice tips:

- Do not suggest that the defense has the burden to call a witness.
- Present your argument in terms of the evidence.
- Stress in your closing that the State has the burden of proof.
- The defense is prohibited from commenting on the State's failure to call previously disclosed witnesses. *State v. Daniels*, 361 N.W.2d 819, 833 (Minn. 1985); *State v. Swain*, 269 N.W.2d 707 (Minn. 1978); *State v. Ostlund*, 416 N.W.2d 755, 762 (Minn. Ct. App. 1987), *review denied* (Minn. Feb. 24, 1988).

9.) Shifting to the defendant, or misstating, the burden of proof

State v. Salitros, 499 N.W.2d 815 (Minn. 1993). During closing argument, the prosecutor stated that constitutional rights are “designed to protect the innocent” instead of a “shield for the guilty,” and attacked the defendant’s defense in general by calling it “standard.” The court found that these statements constituted misconduct and even though defense counsel had not objected and there was no evidence of prejudice, the court said it would exercise its supervisory powers “prophylactically” and order a new trial.

State v. Bailey, 677 N.W.2d 380, 403 (Minn. 2004). The prosecutor's reference to the defendant's "only alibi witness" improperly implied a burden to provide evidence of an alibi. However, the prosecutor did not engage in misconduct or misstate the burden of proof during closing argument when he said, "as the truth seekers, search for the truth in the evidence ... don't search for doubt in the evidence, because the truth seekers ... search for the truth in the evidence, but give the defendant the benefit of any reasonable doubt."

State v. Hunt, 615 N.W.2d 294, 302 (Minn. 2000). The prosecutor improperly implied the wrong burden of proof when he made an analogy to Greek juries who would place a stone on either side of a scale for each successful argument by one party or the other. However, since the prosecutor stated the appropriate burden of proof in his closing argument and the trial court gave an adequate jury instruction, defendant was not denied a fair trial. A new trial was ordered for the state’s discovery violation but not for misconduct in closing argument.

State v. Shannon, 514 N.W.2d 790 (Minn. 1994). The prosecutor engaged in misconduct and denied the defendant a fair trial when he argued that the reasonableness of defendant's actions in a heat-of-passion manslaughter trial should be decided from the jurors' own perspectives, and the trial court failed to correct the jury's confusion. This was plain error requiring a new trial.

In re Welfare of D.D.R., 713 N.W.2d 891 (Minn. Ct. App. 2006). This Extended Juvenile Jurisdiction conviction was reversed for cumulative errors. Among them was the prosecutor shifting the burden of proof to defendant by arguing that defendant was "no longer presumed innocent . . ." and the jury needed to conclude "all [the evidence] is wrong" to find appellant not guilty. The trial judge did not give a curative instruction. The prosecutor's misconduct, together with the trial judge's errors, warranted reversal where the evidence of guilty was not overwhelming.

Compare State v. Martin, 773 N.W.2d 89, 105 (Minn. 2009). It is permissible for the prosecutor to state that even with the presumption of innocence, many people are convicted. This did not shift or misstate the burden of proof, and was a legitimate explanation of the state's burden.

Practice tips:

- Where the defendant does not testify, do not argue the state's allegations are "undisputed."
- Stress in your closing that the State has the burden of proof.
- Do not argue that the authority of the State is a reason to believe the allegations.

10.) Implying that defendant used his presence at trial to tailor his testimony

State v. Swanson, 707 N.W.2d 645, 657-58 (Minn. 2006). It was misconduct when the prosecutor asked questions and made arguments implying that defendant used his right to be present at trial to tailor his testimony. The Court stated, "the prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case." *Id.* The misconduct was harmless in this instance because the state's case was very strong and the improper questions and comments were confined to two pages out of 1,200.

Compare State v. Ferguson, 729 N.W.2d 604, 616-17 (Minn. Ct. App. 2007). When there is actual evidence of tailoring, the prosecutor is permitted to raise this issue. Here defendant changed his story at trial from what he initially told police after he obtained the discovery materials from the State.

