

published on January 30, 2007 in the

New York Law Journal

The D.A. Scandal in the Duke University Case:

Michael B. Nifong's Violation of the North Carolina Rules of Professional Conduct⁽¹⁾

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April 2006 marked the beginning of the nightmare for three members of the Duke University men's lacrosse team when the Durham County District Attorney, Michael B. Nifong, charged them with raping a stripper at a lacrosse team party. The charges were filed even though Mr. Nifong never interviewed the victim.

He was quick to comment during this prosecution, however, that the defendants were guilty of the rape. Reviled by faculty and senior administrators at Duke who had prejudged them (and all members of the nationally ranked lacrosse team) and by the news media that escalated the feeding frenzy,⁽²⁾ these three men faced the dark and dirty side of the criminal justice system, or what Norman Mailer once described as "the belly of the beast."⁽³⁾

Lack of Evidence

As events unfolded, these men watched the case brought by Mr. Nifong unravel. The victim simply could not keep her story straight, only lately admitting that one of the defendants did not rape her. Although the DNA laboratory findings ultimately exonerated the men from any rape charge, in the initial report produced to defense counsel, Mr. Nifong chose to withhold the exculpatory evidence from the defendants. Their DNA, we learned in late December 2006, simply was not present on the person or property of the victim, while DNA from other men was present.

It has also been reported that the photo identification was so seriously flawed that any in-court identification by the victim might be thrown out. We learned that Mr. Nifong did not meet the victim to assess her story against the evidence and never agreed to hear or review the defendants' evidence, although requested to do so by counsel. Additionally, we learned that Mr. Nifong, who was running for re-election as county prosecutor, held

numerous press conferences and made highly disparaging remarks about the defendants, describing them as "hooligans" whose "daddies could buy them expensive lawyers." It has been reported in fact that Mr. Nifong, by his own account, gave 50 to 70 interviews in a one-week period.

On December 22, 2006 Mr. Nifong dropped the rape charges against the defendants and subsequently on January 12, 2007 his request to resign was accepted by the State Attorney General.

The Criminal Case Unravels Based on the D.A.'s Conduct

The case also unraveled because Mr. Nifong cavalierly violated the North Carolina Rules of Professional Conduct (the "Bar Rules"). Mr. Nifong chose what to disclose. For example, the DNA report given to Mr. Nifong by the DNA lab shortly after the indictment was filed - and turned over to the defense attorneys as required by North Carolina law - omitted exculpatory evidence that proved the DNA samples found on the person and underwear of the victim were from other men and that that none of the genetic material matched any of the defendants or any other lacrosse player.

Mr. Nifong conducted this investigation with such disregard for the code of professional responsibility governing the conduct of a prosecutor in North Carolina that on December 28, 2006, the North Carolina Bar filed ethics charges against him, accusing him of making public statements that were "prejudicial to the administration of justice" and of engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation."(4)

The initial complaint identified scores of examples in its 181 separate numbered paragraphs of Mr. Nifong's disregard of the rules governing prosecuting attorney conduct. That complaint was superseded on January 24, 2007 by a complaint including over 100 additional numbered paragraphs specifying how Mr. Nifong withheld or failed to provide potentially exculpatory DNA evidence, lied to the Court and counsel and made false statements to the Grievance Committee after it sent him a notice of grievance and he responded.(5)

The Initial Bar Complaint

The complaint is replete with his direct quotes to the news media of untrue and misleading extrajudicial statements that the State Bar claims were calculated by him to prejudice the rights of the defendants. While making the statements he did to the news media, Mr. Nifong did not adhere to Bar Rule 3.6. That rule governs what a lawyer may say to the media concerning the litigation. Under Rule 3.6 the attorney is strictly admonished to limit statements to those contained in the charging instrument.

Despite the limitations within Rule 3.6, Mr. Nifong complained that "none of the lacrosse players were cooperating with the prosecution, stating "one would wonder why one needs an attorney if one was not charged and had not done anything wrong". As the complaint alleges these statements constituted "improper commentary on the lacrosse team

members' alleged failure or refusal to make a statement to law enforcement authorities and upon the lacrosse team members' alleged invocation of their constitutional rights." (Complaint 43).

