THE QUEST FOR JUSTICE 2008

Prosecutorial Ethics And Professionalism (Third Edition)
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(Third Edition)

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ABOUT THE AUTHOR

JEFFREY J. JAHNS. Jeff is the recipient of the 2004 Washington State Bar Association Professionalism Award “in recognition of his impeccable professionalism and unwavering dedication to improving the justice system in Kitsap County and throughout Washington.” He also received the 1995 Professionalism Award given by the Kitsap County Bar Association “in recognition of sustained excellence in the practice of law.” Jeff was one of only four prosecutors named a Super Lawyer by Washington Law and Politics in 2007. He has previously been named a Super Lawyer several times.

Jeff received his undergraduate degree from the University of Puget Sound in 1978 and his law degree from the University of Puget Sound School of Law in 1981. He was a partner in the law firm of Kindig & Jahns in Tacoma, Washington from 1982 to 1986. Jeff was an associate in the Port Orchard, Washington law firm of Ronald D. Ness & Associates from 1987 to 1994. Jeff joined the Kitsap County Prosecuting Attorney’s Office on January 1, 1995, and is the supervising attorney of the District and Municipal Court Division.


Jeff is also the author of Chapter 18—Criminal Law Practice: Ethical Issues for Prosecutors in the WASHINGTON LEGAL ETHICS DESKBOOK published by the Washington State Bar Association.

Any comments made herein are those of the author and not necessarily those of the Kitsap County Prosecutor’s Office.
The Quest for Justice—2008 Third Edition

This QUEST FOR JUSTICE prosecutorial ethics manual began in 1996 when the author was asked to speak on the topic of prosecutorial ethics at the Washington Association of Prosecuting Attorney’s spring seminar in Olympia. Given that the author had little knowledge on the issue, admittedly the 1996 effort was lacking in both substantive materials and in presentation. Despite the poor performance, WAPA mysteriously gave the author a second chance to improve. Over the next decade, the manual grew in size and sophistication, as did the presentation.

As a former criminal defense attorney, the author had some knowledge about prosecutorial ethics through study of the ABA Standards for Criminal Justice. The QUEST FOR JUSTICE for over a decade analyzed these Standards, focusing on the prosecutorial ethics discussion in chapter 3 of the ABA’s four volume 1986 second edition.

Unbeknownst to the author until reading a new Washington appellate case in August 2004, in 1988 the ABA began the process of adopting a third edition of the ABA Standards which was completed in 1993. As noted in the Introduction to the ABA’s third edition, the Standards were revised in large part to “reflect the dramatic developments in the field of legal ethics” since the second edition Standards were published. Also important from a prosecutorial ethics perspective was the 1991 second edition of the National District Attorneys Association’s NATIONAL PROSECUTION STANDARDS, which was incorporated into the third edition of the ABA Standards.

After the author’s shock dissipated over realization that the ABA Standards discussed in the QUEST FOR JUSTICE for over a decade were outdated, the time came to completely update the QUEST FOR JUSTICE by focusing on the third edition of the ABA Standards and more recent caselaw. Thus, the 2005 second edition of the QUEST FOR JUSTICE.

The time has come again to update the QUEST FOR JUSTICE. During the author’s spring 2008 drafting of the prosecutorial ethics’ chapter for the WASINGTON LEGAL ETHICS DESKBOOK, the author took a critical look at the QUEST FOR JUSTICE’S formatting and decided to make the manual much shorter by eliminating lengthy quotes from cases and statutes. The 2005 version is simply too long at 375 pages, and is somewhat unmanageable as a convenient and quick resource. Also, the 8 and 10 point fonts used are simply becoming too small for the author to read! The focus in this new edition will be shifted from the ABA Standards to caselaw, statutes and other materials of interest. Thus, this 2008 third edition of the QUEST FOR JUSTICE is born.

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PART I – INTRODUCTION

“What Should I Do?”

We have studied ethics in law school, and gone to seminars on the topic. Yet, the study of ethics and the Rules of Professional Conduct focuses almost exclusively on the minimum standards below which no lawyer may ethically fall. While concentrating on what an attorney can do is certainly an appropriate starting point in learning the basic rules, the far more difficult task is to teach, and learn, professionalism, or what an attorney should do. For prosecutors, the task is perhaps even more difficult since we represent the public, who appropriately demand the highest standard of professionalism of their servants.

The Preamble to the Rules of Professional Conduct discusses the concept that lawyers are the “guardians of the law” playing a vital role in the preservation of society. Such a noble cause, and responsibility, cannot be taken lightly. The Preamble continues: “Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards.”

How should one examine his or her conscience, and act accordingly? We have many court rules and cases describing a myriad of procedural matters (the number of days’ notice required, discovery requirements, etc.). A prosecutor could ethically follow these rules exactly, and yet likely decrease the respect for law among the criminal justice system participants and the public.

We are the “guardians of the law,” and must begin discussing our professional responsibility by asking “What should I do?”

Why Study Ethics And Professionalism?

Before Watergate (a really small crime that become a really big political event in 1973), little if anything was discussed about an attorney’s ethical and professional responsibility. As a result of Watergate, many lawyers in President Nixon’s administration were convicted and imprisoned. The President, himself an attorney, was impeached. Spiro Agnew, the Vice President, pleaded nolo contendere and was convicted of income tax evasion. Both resigned in disgrace.

The bar soon recognized the public’s outrage at attorneys and the need to deal with ethics. Law school courses were developed and an ethics component was added to the bar examination. Eventually, ethics was added as a mandatory continuing legal education requirement.

Law school and CLE courses generally teach the black letter law on ethics. Do not do this, or this, or this. Professionalism, though, is often rarely discussed in these courses because the topic is much more difficult to teach. Deciding how one should act
ultimately rests on one’s own values.

Despite the efforts of many, it is certainly safe to say that the public’s respect for lawyers has not increased since Watergate days. The author submits that without serious discussion and development of a moral code concerning whether an attorney “should” take a particular action, the public’s confidence in lawyers will continue to erode. As “guardians of the law,” we all share the blame.

**Should Heat Of The Battle Excuse All Improper Conduct?**

Most people who go to law school do so with an aspiration towards making a difference by helping people seek justice. Yet law school focuses on teaching the rules, the black letter law. This methodical training of the rules can have the result of teaching adherence to the rules at all costs. After all, we are taught by experiencing the cross-examination technique of the Socratic Method to learn the rules. And if this cross-examination technique is a bit uncomfortable for the law student, well, too bad.

So when lawyers deal with each other “in the heat of battle,” it is almost instinctual to treat the opposing party as we were taught. Effective cross-examination, after all, is supposed to be the best method of seeking truth from a witness. If the witness and opposing counsel need to be cross-examined ala Socrates to get to the truth, so be it.

Yet use of this “heat of the battle” means to achieve the end of truth and justice is fraught with abuse. Our role as “guardians of the law” cannot allow us to achieve justice at the expense of personal attack and indignity along the way.

The quest for justice, or the means, must be as righteous as our justice goal. Anything less demeans the law and our profession, and diminishes one’s ability to achieve justice.

**What Is Your View On Being An Attorney?**

How would you describe your view of being a lawyer? Is your job an occupation? A profession? A vocation?

ocularization. 1. an activity in which one engages

professional. 4: a: a calling, requiring specialized knowledge and often long and
intensive academic preparation; b: a principal calling, vocation, or employment

vocation. 1. a summons or strong inclination to a particular state or course of
action

WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1991), at 817, 939, 1320

Do you simply occupy your time as a prosecutor for a paycheck? Or is being a prosecutor a calling based upon a passion for justice?

You probably know attorneys and prosecutors in each category. Which definition best describes you?
**Why Don’t People Like Lawyers? Our Moral Ambiguity.**

Most attorneys have a set of values and beliefs that are followed at home and in their personal lives. Yet, often these values are ignored when dealing with opposing counsel and parties. Do you perceive a tension between your own values and how you act in court? The public pays a significant amount of taxes to support the criminal justice system. It expects its public servants to act morally, ethically, and based on reason, not emotion.

One of the main reasons the public dislikes and distrusts attorneys is our moral ambiguity. We have been trained to zealously represent clients within ethical rules. Yet these “what can I do” rules (or from the public perspective “what can I get away with” rules) fail to in any way take into account one’s own values and belief system. We applaud ourselves for meeting the minimum standards of our ethical rules. Yet this thoughtless allegiance to the minimum standards hardly increases the public’s faith in our profession’s alleged claim to maintain the “highest standards of ethical conduct” proclaimed by the Preamble of the Rules of Professional Conduct.

It is this moral ambiguity that the public notes when we tout our self-regulation. The public snickers because the public does not respect morally ambiguous positions. Children are taught right from wrong and to follow the Golden Rule when dealing with others. Yet even these basic concepts of treating others with respect and dignity appear lost on lawyers and prosecutors in almost any courtroom on any given day.

Our focus on following the “letter of the law” and instinctive adherence to its rules does not translate into what the public perceives as a commonsense understanding of right versus wrong. Yet commonsense and right versus wrong are precisely what we prosecutors daily rely upon when arguing a case to a jury.

Prosecutors take an oath to support the constitutions and laws of the United States and the State of Washington. Case law, however, is filled with examples of prosecutorial error during all phases of a criminal case. The author believes that the embarrassingly high volume of cases citing prosecutorial error exist because the prosecutor failed to ask in good conscience “Should I do this?”

**On Being Happy, Healthy, And Ethical**

Notre Dame Associate Proffesor of Law Patrick J. Schiltz authored an extremely insightful discussion of our profession in Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand.L.Rev. 871, 872 (May 1999).

Dear Law Student:

I have good news and bad news. The bad news is that the profession that you are about to enter is one of the most unhappy and unhealthy on the face of the earth—and, in the view of many, one of the most unethical. The good news is that you can join this profession and still be happy, healthy, and ethical. I am writing to
Schiltz chronicles research studies showing that lawyers are among the most depressed people in America, with elevated rates of anxiety, hostility, and paranoia. Lawyers appear to be prodigious drinkers, and the little data available on drug usage is not encouraging. While study after study supports the proposition that marriage is good for people and divorce bad for many physical and psychological reasons, lawyers appear to rank high among professional divorce rates. Lawyers reportedly think about committing suicide and commit suicide more often than do non-lawyers. The limited information available indicates that the physical health of lawyers may not be much better than their emotional health.

Schiltz posits that people who suffer from depression, anxiety, alcoholism, drug abuse, divorce, and suicide to this extent are by almost any definition unhappy. The source of this unhappiness seems to be one thing all have in common—their work as lawyers.

After discussing causes for such unhappiness including the hours, the money and the “game,” Schiltz next focuses on the impact of ethics at 906-8 (footnotes omitted) (emphasis added):

At this point, I should say a few words about ethics. I hesitate to do so. I know that courses on legal ethics (or “professional responsibility”) are among the least popular courses in the law school curriculum—even less popular than courses on taxation. I realize that, by raising the topic of ethics, I risk making your eyes glaze over. At the same time, the legal profession is widely perceived—even by lawyers—as being unethical. Only one American in five considers lawyers to be “honest and ethical,” and “the more a person knows about the legal profession and the more he or she is in direct personal contact with lawyers, the lower (his or her) opinion of them.” This should concern you.

There are many reasons why ethics courses are so unpopular, but the most important is probably that law students do not think that they will become unethical lawyers. Students think of unethical lawyers as the sleazeballs who chase ambulances (think Danny DeVito in The Rainmaker) or run insurance scams (think Bill Murray in Wild Things) or destroy evidence (think Al Pacino’s crew in The Devil’s Advocate). Students have a hard time identifying with these lawyers. When students think of life after graduation, they see themselves sitting on the 27th floor of some skyscraper in a freshly pressed dark suit (blue, black, or gray) with a starched blouse or shirt (white or light blue) doing sophisticated legal work for sophisticated clients. Students imagine—wrongly—that such lawyers do not have to worry much about ethics, except, perhaps, when the occasional conflict of interest question arises.

Although much of Schiltz’ article discusses life in the big city law firm, the concepts apply equally to the prosecutor. Schiltz continues at 916-18 (footnotes omitted) (emphasis added):

Unethical lawyers do not start out being unethical; they start out just like you—as perfectly decent young men or women who have every intention of practicing law ethically. They do not become unethical overnight; they become unethical
just as you will (if you become unethical)—a little bit at a time. And they do not become unethical by shredding incriminating documents or bribing jurors; they become unethical just as you are likely to—by cutting a corner here, by stretching the truth a bit there.

Let me tell you how you will start acting unethically: it will start with your time sheets. One day, not too long after you start practicing law, you will sit down at the end of a long, tiring day, and you just won’t have much to show for your efforts in terms of billable hours. It will be near the end of the month. You will know that all of the partners will be looking at your monthly time report in a few days, so what you’ll do is pad your time sheet just a bit. Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform. However, you will promise yourself that you will repay the client at the first opportunity by doing thirty minutes of work for the client for “free.” In this way, you will be “borrowing,” not “stealing.” …

You know what? You will also likely become a liar. A deadline will come up one day, and, for reasons that are entirely your fault, you will not be able to meet it. So you will call your senior partner or your client and make up a white lie for why you missed the deadline. And then you will get busy and a partner will ask whether you proofread a lengthy prospectus and you will say yes, even though you didn’t. And then you will be drafting a brief and you will quote language from a Supreme Court opinion even though you will know that, when read in context, the language does not remotely suggest what you are implying it suggests. And then, in preparing a client for a deposition, you will help the client to formulate an answer to a difficult question that will likely be asked—an answer that will be “legally accurate” but that will mislead your opponent. And then you will be reading through a big box of your client’s documents—a box that has not been opened in twenty years—and you will find a document that would hurt your client’s case, but that no one except you knows exists, and you will simply “forget” to produce it in response to your opponent’s discovery requests.

Do you see what will happen? After a couple years of this, you won’t even notice that you are lying and cheating and stealing every day that you practice law. None of these things will seem like a big deal in itself—an extra fifteen minutes added to a time sheet here, a little white lie to cover a missed deadline there. But, after a while, your entire frame of reference will change. You will still be making dozens of quick, instinctive decisions every day, but those decisions, instead of reflecting the notions of right and wrong by which you conduct your personal life, will instead reflect the set of values by which you will conduct your professional life—a set of values that embodies not what is right or wrong, but what is profitable, and what you can get away with. The system will have succeeded in replacing your values with the system’s values, and the system will be profiting as a result.

What can a new prosecutor do to avoid replacing your values with the system’s potentially less honorable values? Schiltz argues that one must develop the habit of acting ethically, and continually focus on the ethical habit. Do not pad time sheets. Do not lie. If you falter, admit it to yourself and those impacted by your improper conduct,
and vow to improve.

Schiltz concludes by noting that it is never too late to change. So, as the 1970s taught us—Remember to smile often, and have a nice day. 😊

**Prosecutorial Challenges—Society And Justice**

The public’s perception of prosecutors is our reality. We are the people exercising this incredible power against the citizenry in the name of public safety. You are the prosecutor’s office when anyone deals with you. What message do your activities send?

Prosecutors inherently serve two masters—society and justice. Yet, society’s desire for a conviction in a particular case often directly conflicts with a prosecutor’s duty to seek justice in obtaining a verdict free of prejudice and passion, and based solely on admissible evidence and reason. GERSHMAN, PROSECUTORIAL MISCONDUCT, at viii-x (1996).

It is easy to deal professionally with an opponent who treats one with respect and courtesy, and who does not use the rules as a sword to attack at any cost. Yet it is hardly virtuous to treat another with respect only when treated similarly.

The true challenge to one’s professionalism comes when dealing with the opponent who lacks a similar moral compass. It is at this time that a prosecutor’s moral character is put to the test. Your response will ultimately determine whether the means you use to obtain a conviction are tainted, or whether justice is truly realized.

Supervisors also must be mentioned. Do you work for honest people who seek justice by encouraging professional conduct of subordinates? Or does your supervisor’s desire for “aggressive” prosecutors translate into obtaining convictions at any cost, even if you have to cheat?

**The ABA Standards For Criminal Justice (3rd Ed. 1993)**

Where does a prosecutor go to seek guidance in what should be done? The author submits that any analysis of a prosecutor’s ethics and professionalism must begin with the nationally recognized ABA STANDARDS FOR CRIMINAL JUSTICE [hereinafter “ABA Standards”]. Why the ABA Standards? A search of case law using the query “Standards for Criminal Justice” resulted in 113 United States Supreme Court cases, 1,368 federal cases, 4,475 state cases, and 106 Washington State cases discussing and relying upon the ABA Standards.

A prosecutor can be assured that consistent adherence to the ABA Standards will result in fulfillment of our duty towards society to attain justice through proper means. The ABA Standards and Commentaries thereto are available at www.abanet.org/crimjust/standards/home.html.

The Prosecution Function is addressed in Chapter 3 of the ABA Standards. The Prosecution and Defense Standards are published along with commentary in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION,
The ABA Standards are organized into the following areas:

- Appellate Review of Sentences
- Collateral Sanctions and Discretionary Disqualification of Convicted Persons
- Criminal Appeals
- Defense Function
- Discovery
- DNA Evidence
- Electronic Surveillance of Private Communications
- Fair Trial & Free Press
- Guilty Pleas
- Joinder & Severance
- Legal Status of Prisoners
- Mental Health
- Post-Conviction Remedies
- Pretrial Release
- Prosecution Function
- Prosecutorial Investigations
- Providing Defense Services
- Sentencing
- Special Functions of the Trial Judge
- Speedy Trial
- Technologically-Assisted Physical Surveillance
- Trial by Jury
- Urban Police Function

Another useful source concerning prosecutorial ethics and professionalism is the National District Attorneys Association’s NATIONAL PROSECUTION STANDARDS (2nd ed. 1991). The Standards are available for PDF download at the NDAA website under the Publications link at www.ndaa.org. The NDAA anticipates approval of an updated edition of the Standards in late 2008.

The Prosecutor Is An Administrator Of Justice

ABA Standard 3-1.2 states that the “prosecutor is an administrator of justice” who must exercise sound discretion in the performance of prosecutorial duties. In this administrator of justice role, the ABA Standard continues that the “duty of the prosecutor is to seek justice, not merely to convict.”

The Commentary to ABA Standard 3-1.2 says: “[I]t is fundamental that the prosecutor’s obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.”

Prosecutors in Washington have been granted tremendous power by the public. Washington is not a grand jury state, and a prosecutor can subject anyone to criminal charges and possible arrest and jail based solely on his or her signature. This awesome power must be wielded impartially, and success cannot be measured by one’s conviction ratio.
While it has been difficult for the author to appreciate after a hard fought trial, a jury’s
decision to acquit is no less of a just result than had it voted to convict. Under our system
of justice, to assert otherwise demean the incredible role the public plays when acting as
jurors standing between the power of government and the presumption of innocence of
the individual. “The ends in our system do not justify the means.” Northern Mariana
Islands v. Bowie, 243 F.3d 1109, 1124 (9th Cir. 2001) (conviction reversed due to
prosecutorial misconduct in failing to investigate documentary evidence that co-suspects
were conspiring to testify falsely against defendant).

Under our system of laws, justice can never be achieved if the means chosen to do so are
tainted. Prosecutors must therefore be daily vigilant to make sure that the means chosen
in their Quest for Justice are always righteous, honorable and above reproach.

Prosecutorial Error Versus Misconduct

The phrase “prosecutorial misconduct” with its implication of an intentional and evil
mens rea by the prosecutor is frequently utilized by the defense bar, courts and the media
to describe what is in actuality prosecutorial error. Although the word “misconduct” may
be impossible to remove from our lexicon in prosecutorial mistake situations, prosecutors
should urge courts to do so when there is no evidence of an intentional effort by the
prosecutor to subvert justice.

The defense bar, courts and the media do not refer to trial or appellate court judicial error
as “judicial misconduct.” Similarly, when a defense attorney makes a mistake we call it
ineffective assistance of counsel. Why continue misusing the word “misconduct” only
for prosecutors who make a mistake?

At a time when their motives appear to be under increasing attack, prosecutors
should ensure that established ethical codes of conduct are the cornerstone of
each professional decision they are called upon to make. Many prosecutors
believe that they are increasingly being accused of alleged prosecutorial
misconduct in what may be fast becoming a standard trial tactic for some defense
attorneys. Perhaps the situation should be referred to as “prosecutorial error.”
Perhaps prosecutors should recognize the term “prosecutorial misconduct” for
what it really is--incorrect, misleading and unnecessarily perjorative. (After all,
we do not refer to an incorrect ruling by a trial judge as judicial misconduct.)

Usually this charge comes in the form of allegations before the court at the trial
level and on appeal. Occasionally, in a noteworthy case, it occurs in the news
media. It is of concern that the increasing barrage of misconduct allegations will
harm the reputation of prosecutors and eventually negatively affect juries and the
courts. A single, widely publicized case of actual misconduct can undo the
goodwill and reputation built upon thousands of appropriately handled cases.
Once a prosecutor’s reputation has been tarnished it can be difficult, if not
impossible, to rebuild.