11.) Expressing personal opinions

(a) Misconduct found

State v. Duncan, 608 N.W.2d 551, 555-556 (Minn. Ct. App. 2000). It is misconduct for a prosecutor to inject personal opinion in closing by arguing that defendant was "lying" when he denied committing the offenses. The prosecutor called the defendant a "predator," disparaged the defense, injected personal opinions, and urged the jury to protect society. A new trial in this criminal sexual conduct case was ordered because of an accumulation of errors in the trial including this misconduct, though the misconduct alone was not considered prejudicial in light of the final argument as a whole.

State v. Buggs, 581 N.W.2d 329, 342-43 (Minn. 1998). The court expressed its distaste for the prosecutor's conduct, but concluded that defendant was not denied a fair trial when the prosecutor remarked to co-counsel, "She's lying" while defendant was on the stand, which was heard by four jurors. The Court concluded that this did not require a new trial because it was unintentional, the trial court took extensive remedial measures, and the remark actually had a negative effect on some of the jurors. The prosecutors' body language that indicated disgust when things did not go their way, so much so that the jury felt alienated, was not so prejudicial as to deny the defendant a fair trial.

(b) No Misconduct

State v. Bradford, 618 N.W.2d 782, 799 (Minn. 2000). Prosecutor was offering interpretation of the evidence as opposed to offering a personal opinion when she stated, "I submit to you [victim] was killed by her partner..." New trial was not granted.

State v. Yang, 627 N.W.2d 666, 679 (Minn. Ct. App. 2001). Unlike *Porter* where the prosecutor expressed a personal opinion about the witnesses' credibility, the prosecutor here simply argued that the officers were worthy of credibility due to their training and experience, and thus did not commit prosecutorial misconduct.

State v. Lopez-Rios, 669 N.W.2d 603, 614 (Minn. 2003). The Court stated, "But the state may argue that particular witnesses were or were not credible." This statement from the court implies that the prosecutor can argue that a witness is or is not credible as long as it is done in a way that does not involve the prosecutor's personal opinion.

Practice tips:

- Don't say "I" or "I submit"
- Instead say "the evidence shows"
- Just as the prosecutor may not express personal opinions, the defense attorney may not as well. *See State v. Strodman*, 399 N.W.2d 610, 615 (Minn. Ct. App. 1987), *review denied* (Minn. March 25, 1987).

12.) Disparaging the defense used at trial or the defense attorney's role

State v. Salitros, 499 N.W.2d 815, 818 (Minn. 1993). During closing argument, the prosecutor attacked the defendant's defense in general by calling it "standard." The court found that this constituted misconduct. "It is clearly improper for a prosecutor to suggest that the arguments of defense counsel are part of some sort of syndrome of standard arguments that one finds defense counsel making in 'cases of this sort.'" *Id.*

State v. Jones, 753 N.W.2d 677, 688 (Minn. 2008). Characterizing defendant's defense as an "old trick" was plain error, held the court, but in this case was not prejudicial in light of the very strong evidence of defendant's guilt.

State v. Bailey, 677 N.W.2d 380 (Minn. 2004). It is prosecutorial misconduct to disparage a defense expert's character by saying he was a paid witness and advocated an improper procedure because he was paid for it. New trial ordered not specifically for misconduct, but the court commented extensively on misconduct in dicta.

State v. Hoppe, 641 N.W.2d 315 (Minn. Ct. App. 2002), *review denied* (Minn. May 14, 2002). It is prosecutorial misconduct to disparage the defense by characterizing as "ridiculous" the defendant's claim that his breath tests were inaccurate and telling the jury not to be "snowed" by his claim he had forgotten his license was revoked. A new trial was ordered.

State v. Williams, 525 N.W.2d 538, 549 (Minn. 1994). It is improper during closing arguments for the state to invite jurors to speculate as to the motivation for a defendant to try the case a specific way, held the court. Prosecutors may not belittle a line of defense in the abstract or "suggest that the defendant raised it because that was the only defense that 'might work.'" *Id.* The case was reversed for several errors, including this argument in closing.