Mr. Nifong made comments to news media concerning the results of tests performed as part of the investigation, including the DNA tests that turned out were deliberately reported to conceal exculpatory evidence. (Complaint 54) Despite knowing, from a review of police reports, that the victim stated no condoms were used in the attack, Mr. Nifong suggested a reason why no DNA could be found linking the defendants to the victim by claiming that they used condoms. (Complaint 124)

Mr. Nifong commented to the news media that "I am convinced there was a rape, yes, sir." In so doing, he improperly asserted in extrajudicial remarks that they were guilty. (Complaint 76, 84)

Mr. Nifong commented on the defendants' exercise of their 5th Amendment rights telling the news media "[t]hey don't want to admit to the enormity of what they have done." (Complaint 103) He made these statements knowing defense counsel in fact had sought to meet him to present the evidence exonerating the defendants, but he declined to do so.(6)

Mr. Nifong referred to the defendants as a bunch of hooligans and complained that people might be covering up for the hooligans. (Complaint 137) By any construction of the Bar rules, this was improper commentary about the character, reputation and credibility of the accused men. (Complaint 140)

False Statements to the Court and Counsel

In the superseding complaint, the North Carolina Bar broadened the charges. The superseding complaint charges Mr. Nifong with failing to provide a complete report containing the results of the DNA tests that would exculpate the defendants, in violation of North Carolina Gen. Stat. 15A-282, 15A-903(a)(1) and 15A-903(a)(2) (Complaint 227).

In the superseding complaint, Mr. Nifong also was charged with misrepresentations and false statements to court and opposing counsel. (Complaint 230 et seq.) The complaint details scores of examples of his false statements and misrepresentations. According to the superseding complaint, he falsely stated "the State is not aware of any additional material or information which may be exculpatory in nature with respect to the Defendant." (Complaint 230) The complaint charges that he made false statements to the Court, as well; for example, at a May 18, 2006 hearing, the Court asked him if he had provided the defendants all the discovery materials and he stated "I've turned over everything I have." (Complaint 235)

Additionally, the superseding complaint charges that Mr. Nifong made "misrepresentations and false statements to the State Bar's Grievance Committee"

beginning on December 20, 2006 when the Grievance Committee delivered its notice of grievance to him; the superseding complaint charges that his responses were false and misleading. For example, in his responsive letter he stated he did not realize that the potentially exculpatory DNA test results were not included in the lab reports from May 12 until he received a December 13 motion to compel discovery, and the Bar complaint charges that such statements were "knowingly false statements of material fact made in connection with a disciplinary matter." (Complaint 288)

The examples of such false and misleading statements to Court and counsel are set forth in the additional 100 numbered paragraphs in the superseding complaint. These new paragraphs charge that Mr. Nifong:

- failed to make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions, including all evidence or information known to him that tended to negate the guilt of the accused in violation of Rule 3.8 (d);
- failed to disclose evidence or information that he knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions in violation of Rule 3.4 (d) (3);
- intentionally limited the lab report to exclude potentially exculpatory evidence, and by doing so knowingly disobeyed the rules of the court in violation of Rule 3.4 (c), and further requested a person other than a client to refrain from voluntarily giving relevant information to another party in violation of Rule 3.4 (f);
- repeatedly misrepresented to the Court and counsel that he provided all potentially exculpatory evidence, violating Rule 3.3 (a) (1) and Rule 8.4 (c);
- made false statements of material fact or law to a tribunal and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by representing or implying to the Court that he was not aware of potentially exculpatory DNA test results or alternatively was not aware of their exclusion from the lab report at the beginning of a hearing before the court on December 15, 2006;
- made misrepresentations to the Grievance Committee concerning the DNA evidence and test results, violating Rule 8.4 (c); and
- engaged in a pattern of misconduct and violations constituting a systematic abuse of prosecutorial discretion in the underlying criminal cases.

The Duke University case is indeed a nightmare for the defendants -- one they did not choose. It has become a nightmare for Mr. Nifong, based on his decisions. It may prove a far worse nightmare for him, as his actions may cost him his license to practice law, and he might face criminal charges of obstruction of justice, false statements and perjury.(7)

The North Carolina Bar Rules relating to Prosecutors

Prosecutors are required to conduct themselves consistent with the highest ethical standards as ministers of justice. Comment No. 1 to Bar Rule 3.8 introduces the subject of the special responsibilities of the prosecutor with this admonition: "A prosecutor has

the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict." Based on the allegations in the Bar complaint, it appears that Mr. Nifong treated this prosecution as a circus turning his duty to seek justice into one guided solely by what he could achieve under the mere "morals of the marketplace" (Meinhard v. Salmon, 249 N.Y. 458 (1928)). A brief discussion of the applicable Bar Rules proves just that.

According to Rule 3.6 (a) a lawyer participating "in the investigation or litigation of a matter shall not make an extrajudicial statement 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 an adjudicative proceeding in the matter."

Rule 3.8 of the Bar Rules directly relates to the conduct of the attorney as prosecutor. Pursuant to Rule 3.8 (f), this rule admonishes the prosecutor that he shall refrain from "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused". Rule 3.8 (d) imposes a duty upon the prosecutor to "make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."