Douglas R. Roth, High Ethical Standards: The Foundation for Every Prosecutor from
AMERICAN PROSECUTORS RESEARCH INSTITUTE’S THE PROSECUTORS DESKBOOK:
New Prosecutors Must Be Careful

In preparing these materials and researching prosecutorial error, the author was struck by the volume of case law on the topic and the number of convictions reversed as a result of a prosecutor’s improper conduct. Since a criminal defendant may appeal as a matter of right, appellate courts are constantly being asked to review the acts and omissions of prosecutors to determine whether the defendant received the constitutional due process right to a fair trial. Prosecutorial error cases are beginning to evidence a trend against finding harmless error, especially for error occurring during closing argument.

The remedies for prosecutorial error range from a court’s imposition of terms to declaration of a mistrial; from reversal of a conviction on appeal to possible bar sanctions including disbarment. The stakes are high for the prosecutor, as they should be since we have the power to make decisions that can result in destruction of a person’s life, career, reputation, and family.

This chapter is not exhaustive. Each prosecutor must develop a framework for the resolution of ethical issues. Often, prosecutorial error is inadvertent and committed due to lack of knowledge, especially for the newer prosecutor. Prosecutors and city attorneys should strive to commit the time and resources in training their newest prosecutors. The Washington Association of Prosecuting Attorneys’ annual three day District Court Training in May is one excellent resource available to Washington prosecutors, full-time city attorneys and tribal attorneys.

The Quest For Justice–Prosecutors And Defense Counsel

Being a prosecutor should be difficult on the conscience since one chooses the job knowing that the concept of justice inherently involves difficult moral decision-making. A prosecutor’s sole focus must be on justice “within the rules.” Defense counsel, on the other hand, satisfy their duty through zealous representation of clients by ensuring the prosecution meets the burden of proof beyond a reasonable doubt through admissible evidence.

Criminal defense counsel, unlike other attorneys, may even ethically raise non-meritorious claims and contentions in the representation of a criminal defendant. RPC 3.1. Although a prosecutor may believe the defense motion is “frivolous” as opposed to “non-meritorious,” the distinction does not matter. The prosecutor must still analyze the defense position and provide the court with a well-reasoned response upon which the court may rely to deny the defense motion.

It can be a most difficult task to uphold the law without losing sight of our oath to protect the individual rights of defendants who we believe committed the charged crimes. Added to this task are federal and state constitutions that were deliberately designed to limit government’s (i.e. prosecutors’) exercise of power against the individual.
Sometimes prosecutors are pressured by victims, complaining witnesses and law enforcement to obtain a conviction at all cost because the suspect “did it.” In these situations, a prosecutor’s job is to say “no” to prosecution when there is a lack of admissible evidence and proof beyond a reasonable doubt even though the prosecutor “believes” the crime occurred and was committed by the suspect. Justice under our system of law demands that we say “no” to prosecution in such situations. For if we do not, who will?

**Anger And Emotion–Heed The Warning Before Misconduct Occurs**

One should not overlook the impact of emotion, especially anger, on one’s ethics and professionalism. Excessive prosecution caseloads, constant deadlines, and the severity and brutality of certain crimes create pressure and stress that will inevitably lead to mistakes, both by prosecutors and staff. This pressure, coupled with a less-than-professional opponent who may as a tactic be trying to get the prosecutor angry so mistakes will be made, may result in prosecutor “heat of the moment” retaliation against defense counsel by filing additional charges against a defendant, increasing sentence recommendations, and/or arguing a plethora of motions and objections which may technically be permitted but hardly serve the interests of justice.

If you have had a bad experience with defense counsel, you must avoid trying to get even by retaliating against a defendant. You know that such actions are wrong even if technically permitted by the rules. Perhaps you should try to see your actions through the eyes of defense counsel, the defendant, and the judge. It never ceases to amaze the author how similar opposing counsel truly are to each other when battling every minutiae at all costs. If the roles were reversed, each lawyer would probably treat the other just as contemptuously. Prosecutors should continually ask themselves these questions. Are you often in tit-for-tat battles with counsel? Do you “get along” with any defense counsel? Why not? Is your moral compass such that you would likely treat prosecutors with similar contempt if you were a member of the defense bar?

Another troubling emotion is supreme arrogance solely because one is a prosecutor. This type of prosecutor does a great disservice to the public since every action taken is put in terms of good (me) versus the enemy (anyone interfering with conviction of an “obviously” guilty person). Such a prosecutor frequently becomes upset when things do not proceed favorably, and often grumble and complain about the “outrageousness” of the perceived improper action to anyone who will listen. Do you ever get angry at defense counsel’s actions or a judge’s rulings? Are you just as contemptuous of defense counsel as they are of you?

What does seeking justice, not merely convictions, mean to you as an administrator of justice? Remember, you cannot control another person’s actions. You only control your responses. An administrator of justice should always act with integrity and civility regardless of the pressures involved. Do you?
Is There Room For Civil Discourse In A Criminal Case?

Barrie Althoff, WSBA Chief Disciplinary Counsel, presented an article entitled “The Ethics of Incivility” in the July 1999 Washington State Bar News, at pp. 50-53. The following selected portions of the article provide ample opportunity for reflection.

Few lawyers and judges have never uttered in the heat of argument words which, on reflection, they regretted as intemperate. While lawyers and judges can disagree without being disagreeable, some lawyers and judges are more than just occasionally disagreeable. Some are consistently and almost universally disagreeable, uncivil, impolite, discourteous, acerbic, acrimonious, obstreperous, ill-mannered, antagonistic, surly, ungracious, insolent, rude, boorish, uncouth, insulting, disparaging, malevolent, spiteful, demeaning, vitriolic and rancorous—and sometimes all of these in one short deposition or hearing. They manifest such behavior to other lawyers, judges, witnesses, clients and the public generally.”

“Concern over declining civility and professionalism is not just a nostalgic yearning for a passing of bygone social graces or outmoded conventions. Rather, civility and professionalism relate to the basic level of trust and respect accorded by one person to another, of the level of confidence a lawyer or a judge can have in the word of another lawyer or a judge. Civility and professionalism form a framework for common expectations of mutual trust, of being treated with dignity, and ultimately set the stage for justice to be done.”

“The legal profession has always had room and need for both the polished and the scruffy lawyer. It is a noble profession not because its members are, or may be required to be, polite or civil or politically correct to one another, but because the profession’s overriding goal is to make the promise of justice a reality. The preamble to the RPCs reminds us that justice is based on a rule of law grounded in respect of the individual. If lawyers truly are guardians of law, then they more than others need to embody in their practices and lives that very same respect for the dignity of the individual. Lawyers need to treat one another with dignity and respect because the very purpose of the law, and thus the very reason for the legal profession’s existence, is to attain respect and protection for the dignity of the individual. Modeling civility and professionalism is an important way for each lawyer and judge to express gratitude to other legal professionals, to honor the innate dignity of one another, and to celebrate the cacophony of justice that is attained through the legal process.”

Emphasis added.

What can you do about the conduct of the “disagreeable, uncivil, impolite, discourteous, acerbic, acrimonious, obstreperous, ill-mannered, antagonistic, surly, ungracious, insolent, rude, boorish, uncouth, insulting, disparaging, malevolent, spiteful, demeaning, vitriolic and rancorous” attorney or judge? You can respond in kind, lead a similarly unhappy existence, risk prosecutor misconduct and bar discipline. Or, not.

You cannot control another person’s actions, but you can control your response through civility. So, as the 1970s taught us—Remember to smile often, and have a nice day. 😊
Respect For Individual Dignity Versus Situational Ethics

As noted above by Barrie Althoff, at the core of the Rules of Professional Conduct is the recognition that justice is based on a rule of law which respects the dignity of the individual. This Golden Rule philosophy of treating others as you want to be treated cannot be overemphasized, especially for prosecutors who represent a righteous and just society.

Examples are provided throughout this manual supporting the author’s opinion that justice cannot be obtained without a clear and ongoing focus on the means used to obtain the justice end. A prosecutor’s respect for the dignity of all individuals—be they colleagues, staff, opposing counsel, judges, victims, defendants, the public, friends, children, or others—will surely go a long way towards the Quest for Justice.

The author proposes that prosecutors should not withhold respect towards others until treated “properly.” Someone has to go first, and there is absolutely no reason why prosecutors cannot take the first step, and all subsequent steps, in leading the charge of showing respect for the dignity of others.

A tit-for-tat situational ethics and professionalism strategy wastes everyone’s time and shows a complete and utter lack of respect for the dignity of others. While one’s opponent may never change and will always be all of those things listed by Barrie Althoff, what possible “point” is successfully made by responding in kind? One simply ends up demeaning his or her own reputation, and ultimately oneself.¹

Do You Know Any “Rambo” Lawyers? Are You One?

Rambo lawyer. A lawyer, esp. a litigator, who uses aggressive, unethical, or illegal tactics in representing a client and who lacks courtesy and professionalism in dealing with other lawyers. – Often shortened to Rambo.

BLACK’S LAW DICTIONARY 1266 (7th Ed. 1999). This is in Black’s Law Dictionary. Really!

Beware Of Bar Discipline!

At the June 1998 annual summer Washington Association of Prosecuting Attorney’s conference in Chelan, the ethics speaker discussed the Bar Association’s increased awareness of prosecutorial error. The Bar has hired additional counsel to review advance sheets, published and unpublished, looking for instances of error by both prosecutors and defense counsel. How about that! While the conviction may be affirmed, the Bar may well institute its own investigation into your conduct in obtaining the conviction!

¹ For an interesting discussion on a lawyer’s role in creating social justice, see Lucia A. Silecchia, Reflections on the Future of Social Justice, 23 Seattle U. L.Rev. 1121 (Spring 2000).
Case Study 1—Failure To Disclose Potentially Exculpatory Evidence

On May 5, 2000, effective May 13, 2000, F. McNamara Jardine (WSBA No. 21677) of Tacoma was suspended for 90 days based upon her failure to disclose potentially exculpatory evidence to the defense in a felony vehicular homicide prosecution in 1996. By failing to disclose potentially exculpatory evidence to the defense in a felony prosecution, Ms. Jardine’s conduct violated RPCs 3.4(a) (unlawfully obstructing another party’s access to evidence) and RPC 3.8(d) (failure to make timely disclosure of evidence to defense in criminal case that tends to negate the guilt of the accused or mitigates the offense). See Washington State Bar News, March 2001 at 49.

Defendant was charged with vehicular homicide after hitting and killing the victim as she walked across the street. Both the defense and prosecution had been told that the victim had a briefcase, but the police did not recover it at the scene. One defense theory was that the victim wore a dark jacket and carried a dark briefcase, obscuring her brightly colored dress from defendant’s view.

Defense specifically requested production and identification of the briefcase. The prosecutor’s office eventually located the person who removed the briefcase from the scene. This person met with Ms. Jardine, and brought the briefcase with him. The person was told that he would not be needed as a witness, and left with the briefcase. Ms. Jardine did not mention the briefcase to the defense, but discussed it with her supervisor. The supervisor instructed Ms. Jardine to disclose the briefcase information to the defense, but she did not do so.

During trial, Ms. Jardine objected to admission of defense reconstruction photographs stating that the briefcase was not accurately portrayed and the depiction was not supported by the evidence. During closing, Ms. Jardine told the jury “we don’t even have the briefcase to determine its color.” Defendant was acquitted. A week after the trial, defense counsel learned that Ms. Jardine knew about the briefcase before trial.

Case Study 2—Racially Discriminatory Argument

On June 9, 2000, Daniel P. Kinnicutt (WSBA 24217), of Del Rio, Texas, was admonished based upon his making a discriminatory argument in court. Mr. Kinnicutt’s conduct violated RPC 8.4(d) (prohibiting conduct prejudicial to the administration of justice) and RPC 8.4(g) (prohibiting committing a discriminatory act). See Washington State Bar News, April 2001 at 53.

In April 1998, Mr. Kinnicutt was a Pierce County deputy prosecuting attorney handling a criminal case involving charges of unlawful possession of controlled substance, failure to remain at the scene of an injury accident, and taking a motor vehicle without the owner’s permission. Defendant was convicted of the drug charge and acquitted of the other two charges.
At trial, the State attempted to prove the following crimes. Booth visited his girlfriend, Tiffany Lucich, at her place of employment and coerced her with threats and abuse to give him the keys to the car owned by her mother for Lucich’s use. Booth was later involved in an injury accident with the vehicle and fled the scene. During his arrest and booking for these offenses, a packet of cocaine fell from his person.

Because Lucich gave the keys to Booth, the State argued her action was not voluntary, but coerced. The State based its argument upon the ages and social status of the accused and the victim. While attempting to further this argument in his rebuttal closing, the prosecutor stated:

You know, in the world’s eyes she is not the most attractive lady. She is heavy set. In terms of the way she styles herself, you probably walk by her in public and look and probably not turn around, and maybe make a snide remark simply because of her status in society. And maybe even because she is dating an individual of an opposite race in color …

An objection cut short transcription of the last sentence. Defense counsel reserved a motion for a mistrial until after the verdict. The jury returned a verdict of guilty on one of the three counts, that of unlawful possession of a controlled substance, whereupon Booth renewed his motion. The trial court denied the motion for a new trial.

The prosecutor’s argument constituted egregious misconduct. “It is well-established that appeals to nationality or other prejudices are highly improper in a court of justice.” State v. Avendano-Lopez, 79 Wn. App. 706, 718, 904 P.2d 324, review denied, 129 Wn2d 1007 (1996). In a most favorable light, the remarks here might be construed to mean: “I don’t personally have a problem with mixed race relationships, but if you do, then maybe you’ll find this argument persuasive.” This is certainly an appeal to prejudice.


Case Study 3—Asserting Defense Counsel Paid Expert To Fabricate Mental Diagnosis

On July 1, 2004, an Arizona prosecutor was suspended for six months and one day due to an unsupported argument made during closing that defense counsel paid an expert in a murder case to fabricate a mental diagnosis to fit the defense theory; an argument that invoked personal fear in the jury should it acquit the defendant. In re Zawada, 208 Ariz. 232, ¶¶16-31, 92 P.3d 862 (2004).

Zawada knew there was no evidentiary basis for the accusation, nor did he offer one. He continued the attack in closing argument, suggesting, still without evidence, that defense counsel paid money to the mental health expert to fabricate a diagnosis of insanity for the defendant. This was not a case of negligence; rather, it was an intentional, knowing attack by Zawada on defense counsel, on the experts, and on the mental health profession. Zawada’s actions
unquestionably indicate he knew his conduct constituted outright disobedience in violation of ER 3.4(c). …

The more serious the injury, the more severe should be the sanction. Serious injury was caused by Zawada’s misconduct. The criminal justice system suffered, as did society as a whole. When serious crime goes unpunished everyone suffers, not because the suspect was unidentifiable, but because a prosecutor’s misconduct bars retrial as a matter of double jeopardy. Disciplinary Commissioner Cahill spoke accurately in his dissent from the Commission’s recommendation: “Simply put, [Zawada’s] knowing, deliberate and intentional misconduct either caused a murderer to walk free, or it helped convict an innocent man of first-degree murder. Either way, no harm could be more serious.”

Together, these cases demonstrated repeated instances of misconduct in cases that involved serious consequences. We agree with that finding. In addition, we agree, pursuant to ABA Standard 9.22(i), that Zawada’s substantial experience in the practice of law should be treated as an aggravating factor. The finding of substantial experience is justified by the fact Zawada has practiced law in Arizona since 1979.

No less important is that much of his experience as an attorney has come through many years working as a prosecutor. Because prosecutors’ ethical duties exceed those of lawyers generally, substantial experience as a prosecutor may become a further aggravating circumstance, particularly in cases, as here, where the prosecutor should have learned much earlier to conform his conduct to the rules, but has not done so. …

In contrast, Zawada has remained hostile, utterly refusing to cooperate in the disciplinary proceedings. His unwillingness to acknowledge gross misconduct suggests at least some risk that Zawada, given the opportunity, would treat expert witnesses in another case with a serious mental health component in the same manner in which he treated the expert witnesses in Hughes. That risk, without appropriate discipline at this point, is unacceptable.
Washington Oath of Attorney—Admission To Practice Rule 5(d)

State of Washington  )

County of ________  )

I, ________, do solemnly declare:

1. I am fully subject to the laws of the State of Washington and the laws of the United States and will abide by the same.

2. I will support the constitution of the State of Washington and the constitution of the United States.

3. I will abide by the Rules of Professional Conduct approved by the Supreme Court of the State of Washington.

4. I will maintain the respect due to the courts of justice and judicial officers.

5. I will not counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust, or any defense except as I believe to be honestly debatable under the law, unless it is in defense of a person charged with a public offense. I will employ for the purpose of maintaining the causes confided to me only those means consistent with truth and honor. I will never seek to mislead the judge or jury by any artifice or false statement.

6. I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with the business of my client unless this compensation is from or with the knowledge and approval of the client or with the approval of the court.

7. I will abstain from all offensive personalities, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.

8. I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay unjustly the cause of any person.

_______________________________
Signature

SUBSCRIBED AND SWORN TO before me this ____ day of ____________, ___.

_______________________________
Judge
Washington State Bar Association Creed Of Professionalism

As a proud member of the legal profession practicing in the state of Washington, I endorse the following principles of civil professional conduct, intended to inspire and guide lawyers in the practice of law:

- In my dealings with lawyers, parties, witnesses, members of the bench, and court staff, I will be civil and courteous and guided by fundamental tenets of integrity and fairness.

- My word is my bond in my dealings with the court, with fellow counsel and with others.

- I will endeavor to resolve differences through cooperation and negotiation, giving due consideration to alternative dispute resolution.

- I will honor appointments, commitments and case schedules, and be timely in all my communications.

- I will design the timing, manner of service, and scheduling of hearings only for proper purposes, and never for the objective of oppressing or inconveniencing my opponent.

- I will conduct myself professionally during depositions, negotiations and any other interaction with opposing counsel as if I were in the presence of a judge.

- I will be forthright and honest in my dealings with the court, opposing counsel and others.

- I will be respectful of the court, the legal profession and the litigation process in my attire and in my demeanor.

- As an officer of the court, as an advocate and as a lawyer, I will uphold the honor and dignity of the court and of the profession of law. I will strive always to instill and encourage a respectful attitude toward the courts, the litigation process and the legal profession.

This creed is a statement of professional aspiration adopted by the Washington State Bar Association Board of Governors on July 27, 2001, and does not supplant or modify the Washington Rules of Professional Conduct.
Kitsap County Prosecutor’s Office Criminal Division Ground Rules For Deputy Prosecutors

Note: Deputy prosecutor performance will generally be reflected in the Kitsap County Prosecuting Attorney Performance Evaluation Criteria referenced parenthetically.

1. Be honest in your dealings with your cases, co-workers and supervisors. (4: Ability to Work With Others)

2. Manage your time effectively by using the GroupWise or other electronic calendaring system. (2: Quantity of Work)

3. Prioritize your cases and create designated time to work on the most important ones. Prepare written motions and briefs for high priority cases when appropriate. (2: Quantity of Work) (1: Quality of Work)

4. Be on time to meetings and to court. (6: Professionalism)

5. Complete your case preps and follow-up requests as early as possible. For Felony Division cases, prepare plea agreements within two weeks from receiving the file for standard cases. For District & Municipal Court Division cases, prepare plea offers at the time of charging. (2: Quantity of Work)

6. Make affirmative efforts to reach expeditious plea agreements with defense counsel by initiating plea negotiations via telephone, e-mail or person contact prior to Omnibus/Pre-Trial hearings. (2: Quantity of Work)

7. For Felony Division cases, obtain approval for all reductions and complete thorough reduction memos as soon as defendants change their plea. (1: Quality of Work)

8. For Felony Division cases, follow calendar policies and prepare CAM sheets so the calendar deputy is aware of all necessary case information. (4: Ability to Work With Others)

9. Make all required Damion entries. (2: Quantity of Work)

10. Complete and follow Trial Checklists/Prep Sheets for all trials. Turn in the Trial Checklist immediately after your verdict along with the Trial Stat Sheet. (3: Trial Skills)

11. Control the courtroom and do not be afraid to take the initiative when necessary. (3: Trial Skills)

12. Follow the file organization protocol and prepare thorough and legible court action notes. (1: Quality of Work)

13. Be a team player. This includes (1) working with and communicating with your legal assistant as a team; and (2) covering hearings and other matters for team members when possible. (4: Ability to Work With Others)
14. When your supervisor asks you to do something, do it. Provide your supervisor with progress reports, meet deadlines, and tell your supervisor when you are finished with the task. (4: Ability to Work With Others)

15. Strive to improve your weaknesses as a caseload manager, trial attorney and Criminal Division team member. (6: Professionalism)

16. When assigned an appeal, complete the brief by the review date or timely request an extension. Make sure to calendar and timely attend any scheduled argument hearings. (4: Ability to Work With Others) (6: Professionalism)

**Kitsap County Prosecutor’s Office Criminal Division Ground Rules For Supervising Deputy Prosecutors**

1. Keep your supervisors informed of all critical issues facing your division/unit including major cases and personnel matters.

