

HELD TO A HIGHER STANDARD: ETHICAL CONSIDERATIONS FOR PUBLIC LAWYERS

BY BRETT KANDT, ESQ.

Robert Bolt's play *A Man for All Seasons* is based on the true story of Sir Thomas More, the 16th-century Lord Chancellor of England who was executed for refusing to affirm the Act of Supremacy, which was to make King Henry VIII the supreme head of the Church of England. Confronted by men who subvert the law for their own benefit, Sir Thomas is willing to die rather than compromise his belief that no one is above the law and everyone is equal before the law. This principle is underscored in an exchange in act 1, scene 7:

Margaret: Father, that man's bad.

More: There is no law against that.

Roper: There is! God's law!

More: Then let God arrest him.

Roper: Sophistication upon sophistication!

More: No, sheer simplicity. The law, Roper, the law. I know what's legal – not what's right. And I'll stick to what's legal.

Roper: Then you set man's law above God's!

More: No, far below; but let me draw your attention to a

fact – I'm *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester. I doubt there's a man alive who could follow me there, thank God...

Alice: While you talk he's gone!

More: And go he should, if he was the Devil himself, until he broke the law!

Roper: So now you'd give the Devil the benefit of law!

More: Yes! What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.¹

The story of More's unwavering conviction that only the rule of law can protect man from the tyranny of others is a powerful one, and in many ways it illuminates the ethical considerations that must guide the public lawyer serving as either a criminal prosecutor or an attorney in government civil practice. This article focuses on those ethical duties that are unique to the public lawyer, since they are essential to upholding the responsibility that comes with representing the sovereign.

Sources of Ethical Duties

Like all attorneys, public lawyers must adhere to the Nevada Rules of Professional Conduct (RPC) and are subject to discipline by the Nevada Supreme Court for any violations of those rules. Public lawyers also have specific statutory responsibilities, depending upon whether an attorney is in the service of the attorney general, a district attorney or a city attorney, these responsibilities originate in NRS Chapter 228 (attorney general duties), NRS Chapter 252 (district attorney duties) or NRS 266.470 (city attorney duties). However, they may be further defined throughout the Nevada Revised Statutes, by local charter or ordinance, by relevant case law or by opinions of the attorney general. National standards, if applicable, may provide further guidance.²

The Ethical Prosecutor

The Role of the Prosecutor – Seeking Justice

The prosecutor is held to a higher standard than other attorneys in our legal system due to the great responsibility that comes with the position. As the United States Supreme Court proclaimed in *Berger v. United States*:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with

CONTINUED ON PAGE 12 ►

HELD TO A HIGHER STANDARD

CONTINUED FROM PAGE 11

earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.³

Exercising Prosecutorial Discretion

The prosecutor's authority to exercise discretion in charging decisions is a key component of our criminal justice system.⁴ RPC 3.8(a) requires that the prosecutor refrain from prosecuting a charge not supported by probable cause, while national standards establish that a prosecution should only proceed on the basis of sufficient admissible evidence to support a conviction.⁵ Prosecutorial discretion is subject to constitutional constraints such as equal protection and due process.⁶ The prosecutor should only file charges that adequately encompass the offense or offenses believed to have been committed and that rationally address the nature and scope of the alleged criminal activity.⁷ National standards specify a number of factors the prosecutor should consider, and factors that should not be considered, in charging decisions.⁸

Responsibilities to Victims

The pursuit of justice includes, in no small part, justice for victims. Crime victims in Nevada are accorded several constitutional and statutory rights in criminal proceedings.⁹ However, justice cannot be achieved for victims, and victims cannot properly exercise their rights, without programs to inform them and assist them in navigating the justice system. While the prosecutor does not represent victims, available resources should be allocated to victim assistance programs in accordance with statutory requirements and national standards.¹⁰

Fairness in Discovery

While there are specific statutory responsibilities imposed upon the prosecutor in criminal procedure that fall within the scope of RPC 3.4, the most fundamental duty is the U.S. Supreme Court's pronouncement in *Brady v. Maryland* that due process requires the timely disclosure of all material evidence possessed by the prosecution team that is favorable to the defense.¹¹ The *Brady* rule is codified in RPC 3.8(d), requiring disclosure of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.¹² The duty encompasses impeachment evidence as well as exculpatory evidence.¹³ Evidence is material when there is a reasonable probability

that had the evidence been available to the defense, a different verdict would have resulted.¹⁴ The duty of the prosecutor to disclose *Brady* material is present even if the defendant has made no request for the material.¹⁵ The prosecutor has an affirmative duty to learn of any favorable evidence known to any party acting on the state's behalf in a case.¹⁶ The duty to disclose *Brady* material is a continuing one, applicable pre-trial, during trial and even post-trial.¹⁷