But see State v. Graham, 764 N.W.2d 340 (Minn. 2009). It was permissible for the prosecutor to argue that based on the evidence, the defense had not presented a solid case.

Practice tip:

- Do not refer to the defense as using "real common defense tactics," "an old trick" or a "standard defense."

13.) Discussing race when not relevant

State v. Ray, 659 N.W.2d 736, 747 (Minn. 2003). During his closing argument, the prosecutor invited the jury to put the evidence "in context, particularly the type of people that presented this evidence to you." The prosecutor stated that the occurrence involved "three young black males in the hood in North Minneapolis. This is not your environment, this is the Defendant's environment." The prosecutor's argument was improper, said the Court. It denied defendant a fair trial because of the racial and socio-economic considerations it asked the jury to apply. Race is improperly raised when it is not relevant to the case, explained the Court. *Id.* at 747. Even though not objected to, the state's final argument was improper and merited reversal, held the Court.

State v. Cabrera, 700 N.W.2d 469, 475 (Minn. 2005). The defense argued that the state's witnesses were not to be believed because they were gang members. The prosecutor responded in final argument that the defense was "just throwing mud on young black men and saying . . . if they're young black men they must be in gangs," and this was "racist speculation on the part of counsel here." These comments were objected to by the defense, and the record showed defense counsel did not mention the race of a witness or imply that race was a factor in the case. The Supreme Court held that the prosecutor's statements injecting race into the closing argument were serious prosecutorial misconduct, and in the interests of justice and the exercise of the Court's supervisory powers, reversed the conviction and remanded the case for a new trial. Race is improperly raised when it is not relevant to the case. *See id.* at 474. The Court emphasized that the issue of racial or ethnic bias must be confronted whenever improperly raised in judicial proceedings.

State v. Clifton, 701 N.W.2d 793, 799 (Minn. 2005). The prosecutor made lengthy remarks that called on the jury to consider "how different your lives may be from the lives and the lifestyles of many of the people who testified before you and from the victim." The prosecutor described the defendant's and victim's neighborhood as "a world, at least to some extent, where some people don't trust the system and don't call the police when they see somebody with a gun. They don't run from trouble but almost seem to flirt with it or at least co-exist with it." The state's remarks constituted misconduct because they "were demeaning" and "came close to appealing to passion and prejudice." *Id.* at 800. However, a new trial was not ordered because "unlike *Ray*, there was no explicit reference to race or use of race to disparage the defendant." *Id.*

State v. Brown, 2000 WL 978756 (Minn. Ct. App. July 18, 2000) (unpublished). The prosecutor compared a Minneapolis minority community unfavorably to the world of Mother Teresa or Pope John Paul. The Court of Appeals determined that

these statements, when considered in totality, "rose to the level of misconduct" and reversed the conviction.

Compare State v. Martin, 773 N.W.2d 89, 104 (Minn. 2009). It was not improper for the prosecutor to argue, "Welcome to the real world of gangs and gang violence. This is what happens on the streets of North Minneapolis." Referring to the "real world" of North Minneapolis is not misconduct when it is used to prepare the jury for evidence from an unfamiliar world, citing *State v. Wren*, 738 N.W.2d 378, 392 (Minn. 2007) and *State v. Jackson*, 714 N.W.2d 681, 695 (Minn. 2006) (the prosecutor did not refer to any party or witness by race).

See *State v. Paul*, 716 N.W.2d 329, 340-41 (Minn. 2006). The prosecutor's argument that murder took place in the "real world" where witnesses were not perfect was not plain error. The remarks, which were not objected to, were brief, did not mention race and culture, did not compare the jury's world to the defendant's, and were not demeaning, held the court. But the court in dictum advised prosecutors to refrain from using concepts and terms such as "different worlds" or "these people." *Id.* at 341.