2. Don’t triangulate with your supervisors and those you supervise. Be honest and direct with both. Do not have “between you and me” conversations with those you supervise regarding work matters, especially when the discussion involves management or other employees.

3. Provide immediate feedback, both positive and negative, to those you supervise and your supervisors. Do not delay sharing positive or negative information unless you need time to research the issue.

4. Work diligently to identify the strengths and weaknesses of those you supervise and provide guidance to foster their improvement and growth.

5. Deal in an even-handed fashion with those you supervise regardless of any personal relationships.

6. Create a teamwork environment by having an open door policy, sharing the work and sharing the credit for getting the work done.

7. Find ways to improve morale by having fun at work when appropriate, as long as it does not have a negative impact on getting the necessary work done.

8. Be creative in finding better ways to conduct business in your unit and in the office. Share that information with your supervisors and team members, and encourage your team members to do the same.

9. When making reduction decisions, make sure that (1) you have full information before making a decision; (2) you ask about the timing of the request to insure it is not being made late in the game to avoid trial (ask why the request was not made earlier and what has changed in the case); and (3) for Felony Division cases, your approved reduction requests are followed up with a sufficient reduction notice.

10. Do not broadcast individual employee issues or problems or discuss them in front of others.
PART II – JUDICIAL VIEW OF THE PROSECUTOR

The judicial branch has been commenting on the role of the prosecutor for over 100 years. Prosecutors should carefully read the following judicial discussion about our role in obtaining justice.

On Appeals To Passion And Sympathy (1899)

Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceased to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.


On Prowess Of The Savage (1909)

It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal in human life. But the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.

On The Role Of The Prosecutor (1935)

The United States Attorney 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 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.


On Conviction Of The Innocent (1976)

A prosecutor must always remember that he or she does not conduct a vendetta when trying any case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided. We recognize that the conduct of a trial is demanding and that if prosecutors are to perform as trial lawyers, a zeal and enthusiasm for their cause is necessary. However, each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants receive fair trials and justice is done. If prosecutors are permitted to convict guilty defendants by improper, unfair means then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means. Courts must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance.


On Wielding Power (1987)

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in the criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

On Treatment Of The Disadvantaged (1995)

It is well-established that appeals to nationality or other prejudices are highly improper in a court of justice, and evidence as to the race, color, or nationality of a person whose act is in question is generally irrelevant and inadmissible if introduced for such a purpose.…

The true test of our criminal justice system lies in how we treat the foreigner, the poor, and the disadvantaged, both in how we treat those born in this country, the wealthy or the “respectable” established citizenry. The dark shadow of arrogant chauvinism would eclipse our ideal of justice for all if we allowed juries to infer that immigrants, legal or illegal, were more likely to have committed crimes.


On The Close Case And Improper Tactics (1996)

We agree with the comment of defendant Lee’s counsel in his brief that “trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.”


On The Ends Justifying The Means (2001)

The ends in our system do not justify the means. Our Constitution does not promise every criminal will go to jail, it promises due process of law. It is regrettable that the final day of judgment for those who killed Laude and kidnapped Rivera has not yet arrived, but as Justice Oliver Wendell Holmes put it, “It is a less evil that some criminals should escape than that the government should play an ignoble role.” It is for this reason that the law places the duty to manage this difficult business with the utmost care upon those in the best position and with the power to ensure that it does not go awry. Although the public has an interest in effective law enforcement, and although we expect law enforcement officers and prosecutors to be tough on crime and criminals, we do not expect them to be tough on the Constitution. As Justice Clark remarked in Mapp v. Ohio, 367 U.S. 643, 659, 81 S. Ct. 1684, 1694, 6 L. Ed. 2d 1081 (1961), “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”
These duties imposed on police and prosecutors by the requirements of due process are hardly novel or burdensome. Investigating and verifying the credibility of witnesses and the believability of testimony and evidence is a task which they undertake every day in the regular discharge of their ordinary responsibilities, and we cannot conceive of any fair-minded prosecutor chafing under these mandates. All due process demands here is that a prosecutor guard against the corruption of the system caused by fraud on the court by taking whatever action is reasonably appropriate given the circumstances of each case.

*Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1124-25 (9th Cir. 2001) (conviction reversed due to prosecutorial misconduct in failing to investigate documentary evidence that co-suspects were conspiring to testify falsely against defendant) (citations omitted).

**On Deliberate Prosecutorial Suppression Of Impeachment Evidence (2002)**

Lord Acton, the celebrated 19th century British historian and student of politics, formulated an observation about government and human nature that aptly, and regrettably, fits this case: "Power tends to corrupt, and absolute power corrupts absolutely." It was for this reason that over one hundred years earlier, the Framers of our Constitution meticulously separated the powers given by the People to our government and erected against each a structural series of checks and balances designed to confront the potential for abuse. Then, by enacting the Bill of Rights, the Framers made certain that basic principles of a fair and just trial could not be episodically overridden, even by a unanimous legislature, an overzealous executive, or a wayward judiciary.

In large measure, the Framers were influenced by Charles de Secondat, baron de Montesquieu, an astute student of history and politics in his own right, who, in his seminal work *The Spirit of the Laws*, said:

> Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power: but constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?

To prevent this abuse, it is necessary, from the very nature of things, power should be a check to power.

This case provides us with a textbook example of the abuse of executive power contemplated by Montesquieu, Lord Acton, and the Framers of our Constitution. Rather than adhere to the clear letter of the law, which itself is the ultimate check against arrogation of power, the prosecutor apparently deliberately withheld from the trial court and from the jury admissible evidence that would cause any fairminded person to have grave reservations about the credibility of a key government witness.…

The law and the truth-seeking mission of our criminal justice system, which
promise and demand a fair trial whatever the charge, are utterly undermined by such prosecutorial duplicity. Although our Constitution guarantees to a person whose liberty has been placed in jeopardy by the State the right to confront witnesses in order to test their credibility, that right was willfully impaired in this case. By unlawfully withholding patently damaging and damning impeachment evidence, the prosecutor knowingly and willfully prevented Benn from confronting a key witness against him. Such reprehensible conduct shames our judicial system.

Prosecutors routinely take an oath of office when they become stewards of the executive power of government. That oath uniformly includes a promise at all times to support and defend the Constitution of the United States. Fortunately, the great majority of all prosecutors appreciate the solemnity of this oath. However, if a prosecutor fails to abide by this undertaking, it is the duty of the judiciary emphatically to say so. Otherwise, that oath becomes a meaningless ritual without substance.

Benn v. Lambert, 283 F.3d 1040, 1062-64, cert. denied, 537 U.S. 942, 123 S. Ct. 341, 154 L. Ed. 2d 249 (9th Cir. 2002) (Trott, C.J., concurring) (death penalty conviction reversed due to prosecution’s failure to disclose extensive impeachment evidence of key state witness) (prosecutor subsequently admonished by Washington State Bar Association).
PART III – GENERAL PROSECUTION STANDARDS

(1) The Function Of The ABA Standards

ABA Standard 3-1.1 provides that the standards are intended to be used as a guide for providing advice to prosecutors, not for the judicial evaluation of alleged prosecutorial misconduct. Given the number of appellate cases throughout the country relying upon the ABA Standards, prosecutors are wise to assume that our appellate courts will continue to rely on Chapter 3 of the ABA Standards when focusing on actions by prosecutors.

(2) The Function Of The Prosecutor

ABA Standard 3-1.2 provides that the prosecutor is an “administrator of justice,” exercising sound discretion in the performance of prosecutorial functions. Paramount is the prosecutor’s duty “to seek justice, not merely to convict.”

(a) Constitutional Authority And Statutory Duties Of The Prosecutor

 Const. art. XI, §5 provides for the position of county prosecuting attorney. The constitutional provision says:

SECTION 5 COUNTY GOVERNMENT. The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office: Provided, That the legislature may, by general laws, classify the counties by population and provide for the election in certain classes of counties certain officers who shall exercise the powers and perform the duties of two or more officers. It shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population: Provided, That it may delegate to the legislative authority of the counties the right to prescribe the salaries of its own members and the salaries of other county officers. And it shall provide for the strict accountability of such officers for all fees which may be collected by them and for all public moneys which may be paid to them, or officially come into their possession.
RCW 36.27.020 creates the duties of a prosecuting attorney. The statute says:

The prosecuting attorney shall:

(1) Be legal adviser of the legislative authority, giving them [it] his or her written opinion when required by the legislative authority or the chairperson thereof touching any subject which the legislative authority may be called or required to act upon relating to the management of county affairs;

(2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;

(3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;

(4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;

(5) Attend and appear before and give advice to the grand jury when cases are presented to it for consideration and draw all indictments when required by the grand jury;

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

(7) Carefully tax all cost bills in criminal cases and take care that no useless witness fees are taxed as part of the costs and that the officers authorized to execute process tax no other or greater fees than the fees allowed by law;

(8) Receive all cost bills in criminal cases before district judges at the trial of which the prosecuting attorney was not present, before they are lodged with the legislative authority for payment, whereupon the prosecuting attorney may retax the same and the prosecuting attorney must do so if the legislative authority deems any bill exorbitant or improperly taxed;

(9) Present all violations of the election laws which may come to the prosecuting attorney's knowledge to the special consideration of the proper jury;

(10) Examine once in each year the official bonds of all county and precinct officers and report to the legislative authority any defect in the bonds of any such officer;

(11) Make an annual report to the governor as of the 31st of December of each year setting forth the amount and nature of business transacted by the prosecuting attorney in that year with such other statements and suggestions as the prosecuting attorney may deem useful;
(12) Send to the state liquor control board at the end of each year a written report of all prosecutions brought under the state liquor laws in the county during the preceding year, showing in each case, the date of trial, name of accused, nature of charges, disposition of case, and the name of the judge presiding;

(13) Seek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

RCW35.23.111 spells out a city attorney’s duties.

(b) **RPC 3.8’s Special Responsibilities Of A Prosecutor**

RPC 3.8 creates Special Responsibilities of a Prosecutor. The rule says:

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 ensure 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 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;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment [1] to RPC 3.8 discusses the prosecutor as a “minister of justice” and not
simply that of an advocate. The extent of a prosecutor’s obligation towards providing a
defendant with “procedural justice” is recognized as a matter of debate. The Comment
notes that many jurisdictions have adopted the Prosecution Function of the ABA
Standards of Criminal Justice.

Comment [2] to RPC 3.8, in discussing that prosecutors should not seek to obtain waivers
of preliminary hearings or other important rights from unrepresented persons, notes that
RPC 3.8(c) does not apply to a person appearing pro se with the approval of the tribunal.
The rule also does not forbid the “lawful questioning of an uncharged suspect who has
knowingly waived the rights to counsel and silence.”

Comment [4] to RPC 3.8 notes that RPC 3.8(3) is intended to limit a prosecutor’s ability
to issue subpoenas to lawyers except in the rare situation when there is a need to “intrude
into the client-lawyer relationship.”

In State v. Regan, 143 Wn. App. 419, 177 P.3d 783 (2008), the court held that it was
reversible error in a bail jumping trial to compel an attorney, who was merely supervising
another fully licensed attorney at trial and who was not seated at counsel table, to testify
that he had instructed the defendant to appear for court at the date and time specified.
Prosecutors must take great care when contemplating issuing a subpoena to defense
counsel. It would be wise to speak with senior prosecutors before doing so. If no
reasonable alternatives to defense counsel testimony are available, prosecutors should
seek court approval before issuing the subpoena to defense counsel so that the court has
the opportunity to be fully briefed on the matter prior to trial.

Comment [5] to RPC 3.8 makes clear that RPC 3.8(f) is intended to supplement RPC 3.6
which prohibits extrajudicial statements having a substantial likelihood of prejudicing a
defendant. Prosecutors are directed to avoid comments having no law enforcement
purpose when the comments have the substantial likelihood of increasing public
condemnation of the defendant. Nothing in the Comment restricts a prosecutor’s statement
which complies with RPC 3.6(b) or 3.6(c).

(c) There Is No Prosecutor Public Safety Exception To

The RPCs

After months of hearings, Mark Pautler, a Jefferson County, Colorado Chief Deputy
District Attorney was suspended for three months from practicing law but stayed for one
year while he will be on probation. In that time, he was required to complete 20 hours of
ethics training, pass the ethics portion of the Multistate bar, and be supervised by another
attorney. The sanction was for Pautler’s inappropriately representing himself as a
defense attorney to get a confessed ax murderer to surrender. The suspect, wanted for
brutally murdering three women and kidnapping, torturing and raping a fourth, asked to
speak with a public defender near the end of negotiations with police for his surrender.
After some consideration, Pautler took the telephone, gave a false name, and told the
suspect he was a public defender. The suspect thereafter surrendered. Shortly after
discovering that Pautler lied to him, the defendant fired his attorneys, represented himself
and pled guilty. He was sentenced to death.

Pautler said he lied about being a public defender to ensure that the suspect surrendered in a peaceful fashion, and would do so again because the suspect indicated during the negotiations that he would kill again. Defense attorneys were especially concerned about Pautler’s lack of remorse, and asserted that had a defense attorney pretended to be a prosecutor, the attorney would be disbarred.

The Colorado Supreme Court affirmed the disciplinary panel findings in In re Pautler, 47 P.3d 1175 (Colo. 2002). The court held that: (1) no imminent public harm exception existed to the ethical principle that a lawyer may not engage in deceptive conduct; (2) the prosecutor violated the professional conduct rule that provided that, in dealing on behalf of a client with a person not represented by counsel, the attorney was required to state he was representing a client and could not state or imply that the attorney was disinterested; and (3) the suspension was ordered to be for three months, which was stayed during twelve months of probation during which the attorney was to take ethics courses and retake the professional responsibility examination, was reasonable. The court noted at 1176-84:

In this proceeding we reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as a part of attempting to secure the surrender of a murder suspect. A prosecutor may not deceive an unrepresented person by impersonating a public defender …

The jokes, cynicism, and falling public confidence related to lawyers and the legal system may signal that we are not living up to our obligation; but, they certainly do not signal that the obligation itself has eroded … Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest. Certainly, the reality of such behavior must be abjured so that the perception of it may diminish.…

[W]e stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so.…

This sanction reaffirms for all attorneys, as well as the public, that purposeful deception by lawyers is unethical and will not go unpunished.

(d) A Defendant’s Right To Self-Representation

A defendant has a constitutional right to self-representation. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Although a defendant’s request for self-representation must be timely, unequivocal, knowing and voluntary, the request does not have to be made intelligently. State v. Vermillion, 112 Wn. App. 844, 51 P.3d 188, review denied, 148 Wn.2d 1022 (2003) (convictions reversed because trial court improperly held that self-representation was not in the defendant’s best interests).

When a defendant seeks self-representation and the case will likely proceed to trial,
prosecutors should encourage trial courts to follow the advisory list of questions for examining prospective pro se defendants found in State v. Christensen, 40 Wn. App. 290, 297, n.2, 698 P.2d 1069, review denied, 104 Wn.2d 1003 (1985) and the textbook examination found in State v. Hahn, 106 Wn.2d 885, 891, n.3, 726 P.2d 25 (1986).

If a defendant seeks self-representation with the goal of pleading guilty, a much less extensive colloquy is constitutionally required. Iowa v. Tovar, 541 U.S. 77, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004) (Sixth Amendment satisfied when trial court informs accused of the nature of the charges, of his or her right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea).

Caution:

Prosecutors are placed in a difficult position when a defendant seeks self-representation. The ABA Standard and RPC 3.8 make clear a prosecutor’s obligation to protect a defendant’s constitutional right to counsel. Balanced against that right is the right to self-representation. Careful adherence to the above cases should help in avoiding the Vermillion result of a reversed conviction because the trial court required the defendant to be represented by counsel. Prosecutors should have sample “Faretta” waiver forms on hand so that the court’s colloquy with the defendant is sufficient.

(3) Conflicts of Interest

ABA Standard 3-1.3 provides that as with all lawyers, prosecutors must maintain a fiduciary duty with their client—the public. Accordingly, a prosecutor’s professional judgment must be exercised solely for the benefit of that client, “free of any compromising influences or loyalties.” The prosecutor’s correct role is not to strive for courtroom victories or media or public attention, but for results which best serve the interests of justice and that “satisfy the prosecutor’s fiduciary and statutory duties to the public in a lawful and professional manner.” Comment to ABA Standard 3-1.3.

(a) Prosecution Of Former Client Or Family Member

Former defense attorneys who become prosecutors must take special care to protect the confidentiality of those former clients. The Comment to ABA Standard 3-1.3 says that since a lawyer’s duty of confidentiality to a client continues after termination of the attorney-client relationship, “it is improper for a prosecutor who has formerly engaged in private practice to use confidential information obtained during a former attorney-client relationship to the disadvantage of the former client when that information retains its privileged character.”

In State v. Stenger, 111 Wn.2d 516, 760 P.2d 357 (1988), an entire prosecutor’s office was disqualified in a capital case because the elected prosecutor charged with making the death decision had previously represented the defendant. The Supreme Court was concerned given the severity of the crime that the elected prosecutor might have information from the prior representation which could be used by the prosecutor when
making the decision concerning filing the death notice.

However, in *State v. Ladenburg*, 67 Wn. App. 749, 840 P.2d 228 (1992), *abrogated on other grounds by State v. Finch*, 137 Wn.2d 792, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999), no conflict was found to exist when the elected prosecutor’s nephew was prosecuted for a non-capital crime. Especially important to the *Ladenburg* holding was that the case did not involve the death penalty, no suggestion was made that the elected prosecutor had any information which could have been used against the defendant, there was no indication that the elected prosecutor actively participated in the case, the prosecutor’s office was large (Pierce County), and there was no evidence that the deputy prosecutor’s judgment was influenced by the elected prosecutor.

**b) Prosecutor As Witness**

Washington cases make clear that unlike private firm disqualification, an entire prosecutor’s office is not subject to disqualification because one of its members has a conflict unless the conflict is with the elected prosecutor and the case involves the death penalty. The trial court’s disqualification of an entire prosecutor’s office was reversed in *State v. Schmitt*, 124 Wn. App. 662, 102 P.3d 856 (2004), where a deputy prosecutor handling the case became a material witness for the defense due to her conversation with the victim. Relying on *Stenger*, the *Schmitt* court held that although the deputy prosecutor could no longer prosecute the case given her status as a material witness for the defense, the prosecutor’s office could continue to prosecute the matter. Similarly in *State v. Bland*, 90 Wn. App. 677, 953 P.2d 126, *review denied*, 136 Wn.2d 1028 (1998), where a deputy prosecutor testified on behalf of the prosecution, disqualification of the entire prosecutor’s office and appointment of a special prosecutor was not required.

**c) Prosecutor As Mediator Followed By Prosecution**

In *State v. Tolias*, 135 Wn.2d 133, 954 P.2d 907 (1998), the elected prosecutor attempted to mediate a neighborhood dispute. When mediation efforts failed, the prosecutor filed second degree assault charges arising out of the same controversy. The Court of Appeals held that the prosecutor had a conflict based upon his violation of the appearance of fairness doctrine, reversed the conviction and ordered a new trial. The Supreme Court upheld the conviction after finding that the defendant waived the appearance of fairness doctrine by failing to raise the issue in the trial court.

**Practice Tip**

Although the Supreme Court did not reach the conflict issue, prosecutors should take care when involved in pre-charge mediation activities which might result in criminal charges being filed. Although *Tolias* is not clear whether the prosecutor was in a conflict situation, a conflict challenge can be avoided by having another prosecutor in the office review the matter for prosecution.
(d) Prosecutor Assisting County Employee With Anti-Harassment Order Followed By Prosecution

In an unpublished opinion, the Court of Appeals held that no conflict of interest existed when the civil division of the Snohomish County Prosecutor’s Office assisted a county employee in obtaining an anti-harassment order due to workplace harassment, and the criminal division of the office subsequently prosecuted the harassing county employee for stalking. *State v. Orozco*, 143 Wn. App. 1036, ¶2, 2008 WL 700185 (2008) [UNPUBLISHED OPINION]. The *Orozco* Court noted that a prosecutor has no duty of impartiality under RPC 3.8, citing *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999), quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S. Ct. 1610, 1616, 64 L. Ed. 2d 182 (1980) (citations omitted).

The Court observed that, unlike judges, “[p]rosecutors need not be entirely ‘neutral and detached,’ ” and may be rewarded for initiating and carrying out prosecutions in the name of the people. As such, they “are necessarily permitted to be zealous in their enforcement of the law.” Although the constitution prevents prosecutors from making decisions that are “motivated by improper factors or ... contrary to law.... [T]he strict requirements of neutrality cannot be the same for ... prosecutors as for judges....”