Comment No. 6 specifies that paragraph (f) supplements Rule 3.6 prohibiting extrajudicial statements that have a substantial likelihood of prejudicing and adjudicatory proceeding. It admonishes the prosecutor that in the context of criminal prosecution, an "extrajudicial statement can create the additional problem of increasing public condemnation of the accused." Comment No. 6 also makes clear that a prosecutor should "avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused."

Comment No. 1 to Rule 3.8 admonishes the prosecutor that he "has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Comment No. 4 admonishes the prosecutor to be "aware of the discovery requirements established by statutory law and case law, specifically referencing N.C.G.S.A. 15A-903 et seq. and Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. U.S., 405 U.S. 150 (1972). Brady and Giglio stand for long established law that a prosecutor must disclose exculpatory evidence as well as evidence that may raise questions about the credibility of a complaining witness.

By continuously making extrajudicial comments about the defendants, other witnesses, supporting a version of the victim's story (without having interviewed her) and inflaming the public to hold the defendants to scorn and ridicule, lying to the Court and counsel, and to the Grievance Committee, as detailed in the Bar complaint, Mr. Nifong violated Rule 3.4 and 3.6. By failing to turn over exculpatory evidence relating to the DNA tests

and directing the lab to conceal the exculpatory evidence from the defendants, he violated Rule 3.8.

ABA Standards: Failing to Interview the Victim

Indeed by failing to interview the victim, and turning down defense counsel's offer to consider the defense evidence prior to indictment, or thereafter, Mr. Nifong appears to have conducted this prosecution in direct violation of Standard 3-3.4 of The ABA Standards relating to the Prosecution Function. That Standard recognizes that the decision to institute criminal proceedings is the primary responsibility of the prosecutor. On the issue of the duty to interview the complaining witness - something that Mr. Nifong chose not to do -- Standard 3-3.4 (d) recognizes that only the prosecutor, not the police officer initially at the scene, is by virtue of his power to institute criminal charges in the position to evaluate the quality of the evidence to support a conviction.

ABA Standard 3-3.11 admonishes the prosecutor not to ignore facts. "A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether disclosure to the defense may be required. The duty of the prosecutor is to acquire all the relevant evidence without regard to its impact on the success of the prosecution."

Conclusion

There are sure to be many more developments in the story of how Mr. Nifong conducted the prosecution of the three Duke University students that will have direct impact on his license to practice law. This is a story that squarely teaches that "rushing to judgment" without wisely stepping back and reviewing the evidence runs directly counter to the ethical obligations that govern how attorneys are required to conduct themselves. The harm of such ignorant conduct is that others are grievously wounded. Familiarity with, and adherence to, the code of professional responsibility provides the foundation for attorneys to avoid abuse of their license and harm others by so doing.

Notes

(1) Henry Korn served as a Member of the Departmental Disciplinary Committee First Judicial Department in New York from 1982 through 1988. The Committee was established by the Appellate Division of the Supreme Court to hear cases of lawyer misconduct and report to the Appellate Division as to the appropriate punishment to be imposed on an attorney who violated the Code of Professional Responsibility in New York. Prior to serving as a Member of the Committee and hearing such cases, Mr. Korn served as an Assistant U.S. Attorney for the Southern District of New York from 1976-81 in its Criminal Division.

(2) The Duke story was a field day for news media, as well as network television. Every media representative jumped into this story to rush the "facts" to the public. Leading news organizations, including The New York Times, San Francisco Chronicle, Associated Press, and Los Angeles Times, all sent staff to Durham and all rushed to meet deadlines and most often fed the frenzy of this story, emphasizing Town/Gown discord and racial considerations for their story lines. The daily involvement of these out of state newspapers is graphically compiled in http://en.wikipedia.org/wiki/Duke_University_lacrosse_team_scandal

(3) The term "in the belly of the beast" was used by Norman Mailer in his best selling work, co-authored with Jack Henry Abbott, *In the Belly of the Beast: Letters from Prison* (Random House 1981), to describe the experience that one charged with a crime faces as he works his way through the criminal justice and if sentenced, within the prison system, blind in a practical and metaphysical sense by the defendant's lack of understanding (thus, darkness) of the chambers where the business of criminal justice and punishment is conducted.

(4) <http://sports.yahoo.com/top/news>; Associated Press 28 December 2006. The North Carolina Bar Association formal complaint can be found at <http://www.wral-tv.com/news/local/story/1120129/>.

(5) The superseding Bar complaint can be found at www.thesmokinggun.com.

(6) As any current and former prosecutor or law enforcement official will admit, should defense counsel or his client wish to disclose the defense evidence prior to the filing of criminal charges, or at any time pre-trial, it would be professionally irresponsible to decline such an invitation.

(7) See, e.g., N.C.G.S.A. sections 14-223, 14-225, and 14-209.

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