State v. Lindsey, 755 N.W.2d 752 (Minn. Ct. App. 2008), *review denied* (Minn. Oct. 29, 2008). Testimony elicited by the prosecutor that defendant made racial statements and used swear words at officers did not make race an issue in the case, the court held.

Practice tips:

- Don't refer to a party or witness by race.
- Call witnesses by their names, not "these people."
- Don't use the phrase "different world."

14.) Misstating evidence

State v. Johnson, 616 N.W.2d 720, 728 (Minn. 2000). The court said the prosecutor may argue reasonable inferences from the facts presented; thus, prosecutor's argument that a person other than the defendant was not the shooter was not unduly prejudicial when there was supporting testimony and a proper jury instruction was given. A new trial was not granted.

15.) Vouching for the credibility of witnesses

State v. Swanson, 707 N.W.2d 645, 656 (Minn. 2006). The prosecutor endorsed the credibility of a witness in closing argument by stating, "The state believes she is very believable." The Supreme Court held that this was impermissibly vouching on its face because the state directly endorsed the credibility of the witness. While plain error, the vouching was not prejudicial in this case because

the evidence of guilt was strong and the vouching was only a small part of the prosecutor's closing.

State v. Lopez-Rios, 669 N.W.2d 603, 614 (Minn. 2003). No misconduct found. One of the state's witnesses testified that defendant had wanted to "use the gun." On re-direct, the prosecutor asked the defendant if he "wanted to do the job," which was objected to as leading and sustained. In closing argument, the prosecutor told the jury the defendant, "said words to the effect 'I'm going to do the job.'" The court concluded that the prosecutor's remarks merely paraphrased the substance of the state's witness's testimony and, at worst, were unartful, not misconduct. Improper vouching occurs "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." The Court stated, "But the state may argue that particular witnesses were or were not credible."

State v. Folkers, 581 N.W.2d 321, 326 (Minn. 1998). Mere admission of a plea agreement that required a witness to testify truthfully was not prosecutorial misconduct and not improper vouching for the witness' credibility.

State v. Gail, 713 N.W.2d 851, 866 (Minn. 2006). The prosecutor argued that a key witness was "a believable person" and was "frank and sincere." The defense argued on appeal that this constituted impermissible vouching for the witness. The prosecutor, held the Supreme Court, was merely arguing the witness was credible and therefore did not commit misconduct.

16.) Going outside the record

State v. Jones, 753 N.W.2d 677, 688 (Minn. 2008). The prosecutor's argument that "lawyers don't tell witnesses what to say" was plain error, held the court. It is improper to state as fact anything that "the evidence does not tend to prove," quoting *State v. Bernstein*, 148 Minn. 301, 306, 181 N.W. 947, 949 (1921). However, viewed in light of the closing argument as a whole and the strength of the state's case, the prosecutor's misconduct was not prejudicial.

State v. Bailey, 677 N.W.2d 380, 404 (Minn. 2004), *rehearing denied* Apr. 22, 2004. In closing argument, the prosecutor compared the defense regarding DNA evidence to a contention made by O.J. Simpson in his murder trial. The court concluded that the comparison went outside the record and was misconduct. A new trial was ordered on other grounds, but the court commented extensively on the misconduct in dicta.

State v. Bradford, 618 N.W.2d 782, 799-800 (Minn. 2000). It was prosecutorial misconduct in the closing argument when the prosecutor speculated as to what happened at the crime scene without a factual basis in the record. A new trial was not granted, as the misconduct was harmless error.

Compare State v. Bobo, 770 N.W.2d 129, 142-43 (Minn. 2009). The prosecutor argued witness intimidation in the prosecutor's closing argument, to explain a

witness who refused to answer some questions and changed his testimony at trial from his grand jury testimony. Those comments were held to be reasonable. In his closing argument, the prosecutor stated that during the testimony of the witness, there was a “sea of people, people who had never been here at any other time in the trial and haven’t been here since.” The prosecutor went on, “Those people were here to intimidate Sam James. And it worked.” On appeal, the defense argued there was no evidence presented to the jury to support the argument. There was trial testimony that the witness was scared to testify and he recognized many of the spectators when he took the stand. The court held that because there was some evidence documenting the witness intimidation, the prosecutor’s closing argument was a reasonable inference from the evidence. Moreover, this portion of the closing argument was brief, so did not affect the defendant’s substantial rights.