The evils the appearance of fairness doctrine seek to prevent are not implicated in this case because a prosecutor is not a quasi-judicial decisionmaker. A prosecutor's determination to file charges, to seek the death penalty or to plea bargain are executive, not adjudicatory, in nature and therefore the doctrine does not apply.

(e) Prosecutor Who Is Related To Or Has A Significant Interest With Defense Counsel

The Comment to ABA Standard 3-1.3 notes that a family interest can be a source of a conflict of interest. Accordingly, ABA Standard 3-1.3(g) prohibits a prosecutor from participating in a criminal matter in which the defendant is represented by the prosecutor’s parent, child, sibling, or spouse.

Similarly, when a prosecutor has a significant personal or financial interest with defense counsel, a conflict of interest may also exist. Unlike the above prohibition concerning family members, a supervisor may approve the prosecutor’s involvement with a criminal case involving a defense counsel with whom the prosecutor has a significant personal or financial interest. A prosecutor may also act in this situation if “there is no other prosecutor authorized to act in the prosecutor’s stead.” ABA Standard 3-1.3(g).
(f) Improper Referrals To And Comments About Defense Counsel

A prosecutor may possess a “natural and understandable interest” in who represents an accused along with how vigorously that person is represented. However, this interest may well be directly adverse to the accused’s best interests. Accordingly, prosecutors should avoid a potential conflict by generally refraining from making such referrals. Comment to ABA Standard 3-1.3(h).

However, prosecutors are often in a good position to assess the quality of the defense bar in their jurisdiction. The Comment to ABA Standard 3-1.3(h) notes that the Standard balances these interests by permitting a prosecutor who has not initiated the subject to make a “specific recommendation of defense counsel in response to a direct request” from an accused. A prosecutor should, in such situations when asked, consider providing the names of several defense counsel to avoid subsequent claims of improper referrals.

ABA Standard 3-1.3(h) continues that a prosecutor should exercise great restraint when tempted to comment on the reputation or abilities of a particular defense attorney when asked by an accused seeking information about defense representation.

(g) The “Chinese Wall” Conflict Barrier

In State v. Stenger, 111 Wn.2d 516, 522, 760 P.2d 357 (1988), the Supreme Court noted that a conflicted prosecutor might well be screened from the prosecution and thus make it unnecessary to disqualify the entire office. The creation of a “Chinese Wall” between the conflicted prosecutor and the rest of the office should suffice to avoid disqualification of the entire office so long as RPC 1.10(e) is satisfied.

Significantly, it should be noted that RPC 1.10 does not require that the former client consent to the erection of the “Chinese Wall”, nor does RPC 1.10 give a former client a veto power over the decision to screen the disqualified attorney instead of transferring the case to another firm. Such a veto power would run afoul of the rule that an accused does not have the right to choose his or her prosecutor. State v. Cook, 84 Wn.2d 342, 350, 525 P.2d 761 (1974).

The Washington State Bar Association has not addressed the issue of the adequacy of the “Chinese Wall” screening discussed by RPC 1.10(e) in a prosecution setting. The Alabama State Bar Association agrees that an entire prosecutor’s office is not vicariously disqualified due to a single deputy prosecutor’s conflict (based upon representation of the defendant in the pending case) if an adequate “Chinese Wall” screening is accomplished. See Alabama State Bar Association Opinion No. 1994-10, available at www.alabar.org/ogc/fopDisplay.cfm?oneId=59.

When creation of a “Chinese Wall” is necessary, the Kitsap County Prosecutor’s Office implements a three part process. Although Stenger does not detail the specifics of the screening process, the following “Chinese Wall” process should satisfy the requirements
(h) Defense Counsel’s Conflict Requires A Prosecution Response

The Sixth Amendment affords a criminal defendant the right to effective assistance of counsel, free from conflicts of interest. In this regard, the Sixth Amendment does not distinguish between retained and appointed counsel. *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 1103, 67 L. Ed. 2d 220 (1981). Accordingly, a trial court commits error by failing to inquire when it knows or reasonably should have known that defense counsel has a conflict of interest. *In re Richardson*, 100 Wn.2d 669, 677-79, 675 P.2d 209 (1983) (the automatic reversal rule discussed in *Richardson* was rejected in *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)).

Federal courts have consistently chastised prosecutors for failing to notify the court of a possible defense attorney conflict. See *United States v. Iorizzo*, 786 F.2d 52, 59 (2nd Cir. 1985) (appellate court chastises prosecutor for merely advising trial judge of potential conflict, and not also filing motion for disqualification); *Mannahalt v. Reed*, 847 F.2d 576, 583-84, *cert. denied*, 488 U.S. 908, 109 S. Ct. 260, 102 L. Ed. 2d 249 (9th Cir. 1988) (appellate court chastises prosecutor for not bringing potential conflict to the attention of trial court and for not moving for disqualification of defense counsel); and *United States v. Friedman*, 854 F.2d 535, 572 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1004, 109 S. Ct. 1637, 104 L. Ed. 2d 153 (1989) (prosecutor’s interest in avoiding conflicts that might place any conviction it obtains at risk gives it standing to bring disqualification motions even if defendant wishes to privately retain counsel).

Although joint representation is not a per se violation of the right to effective assistance of counsel, a trial court errs when it fails to appoint separate counsel or take adequate steps to assure that each defendant waived the conflict. *State v. Robinson*, 79 Wn. App. 386, 394, 902 P.2d 652 (1995).

An attorney’s previous representation of a witness may create a conflict depending upon the nature of the representation and whether the attorney must use witness confidences against the witness in order to properly represent the defendant. *State v. Ramos*, 83 Wn. App. 622, 922 P.2d 193 (1996).

A dispute between attorney and client over trial strategy does not create a conflict of interest. *State v. Varga*, 151 Wn.2d 179, 86 P.3d 139 (2004); *In re Stenson*, 142 Wn.2d
710, 16 P.3d 1 (2001). However, if there is an irreconcilable conflict and breakdown in communication between attorney and defendant, a conflict of interest may arise requiring court intervention. United States v. Adelzo-Gonzalez, 268 F.3d 772 (9th Cir. 2001). A court may need to appoint another attorney to investigate a breakdown in communication allegation. United States v. Wadsworth, 830 F.2d 1500 (9th Cir. 1987).

Although a prosecutor has the obligation to notify the court of a defense attorney’s conflict of interest and move to disqualify counsel in order to protect a defendant’s Sixth Amendment right to a conflict-free attorney, the prosecutor’s involvement in the conflict hearing is limited. The court must conduct the inquiry, and may be required to do so in camera by excluding the prosecutor given the potential of the disclosure of attorney-client communications. Prosecutors should make sure that a record is made of any in camera hearing. Depending upon the information provided to the court during an in camera hearing, the court may seal the record of the hearing pending appellate review.

**Practice Tip**

A defendant may waive his or her attorney’s conflict of interest. Prosecutors must take care to make sure that the waiver is sufficient. For example, in the joint representation situation, all defendants must waive the attorney’s conflict on the record. In the witness conflict situation, both the defendant and witness must waive the attorney’s conflict on the record. Prosecutors should encourage the court to use written waiver forms so that the court can conduct the proper colloquy with the appropriate persons, and thus make an adequate appellate record. Waiver of defense counsel conflict forms are available through the Washington Association of Prosecuting Attorneys.
(i) Prosecuting Defense Counsel When Counsel Represents A Defendant

Prosecution of defense counsel at the same time counsel is representing a defendant creates a situation requiring court inquiry. In *Campbell v. Rice*, 302 F.3d 892 (9th Cir. 2002), counsel was charged with attempting to transport drugs into a county jail. Counsel was thereafter retained to represent a defendant charged with multiple burglary counts in the same jurisdiction. Recognizing a conflict, the court met with the prosecutor and defense counsel in chambers. The prosecutor assured the court that the plea offer and handling of the case against the attorney was similar to other drug cases and had no impact on the defendant’s case. The defendant was not told of this conflict and was not present at the in chambers hearing.

In reversing the conviction, the Ninth Circuit held that the failure to include the defendant during the in chambers hearing concerning the conflict violated the defendant’s due process rights.

The 9th Circuit ultimately reviewed the case *en banc* in *Campbell v. Rice*, 408 F.3d 1166 (9th Cir. 2005), *cert. denied*, 546 U.S. 1036, 126 S.Ct. 735, 163 L.Ed.2d 578 (2005).

Without determining whether it was error for the trial court to conduct the in camera hearing without the defendant being present, the Ninth Circuit found that any error was subject to the harmless error rule. Concluding that any such error was harmless, the court determined that reversal was not required.

Two Ninth Circuit judges dissented, beginning their analysis as follows: “Prosecutors in the Ninth Circuit may not deliberately mislead judges about matters that are of vital importance to our judicial system.” *Campbell v. Rice*, 408 F.3d at 1173.

Although the *en banc* 9th Circuit declined to determine whether it was error to not notify the defendant about his attorney's conflict, it appears clear that the attorney in *Campbell* did have a conflict because of the potential of selling out a client to get a better deal from the prosecutor in the attorney's criminal case.

**Comment**

Prosecutors have a duty to make sure a defendant is not represented by a conflicted lawyer absent a waiver by the client of the conflict.

Prosecutors must therefore notify the court of such a situation so that the court can conduct the proper conflict inquiry. Care must be taken to make sure that the defendant is fully apprised of the conflict in open court.

Prior to notifying the court, however, the prosecutor should speak with the defense attorney about the situation, and present the attorney with a copy of the Ninth Circuit *Campbell v. Rice* opinion.

If the attorney chooses to not take action, then the prosecutor should file a motion to disqualify the attorney due to the attorney’s conflict.
(j) **Civil Conflicts**

In *Westerman v. Cary*, 125 Wn.2d 277, 298-302, 892 P.2d 1067 (1994), the Washington Supreme Court held that a prosecutor had a conflict of interest where representation of two public bodies required the prosecutor to take directly opposite positions in the same case. In such a situation, the Westerman court held that a superior court had the statutory authority to appoint a special prosecutor at public expense where the prosecutor was disabled due to the conflict.

In *Osborn v. Grant County*, 130 Wn.2d 615, 638, 926 P.2d 911 (1996), the court held that a prosecutor had no duty to bring litigation on behalf of a county clerk against the county due to a potential conflict the prosecutor’s office had in representing the county commissioners. Appointment of a special prosecutor on behalf of the clerk was held to be improper.

In *Whatcom County v. State*, 99 Wn. App. 237, 250-51, 993 P.2d 273, review denied, 141 Wn.2d 1001 (2000), a trial court was held to have authority to order the Attorney General to defend a prosecutor sued under 42 USC §1983 because the prosecutor was a state actor and entitled to a defense and indemnification from the State.

Government lawyers do not have a duty to maintain a standard of conduct higher than that expected of an attorney for a private party. *Lybbert v. Grant County*, 141 Wn.2d 29, 37-38, 1 P.3d 1124 (2000).

(4) **Public Statements**

It is difficult to strike a balance between protecting a defendant’s right to a fair trial and the right of free speech through media dissemination of information to the public. Standard 3-1.4 says that a prosecutor should not make extrajudicial statements 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.” RPC 3.6(a) uses virtually identical language to the ABA Standard.

RPC 3.6(b) discusses what may be disclosed by lawyers. Authorized public statements include (1) the claim, offense or defense involved, and the identity of the persons involved unless prohibited by law; (2) information in a public record; (3) that an investigation is in progress; (4) the scheduling or result of any step in the litigation; (5) a request for assistance in obtaining evidence and information; and (6) a warning of danger concerning the behavior of the person involved when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.

In addition to the above six categories, RPC 3.6(b)(7) specifically addresses criminal cases, and permits dissemination (i) of the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) of the time and place of arrest; and (iv) of the identity of investigating and arresting officers or agencies and the length of the
investigation.

Comment [9] to RPC 3.6 refers prosecutors to Guidelines For Applying RPC 3.6 in the appendix to the RPCs. These Guidelines state:

I. Criminal

A. The kind of statement referred to in Rule 3.6 which may potentially prejudice criminal proceedings is a statement which relates to:

(1) The character, credibility, reputation or criminal record of a suspect or defendant;

(2) The possibility of a plea of guilty to the offense or the existence or contents of a confession, admission or statement given by a suspect or defendant or that person’s refusal or failure to make a statement;

(3) The performance or results of any investigative examination or test such as a polygraph examination or a laboratory test or the failure of a person to submit to an examination or test;

(4) Any opinion as to the guilt or innocence of any suspect or defendant;

(5) The credibility or anticipated testimony of a prospective witness; and

(6) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial.

B. The public has a legitimate interest in the conduct of judicial proceedings and the administration of justice. Lawyers involved in the litigation of criminal matters may state without elaboration:

(1) The general nature of the charge or defense;

(2) The information contained in the public record; and

(3) The scheduling of any step in litigation, including a scheduled court hearing to enter a guilty plea.

C. The public has a right to know about threats to its safety and measures aimed at assuring its security. Toward that end a public prosecutor or other lawyer involved in the investigation of a criminal case may state:

(1) That an investigation is in progress, including the general scope of the investigation and, except when prohibited by law, the identity of the persons involved;

(2) A request for assistance in obtaining evidence and information;

(3) A warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(4) (i) The identity, residence, occupation and family status of the accused; (ii) information necessary to aid in apprehension of the accused; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
II. Civil

The kind of statement referred to in Rule 3.6 which may potentially prejudice civil matters triable to a jury is a statement designed to influence the jury or to detract from the impartiality of the proceedings.

(5) Duty To Respond To Misconduct

Policy decisions made by a prosecutor’s supervisors may be questioned “but should nonetheless ordinarily be followed by the prosecutor.” Comment to Standard 3-1.5. Standard 3-1.5(a) provides that where a prosecutor knows that another person in the office is “engaged in action, intends to act or refuses to act in a manner that is a violation of a legal obligation to the prosecutor’s office or a violation of law,” the prosecutor should follow office policy concerning such matters.

If office policies are not of assistance or do not exist, the prosecutor should timely ask the person to reconsider the action.

If the person continues on his or her course of action, or a request for reconsideration is not feasible, or if the seriousness of the matter so requires, the prosecutor “should refer the matter to higher authority in the prosecutor’s office” including referral to the elected prosecutor if the seriousness so warrants.

If despite the above efforts, the elected prosecutor insists upon the course of conduct and the action is a clear violation of law, the prosecutor may take additional action “including revealing the information necessary to remedy this violation to other appropriate government officials not in the prosecutor’s office.” ABA Standard 3-1.5(b).

It is a gross misdemeanor to commit official misconduct. RCW 9A.80.010 provides that a public servant is guilty of official misconduct if, “with intent to obtain a benefit or to deprive another person of a lawful right or privilege: (a) He intentionally commits an unauthorized act under color of law; or (b) He intentionally refrains from performing a duty imposed upon him by law.”
PART IV – ORGANIZATION OF THE PROSECUTION FUNCTION

(1) Prosecution Authority To Be Vested In A Public Official

The prosecution function “should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.” ABA Standard 3-2.1. A public prosecutor gives greater assurance that an accused’s rights will be respected and provides a valuable check on a private party’s vindictive desire to initiate criminal prosecution. Comment to ABA Standard 3-2.1.

Contrary to this ABA Standard, CrRLJ 2.1(c) authorizes a person to initiate a criminal proceeding alleging a misdemeanor or gross misdemeanor upon the filing of a citizen complaint. Although the rule contemplates input from the county prosecuting attorney, the rule grants power to the court over prosecution objection upon a finding of probable cause to authorize a citizen to sign and file a criminal complaint upon the citizen’s filing of an affidavit.

No legislation exists granting such a power to the judiciary. Accordingly, the author believes that CrRLJ 2.1(c) is an unconstitutional usurpation by the judicial branch of the executive branch’s power to decide who is or is not charged with violations of the criminal law. Briefing in support of this position is available upon request.

If a court grants the citizen complaint and thereafter compels the prosecutor to prosecute the accused despite the prosecutor’s ethical concerns to the contrary, the prosecutor may be placed in an ethical position of having to decline to follow the court’s order to prosecute. In such a situation, the prosecutor should immediately contact the Washington Association of Prosecuting Attorneys for assistance. The trial court should be advised to stay any contempt sanctions based upon the prosecutor’s refusal to follow the prosecution order, and also be provided a copy of Seventh Elect Church v. Rogers, 102 Wn.2d 527, 536, 688 P.2d 506 (1984) (“When an attorney makes a claim of privilege in good faith, the proper course is for the trial court to stay all sanctions for contempt pending appellate review of the issue.”).
(2) Interrelationship Of Prosecution Offices

Within A State

ABA Standard 3-2.2(c) provides that a state association of prosecutors should be established to improve the administration of justice and assure “the maximum practicable uniformity in the enforcement of the criminal law throughout the state.”

The Washington Association of Prosecuting Attorneys has been established to perform such a function. WAPA provides ongoing assistance to prosecutors through advice, e-mail trees, seminars, sharing of pleadings and theories, etc. Prosecutors should take full advantage of the services offered by WAPA. WAPA’s website is www.waprosecutors.org.

The National District Attorneys Association provides assistance and publications to prosecutors. NDAA’s website is www.ndaa.org.

An extremely useful tool in finding prosecutors’ offices throughout the United States is the Eaton County Michigan Prosecuting Attorney’s website at http://207.74.121.45/Prosecutor/proslist.htm

ABA Standard 3-2.2(d) provides that a central pool of resources and personnel should be maintained by state government and available to assist all local prosecutors, including laboratories, investigators, and other experts. As noted in the Comment, few local prosecution offices have access to the resources necessary for “effective investigation and prosecution under modern conditions.”

(3) Assuring High Standards Of Professional Skill

“The function of public prosecution requires highly developed professional skills.” ABA Standard 3-2.3(a). While some turnover may be desirable to maintain a steady infusion of “new blood” and ideas, the most efficient prosecution offices are built on career-type service because there is a limit to how much turnover of personnel is tolerable and consistent with effective prosecution. Comment to ABA Standard 3-2.3(a).

ABA Standard 3-2.3(b) provides that prosecution offices should provide full-time occupations. There is a risk that part-time prosecutors will not give sufficient energy and attention to duties when faced with the realities of maintaining a private practice. The ever-present temptation is to give priority to private clients. Comment to ABA Standard 3-2.3.

Opinion is divided on whether prosecutors should be appointed or elected. Regardless of the method of selection, “the ultimate goal is to remove the office from partisan politics. To do this requires the support and cooperation of the bar and political parties.” Comment to ABA Standard 3-2.3.
ABA Standard 3-2.3(d) provides that prosecutors should make special efforts to recruit qualified women and members of minority groups.

ABA Standard 3-2.3(e) provides that in order to achieve professionalism and recruit competent lawyers, compensation for prosecutors and staff “should be commensurate with the high responsibilities of the office and comparable to the compensation of their peers in the private sector.” Under no circumstances should prosecutors be paid on a case-by-case basis. Such systems are “totally unacceptable.” Comment to ABA Standard 3-2.3.

RCW 36.27.050 prohibits prosecutors from receiving any fee or reward from any person on behalf of any prosecution or for any official services except as provided in RCW 36.27. The statute also prohibits a prosecutor from being engaged as an attorney for any action arising out of the same facts involved in any criminal proceeding.

RCW 36.27.060 generally prohibits a prosecutor or deputy prosecutor from being engaged in private practice. Exceptions are provided in section (3) which permit prosecutors to perform legal services for oneself, one’s immediate family and charity. However, section (4) prohibits any private practice if the legal services interfere with the duties of the prosecutor. Section (4) continues that all such private legal services may not be deemed within the scope of employment of the prosecutor. Prosecutors desiring to perform private legal services should check in advance with a supervisor or the elected prosecutor.

(4) Special Assistants, Investigative Resources, Experts

ABA Standard 3-2.4(a) says that funds should be provided to a prosecutor for investigative and other necessary supporting personnel under the prosecutor’s direct control. Prosecutors may need to conduct investigations that the police are unwilling to undertake, such as investigations of public officials including the police themselves. Sufficient staffing is obviously important. “There is no savings to the taxpayer if relatively highly paid professionals are forced to perform stenographic and clerical duties because of a lack of secretarial personnel.” Comment to ABA Standard 3-2.4.

(5) Prosecutor’s Handbook; Policy Guidelines And Procedures

“Each prosecutor’s office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office.” ABA Standard 3-2.5(a). The Kitsap County Prosecutor’s Office’s Mission Statement, Standards and Guidelines are available on its website at www.kitsapgov.com/pros. Written prosecution standards are useful in response to a defense claim of vindictive prosecution when charging decisions are made consistent with the policies upon a defendant’s rejection of a

An office handbook is also encouraged. Such a handbook serves to maintain consistent policies despite staff turnover. “Perhaps of equal importance is the function of such a handbook as a teaching tool by which the accumulated experience of many former or senior prosecutors is preserved and transmitted to newer assistants.” Comment to ABA Standard 3-2.5.

