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# If You Prosecute Criminal Misdemeanors, You Must Read This

by Keith A. Call

The American Bar Association's Standing Committee on Ethics and Professional Responsibility (the Committee) recently took aim at a problem it perceives among prosecutors of misdemeanor crimes. The Committee's recent ethics opinion (the Opinion) seeks to promote fairness in the context of an overwhelming load of misdemeanor prosecutions. See ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op. 486 (May 9, 2019).

### Reported Evidence of Unethical Plea Bargaining Practices

According to the Opinion, researchers estimate that misdemeanors make up approximately 80% of state criminal dockets. Misdemeanor prosecutions have doubled since 1972, with the expansion concentrated in "communities of color." *Id.* at 3 (citation omitted). Collateral consequences for misdemeanor defenses are significant and "can lead to denial of employment, expulsion from school, deportation, denial of a professional license, and loss of eligibility for a wide variety of public services." *Id.* at 3–4 (citations omitted).

The vast majority of misdemeanor defendants plead guilty at their initial appearances, often with no legal representation. The administrative burden on prosecutors and judges resulting from this increase in misdemeanor prosecutions can put intense pressure on a justice system that demands fairness. *Id.* at 4. The United State Supreme Court has warned, "[t]he volume of . . . cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result." *Id.* (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972) (omission in original)).

The Opinion identifies several methods of plea negotiation that the Committee deems unethical. These include:

- requiring or encouraging plea negotiation with a prosecutor before a right to counsel has been raised;

- using delay or the prospect of a harsher sentence to dissuade the accused from invoking the right to counsel;
- gathering arrestees into court *en masse* and instructing them, prior to any advice regarding the right to counsel, that they must tell the court clerk how they intend to plead;
- using forms to obtain waivers of the right to counsel either as a condition of negotiating a plea or following a negotiation absent proper confirmation that the defendant understands the forms and the rights being waived;
- permitting police officers involved in the investigation of a crime or arrest to act as prosecutors and negotiate pleas;
- advising defendants of the right to counsel but failing to provide any procedure for asserting or validly waiving that right before requiring plea negotiation with a prosecutor; and
- failing to inform indigent defendants of the procedure for requesting a waiver of court application fees associated with the assignment of a state-subsidized defense lawyer.

*Id.* at 5–6 (citations omitted). Invoking several different Model Rules of Professional Conduct, the Opinion condemns each of these practices as a violation of the Model Rules of Professional Conduct.

*KEITH A. CALL is a shareholder at Snow, Christensen & Martineau. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation.*





## The Prosecutor's Ethical Responsibilities in Plea Bargaining

The Opinion places particular emphasis on Model Rule 3.8(a-c) (Special Responsibilities of a Prosecutor), which provides:

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; . . .

Invoking this rule, the Committee opines that a prosecutor must exercise informed discretion with respect to the prosecution of every misdemeanor charge and may not uncritically rely on a police report or citation and a criminal background check. The Committee notes that if the prosecutor's workload is too heavy to permit independent assessment of each charge, he or she may not be able to fulfill his or her ethical responsibilities. Supervising prosecutors must control workloads so each matter can be handled ethically and competently. Opinion 486 at 8–9.

The Opinion also invokes Model Rules 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), and 8.4(c) (Misconduct) to discuss a prosecutor's plea bargains with an accused individual who is not represented. This includes individuals who are ineligible for state-subsidized counsel, those who elect to proceed pro se, and those who are still in the process of securing counsel. The rules require the prosecutor to avoid giving the impression that he or she is "disinterested" and prohibit or limit a prosecutor from giving legal advice. Opinion 486, at 13–14. The rules also impose on the prosecutor a "heightened" duty to make sure the accused's acceptance of a plea is "voluntary, knowing, and intelligent." *Id.* at 14. For example, it is unethical, according to the Opinion, for a prosecutor to omit known collateral consequences of accepting a plea. *Id.* at 1415.

Finally, the Opinion imposes a continuing duty on the prosecutor after the plea is accepted. If, during the plea

colloquy with the court, the prosecutor learns that the accused's acceptance of a plea or waiver of the right to counsel is not "voluntary, knowing, and intelligent," then "the prosecutor is obliged to intervene." *Id.* at 15 (citation omitted). "The prosecutor cannot . . . knowingly permit an unconstitutional plea to be entered by an unrepresented accused." *Id.*

## Conclusion

While the Model Rules of Professional Conduct and ABA ethics opinions are not necessarily binding in Utah, they are certainly instructive and persuasive. The Opinion is devoid of any reference to any particular practice in Utah. As a civil practice lawyer, I am unclear on the extent to which the identified practices occur in Utah. But I am quite confident that the ABA's Opinion 486 will engender significant discussion among the Utah criminal bar, as it should.

*Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.*