See also State v. Johnson, 616 N.W.2d 720, 728 (Minn. 2000). The court interpreted *Porter* as allowing the prosecutor to argue reasonable inferences from the facts presented; thus, prosecutor’s argument that a person other than the defendant was not the shooter was not misconduct when there was supporting testimony.

17.) Improperly aligning with the jury

State v. Mayhorn, 720 N.W.2d 776, 789-90 (Minn. 2006). The prosecutor in final argument, over defendant’s objection, said, “This is kind of foreign for all of us, I believe, because we’re not really accustomed to the drug world and drug dealing.” A prosecutor, stated the court, may not describe herself and the jury as a group of which the defendant is not a part. Since the prosecutor is not a member of the jury, the use of “we” and “us” was inappropriate as an appeal to the jury’s passions and an attempt to align herself with the jury, stated the court. The Minnesota Supreme Court reversed the defendant’s conviction for multiple instances of prosecutorial misconduct, including in cross examination, final argument and rebuttal.

State v. Nunn, 753 N.W.2d 657, 662-64 (Minn. 2008). In requesting post-conviction relief, the defendant argued that by using the pronoun “we” when summarizing the evidence, the prosecutor improperly aligned himself with the jury and created a situation of “us” (the prosecutor and the jury) against “him,” the defendant. The Minnesota Supreme Court noted that the trial in this case was in 1996, before *Mayhorn* was decided, and the court would not apply *Mayhorn* retroactively. Moreover, the court noted that here the “we” referred to everyone in the courtroom when evidence was presented, not as in *Mayhorn*, a foreign drug world of which the defendant was part but not the prosecutor and jury. Thus the prosecutor’s use of “we” was not misconduct, held the court.

Practice tips:

- Do not use “we” or “us” when talking to the jury.

- Don't talk about a "different world" of which we are not part.

18.) Cumulative effect of multiple instances of misconduct

State v. Porter, 526 N.W.2d 359 (Minn. 1995). The prosecutor gave a closing argument implying that the jury would be "suckers" if they acquitted the defendant, telling them there would be no "salve" to put on their conscience if they made the wrong decision, and stating that the prosecution's expert witness was credible and her credentials were "impeccable" and "unimpeached." The court found that these constituted misconduct by appealing to the passions of the jury, arguing the consequences of the jury's verdict, bolstering the credibility of the state's expert witness, and distorting the state's burden of proof. The misconduct was reversible error and could not have been remedied by the trial court's jury instruction, held the court.

State v. Mayhorn, 720 N.W.2d 776, 785-91 (Minn. 2006). The Minnesota Supreme Court reversed the defendant's conviction for multiple instances of prosecutorial misconduct, including in cross examination, final argument and rebuttal. The prosecutor in final argument, over defendant's objection, said, "This is kind of foreign for all of us, I believe, because we're not really accustomed to the drug world and drug dealing." A prosecutor, stated the court, may not describe herself and the jury as a group of which the defendant is not a part. Since the prosecutor is not a member of the jury, the use of "we" and "us" was inappropriate as an appeal to the jury's passions and an attempt to align herself with the jury, stated the court. The prosecutor also commented that "Lyra" was an appropriate name for a witness. The court noted that this was a suggestion that the witness was a liar. Because it is improper for a prosecutor to give her own opinion about the credibility of a witness, this comment was misconduct. In cross-examining the defendant, she asked him about his multiple romantic relationships with women, and then in closing said, "he admits that he is a habitual liar," based in part on his responses to these questions. The court found that the questions and comment on defendant's alleged infidelities were an improper attack on his character. The cumulative effect of multiple instances of prosecutorial misconduct, held the Supreme Court, together with two evidentiary errors, deprived the defendant of a fair trial and required reversal.