RCW 9.94A.411 provides recommended prosecution standards for adult felony cases. RCW 13.40.077 provides recommended prosecution standards for juvenile cases.

(6) Training Programs

Training programs for new personnel and for continuing education of staff should be established. Public funds should be provided to enable prosecutors to attend such programs. ABA Standard 3-2.6.

(7) Relations With Police

(a) Police Training Encouraged

Prosecutors should provide legal advice to the police “concerning police functions and duties in criminal matters.” Additionally, prosecutors should cooperate with police in training police in the performance of their duties in accordance with the law. ABA Standard 3-2.7. Police training should be well organized and presented. The ever-changing nuances of search and seizure law necessitates a preventive lawyering approach through police training rather than a responsive approach through criminal litigation. Proper training can protect the public from improper police actions, and protect the jurisdiction and police from lawsuits.

(b) RPC 4.2 And Communication With A Represented Person

RPC 4.2 prohibits a lawyer from communicating “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.” (emphasis added). A lawyer was suspended for 60 days for directly communicating with an adverse party the lawyer should have known was represented by counsel and for making misrepresentations to obtain an ex parte order. In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 48 P.3d 311 (2002) (an attorney’s duty is to determine whether the party is in fact represented by contacting the opposing lawyer). Comment [3] makes clear that RPC 4.2 applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate the
communication upon learning that the person is one with whom communication is not permitted by the rule.

Comment [4] provides that the rule does not “prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.”

Comment [5] requires a prosecutor to comply with RPC 4.2 as well as honoring the constitutional rights of an accused. “The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.”

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<td>Prosecutors must be extremely careful dealing with defendants and their families, especially over the telephone. Conversations can be misconstrued by a family member, and communicated to a represented defendant. The best practice is to avoid telephonic conversations with any defendant or family member, and only deal with defendants in open court after it is clear that the defendant is not represented by counsel. Prosecutors should make sure as soon as possible to make a record in open court before a judge of whatever is discussed with a pro se defendant.</td>
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(c) The Sixth Amendment Right To Counsel And Communication With A Represented Person


The Sixth Amendment right to counsel attaches when an accused is brought before a judicial officer, informed of a formally lodged accusation, and has restrictions imposed on his or her liberty, because the government has formally committed itself to prosecution. *Rothgery v. Gillespie County, Tex.*., ___ U.S. ___, 128 S. Ct. 2578, 2586, ___ L. Ed. 2d ___ (2008), at headnote 7.

Once the Sixth Amendment right to counsel attaches, the accused is at least entitled to the presence of appointed counsel during any “critical stage” of the post-attachment proceedings. “Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.” *Rothgery v. Gillespie County, Tex.*, 128 S. Ct. at 2591 (court declines to decide whether six month delay in the appointment of counsel resulted in prejudice to Rothgery’s Sixth Amendment rights). See also *State v. Everybodytalksabout*, 161 Wn.2d 702, 166 P.3d 693 (2007).
Justice Alito’s Rothgery concurring opinion, joined by Chief Justice Marshall and Justice Scalia, asserts that a defendant is not entitled to an attorney as soon as the defendant’s Sixth Amendment right to counsel attaches. The Sixth’s Amendment’s use of the word “defence” means defense at trial, not defense in relation to other objectives that may be important to the accused. For this reason, the Court rejected the argument that the Sixth Amendment entitled a defendant to the assistance of appointed counsel at a probable cause hearing in Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) and rejected that the right to counsel entitles a defendant to a preindictment private investigator in United States v. Gouveia, 467 U.S. 180, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984).

Critical states entitling an indigent defendant to the presence of appointed counsel include: A preliminary hearing if “substantial prejudice … inheres in the … confrontation” and “counsel [may] help avoid that prejudice.” Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 2003, 26 L. Ed. 2d 387 (1970) (plurality opinion) (internal quotation marks omitted); A pretrial lineup, since “the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.” United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149 (1967); and other “critical stages” of the prosecution including pretrial interrogation, a pretrial psychiatric exam, and certain kinds of arraignments. See Michigan v. Harvey, 494 U.S. 344, 110 S. Ct. 1176, 1185, n.5, 108 L. Ed. 2d 293 (1990); Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 1877, 68 L. Ed. 2d 359 (1981); and Coleman v. Alabama, supra, 90 S. Ct. at 2002.


**Caution**

A prosecutor must carefully determine whether the Sixth Amendment right to counsel has attached when advising law enforcement concerning its contact with a represented suspect.

“The prosecutor is a lawyer first; a law enforcement officer second. The provisions of the Code of Professional Responsibility are as applicable to him as they are to all lawyers.”

In United States v. Grass, 239 F. Supp. 2d 535 (M.D. Penn. 2003), the District Court, citing several federal appellate cases, ruled that RPC 4.2 did not prohibit a prosecutor from offering advice to the police to contact a represented suspect because there is no
right to counsel prior to indictment. Thus, the advice and communication was authorized by law. The court did note the wisdom of the prosecutor in cautioning the undercover police to avoid any discussion about conversations the suspect had with his attorney. The court also stressed that post-indictment communications with a represented person are not authorized by law under RPC 4.2. The *Grass* case and the cases cited therein are important for prosecutors involved with providing pre-indictment advice to law enforcement concerning undercover contact with a represented suspect.

**Practice Tip**

Based upon the *Grass* case and the citations therein, prosecutors should feel secure in providing pre-charge advice to law enforcement involving a case with a represented suspect.

Prosecutors should take heed of footnote 8 in the *Grass* case, however, which applauds the prosecutor for making clear to law enforcement that it must avoid all attorney-client conversations the suspect had with attorney.

However, in *United States v. Danielson*, 325 F.3d 1054 (9th Cir. 2003), the prosecutor had an informant tape record conversations with a represented defendant who had been charged. Discussion included trial strategy. The Ninth Circuit held that the defendant’s Sixth Amendment right to counsel was violated, reversed the conviction, and remanded the case to determine prejudice. Similarly in *Fellers v. United States*, 540 U.S. 519, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004), the Supreme Court held that law enforcement violated a defendant’s Sixth Amendment right to counsel by deliberately eliciting information from the defendant during a post-indictment visit to his home absent counsel or a waiver of counsel. The court noted that whether the officers’ conduct constituted an interrogation under the Fifth Amendment was irrelevant to the Sixth Amendment analysis.

“The prosecutor is a lawyer first; a law enforcement officer second. The provisions of the Code of Professional Responsibility are as applicable to him as they are to all lawyers.” *State v. Morgan*, 231 Kan. 472, 478, 646 P.2d 1064, 1070 (1982) (prosecutor violated Sixth Amendment and rule equivalent to RPC 4.2 which prohibits communication about the subject of the representation with a person the lawyer knows to be represented by another lawyer absent the lawyer’s consent or when authorized to do so by law). A violation of RPC 4.2 may subject a prosecutor to bar discipline. *Peope v. Green*, 405 Mich. 273, 293-95, 274 N.W.2d 448, 454-55 (1979).

**8. Relations With The Court And Defense Bar**

**(a) The Court–Generally**

As with lawyers in general, a prosecutor should not intentionally misrepresent matters of fact or law to a court. ABA Standard 3-2.8(a). A prosecutor’s duties involve frequent contact with judges within the prosecutor’s jurisdiction. Prosecutors must take care to preserve the appearance as well as the reality of the correct relationship between
advocates and judges. ABA Standard 3-2.8(b).

**(b) The Court–Social Relationships**

It is only natural that a cordial relationship of mutual respect often develops between judges and prosecutors. “It is only when this cordiality is carried to the point of frequent social contacts that the danger zone is reached.” Although this kind of relationship often develops innocently and gradually without any actual impropriety, opposing counsel and the public cannot fail to be concerned by the appearance of a close social relationship between one of the advocates and the “umpire.” Comment to ABA Standard 3-2.8.

Judges are not required to recuse themselves from cases wherein a personal friend is counsel. However, judges should disclose the relationship with counsel and explain the relationship. In some situations, the judge should recuse if the judge cannot be impartial or the judge’s impartiality might be reasonably questioned. The judge might also invite comments or concerns from counsel. Judicial Ethics Advisory Committee Opinion 04-02, available at the Washington Court’s website at www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=0402.

**(c) The Court–Impugning A Judge’s Integrity**

RPC 8.2 prohibits a lawyer from impugning the integrity of a judge. An Indiana lawyer was reprimanded for impugning the integrity of the appellate court through the lawyer’s pleadings wherein he asserted that the court of appeals’ decision was so factually and legally inaccurate “that one is left to wonder whether the Court of Appeals was determined to find” for the opponent. The Indiana court made clear that advocacy permits a lawyer to challenge the factual or legal basis of a decision. Challenges to a judge’s motives by asserting bias and favoritism are not permitted, however. *In re Wilkins*, 782 N.E.2d 985, cert. denied, 540 U.S. 813, 124 S. Ct. 63, 157 L. Ed. 2d 27 (Ind. 2003). A Washington attorney was admonished for violating RPC 8.2 by challenging a judge’s impartiality based upon the fact the judge had previously been a partner in the opponent’s law firm. No factual basis was provided to support the allegations. *In re Joseph R. Jackson*, WSBA No. 12929. See Washington State Bar News, September 2004, at 52.

An assistant city attorney’s actions warranted sanction when, in response to a court’s show cause order to explain why an appeal was not frivolous, the attorney failed to recite to the record fairly and accurately and restated inaccurate facts and legal argument previously rejected by the court. *Frunz v. Tacoma*, 476 F.3d 661, 665 (9th Cir. 2007) ($138,000 jury award upheld and city appeal found frivolous; Tacoma ordered to pay Frunz’ attorney’s fees and double costs, and assistant city attorney ordered within 10 days to serve a copy of the Ninth Circuit’s order and opinion on the Tacoma City Manager and each member of the Tacoma City Council).
(d) The Court–Ex Parte Proceedings

A prosecutor should not engage in unauthorized ex parte communication with the court, and should not fail to disclose adverse controlling authority not disclosed by the defense. ABA Standard 3-2.8(c) and (d). All lawyers have a duty of candor to the court, especially during ex parte proceedings. In re Stephen T. Carmick, 146 Wn.2d 582, 595, 48 P.3d 311 (2002) (“The duty of candor in an ex parte proceeding directly influences the administration of justice. We cannot, and will not, tolerate any deviation from the strictest adherence to this duty.”).

In State v. Taylor, 114 Wn. App. 124, 126, n.1, 56 P.3d 600 (2002), the prosecutor obtained an ex parte order of dismissal without prejudice. Although the court of appeals held that the issue was not reviewable until the case was refiled, the court noted that prosecutors should have provided proper notice to the defense. The Supreme Court affirmed the Court of Appeals in State v. Taylor, 150 Wn.2d 599, 603, n.2, 80 P.3d 605 (2003), and noted that the court frowns on such ex parte contacts. If a prosecutor decides to dismiss a case, the prosecutor may dismiss the case with prejudice through an ex parte order since the case cannot be refiled. If the prosecutor seeks dismissal without prejudice, defense counsel should be contacted in advance and provided with notice of the hearing.

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<td>Prosecutors may dismiss cases with prejudice through an ex parte order.</td>
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<td>If the prosecutor wants to dismiss a case without prejudice, the prosecutor should take care to obtain approval from opposing counsel before presenting an ex parte order to dismiss without prejudice. Otherwise, the prosecutor should note the motion to dismiss for a hearing with proper notice to opposing counsel.</td>
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(e) The Defense Bar–Maintaining A Good Working Relationship

Prosecutors should strive to develop and maintain a good working relationship with the defense bar. ABA Standard 3-2.8(e). Although prosecutors need not and should not avoid friendly contacts with defense lawyers or participation in social and professional activities, prosecutors must be cautious of accused persons seeking out particular lawyers believing the lawyer has a special relationship with the prosecutor or judge. Comment to ABA Standard 3-2.8.
(f) The Defense Bar–Receipt Of Evidence From Counsel

A prosecutor who receives evidence from a defense attorney is not barred from introducing the evidence subject to the rules of evidence. Prosecutors should not, however, use the fact of defense counsel’s possession of the item as proof of the accused’s guilt. Comment to ABA Standard 3-2.8.

(9) Prompt Disposition Of Criminal Charges

The interests of the public and defendants are best served by prompt disposition of criminal charges. “The prophylactic effect of criminal sanctions is dissipated by delay in bringing them to bear upon offenders.” Comment to ABA Standard 3-2.9.

Caseloads of as many as seventy or more is intolerable and unmanageable. Cases are not adequately prepared, and the prosecutor tends to consent to unwarranted continuances. There is a limit to how much work any prosecutor can effectively perform. Prosecutors have a duty to the people in their jurisdiction not to carry so heavy a caseload that the interests of justice may be compromised. Comment to ABA Standard 3-2.9.

Prosecutors should not use procedural devices for delay absent a legitimate reason to do so. ABA Standard 3-2.9(b).

Prosecutors should be punctual in court attendance and in the submission of pleadings. Prosecutors should also emphasize the importance of punctuality to all witnesses in attendance in court. ABA Standard 3-2.9(c).

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<td>Always be early for court. Always.</td>
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<td>Try to avoid continuances by being adequately prepared. Continuing cases just makes more work later, and often hurts the prosecution because witnesses become unavailable and memories fade.</td>
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(a) Preaccusatorial Delay

Although preaccusatorial delay may violate a defendant’s due process rights, the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor’s judgment as to when to seek an indictment. Prosecutors must be allowed broad discretion to delay the filing of charges until they are satisfied that they should prosecute and will be able to establish proof beyond a reasonable doubt. United States v. Lovasco, 431 U.S. 783, 97 S. Ct. 2044, 2051, 52 L. Ed. 2d 542 (1977).

Most of Washington’s cases concerning preaccusatorial delay focus on the loss of juvenile court jurisdiction. In State v. Dixon, 114 Wn.2d 857, 792 P.2d 137 (1990), a defendant’s due process rights were not violated even though the delay resulted in loss of
juvenile court jurisdiction where the prosecutor prosecuted a co-defendant first in order to obtain his testimony against the defendant on the issue of intent. In State v. Frazier, 82 Wn. App. 576, 918 P.2d 964 (1996), dismissal of an adult felony prosecution was upheld when the prosecutor failed to review the case for eight weeks prior to the defendant’s eighteenth birthday. Due process is not violated when a timely conducted investigation results in the loss of juvenile court jurisdiction. State v. Brandt, 99 Wn. App. 184, 992 P.2d 1034, 9 P.3d 872 (2000); State v. Salavea, 151 Wn.2d 133, 86 P.3d 125 (2004).

(b) Time For Trial–CrR 3.3, JuCR 7.8, And CrRLJ 3.3

On September 1, 2003, Washington’s speedy trial rules were substantially rewritten based upon recommendations of a Time for Trial Task Force created to review these rules. A substantial body of cases exist interpreting the former speedy trial rules. It is difficult to anticipate which speedy trial rule cases will survive the updated time for trial rules. Previous speedy trial cases are analyzed in THE QUEST FOR JUSTICE 2005, at pages 56-80, available at the Washington Association of Prosecuting Attorneys and Kitsap County Prosecutor’s Office websites. Prosecutors are cautioned to carefully review the updated time for trial rules. Litigation questions and strategies should be directed to the Washington Association of Prosecuting Attorneys. A couple of speedy trial cases, however, are worth mentioning.

(c) Time For Trial–When Does A Trial “Commence”?

A trial commences when any preliminary motion is made and a ruling obtained on the trial date. For example, a preliminary ER 615 motion to exclude witnesses commences the trial for time for trial purposes when the motion is made and ruled upon the morning of trial. State v. Carlyle, 84 Wn. App. 33, 925 P.2d 635 (1996). Carlyle is a very useful case for prosecutors faced with scheduling or jury problems on the morning of trial. It does not matter whether the court grants the motion, only that a ruling is made because the ruling commences the trial. The fact that the trial may take weeks or months thereafter to conclude has no impact on the issue concerning the commencement of the trial and compliance with the time for trial rules.

| Practice Tip | On the morning of trial, prosecutors should always make an ER 615 motion to exclude witnesses and get a ruling from the court granting or denying the motion. A court’s ruling made on the trial date “commences” the trial for time for trial purposes. Regardless of when jury selection, opening statement, and presentation of evidence occur, the trial has “commenced” and the time for trial rules are satisfied. |

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(d) Time For Trial–Court Congestion


(e) Time For Trial–Defendant Late For Court Is A Failure To Appear

A trial court is permitted to find that a defendant failed to appear (and thus re-start the speedy trial clock) when a defendant shows up late for trial. It does not matter that the court declined to issue an arrest warrant or that another case had trial priority and the defendant’s trial would not have commenced on the day in question. “While the rule may appear to permit harsh results, such rules are made necessary by the crush of litigation that confronts modern courts. Firm and fair application of the rule will benefit all litigants who have matters pending in our busy courts.” *State v. Wachter*, 71 Wn. App. 80, 856 P.2d 732, *review denied*, 123 Wn.2d 1014 (1994).

(f) Time For Trial–Traffic Infraction Resolution

Resolution of a traffic infraction has no impact on criminal charges arising out of the same incident. Infractions are civil, and thus the criminal rules regarding mandatory joinder and speedy trial do not apply upon resolution of the infraction. *State v. Keltner*, 102 Wn. App. 396, 9 P.3d 838 (2000).

(g) Time For Trial–Military Mobilization

Military mobilization presents some prosecutorial challenges. A robbery case continued ten days beyond expiration of the speedy trial rules was upheld due to an unexpected National Guard call-up of the investigating detective. *State v. Nguyen*, 68 Wn. App. 906, 847 P.2d 936, *review denied*, 122 Wn.2d 1008 (1993). Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys, has noted that prosecutors have some options when dealing with unavailable witnesses due to activation for military service.

1. A perpetuation deposition may be sought under CrR 4.6 or CrRLJ 4.6. These depositions may only be used at trial in lieu of the witness’ presence if the defendant was given notice of the deposition and the defendant and counsel were given an opportunity to participate in the taking thereof.

2. Speedy trial is tolled while the witness is on military call-up. *See generally State v. Nguyen*, above, and *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988) (unavailability of material state witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant). If the period of service drags
on too long, the defendant may be able to obtain dismissal on Sixth Amendment grounds even though the court rule was not violated.

3. The charge can be dismissed without prejudice and refiled after the witness returns. The statute of limitations, though, will continue running. The case would have to be refiled within the statute of limitations plus the time the charge had been pending in court. If the charge is filed outside the statute of limitations, the prosecutor needs to explain the tolling in the charging document. E.g. “On or about the ___ day of ______, ____, in the County of _____, State of Washington, the above-named Defendant did …, and furthermore, this charge was previously pending in the above-entitled court from the ___ day of _____, _____, through the ___ day of _____, _____; contrary to RCW [insert crime] and RCW 9A.04.080(2).”

(h) Time For Trial–Clock Continues To Run Despite Court’s Oral Rulings

New prosecutors are often unaware that the time for trial clock continues to run even though a court grants a defense suppression or other motion and orally dismisses a case. Entry of a written order of dismissal will stop the time for trial clock. Although often difficult to do after a hard-fought loss, a prosecutor should immediately prepare a written order of dismissal to stop the time for trial clock so that the decision whether to appeal the ruling can thereafter be made. Findings of fact and conclusions of law may be entered after entry of the order of dismissal. State v. Duffy, 86 Wn. App. 334, 936 P.2d 444 (1997); State v. Hoffman, 150 Wn.2d 536, 78 P.3d 1289 (2003).

Caution

The time for trial clock continues to run despite a trial court’s oral suppression or dismissal ruling.

Prosecutors, to stop the time for trial clock, must immediately present a written order of dismissal when a trial court (1) orally grants a defense suppression motion which effectively terminates the prosecution’s case, or (2) orally grants a defense motion to dismiss.

(10) Supercession And Substitution Of Prosecutor

Const. art. IV, §9 provides that any judge of a court of record, the attorney general, or any prosecuting attorney may be removed from office by a joint resolution of the legislature, in which three-fourths of the members concur, for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause as stated in the resolution. The officer complained of shall be served with a copy of the charges and an opportunity to be heard.

RCW 43.10.090 provides that upon written request of the governor, the attorney general shall investigate violation of the criminal laws. If after investigation the attorney general believes that the prosecuting attorney of the county has failed or neglected to prosecute
violations of such criminal laws, the attorney general shall direct the prosecuting attorney to do so. If the prosecuting attorney fails to do so in a reasonable time or refuses to do so, the attorney generally may initiate and prosecute such criminal actions.