Fairness at Trial

In addition to constitutional limitations on the exclusion of jurors,¹⁸ prosecutors are subject to intense scrutiny of statements at any stage of trial that may constitute prejudicial misconduct. The standard is "whether a prosecutor's statements so infected the proceedings with unfairness as to make the resulting conviction a denial of due process."¹⁹ Since it is reversible error if a prosecutor's misconduct violates the right to a fair trial, it is vital that the prosecutor be familiar with extensive Nevada case law analyzing prosecutorial misconduct to avoid such pitfalls.²⁰

Trial Publicity

The prohibition on extrajudicial statements set forth in RPC 3.6(a) extends to statements by the prosecutor in a criminal proceeding likely to increase public condemnation of the accused.²¹ Prosecutors are further required under RPC 3.8(f) to exercise reasonable care to prevent any party acting on the state's behalf in a case from making extrajudicial statements prohibited under Rule 3.6.²² "The prosecutor should strive to protect both the rights of the individual accused of a crime and the right of the public to know."²³ Rule 3.6(b) specifies the type of actual information directly relevant to a case that is appropriate for disclosure, while national standards provide further detail on what information may or may not be appropriate for disclosure in a criminal proceeding.²⁴

The Ethical Government Civil Attorney

Knowing Who the Client Is

The ethical duties of the government civil attorney are predicated upon a clear understanding of who the client is. The duties articulated in RPC 1.13, regarding the representation of an organization acting through its duly authorized constituents, apply to the representation of a government entity.²⁵ The attorney therefore represents the

CONTINUED ON PAGE 14 ►

HELD TO A HIGHER STANDARD

CONTINUED FROM PAGE 12

government entity acting through the government officials that are the entity's duly authorized constituents; the immediate attorney-client relationship exists between the attorney and the government officials acting in their official capacities on behalf of the government entity. However, in Nevada this representation carries a special responsibility under RPC 1.13(f):

In dealing with an organization's...constituents, a lawyer shall explain the identity of the client to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent.

Therefore, in Nevada the attorney has an affirmative duty to communicate to each government official with whom he or she has an immediate attorney-client relationship that the client is the government entity, not the official. Only by clearly establishing the boundaries of the attorney-client relationship and communicating that information can the attorney provide effective representation.

Government officials have a fiduciary duty to act in the public's best interest, and the attorney-client relationship between the government official and the attorney is tempered by this broader duty to the public.²⁶ The government civil attorney is held to a higher standard as a result, and has a corresponding duty to act in the best interests of citizens in the course of representing the government client. The attorney fulfills that duty primarily by providing timely and competent legal advice and representation to government officials and by the enforcement of Nevada law, which can limit the government entity's liability and protect taxpayer money.

Confidentiality of Information

Because transparency and accountability in government are essential to a free society, the government civil attorney must carefully balance the public's right to access with any legal or ethical constraints on his or her ability to disclose information or otherwise engage in public discourse. RPC 1.6 generally restricts the disclosure of information related to the representation of a client; however, subsection (b)(6) permits disclosure if required by another law. Nevada's public records law (NRS Chapter 239) and open meeting law (NRS Chapter 241) clearly fall within the scope of RPC 1.6(b)(6), but these are limited in turn by certain statutory exceptions, such as those for privileged attorney-client communications and attorney work-product.²⁷



RPC 1.6(b) works in tandem with RPC 1.13(b), regarding the referral to a higher authority of violations of law by someone acting on behalf of an organization. The comments to ABA Model Rule 1.13 reflect a different standard for the government civil attorney in determining how to proceed under the rule, attributable to the attorney's duty to act in the best interests of citizens in the course of representation:

In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.²⁸

Additional Ethical Considerations for All Public Lawyers

Conflicts of Interest

While RPC 1.7 requires all attorneys to refrain from the representation of clients whose legal interests are adverse, this ethical dictate does not necessarily preclude the attorney general, district attorneys and city attorneys from representing numerous agencies within a government entity,

in various capacities, consistent with their respective statutory responsibilities. Nor does the representation of an administrative agency which combines investigative, prosecutorial and judicial functions necessarily constitute a conflict of interest.²⁹

RPC 1.11 places specific limitations on current and former public lawyers from participating in matters in which an attorney participated “personally and substantially” before moving into or out of public service.³⁰ The rule permits screening to avoid imputed disqualification; however, in criminal prosecutions vicarious disqualification may be the appropriate action, depending upon the specific facts involved:

[V]icarious disqualification may be warranted in extreme cases where the appearance of unfairness or impropriety is so great that the public trust and confidence in our criminal justice system could not be maintained without such action. Such an extreme case might exist even where the state has established an effective screen precluding the individual lawyer’s direct or indirect participation in the prosecution.³¹

Communicating with Unrepresented or Represented Persons

Although prosecutors and government civil attorneys serve the interests of all citizens, they do not represent private parties (or government employees in personnel matters) and should take care when interacting with the public in *any* capacity (including education outreach) to ensure that constituent service does not run afoul of any legal or ethical constraints. They must be vigilant against any potential violation of RPC 4.2 – the no-contact rule³² – or RPC 4.3, especially in matters where the interests of a private party may be adverse to the interests of the government. When initiating a prosecution, RPC 3.8(b) further requires that the prosecutor make reasonable efforts to assure the accused is advised of the right to counsel and afforded a reasonable opportunity to obtain counsel, while RPC 3.8(c) prohibits the prosecutor from seeking to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons.³³

The Consequences of Ethical Violations

Prosecutors enjoy absolute immunity for acts that are “intimately associated with the judicial phase of the criminal process” and qualified immunity for acts deemed investigative or administrative in nature.³⁴ Government civil attorneys also generally possess

statutory and common law immunity in the performance of their duties.³⁵ Nevertheless, an ethical violation by a public lawyer can have serious ramifications for citizens. Prosecutorial misconduct may result in a mistrial or reversal on appeal – or worse, a wrongful conviction. A failure to provide competent legal representation to government officials may result in liability for the government entity and cost taxpayers money. When public lawyers err it can also undermine confidence in government and the justice system.

Conclusion

In *A Man for All Seasons*, Sir Thomas More’s dedication to the rule of law forms the basis of his moral code and guides his actions. As a result, More holds himself to a higher standard than his contemporaries, and even his king. Nevada’s public lawyers are likewise held to a higher ethical standard in representing the sovereign and enforcing Nevada’s laws for the protection and benefit of its citizens. **NL**

CONTINUED ON PAGE 16 ►

HELD TO A HIGHER STANDARD

CONTINUED FROM PAGE 15

BRETT KANDT serves as Special Deputy Attorney General for the Nevada Attorney General and Executive Director of the Nevada Prosecution Advisory Council. He is chair of the State Bar of Nevada's Public Lawyers Section.