State v. Dobbins, 725 N.W.2d 492 (Minn. 2006). The state, held the Minnesota Supreme Court, engaged in prosecutorial misconduct when it: (1) asked questions that were directed at the defendant's presence at the trial and his ability to tailor his testimony; (2) questioned the defendant about his pretrial silence and his right to counsel; (3) asked the defendant a series of "Are they lying?" questions when the defendant did not put the witnesses' credibility in central focus; and (4) engaged in a series of remarks that diverted the jury's attention from issues relating to the defendant's guilt or innocence. However, a new trial is not warranted because the objected-to misconduct was harmless error and the unobjected-to misconduct did not affect the defendant's substantial rights.

Practice tips:

- Self-correct in your closing argument if you make an improper statement.
- Do not dwell in your closing on the improper statement.
- If you feel your argument may have gone across, or right up against, the line of what is permissible, consider asking the court yourself for a curative instruction, even if the defendant did not object or did not ask for a curative instruction. If the defense did so, then agree to a curative instruction.
 - As the court stated in *State v. Pearson*, 775 N.W.2d 155, 164 (Minn. 2009), “we assume that jurors follow the trial court's instructions, and we have held that such instructions mitigate improper arguments by the State,” citing *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994).

Sources and Resources

Judge Alan Pendleton, “Prosecutorial Misconduct in Closing Argument: What’s Left to Say?” Continuing education article, Minnesota County Attorney’s Association 1997 Annual Meeting (November, 1997)

Judge Kathleen Gearin, “Ethical Considerations in the Trial Setting,” article for 2000 Honorable James Preece Trial Advocacy School, Minnesota County Attorney’s Association

Ronald I. Meshbesh, “Closing Arguments in Criminal Cases,” [Trial Handbook for Minnesota Lawyers](#), Sec. 36.18 (Vol. 23, Minn. Prac., West Pub., 2004-05 ed.)

Michael K. Walz, Jean E. Burdorf and David C. Brown, “Prosecutorial Error: Discussion Notes and Detailed Outline,” Hennepin County Attorney’s Office CLE presentation on Nov. 19, 2009 (this CLE included an excellent discussion of how to avoid committing error)

Thanks

Thanks to Steven Courtney, Thomas Lockhart, Will Moody, Carolyn Harris and Thomas Ragatz for their assistance in updating this article. Thanks as well to Mitchell Rothman and Mark Lystig of the Ramsey County Attorney’s Office and Mike Walz, Marlene Senechal and Jean Burdorf of the Hennepin County Attorney’s Office for their insights and tips on avoiding prosecutorial misconduct.

APPENDIX: RULES AND STANDARDS OF CONDUCT

MINNESOTA RULES OF PROFESSIONAL CONDUCT

With amendments effective July 1, 2007

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for a defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RULE 3.6: TRIAL PUBLICITY

- (a) A lawyer who is participating or has participated in the investigation or litigation of a criminal matter shall not make an extrajudicial statement about the matter that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter.
- (b) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

RULE 3.7: LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

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;
- (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; and
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
- (f) exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel:

(a) a lawyer shall not state or imply that the lawyer is disinterested;

(b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;

(c) when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and

(d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION

Standard 3-1.4 Public Statements

- (a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.
- (b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard.

Standard 3-3.11 Disclosure of Evidence by the Prosecutor

- (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.
- (b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
- (c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

Standard 3-5.5 Opening Statement

The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. A prosecutor should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

Standard 3-5.6 Presentation of Evidence

- (a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.
- (b) A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

- (c) A prosecutor should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.
- (d) A prosecutor should not tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

Standard 3-5.7 Examination of Witnesses

- (a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.
- (b) The prosecutor's belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination. A prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully.
- (c) A prosecutor should not call a witness in the presence of the jury who the prosecutor knows will claim a valid privilege not to testify.
- (d) A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

Standard 3-5.8 Argument to the Jury

- (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
- (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
- (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.
- (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Standard 3-5.9 Facts Outside the Record

The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.