(11) **Literary Or Media Agreements**

Prior to conclusion of all aspects of a matter, a prosecutor should not enter into an agreement by which the prosecutor acquires an interest in literary or media rights based in substantial part on information relating to the matter. ABA Standard 3-2.10. The Comment notes that such an agreement made while the criminal case is pending may create a conflict between the interests of the people in obtaining a fair and just outcome and the personal interests of the prosecutor. Accordingly, such agreements should be “scrupulously avoided” until all aspects of the matter are concluded.
PART V – INVESTIGATION FOR PROSECUTION DECISION

(1) Investigative Function of Prosecutor

(a) Duty To Investigate

Although prosecutors generally rely on police and other agencies for investigation of criminal activity, prosecutors have a duty to “investigate suspected illegal activity when it is not adequately dealt with by other agencies.” ABA Standard 3-3.1(a).

(b) Discriminatory Investigation Or Prosecution

A prosecutor should not use improper considerations in exercising discretion to investigate or prosecute, including discrimination against or in favor of a person on the basis of “race, religion, sex, sexual preference, or ethnicity.” ABA Standard 3-3.1(b).

(c) Illegally Obtained Evidence

Prosecutors must take the lead assuring that criminal investigations “are conducted lawfully and in full and ungrudging accordance with the safeguards of the Bill of Rights, as implemented by legislation and the decisions of the courts.” Comment to ABA Standard 3-3.1(c).

(d) Obstructing Defense And Witness Communications

A prosecutor should not discourage or obstruct defense counsel’s communication with prospective witnesses. Further, a prosecutor should not advise a witness “to decline to give to the defense information which such person has the right to give.” ABA Standard 3-3.1(d). It is proper for a prosecutor to “caution a witness concerning the need to exercise care in subscribing to a statement prepared by another person.” Comment to ABA Standard 3-3.1(d).

RPC 3.4(a) provides that a lawyer should not “unlawfully obstruct another party’s access to evidence[.]”

Washington State Bar Association Published Informal Opinion 88-2 specifically deals with a prosecutor’s obligations concerning advice to prospective witnesses concerning defense interviews.

(1) May a prosecutor discourage witnesses from talking with a defense attorney or investigator? After citing the above ABA Standard and Commentary, the Opinion noted: “…[A] prosecutor who discourages or otherwise obstructs witnesses from consenting to defense interviews would violate RPC 3.4.”
The Opinion additionally cites CrR 4.7(h)’s prohibition on any party impeding an investigation, and State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976) (prosecutor instructed alibi witnesses in special inquiry not to discuss their testimony with defense counsel; the Supreme Court affirmed the trial court’s dismissal of the case, noting a defendant’s constitutional right to make a full investigation of the facts and applicable law).

(2) May a prosecutor encourage witnesses not to be interviewed unless a prosecutor is present? “We believe that encouraging witnesses not to be interviewed unless a prosecutor is present constitutes obstructing access to the witness, which is prohibited by RPC 3.4.”

(3) May a prosecutor advise a witness of his or her right to be represented by a person of the witness’s choice during a defense interview? “We believe it is permissible for the prosecutor to advise a witness of his or her rights as a witness. Those rights include the right, if the witness chooses, to have the prosecution present at a defense interview.” The above ABA Standard and Commentary were cited in support of this Opinion.

Care must be taken when speaking with witnesses about defense interviews. Although a prosecutor may not pre-condition a defense interview on the prosecutor’s presence, it is proper to let the witness know that although the prosecutor is not the witness’ attorney, the prosecutor will be present if requested by the witness. When dealing with a witness who is reluctant to submit to any defense interview, the prosecutor should consider informing the witness that the defense has a right to interview the witness, and that a court may order a deposition at the defense’s convenience pursuant to CrR 4.6 or CrRLJ 4.6, or perhaps even dismiss a case if the witness refuses a defense interview.

![Comment](https://example.com/comment)

1. A prosecutor may not discourage a witness from speaking with the defense.
2. A prosecutor may not require the prosecutor’s presence as a pre-condition to a defense interview.
3. A prosecutor should advise a witness of the right to be represented by an attorney during a defense interview.
4. A prosecutor should advise a witness that the prosecutor is not the witness’ attorney.
5. A prosecutor should advise a witness that the prosecutor will be present during a defense interview if the witness wants the prosecutor present.

It is misconduct for a prosecutor to advise co-suspects not to speak with defense counsel unless the prosecutor is present after the co-suspects have made a deal with the prosecution to testify against the defendant. State v. Hofstetter, 75 Wn. App. 390, 878 P.2d 474, review denied, 125 Wn.2d 1012 (1994).

It is also improper for a prosecutor to advise several defense witnesses that the defendant
refused to submit to a polygraph when the witnesses thereafter refused to testify for the defense. In State v. Kearney, 11 Wn. App. 394, 523 P.2d 443, review denied, 84 Wn.2d 1011 (1974), dismissal was deemed to be the proper remedy because the defense was denied an opportunity to present its own case due to the prosecutor’s prejudicing of the defense witnesses.

In State v. Wilson, 149 Wn.2d 1, 65 P.3d 657 (2003), the prosecutor agreed to arrange a defense interview of a prosecution witness. The witness initially refused the interview. The Supreme Court reversed the trial court’s CrR 8.3(b) dismissal order, holding that less extreme alternatives to dismissal were available including release of the in-custody defendant to extend speedy trial time, the taking of a court ordered deposition, providing more time for the prosecutor to arrange the interview, and possible exclusion of the witness’ testimony.

(e) **Colorable Judicial Process To Interview Witnesses**

Unless authorized to do so by law, a prosecutor should not seek to compel a witness interview by use of any communication which has the appearance or color of a subpoena or other judicial process. ABA Standard 3-3.1(e).

(f) **Promise Not To Prosecute**

A prosecutor should not promise not to prosecute unless the activity is part of an “officially supervised investigative and enforcement program.” ABA Standard 3-3.1(f). This standard recognizes that it is proper to promise an informant not to prosecute for specific criminal activity when the informant is engaged in such activity as part of a supervised investigation. Comment to ABA Standard 3-3.1(f).

(g) **Interviews By The Prosecutor And Impeachment**

Unless a prosecutor is prepared to forego impeachment, a prosecutor should “avoid interviewing a prospective witness except in the presence of a third person.” ABA Standard 3-3.1(g).

It is misconduct for a prosecutor to attempt to impeach a witness by asking the witness about a conversation between the witness and the prosecutor, and thereafter failing to provide evidence supporting the out-of-court inconsistent statement. State v. Donley, No. 24869-7-II, 106 Wn. App. 1009, 2001 WL 472965, review denied, 144 Wn.2d 1021 (May 4, 2001) [UNPUBLISHED OPINION].

District and municipal court prosecutors must be especially careful here. Due to volume, lack of resources and often untimely defense disclosure of defense witnesses along with the court’s desire to keep the trial moving, prosecutors are frequently placed in the position of having to interview adverse witnesses in a hallway just prior to the witness testifying. Although prosecutors should interview the witness regardless of whether another person is available during the interview to act as a possible impeachment witness (an officer is the best choice), the lack of an impeachment witness will result in the
prosecutor’s inability to impeach the witness based upon statements made during the interview.

| Caution | It is not proper for a prosecutor to ask a witness: “Didn’t you tell me …?” absent the calling of an impeachment witness if the witness says “no.” Prosecutors must always forego asking an impeachment question unless the prosecutor has admissible evidence and/or a witness to “tie up” the impeachment. |

(h) Parallel Civil And Criminal Investigations

The Supreme Court has held that the government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it does not act in bad faith. In United States v. Kordel, 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970), the court held that the government did not violate the due process rights of corporate executives when it used evidence it obtained from an FDA civil investigation to convict them of criminal misbranding. The court explained that the FDA did not act in bad faith when it made a request for information, which ultimately was used in the criminal investigation, for the agency made similar requests as a matter of course in 75% of its civil investigations. The court suggested that the government may act in bad faith if it brings a civil action solely for the purpose of obtaining evidence in a criminal prosecution and does not advise the defendant of the planned use of evidence in a criminal proceeding.

In United States v. Stringer, 521 F.3d 1189 (9th Cir. 2008), the court reversed a trial court’s dismissal of three defendants’ criminal cases even though the defendants were not told of the parallel criminal investigation during their participation in an SEC investigation. The defendants were told that the information they provided in the SEC investigation could be used in a criminal investigation, and were thus held to have waived their privilege against self incrimination by freely participating in the civil investigation.

(2) Relations With Victims And Witnesses

(a) Witness Compensation

Except for expert testimony, a prosecutor should not compensate a witness for giving testimony. It is proper, however, to reimburse a witness for the reasonable expenses of attendance at interviews and court hearings. Payments may include the costs of transportation and loss of income so long as the fact of reimbursement is not concealed. ABA Standard 3-3.2(a).
(b) Witness Self Incrimination

A prosecutor should advise a witness who is to be interviewed and may make incriminating statements of the witness’ right against self incrimination and the right to counsel. It is also proper for a prosecutor to advise a witness of possible criminal prosecution. A prosecutor should not so advise a witness for the purpose of influencing the witness in favor of or against testifying. ABA Standard 3-3.2(b).

Dismissal is an appropriate remedy when a prosecutor instructs alibi witnesses in a special inquiry to not discuss their testimony with defense counsel in violation of the defendant’s right to compulsory process. State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976).

No due process violation occurs when a prosecutor truthfully notifies a potential defense witness that the witness may be the subject of a criminal prosecution based upon the witness’ anticipated testimony, and the witness thereafter refuses to testify for the defense. State v. Carlisle, 73 Wn. App. 678, 871 P.2d 174 (1994). Especially important to the Carlisle court was the fact that the prosecutor did not threaten to prosecute the witness.

Practice Tip

A prosecutor has a duty to warn a witness of his or her right against self incrimination when the prosecutor has reason to believe the witness may be the subject of a criminal prosecution.

When confronted with this situation, the prosecutor must notify the witness of the right against self incrimination and the right to counsel, and let the witness know that any prosecution decision concerning possible criminal charges based upon the witness’ statements or testimony will be made by the prosecutor’s supervisor.

Defense counsel may respond quite negatively to a prosecutor’s actions in notifying a prospective defense witness of his or her right against self incrimination. Counsel may seek dismissal, sanctions against the prosecutor, and perhaps even file a bar complaint arguing that the prosecutor’s motivation is really to intimidate the defense witness from testifying for the defense.

This entire situation is most difficult when a prosecutor believes that a defense witness’ statements or testimony may result in possible criminal prosecution of the witness. If a prosecutor speaks up and warns the witness, the defense in the underlying case will surely claim a due process violation when the defense witness chooses to thereafter assert his or her right against self-incrimination by arguing that the prosecutor’s motives were solely to keep the defense witness off the stand. If the prosecutor says nothing and the defense witness in essence confesses to a crime and is subsequently charged, the self-incriminating witness’ defense attorney will surely assert that the prosecutor failed in its duty to protect the witness from self-incrimination, citing Carlisle’s analysis to seek
suppression of the statements or testimony.

This Hobson’s Choice must be resolved by a prosecutor erring on the side of ensuring that a witness be given legal advice (by appointed counsel if necessary) prior to being put in jeopardy of subsequent criminal prosecution based upon statements the witness might make. If the witness, after obtaining this advice, chooses to not testify; so be it.

A defendant does not have a constitutional right to compel another witness to incriminate himself or herself. If the witness chooses to testify anyway after being advised by counsel, the witness’ choice to waive his or her self-incrimination rights will have been knowingly and voluntarily made. The defendant in the underlying case will have no issue, and the witness will have been forewarned about the possibility of criminal charges.

Defense counsel has no duty to protect a witness from possible future criminal prosecution based upon the witness’ statements or testimony. Prosecutors, however, have such a duty to the witness, and must stay firm in exercising the prosecutor’s duty to protect witnesses from unwittingly providing evidence against themselves.

## (c) Victim And Witness Rights

Upon request, a prosecutor should provide victims and witnesses with information about case status. ABA Standard 3-3.2(c).

Effective law enforcement depends on the cooperation of crime victims. Upon notifying the prosecuting attorney, a felony crime victim shall have the right to be informed of and attend all court proceedings, including trial. Felony crime victims also have the right to make a statement at sentencing and any hearing where the defendant’s release is considered. If the victim is deceased, incompetent, a minor or otherwise unavailable, the prosecutor may identify a representative to appear to exercise the victim’s rights. Const. art. I, §35.

RCW 7.69.030 provides for the rights of victims, survivors and witnesses. The statute says:

There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights, which apply to any criminal court and/or juvenile court proceeding:

1. With respect to victims of violent or sex crimes, to receive, at the time of reporting the crime to law enforcement officials, a written statement of the rights of crime victims as provided in this chapter. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county;

2. To be informed by local law enforcement agencies or the prosecuting attorney of the final disposition of the case in which the victim, survivor, or witness is involved;
(3) To be notified by the party who issued the subpoena that a court proceeding to which they have been subpoenaed will not occur as scheduled, in order to save the person an unnecessary trip to court;

(4) To receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available;

(5) To be informed of the procedure to be followed to apply for and receive any witness fees to which they are entitled;

(6) To be provided, whenever practical, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families or friends of defendants;

(7) To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within ten days of being taken;

(8) To be provided with appropriate employer intercession services to ensure that employers of victims, survivors of victims, and witnesses of crime will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearance;

(9) To [have] access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having such assistance administered. However, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(10) With respect to victims of violent and sex crimes, to have a crime victim advocate from a crime victim/witness program, or any other support person of the victim's choosing, present at any prosecutorial or defense interviews with the victim, and at any judicial proceedings related to criminal acts committed against the victim. This subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the crime victim;

(11) With respect to victims and survivors of victims, to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified;

(12) With respect to victims and survivors of victims, to be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing for felony convictions upon request by a victim or survivor;

(13) To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all
presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;

(14) With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions;

(15) With respect to victims and survivors of victims, to entry of an order of restitution by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment; and

(16) With respect to victims and survivors of victims, to present a statement in person, via audio or videotape, in writing or by representation at any hearing conducted regarding an application for pardon or commutation of sentence.

Laws of 2008, ch. 286 (effective April 1, 2008) provides victims of domestic violence, sexual assault or stalking with the right to take employment leave, with or without pay, for purposes of complying with court appointments, seeking treatment or counseling, participating in safety planning or relocation, or to help a family member/victim with these listed purposes. Verification to the employer of the conditions necessary to create this right may be by police report, court order, advocate report, or written report by the victim. This law will be a new chapter in RCW Title 49. Prosecutors must communicate this right to victims pursuant to RCW 7.69.030.

RCW 7.69A.030 provides for the rights of child victims and witnesses. The statute says:

In addition to the rights of victims and witnesses provided for in RCW 7.69.030, there shall be every reasonable effort made by law enforcement agencies, prosecutors, and judges to assure that child victims and witnesses are afforded the rights enumerated in this section. Except as provided in RCW 7.69A.050 regarding child victims or child witnesses of violent crimes, sex crimes, or child abuse, the enumeration of rights shall not be construed to create substantive rights and duties, and the application of an enumerated right in an individual case is subject to the discretion of the law enforcement agency, prosecutor, or judge. Child victims and witnesses have the following rights, which apply to any criminal court and/or juvenile court proceeding:

(1) To have explained in language easily understood by the child, all legal proceedings and/or police investigations in which the child may be involved.

(2) With respect to child victims of sex or violent crimes or child abuse, to have a crime victim advocate from a crime victim/witness program, or any other support person of the victim's choosing, present at any prosecutorial or defense interviews with the child victim. This subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the child victim and to promote the child's feelings of security and safety.

(3) To be provided, whenever possible, a secure waiting area during court proceedings and to have an advocate or support person remain with the child
prior to and during any court proceedings.

(4) To not have the names, addresses, nor photographs of the living child victim or witness disclosed by any law enforcement agency, prosecutor's office, or state agency without the permission of the child victim, child witness, parents, or legal guardians to anyone except another law enforcement agency, prosecutor, defense counsel, or private or governmental agency that provides services to the child victim or witness.

(5) To allow an advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate with prosecution and the potential effect of the proceedings on the child.

(6) To allow an advocate to provide information to the court concerning the child's ability to understand the nature of the proceedings.

(7) To be provided information or appropriate referrals to social service agencies to assist the child and/or the child's family with the emotional impact of the crime, the subsequent investigation, and judicial proceedings in which the child is involved.

(8) To allow an advocate to be present in court while the child testifies in order to provide emotional support to the child.

(9) To provide information to the court as to the need for the presence of other supportive persons at the court proceedings while the child testifies in order to promote the child's feelings of security and safety.

(10) To allow law enforcement agencies the opportunity to enlist the assistance of other professional personnel such as child protection services, victim advocates or prosecutorial staff trained in the interviewing of the child victim.

(11) With respect to child victims of violent or sex crimes or child abuse, to receive either directly or through the child's parent or guardian if appropriate, at the time of reporting the crime to law enforcement officials, a written statement of the rights of child victims as provided in this chapter. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county.

RCW 7.69A.050 provides for the confidentiality of child victim and witness address information. The statute says:

At the time of reporting a crime to law enforcement officials and at the time of the initial witness interview, child victims or child witnesses of violent crimes, sex crimes, or child abuse and the child's parents shall be informed of their rights to not have their address disclosed by any law enforcement agency, prosecutor's office, defense counsel, or state agency without the permission of the child victim or the child's parents or legal guardian. The address may be disclosed to another law enforcement agency, prosecutor, defense counsel, or private or governmental agency that provides services to the child. Intentional disclosure of an address in violation of this section is a misdemeanor.
RCW 10.99.060 requires the prosecution to notify a domestic violence victim (the crime is committed against a family or household member as defined by RCW 10.99.020(3)) of the prosecution decision. The statute says:

The public attorney responsible for making the decision whether or not to prosecute shall advise the victim of that decision within five days, and, prior to making that decision shall advise the victim, upon the victim's request, of the status of the case. Notification to the victim that charges will not be filed shall include a description of the procedures available to the victim in that jurisdiction to initiate a criminal proceeding.

Lastly, ER 615 permits a court to exclude witnesses from a hearing or trial so that the witness cannot hear the testimony of other witnesses. The rule does not authorize exclusion of a person “whose presence is shown by a party to be reasonably necessary to the presentation of a party’s case.” Typically, prosecutors should ask court permission to have the investigating officer present at counsel table throughout the trial to assist the prosecutor.

(d) Victim And Witness Rights–Redaction

Prosecutors should carefully redact victim and witness personal identifiers from court documents. Victims and witnesses are often reluctant to cooperate with the criminal justice system. Unnecessarily exposing their personal information to the public only increases the likelihood of future non-cooperation.

**Practice Tip**

A general rule of thumb is: redact any victim or witness identifier information (e.g. date of birth, address, social security number, driver’s license number, telephone number, job information, etc.) before filing a court document that you would want redacted if the information was about you.

Effective October 26, 2004, General Rule 31(e) requires lawyers to redact the following personal identifiers from all documents filed with the court: social security numbers, financial account numbers and driver’s license numbers.

Unfortunately, GR 31(e) cannot be reconciled with other court rules requiring prosecutors to provide all known personal identifiers concerning defendants. See CrR 2.1, JuCR 7.2 and 1.4, and CrRLJ 2.1. Given the strong public policy of linking defendants with their criminal history through the Judicial Information System, the consensus among prosecutors is that the “unless necessary or otherwise ordered by the Court” language of GR 31(e)(1) is sufficiently broad to permit disclosure of a defendant’s personal identifiers as required by other court rules.
(e) Witness Intimidation

A prosecutor should advise victims and witnesses who may need protections against intimidation about such protections. ABA Standard 3-3.2(d).

Victim and witness intimidation is widespread and pervasive in the criminal justice system. Possible options to deal with this problem include: “extra police patrols; temporary or permanent victim or witness relocation; temporary restraining orders requiring the accused to maintain a specific geographical distance from the victim or witness; police ‘hot lines’ for intimidation calls; transportation to and from work or the court; phone disconnect or monitoring; mail stop and forward services; and phone traces.” Comment to ABA Standard 3-3.2(d). Prosecutors should not, though, “create or encourage false expectations. They are unfair—possibly dangerous—to the victim or witness, and can be detrimental to the successful prosecution of the case itself.” Comment to ABA Standard 3-3.2(d).

(f) Court Scheduling

It is not possible to schedule criminal cases for the convenience of all concerned parties. Often, scheduling changes are required for various legitimate reasons. Nevertheless, prosecutors should attempt to make reasonable efforts to notify victims and witnesses of scheduling changes as soon as is reasonable. Comment to ABA Standard 3-3.2(e).

A prosecutor should not require victims and witnesses to attend court hearings unless their testimony is essential. When such testimony is required, prosecutors should seek to “reduce to a minimum the time [the victim or witness] must spend at the proceedings.” ABA Standard 3-3.2(f). Prosecutors should give notice as soon as practical to victims and witnesses of court scheduling and scheduling changes. Obviously, subpoenaed witnesses should be given timely notice of the time, date and location they are expected to appear.

Often, victims and witnesses are interested in court dates even when not required to testify, and are interested in the case’s final disposition. Victims of serious crimes should be provided timely notice of all significant judicial proceedings, including the final disposition, and decisions or actions that result in the defendant’s release from custody. Comment to ABA Standard 3-3.2(f).