- 1 Robert Bolt, *A Man For All Seasons* 65-66 (Random House 1962).
- 2 See, e.g., American Bar Association (ABA) Prosecution Function Standards (3d Ed. 1993); National District Attorneys Association (NDAA) National Prosecution Standards (2d Ed. 1991).
- 3 295 U.S. 78, 88 (1935), cited in *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987); see also RPC 3.8 (Special Responsibilities of Prosecutor); ABA Prosecution Function Standard § 3-1.2 (3d Ed. 1993); NDAA National Prosecution Standard § 1.1 (2d Ed. 1991).
- 4 *Wayte v. United States*, 470 U.S. 598, 607 (1985); see also NDAA National Prosecution Standards §§ 42.1 and 43.1 (2d Ed. 1991). NDAA National Prosecution Standard § 1.3 provides that "[t]he prosecutor . . . must place the rights of society in a paramount position in exercising prosecutorial discretion."
- 5 ABA Prosecution Function Standard § 3-3.9(a) (3d Ed. 1993); NDAA National Prosecution Standard § 43.3 (2d Ed. 1991); see also ABA Model Rule of Professional Conduct Rule 3.8 cmt. 1 (2002).
- 6 *Wayte v. United States*, 470 U.S. at 608.
- 7 ABA Prosecution Function Standard § 3-3.9(f) (3d Ed. 1993); NDAA National Prosecution Standard § 43.2 (2d Ed. 1991).
- 8 ABA Prosecution Function Standard § 3-3.9(b) (3d Ed. 1993); NDAA National Prosecution Standards §§ 42.3, 42.4, and § 43.6 (2d Ed. 1991).
- 9 Victims of crime have a constitutional right to be:
 - Informed, upon written request, of the status or disposition of a criminal proceeding at any stage of the proceeding;
 - Present at all public hearings involving the critical stages of a criminal proceeding; and
 - Heard at all proceedings for the sentencing or release of a convicted person after trial.
 Nevada Const. art. I, § 8. Statutory rights include NRS 178.5698; NRS 178.5696(1); NRS 178.571; NRS 176.015(3) and (4); NRS 200.601(1) and (2); NRS 205.980(3); and NRS 213.130(4).
- 10 NDAA National Prosecution Standards §§ 26.1-26.7 (2d Ed. 1991).
- 11 373 U.S. 83, 87 (1963), cited in *State v. Bennett*, 119 Nev. 589, 599-603, 81 P.3d 1, 8-10 (2003).
- 12 See also ABA Prosecution Function Standard § 3-3.11 (3d Ed. 1993); NDAA National Prosecution Standard § 25.4 (2d Ed. 1991).
- 13 *United States v. Bagley*, 473 U.S. 667, 676 (1985).
- 14 *Strickler v. Greene*, 527 U.S. 263, 281 (1999).
- 15 *United States v. Agurs*, 427 U.S. 97, 107 (1976).
- 16 *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).
- 17 *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976).
- 18 *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Dretke*, 545 U.S. 231 (2005).
- 19 *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); see also *Anderson v. State*, 121 Nev. 511, 517, 118 P.3d 184, 187 (2005).
- 20 See, e.g., *Moser v. State*, 91 Nev. 809, 544 P.2d 424 (1975); *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (1985); *Williams v. State*, 103 Nev. 106, 734 P.2d 700 (1987); *McGuire v. State*, 100 Nev. 153, 677 P.2d 1060 (1984); *Yates v. State*, 103 Nev. 200, 734 P.2d 1252 (1987); *Howard v. State*, 106 Nev. 713, 800 P.2d 175 (1990); *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991); *Lisle v. State*, 113 Nev. 540, 937 P.2d 473, 481 (1997); *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001); *Rowland v. State*, 118 Nev. 31, 39 P.3d 114 (2002); *Anderson v. State*, 121 Nev. 511, 118 P.3d 184 (2005); *Pantano v. State*, 122 Nev. 782, 138 P.3d 477 (2006); *Rose v. State*, 123 Nev. 24, 163 P.3d 408 (2007). The cited cases provide a good overview on prosecutorial misconduct at trial; further information on relevant Nevada case law is available from the Nevada Prosecution Advisory Council at www.nvpac.state.nv.us.
- 21 The limitations of the rule are aimed at extrajudicial statements that can violate the right to a fair trial, specifically: (1) comments likely to influence the outcome of a trial, and (2) comments likely to prejudice the jury venire. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).
- 22 See also ABA Model Rule of Professional Conduct Rule 3.8 cmt. 5, 6 (2002); ABA Prosecution Function Standard § 3-1.4 (3d Ed. 1993).
- 23 NDAA National Prosecution Standard § 33.1 (2d Ed. 1991).
- 24 NDAA National Prosecution Standards §§ 34.1-34.2 (2d Ed. 1991); see also ABA Model Rule of Professional Conduct Rule 3.6 cmt. (2002).
- 25 See ABA Model Rule of Professional Conduct Rule 1.13 cmt. 9 (2002) ("The duty defined in this Rule applies to governmental organizations.").
- 26 See, e.g., *U.S. v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest); see also NRS 281A.020(1)(a) (public office is a public trust and shall be held for the sole benefit of the people).
- 27 See, e.g., NRS 241.015(2)(b)(2) (open meeting law exception for attorney-client gathering of quorum); Op. Nev. Att'y Gen. No. 2001-37 (December 31, 2001) (limits of work-product doctrine).
- 28 ABA Model Rule of Professional Conduct Rule 1.13 cmt. 9 (2002).
- 29 See, e.g., Op. Nev. Att'y Gen. No. 97-01 (January 16, 1997).
- 30 See also ABA Model Rule of Professional Conduct Rule 1.11 cmt. (2002).
- 31 *Collier v. Legakes*, 98 Nev. 307, 310, 646 P.2d 1219, 1221 (1982).
- 32 See also *Faison v. Thornton*, 863 F.Supp. 1204, 1213 (D.Nev. 1992) (scope of no-contact rule); *Palmer v. Pioneer Inn Assocs.*, 118 Nev. 943, 960-61, 59 P.2d 1237, 1248 (2002) ("managing-speaking agent test" for organizations); *Byers v. City of Reno*, 628 F.Supp. 182, 183 (D.Nev. 1986) (no-contact rule applies to all employees in action brought against unknown employees); *Erickson v. Newmar Corp.*, 87 F.3d 298, 302 (9th Cir. 1996) (no-contact rule applies to opposing party's expert witnesses).
- 33 See also ABA Prosecution Function Standard § 3-3.10(a) and (c) (3d Ed. 1993); NDAA National Prosecution Standards §§ 24.1-24.5 (2d Ed. 1991).
- 34 *Imbler v. Pachtman*, 424 U.S. at 430 (1975); *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (2008).
- 35 NRS 41.032; see also *County of Washoe v. District Court*, 98 Nev. 456, 458, 652 P.2d 1175, 1176 (1982).