(g) Victim Consultation In Serious Crimes

A prosecutor needs all available information concerning a serious crime prior to deciding to not prosecute, to dismiss, or to offer a plea agreement. When practical, a prosecutor should give victims an opportunity to provide information and discuss the matter prior to the prosecutor taking final action. A prosecutor is not the victim’s attorney, however, and must ultimately exercise discretionary authority to make case decisions without regard to the victim’s or anyone else’s views. Comment to ABA Standard 3-3.2(g).

Concerning adult felony cases, RCW 9.94A.411(2)(b)(v) says: “Discussions with the
victim(s) or victims’ representatives regarding the selection or disposition of charges may occur before the filing of charges. The discussions may be considered by the prosecutor in charging and disposition decisions, and should be considered before reaching any agreement with the defendant regarding these decisions.”

(h) **Witness Preparation Versus Witness Coaching (AKA Tampering)**

A lawyer may discuss the case with witnesses before they testify. In fact, a lawyer has a duty to investigate the facts of a case which by necessity involves communication with witnesses so the lawyer “can deliver their testimony efficiently, persuasively, comfortably, and in conformity with the rules of evidence.” Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995).

Despite the above obligation, a lawyer must not during a witness interview “try to bend the witness’s story or put words in the witness’s mouth.” Wydick, *The Ethics of Witness Coaching*, at 2. Professor Wydick summarizes a lawyer’s obligation by quoting from an old lawyer disciplinary case, *In re Eldridge*, 2 Ky.L.Rptr. 75, 37 Sickels 161, 82 N.Y. 161, 1880 WL 12546 at 5 (N.Y. 1880), which says: “[A lawyer’s] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.” Violation of this advice may result in lawyer discipline for offering knowingly false testimony in violation of RPC 3.3(a)(4).

**Caution**

A lawyer’s duty is to “extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.” *In re Eldridge* (N.Y. 1880).

Professor Wydick suggests several legitimate reasons for an advocate’s questioning of a witness. Wydick, *The Ethics of Witness Coaching*, at 17-18. The following list is a helpful reminder of the goals a prosecutor should consider when conducting a witness interview and witness preparation.

[T]o investigate the facts, that is, to find out about the events in question;

to find out what the witness perceived and can testify to from personal knowledge;

to determine how accurately the witness perceived the events and what conditions may have hindered or assisted his perception;

to test the witness's memory about what he perceived;

to discover how certain the witness is about what he remembers;

to determine adverse or favorable conditions that may have affected the witness's memory;

to refresh the witness's memory of things he once remembered but has since forgotten;
to find out whether exposure to relevant documents, other items of tangible or testimonial evidence, or some non-evidentiary stimulus will help refresh the witness's memory;

to test the witness's ability to communicate his recollections accurately;

to find out what the witness means by words or expressions he used in his story;

to test the witness's truthfulness;

to warn the witness that his credibility may be attacked and that some kinds of acts in his past may be exposed in open court;

to ascertain whether the witness has a good or bad character as respects truthfulness;

to find out whether the witness has previously been convicted of a crime that could be used to impeach his credibility;

to uncover instances of non-criminal conduct that could be used to impeach the witness's credibility;

to discover whether the witness's story has been influenced by bias or prejudice;

to find out whether the witness's story has been influenced, properly or improperly, by the statements or conduct of some other person;

to find out whether the witness has previously made statements that are either consistent or inconsistent with his present story;

to test the witness's demeanor in response to various stimuli he may encounter when he testifies (for example, the witness's likely response to harsh questioning by a cross-examiner);

to explain the role of a witness, the obligations imposed by the oath, and the formality of court proceedings;

to inform the witness about the physical surroundings in which he will testify, the persons who will be present, and the logistical details of being a witness;

to explain to the witness why he should listen to questions carefully, not guess, not volunteer information that has not been asked for, be alert to objections, and the like;

to advise the witness about appropriate attire and physical appearance in court, distracting mannerisms, inappropriate language and demeanor, and the effective delivery of testimony.

One extremely important obligation of Washington prosecutors not included in Professor Wydick’s list is:

To advise the witness of pre-trial judicial rulings limiting the areas about which the witness may testify.

Professor Wydick, The Ethics of Witness Coaching, at 38-39 (footnote omitted), suggests that an advocate who wants to avoid improper witness coaching should consider these four steps:
PART V. INVESTIGATION FOR PROSECUTION DECISION

Step One: Will my next question or statement overtly tell this witness that I want him to testify to something I know is false? If so, I could be disciplined or criminally sanctioned. If not, then –

Step Two: Will my next question or statement send a covert message to this witness that I want him to testify to something I know is false? If so, I could be disciplined or criminally sanctioned. If not, then –

Step Three: Is there a legitimate reason for my next question or statement to this witness? If there is no legitimate reason, then I should not ask the question or make the statement. If there is a legitimate reason, then –

Step Four: Am I asking the question or making the statement in the manner that is least likely to harm the quality of the witness’s testimony? If not, then I should change my approach.

A former Thurston County deputy prosecutor was disbarred for offering to dismiss criminal charges against a potential defense witness if the witness absented himself from the defendant’s trial by invoking the witness’s right against self incrimination. In re Charles O. Bonet, 144 Wn.2d 502, 515, 29 P.3d 1242 (2001) (footnote omitted). Comparing Bonet’s offer to not file criminal charges with a civil lawyer’s bribe to influence testimony, the Supreme Court said:

In reaching this conclusion, we take particular note of the fact that in this state a prosecuting attorney possesses a significant power—the power to charge or not charge a person with a crime. A prosecutor’s act of offering to dismiss or withhold a charge against a person in order to influence that person’s decision about testifying for another person charged with a crime is highly unethical and as deserving of opprobrium as would a public or private attorney's effort to bribe a witness with money to influence that person’s testimony.

(3) Relations With Expert Witnesses

A prosecutor engaging an expert witness should respect the expert’s independence and not seek to dictate the expert’s opinion. A prosecution expert is to testify in accordance with the standards of the expert’s field. ABA Standard 3-3.3(a) and Comment thereto.

An excessive fee should not be paid to a prosecution expert for the purpose of influencing the expert’s testimony, nor the fee contingent upon the results of the case. ABA Standard 3-3.3(b).

(4) Decision To Charge

(a) Initiation Of Charges

The criminal charging decision should be “initially and primarily the responsibility of the prosecutor.” ABA Standard 3-3.4(a). Modern conditions require that the power to institute criminal proceedings be “vested in a professional, trained, responsible public official.” Comment to ABA Standard 3-3.4(a).
(b) **Arrest And Search Warrants**

Prosecutors should ensure that investigators are adequately trained in the standards and laws governing the issuance of arrest and search warrants. Prosecutorial approval should be sought in close or difficult cases. ABA Standard 3-3.4(b).

(c) **Prosecution Charging Procedures**

Orderly procedures should be established for the screening of cases initiated by the police. It is highly desirable that a charging unit staffed with experienced prosecutors serve this function. “If competent and experienced lawyers, following screening processes involving several layers of independent professional appraisal, conclude that a case should proceed, it is not unreasonable to assume that there is a strong case against the accused.” Post-trial evaluation is encouraged because it serves a useful purpose in improving a prosecutor’s performance. Comment to ABA Standard 3-3.4(c).

(d) **Citizen Complaints**

Where the law permits a citizen to seek criminal charges directly with the court, the complaint should be required to be presented for prosecutorial approval and the prosecution decision communicated to the court. ABA Standard 3-3.4(d).

CrRLJ 2.1(c) authorizes a person to initiate a criminal proceeding alleging a misdemeanor or gross misdemeanor upon the filing of a citizen complaint. Although the rule contemplates input from the county prosecuting attorney, the rule grants power to the court over prosecution objection upon a finding of probable cause to authorize a citizen to sign and file a criminal complaint upon the citizen’s filing of an affidavit.

No legislation exists granting such a power to the judiciary. Accordingly, the author believes that CrRLJ 2.1(c) is an unconstitutional usurpation by the judicial branch of the executive branch’s power to decide who is or is not charged with violations of the criminal law. Briefing in support of this position is available upon request.

**Alert**

The constitutionality of the citizen complaint rule will likely be resolved in 2009 by our Supreme Court in *Spokane Valley ex rel. Chris Anderlik*.

In *Spokane Valley ex rel. Chris Anderlik*, Supreme Court No. 81295-1, two deputy sheriffs repeatedly used tasers against a 600 pound bull calf which was grazing near the Centennial Trail. The deputies were concerned that the calf would run onto nearby Interstate 90. Liberty Lake resident Chris Anderlik sought to have the deputies charged with second degree animal cruelty through the citizen complaint court rule after the Spokane County Prosecutor’s Office declined to file charges. A Spokane County District Court judge initially granted the citizen complaint, but thereafter reversed her decision holding that the citizen complaint court rule violates the separation of powers doctrine as applied to the facts of the case.
If a court grants the citizen complaint and thereafter compels the prosecutor to prosecute the accused despite the prosecutor’s ethical concerns to the contrary, the prosecutor may be placed in an ethical position of having to decline to follow the court’s order to prosecute. In such a situation, the prosecutor should immediately contact the Washington Association of Prosecuting Attorneys for assistance. The trial court should be advised to stay any contempt sanctions based upon the prosecutor’s refusal to follow the prosecution order, and also be provided a copy of *Seventh Elect Church v. Rogers*, 102 Wn.2d 527, 536, 688 P.2d 506 (1984) (“When an attorney makes a claim of privilege in good faith, the proper course is for the trial court to stay all sanctions for contempt pending appellate review of the issue.”).

(e) Police Agreement Not To Prosecute


(f) Prosecution Agreement Not To Prosecute–Immunity

The decision whether to grant immunity is vested solely with the prosecution. A defendant has no right to demand immunity for a defense witness in order to obtain exculpatory testimony unless a court finds the prosecutor’s misconduct intimidated the witness to the point where the witness refuses to testify. *State v. Fish*, 99 Wn. App. 86, 992 P.2d 505, *review denied*, 140 Wn.2d 1019 (2000).

(g) Prosecution Agreement Not To Prosecute–Neighboring Prosecutor’s Office Immunity

In *State v. Bryant*, 146 Wn.2d 90, 42 P.3d 1278 (2002), the King County Prosecutor’s Office entered into an immunity agreement wherein it agreed that “nothing you reveal can ever be used against you in any prosecution.” The Snohomish County Prosecutor’s Office thereafter filed robbery charges based upon statements the defendant made in the King County case. In a plurality decision, the Supreme Court dismissed the Snohomish prosecution. The majority two-justice opinion held that a county prosecutor cannot bind another county’s prosecution, but held that fundamental fairness required dismissal due to King County’s failure to clearly inform the defendant that the immunity only applied to King County matters. A four-justice concurring opinion believed that a county prosecutor could bind another county’s prosecution because all prosecutors represent the State. The three-judge dissent believed that a county prosecutor can never bind another county’s prosecution, and rejected the majority’s fundamental fairness analysis.
Practice Tip

The lesson of Bryant is clear. Prosecutors must use care when drafting immunity agreements to make clear that the agreement only applies to crimes occurring in that jurisdiction.

(h) Constitutional Right To Notice Of Essential Elements Of A Crime—Leach & Kjorsvik Rules

The Sixth Amendment and const. art. I, §22 provide that a criminal charging document must include all statutory and court-created elements in order to afford notice to an accused of the nature and cause of the accusation that he or she must be prepared to defend against. State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). A liberal standard of review analysis is applied if the defense challenges the sufficiency of the charging document after the prosecution rests or on appeal. Kjorsvik; State v. Phillips, 98 Wn. App. 936, 991 P.2d 1195 (2000). A strict construction standard is applied when the objection is made at or before trial. State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). The remedy for violation of the constitutional provisions is dismissal or reversal without prejudice for the prosecution to refile charges. Vangerpen.

Practice Tip

Prosecutors should take care to make sure their charging language is current prior to any case to be tried.

Many convictions have been reversed and cases retried simply because the trial prosecutor did not bother to review the sufficiency of the charging language as required by Leach and Kjorsvik.

Fourteen pages of cases on this topic are discussed in THE QUEST FOR JUSTICE 2005, at pages 108-122, available at the Washington Association of Prosecuting Attorneys and Kitsap County Prosecutor’s Office websites.

Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys, has prepared an over 700 page Charging Manual to assist prosecutors with proper charging language for most Washington crimes. The manual is available at the Legal Resources link at WAPA’s website at www.waprosecutors.org.

(i) Vacation Of Invalid Protection Order Prior To Charging Decision

Prosecutors have great discretion in deciding when and what charges to file. An exception has been created when a court issues a protection order, and prior to the prosecutor charging a violation of the order, the issuing court vacates the order because the petition failed to meet statutory requirements. Tacoma v. Cornell, 116 Wn. App. 165, 64 P.3d 674 (2003).
In holding that criminal charges were not permitted to be filed after the order was vacated, the Cornell court recognized the general rule that a prosecutor may generally charge a violation of an order even though the order is later vacated. The Cornell holding is very narrow because the case did not deal with the more common scenario where a person violates a court order and the order is later rescinded prior to charging. Cornell merely prohibits the filing of charges after an invalidly entered order is vacated, not when a valid order is later rescinded.

(5) Grand Juries

Grand juries are rarely used by Washington prosecutors. ABA Standard 3-3.5 and 3-3.6 should be reviewed for information on this topic.

(6) Quality And Scope Of Evidence For Charging By Information

In jurisdictions empowering the prosecutor to charge by information, a prosecutor should not file criminal charges absent probable cause. Additionally, no criminal case should be filed or permitted to continue absent sufficient admissible evidence to convict. Comment to ABA Standard 3-3.7.

(7) Discretion As To Noncriminal Disposition

In appropriate cases, the prosecutor should consider the availability of formal or informal noncriminal disposition. Prosecutors should be familiar with social agency resources which can assist in the evaluation of the diversion of criminal cases. ABA Standard 3-3.8.

Many experienced prosecutors defer prosecution upon the fulfillment of certain conditions, such as seeking psychiatric assistance where a mental condition may have contributed to the criminal activity, entering military service, obtaining new employment, or entering some other rehabilitative program. When the defendant’s diversion is successful, “the dismissal of charges or the suspension of sentence is appropriate.” Comment to ABA Standard 3-3.8.

(a) Pre-Trial Diversion Agreements AKA Stipulated Orders Of Continuance

The legislature has also recognized the prosecutor’s authority to enter into diversion agreements. See RCW 10.01.220(2); 9A.88.120(1), (3) and (5); and 10.31.110 (Laws of 2007, ch. 375, §16 which provides: “Nothing in this act shall be construed to alter or diminish a prosecutor’s inherent authority to divert or pursue the prosecution of criminal offenders.”).

Taking heed of ABA Standard 3-3.8’s diversion recommendation, Washington prosecutors have exercised their discretion and created various diversion programs. One successful example is The El Cid program offered by the Pierce County Prosecutor’s Office. The program “is a diversion program for first time Felony and Misdemeanor offenders. It is designed for non-violent offenders who are alleged to have committed property crimes such as theft and embezzlement. The El Cid program recently passed the twenty-nine year mark. During that time more than 4,600 clients have been involved in diversion. Over 94% of the participants pay back any restitution they owe and do not re-offend. The program's success is based on an approach of promoting social responsibility and accountability while encouraging individuals to make positive lifestyle changes. Over 300 clients are under the supervision of the diversion counselors.” Pierce County Prosecutor’s Office website, at www.co.pierce.wa.us/pc/Abtus/ourorg/pa/elcid.htm.

**Comment**
Experience and data confirm that with carefully constructed entry criteria, criminal diversion programs reduce rescidivism.

A DUI study determined that prosecution diversion of DUI cases generally showed a lower recidivism rate than prosecution amendment of DUI charges to lesser charges. Depending upon the year, the lowest DUI recidivism rate was either through prosecution diversions or deferred prosecutions. The highest recidivism group involved those defendants found guilty of DUI. Robert Barnoski, *Deferred Prosecution of DUI Cases in Washington State: Evaluating the Impact on Recidivism* (Washington State Institute for Public Policy August 2007), Exhibit 9 at page 6. The full report is available at the Washington State Institute for Public Policy website at www.wsipp.wa.gov/pub.asp?docid=07-08-1901.

Various forms of diversion agreements are used throughout Washington courts of limited jurisdiction. The agreements are generally called pre-trial diversion agreements or stipulated orders of continuance. Prosecutors dealing with the high volume of criminal cases filed in these courts and the often lack of adequate resources to handle the volume recognize the necessity of “triaging” cases through diversion agreements. It is important that prosecutors have diversion standards to guide new deputy prosecutors handling these cases. An example of a prosecutor’s pre-trial diversion agreement standards can be found in the Plea Negotiations in Kitsap County District and Municipal Courts Manual at the Kitsap County Prosecutor’s Office website at www.kitsapgov.com/pros.

Prosecutors should be careful when drafting pre-trial diversion agreements or stipulated orders of continuance to consider the process to be followed if the defendant breaches the agreement. Although a somewhat lengthy seven pages, Kitsap County’s pre-trial
diversion agreement has performed well over time and is available by contacting the
author.

The terms of a pre-trial diversion agreement are limited only by the creativity of the
contracting parties. An exception concerns money paid by a defendant as part of the
agreement. In April 2006, it came to light that a Kennewick assistant city attorney and a
contract public defender were stealing money paid by DUI defendants as part of their
diversion agreements. The money was intended for a local youth program dealing with
troubled teenagers. Ultimately, both attorneys were convicted on bribery charges in
federal district court. The assistant city attorney was sentenced to 30 months. The public
defender received an 18 month prison term. Both were ordered to pay over $80,000 in
restitution. Both attorneys are suspended pending investigation by the Washington State
Bar Association.

Caution

Prosecutors are prohibited by statute from negotiating criminal cases
through a defendant’s payment of charitable contributions unless a specific
state statute permits such a contribution.

Recognizing the need for legislation, the Washington Association of Prosecuting
Attorneys drafted a bill dealing with diversion agreement charitable contributions.
Enacted in 2007, RCW 10.01.220 provides:

A city attorney, county prosecutor, or other prosecuting authority may not
dismiss, amend, or agree not to file a criminal charge in exchange for a
contribution, donation, or payment to any person, corporation, or organization.
This does not prohibit:

(1) Contribution, donation, or payment to any specific fund authorized by state
statute;

(2) The collection of costs associated with actual supervision, treatment, or
collection of restitution under agreements to defer or divert; or

(3) Dismissal following payment that is authorized by any other statute.

Revocation of a pre-trial diversion agreement based upon a prosecutor’s allegation of a
defendant’s breach of the agreement is a three-part process as outlined by State v.
Marino, 100 Wn.2d 719, 674 P.2d 171 (1984) and State v. Kessler, 75 Wn. App. 634, 879
P.2d 333 (1994). Step one requires the prosecution to prove by a preponderance of the
evidence that the defendant violated a term of the agreement. Step two requires the court
to determine whether the prosecution’s decision to seek termination of the agreement was
“not unreasonable.” The court is not permitted to substitute its judgment whether it
would have sought revocation, but rather the focus as in a contract case is on whether the
breach was material, thus warranting a remedy. The third step requires the prosecution to
prove beyond a reasonable doubt that the defendant was guilty of the underlying
charge(s).
Some judges are opposed to prosecution diversion agreements despite the above discussion of a prosecutor’s discretionary authority in entering such agreements and data showing successful results through diversion programs. Perhaps one reason involves a judicial Ethics Advisory Committee Opinion, 04-05, which was issued on August 16, 2004. The opinion as interpreted by some judges appeared to prohibit judges from authorizing any diversion agreements. After much criticism, the judicial ethics opinion was amended September 21, 2005 and can be found at the Washington Courts website at www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.byyear. The amended judicial ethics opinion concludes with the following:

This opinion is not intended to comment upon the legal authority to grant what is commonly referred to as a Stipulated Order of Continuance (SOC) or to approve other pre-trial diversion agreements. Judicial officers must determine whether a proposed agreement and its terms are authorized by statute or case law. Determination of legal issues is beyond the jurisdiction of this committee.

Given ABA Standard 3.3-8 and the above discussion, prosecutors and defense counsel should encourage courts of limited jurisdiction to consider the merits of post-charge pre-trial diversion agreements when the prosecutor chooses to exercise discretion and authorize such agreements in lieu of litigation and trial. While such cases could be handled through a pre-charge diversion process, court involvement in diversion agreements serves an important role which should not be quickly discarded by a court’s dislike of the prosecution’s exercise of its discretionary authority to enter into post-charge diversion agreements with the defense.

(b) Adult Felony First Time Offender Waiver
RCW 9.94A.650 authorizes a court for some first time adult felony offenders to “waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include a term of community supervision or community custody as specified in subsection (3) of this section, which, in addition to crime-related prohibitions, may include requirements that the offender perform” various court-ordered activities.

(c) Adult Felony Drug Offender Sentencing Alternative
RCW 9.94A.660 authorizes a court for some adult felony drug offenders to “waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under subsection (5) of this section or a residential chemical dependency treatment-based alternative under subsection (6) of this section. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.”
(d) Adult Felony Special Sex Offender Sentencing Alternative

RCW 9.94A.670 authorizes a court for some adult felony sex offenders to “impose a sentence or, pursuant to RCW 9.94A.712, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence and impose” several statutory mandated conditions.

(e) Adult Felony Work Ethic Camp Program

RCW 9.94A.690 authorizes a court for some adult felony offenders to “impose a sentence within the standard sentence range and may recommend that the offender serve the sentence at a work ethic camp. In sentencing an offender to the work ethic camp, the court shall specify: (a) That upon completion of the work ethic camp the offender shall be released on community custody for any remaining time of total confinement; (b) the applicable conditions of supervision on community custody status as required by RCW 9.94A.700(4) and authorized by RCW 9.94A.700(5); and (c) that violation of the conditions may result in a return to total confinement for the balance of the offender’s remaining time of confinement.”

(f) Drug And Mental Health Courts

RCW 2.28.170 authorizes counties to establish and operate drug courts. The statute sets out minimum requirements for offender participation, and permits counties to seek more stringent standards than the minimum requirements.

A county’s practice of permitting the prosecution to determine an offender’s drug court eligibility is permissible. The drug court statute is not analogous to the deferred prosecution statute, RCW 10.05, wherein the court may grant a deferred prosecution over prosecution objection. State v. DiLuzio, 121 Wn. App. 822, 90 P.3d 1141 (2004).


Similar legislation has been enacted in RCW 2.28.180 authorizing counties to establish and operate mental health courts. RCW 2.28.190 permits a drug and mental health court to be combined “into a single therapeutic court.”

(g) Juvenile Diversion

RCW 13.40.070(6) requires the prosecution in certain juvenile offender cases to refer the case to diversion where “a case is legally sufficient the prosecutor shall divert the case if the alleged offense is a misdemeanor or gross misdemeanor or violation and the alleged offense is the offender's first offense or violation. If the alleged offender is charged with a related offense that must or may be filed under subsections (5) and (7) of this section, a
case under this subsection may also be filed.” It will be up to a diversion unit (a representative of the juvenile department or a community board, or “youth court” under RCW 13.40.600) to decide whether the diversion is appropriate and to complete the process.

RCW 13.40.070(7) grants discretionary authority to the prosecution in certain juvenile offender cases to refer the case to diversion where “a case is legally sufficient and falls into neither subsection (5) nor (6) of this section, it may be filed or diverted. In deciding whether to file or divert an offense under this section the prosecutor shall be guided only by the length, seriousness, and recency of the alleged offender's criminal history and the circumstances surrounding the commission of the alleged offense.”

Additional statutes to be reviewed concerning juvenile diversion include RCW 13.40.080 and 13.40.085.

Deferred dispositions under 13.40.127 result in a juvenile conviction that is later dismissed upon completion of conditions of supervision.

**h) Court Of Limited Jurisdiction Deferred Prosecution**

RCW 10.05 authorizes a court to continue a non-felony adult criminal case for 5 years upon the defendant’s petition under oath that the “wrongful conduct charged is the result of or caused by alcoholism, drug addiction, or mental problems for which the person is in need of treatment and unless treated the probability of further reoccurrence is great[.]” Criminal charges shall be dismissed upon successful completion of the deferred prosecution. RCW 10.05.120.


**i) Court Of Limited Jurisdiction Compromise Of Misdemeanors**

RCW 10.22.010 authorizes a court of limited jurisdiction to dismiss certain types of adult non-felony cases where the person injured by the act constituting the offense has a civil remedy except when the offense was committed (1) by or upon an officer while in the execution of the duties of his or her office; (2) riotously; (3) with an intent to commit a felony, or (4) by one family or household member against another as defined in RCW
10.99.020(1) and was a crime of domestic violence as defined in RCW 10.99.020(2). Laws of 2008, ch. 276, §308 also prohibits a compromise of misdemeanor when the offense is criminal street gang tagging and graffiti as defined by laws of 2008, ch. 276, §306.


Practice Tip

RCW 10.22 remains an underutilized option for the resolution of criminal cases. Prosecutors should consider recommending the compromise of misdemeanor option to defense counsel in non-traffic cases involving a victim and an offender with no criminal history.

(8) Discretion In The Charging Decision

(a) Probable Cause Required And Sufficient Admissible Evidence Recommended

ABA Standard 3-3.9(a), consistent with RPC 3.8(a), requires that all charges be supported by probable cause. The Standard continues that a prosecutor should not file nor permit criminal charges to continue where there is insufficient admissible evidence to support a conviction. The Comment to this Standard says:

A prosecutor ordinarily should prosecute if, after full investigation, he or she finds that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence available to support a verdict of guilty.

So long as the prosecutor has probable cause to believe the defendant committed a criminal offense, “the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

A prosecutor has broad discretion to charge some but not others guilty of the same crime so long as the selection was not “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *State v. Judge*, 100 Wn.2d 706, 713,


For adult felony cases, RCW 9.94A.411(2)(b) recommends that generally the decision to prosecute should not be made until law enforcement conducts a thorough factual investigation, including: (1) interviewing all material witnesses, together with obtaining written statements whenever possible; (2) the completion of necessary laboratory tests; and (3) obtaining the suspect’s version of the events in accordance with constitutional requirements. In certain situations, criminal charges may be filed prior to a complete investigation if (1) probable cause exists to believe the suspect is guilty; (2) the suspect presents a danger to the community or is likely to flee if not apprehended; or (3) the arrest of the suspect is necessary to complete the investigation. If this exception is applied, prosecutors shall obtain a commitment from law enforcement to timely complete the investigation. If the investigation does not present sufficient evidence to meet the normal charging standard, the criminal charge should be dismissed.

**Practice Tip**

In larger jurisdictions, law enforcement due to volume rarely responds to a request for followup investigation on misdemeanor cases.

Rather than having a file sit for months waiting for followup that is unlikely to be done, prosecutors should consider promptly declining to prosecute the case, with instruction to law enforcement that the prosecutor will reconsider the charging decision if the listed followup is timely provided.

For courts of limited jurisdiction cases, experience dictates that rarely will law enforcement conduct follow-up investigations. Accordingly, when a criminal referral is received lacking a thorough investigation, it is recommended that criminal charges be declined. A notice should be sent to the referring law enforcement agency explaining that the prosecution will reconsider the charging decision if additional information is provided by law enforcement. Keeping uncharged cases open for weeks and months waiting for law enforcement follow-up information which is likely not forthcoming serves no interest other than to delay the inevitable decision to decline criminal charges.

RCW 9.94A.411(2) provides the following guidance for assisting prosecutors in the decision to prosecute:

Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable
and objective fact-finder. With regard to offenses prohibited by RCW 9A.44.040, 9A.44.050, 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, 9A.44.089, and 9A.64.020 the prosecutor should avoid prefiling agreements or diversions intended to place the accused in a program of treatment or counseling, so that treatment, if determined to be beneficial, can be provided pursuant to RCW 9.94A.670.

Crimes against property/other crimes will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

A written charging standard is important to guide a prosecutor’s discretionary charging decision. Prosecutor’s offices often choose to limit their charging discretion from the broad RPC 3.8(a) requirement that the charging decision only be supported by probable cause.

**Example**

The Kitsap County Prosecutor’s Office has the following charging standard:

“It is the policy of the Office of the Kitsap County Prosecuting Attorney to charge the crime or crimes that accurately reflect the defendant’s criminal conduct, taking into account reasonably foreseeable defenses, and for which we expect to be able to produce at trial proof beyond a reasonable doubt.”

The Comment to ABA Standard 3-3.9(a) notes continuing disagreement among prosecutors concerning the propriety of seeking a guilty plea when the prosecutor knows a conviction is no longer possible, “e.g., a witness whose testimony was necessary to establish probable cause has died or is otherwise no longer available to testify at trial.” The Standard takes no position on this question.

In *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004), the court questioned whether a prosecutor’s knowledge of a witness’ unavailability for trial can be characterized as evidence, and rejected a due process violation claim involving *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

**Caution**

Prosecutors have absolute immunity when acting as a lawyer.

Signing an affidavit of probable cause affirming the existence of facts converts the prosecutor into a complaining witness. Similar to law enforcement, a prosecutor acting as a complaining witness only has qualified immunity.

In *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997), the Supreme Court held that a prosecutor only has qualified immunity when the prosecutor acts as a complaining witness rather than a lawyer. In *Kalina*, a 42 USC §1983 action was permitted to proceed against the prosecutor’s office and the prosecutor where the prosecutor signed an inaccurate probable cause statement in support of criminal charges.
A prosecutor has absolute immunity from civil suit under Kalina, however, when mistakenly filing a complaint in a wrong court because filing complaints is a traditional function of the prosecutor acting as an advocate of the State. Tanner v. Federal Way, 100 Wn. App. 1, 997 P.2d 932 (2000).

Jail personnel (and prosecutors) have a duty to take steps to promptly release a detainee once they know or should have known based on information provided to them that the person being held is not the person named in an arrest warrant. Stalter v. State, 151 Wn.2d 148, 86 P.3d 1159 (2004).

(b) Factors To Be Considered In Declining To Prosecute

A prosecutor is not required to file all charges supported by admissible evidence. ABA Standard 3-3.9(b). “It is axiomatic that all crimes cannot be prosecuted even if this were desirable … A prosecutor should adopt a ‘first things first’ policy, given greatest attention to those areas of criminal activity that pose the most serious threat to the security and order of the community.” Comment to ABA Standard 3-3.9(b). The ABA Standard provides the following illustrative list of factors a prosecutor may consider when exercising his or her charging discretion:

(i) the prosecutor’s reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) reluctance of the victim to testify;
(vi) cooperation of the accused in the apprehension or conviction of others; and
(vii) availability and likelihood of prosecution by another jurisdiction.

It is not desirable that a prosecutor file all crimes at the highest degree possible. Many factors should be considered concerning individual defendants and the charges filed, including: motive, mitigating factors, the defendant’s age, prior criminal history, and role in the offense. The Comment to ABA Standard 3-3.9(b) continues:

ABA Comment  “In exercising discretion in this way, the prosecutor is not neglecting his or her public duty or discriminating among offenders. The public interest is best served and evenhanded justice best dispensed, not by the unseeing or mechanical application of the “letter of the law,” but by a flexible and individualized application of its norms through the exercise of a prosecutor’s thoughtful discretion.”

A victim’s refusal to testify is another relevant consideration. While a prosecutor may justifiably decline to prosecute less serious offenses because of a lack of witness cooperation, in serious cases the interests of the community may require a prosecutor to
compel witness attendance through the subpoena power. Comment to ABA Standard 3-3.9(b).

Prosecutors may properly choose to offer a lenient course with one co-suspect in order to bring a more culpable offender to justice. Comment to ABA Standard 3-3.9(b).

RCW 9.94A.411(1) provides the following examples of reasons for a prosecutor not to file criminal charges:

(a) **Contrary to Legislative Intent** – It may be proper to decline to charge where the application of criminal sanctions would be clearly contrary to the intent of the legislature in enacting the particular statute.

(b) **Antiquated Statute** – It may be proper to decline to charge where the statute in question is antiquated in that:
   (i) It has not been enforced for many years; and
   (ii) Most members of society act as if it were no longer in existence; and
   (iii) It serves no deterrent or protective purpose in today's society; and
   (iv) The statute has not been recently reconsidered by the legislature.

This reason is not to be construed as the basis for declining cases because the law in question is unpopular or because it is difficult to enforce.

(c) **De Minimis Violation** – It may be proper to decline to charge where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution.

(d) **Confinement on Other Charges** – It may be proper to decline to charge because the accused has been sentenced on another charge to a lengthy period of confinement; and
   (i) Conviction of the new offense would not merit any additional direct or collateral punishment;
   (ii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and
   (iii) Conviction of the new offense would not serve any significant deterrent purpose.

(e) **Pending Conviction on Another Charge** – It may be proper to decline to charge because the accused is facing a pending prosecution in the same or another county; and
   (i) Conviction of the new offense would not merit any additional direct or collateral punishment;
   (ii) Conviction in the pending prosecution is imminent;
   (iii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and
   (iv) Conviction of the new offense would not serve any significant
deterrent purpose.

(f) High Disproportionate Cost of Prosecution – It may be proper to decline to charge where the cost of locating or transporting, or the burden on, prosecution witnesses is highly disproportionate to the importance of prosecuting the offense in question. This reason should be limited to minor cases and should not be relied upon in serious cases.

(g) Improper Motives of Complainant – It may be proper to decline charges because the motives of the complainant are improper and prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

(h) Immunity – It may be proper to decline to charge where immunity is to be given to an accused in order to prosecute another where the accused's information or testimony will reasonably lead to the conviction of others who are responsible for more serious criminal conduct or who represent a greater danger to the public interest.

(i) Victim Request – It may be proper to decline to charge because the victim requests that no criminal charges be filed and the case involves the following crimes or situations:

(i) Assault cases where the victim has suffered little or no injury;
(ii) Crimes against property, not involving violence, where no major loss was suffered;
(iii) Where doing so would not jeopardize the safety of society.

Care should be taken to insure that the victim’s request is freely made and is not the product of threats or pressure by the accused.

The presence of these factors may also justify the decision to dismiss a prosecution which has been commenced.

(c) Supervisory And Subordinate Prosecutor Responsibilities

Reasonable Doubt About Accused’s Guilt. A prosecutor who has a reasonable doubt about the guilt of an accused should not be compelled by a supervisor to prosecute the case. ABA Standard 3-3.9(c). Supervising prosecutors should create an atmosphere where subordinate prosecutors are free to disclose and discuss such doubts about the guilt of an accused. However, a case may be reassigned to another prosecutor who does not share the first prosecutor’s doubts about the accused’s guilt. Comment to ABA Standard 3-3.9(c).

Supervisory Prosecutor Responsibilities. RPC 5.1(a) requires that managerial lawyers “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform” to the RPCs. Similarly, supervisory lawyers “shall make reasonable efforts to ensure that the other [subordinate] lawyer
conforms” to the RPCs. RPC 5.1(b).

Comment [1] to RPC 5.1(a) requires lawyers with managerial authority “to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.”

Although continuing legal education in professional ethics is helpful, “the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.” Comment [3] to RPC 5.1(a).

RPC 5.1(c) makes a lawyer responsible for another lawyer’s RPC violation if:

1. the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
2. the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

“A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.” Comment [5] to RPC 5.1(c)(2).

A supervisory lawyer who gives no direction, does not ratify, or who has no knowledge of a subordinate lawyer’s misconduct, and thus has not violated RPC 5.1(c), may still be subject to Washington State Bar Association inquiry for failing to “make reasonable efforts” to ensure that the offending subordinate lawyer conformed to the RPCs under RPC 5.1(b). Comment [8] to RPC 5.1.

| Practice Tip | Ongoing training, both in-house and through Washington Association of Prosecuting Attorneys’ seminars, can be helpful in ensuring subordinate prosecutor ethical conduct. Also, a consistently scheduled meeting where subordinate prosecutors can “roundtable” cases and feel comfortable raising ethics issues is a very useful tool, especially for the new prosecutor. |
Subordinate Lawyer Responsibilities. Notwithstanding the direction of another person, a lawyer is bound by the RPCs. RPC 5.2(a). However, RPC 5.2(b) provides that a subordinate lawyer does not violate the RPCs:

if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.

Although a lawyer is not relieved of RPC responsibility when acting at the direction of a supervisor, a subordinate who filed a frivolous pleading at the direction of a supervisor “would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.” Comment [1] to RPC 5.2(a).

If a question can reasonably be answered only one way, the supervisor and subordinate RPC duty is clear. A subordinate does not violate the RPCs, however, if that lawyer “acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” RPC 5.2(b).

Comment [2] to RPC 5.2(b) provides:

[I]f the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor’s reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Reporting Professional Misconduct. RPC 8.3(a) places a non-mandatory reporting duty upon a lawyer who knows that another lawyer has committed an RPC violation “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” RPC 8.3(b) places a similar non-mandatory reporting duty on a lawyer concerning a substantial question as to a judge’s fitness for office. Comment [3] to RPC 8.3 provides:

While lawyers are not obliged to report every violation of the Rules, the failure to report a serious violation may undermine the belief that lawyers should be a self-regulating profession. A measure of judgment is, therefore, required in deciding whether to report a violation. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made whenever a lawyer’s conduct raises a serious question as to the honesty, trustworthiness or fitness to practice. Similar considerations apply to the reporting of judicial misconduct.

**Practice Tip**

When issues arise concerning the ethical responsibilities of supervisory lawyers, subordinate lawyers, or the non-mandatory duty to report misconduct, it is often wise to initially discuss the matter directly with the offending person. Then depending upon the circumstances and if necessary, perhaps a supervisor and/or another respected person within the prosecution community should be consulted.
Caution Depending upon the offense, it may then be necessary for a prosecutor to notify a defendant’s attorney and/or the court and/or the Washington State Bar Association.

When in doubt, ask a colleague for guidance. The author is available and honored to discuss prosecutorial ethics issues with you.

(d) Consideration Of Personal Or Political Advantage
Prohibited

A prosecutor should give no weight to the personal or political advantages or disadvantages in making the decision to prosecute. ABA Standard 3-3.9(d). A prosecutor should avoid measuring an office’s success by the “conviction rate” of the office.

Caution In June 2007, former Durham County, North Carolina District Attorney Michael B. Nifong was disbarred due to multiple ethics violations he committed during the rape prosecution of three Duke lacrosse players.

Nifong’s misconduct was found to have been aggravating due to a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct in connection with DNA evidence, vulnerability of the three wrongfully charged lacrosse players, and substantial experience in the practice of law.

The Amended Findings of Fact, Conclusions of Law and Order of Discipline is available on the North Carolina Bar Association’s website at www.ncbar.com/orders/06dhc35.pdf.

(e) Community Indifference

In cases involving a serious threat to the community, a prosecutor should not avoid prosecution due to the fact that juries in the jurisdiction tend to acquit persons accused of the particular act in question. ABA Standard 3-3.9(e). “These actions represent more than mere gestures on the part of the prosecutor, for such tactics can successfully alert the community to wrongdoing and create a community commitment to rectify the offending conditions.” Comment to ABA Standard 3-3.9(e).
(f) The Number And Degree Of Charges

A prosecutor should only bring charges in number and degree that are reasonably supported with admissible evidence and “are necessary to fairly reflect the gravity of the offense.” ABA Standard 3-3.9(f). The Comment to the ABA Standard says:

Defense counsel often complain that prosecutors charge a number of different crimes, that is, “overcharge,” in order to obtain leverage for plea negotiations. Although there are many different conceptions of what “overcharging” actually is, the heart of the criticism is the belief that prosecutors have brought charges, not in the good faith belief that they fairly reflect the gravity of the offense, but rather as a harassing and coercive device in the expectation that they will induce the defendant to plead guilty.

The Comment continues that the line separating overcharging from proper prosecutorial discretion when making a charging decision is subjective. The key consideration is fairly bringing those charges the prosecutor believes are supported by the evidence without “piling on” to obtain improper leverage to compel a guilty plea.

RCW 9.94A.411(2) provides prosecutors with the following guidance concerning the selection of charges:

(i) The prosecutor should file charges which adequately describe the nature of defendant’s conduct. Other offenses may be charged only if they are necessary to ensure that the charges:

(A) Will significantly enhance the strength of the state’s case at trial; or
(B) Will result in restitution to all victims.

(ii) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:

(A) Charging a higher degree;
(B) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant’s criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

(g) Prosecutor Actions Premised On Promise Not To Sue

A prosecutor should not condition a dismissal or decision to not file criminal charges on the accused’s relinquishment of a civil right unless the accused acts “knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.” ABA Standard 3-3.9(f).
In *Town of Newton v. Rumery*, 480 U.S. 386, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987), Rumery released his right to file a civil rights action in return for a prosecutor’s dismissal of criminal charges filed against him. After the criminal charges were dismissed, Rumery filed a 42 USC §1983 action based upon facts arising out of the criminal prosecution.

The Supreme Court upheld the trial court’s dismissal of the civil action in a 5-4 decision. The majority held that: (1) the mere possibility of harm to important interests of a criminal defendant and of society as a whole does not require a per se rule invalidating release-dismissal agreements whereby a criminal defendant releases his right to file a civil rights action in return for a prosecutor’s dismissal of pending criminal charges, and (2) the agreement was enforceable where the defendant voluntarily entered into the agreement, and the prosecutor had legitimate reasons to make the agreement that was directly related to his prosecutorial responsibilities and was independent of his discretion to bring criminal charges.

The dissent would create a per se rule and invalidate all such release-dismissal agreements. The dissent believed that a prosecutor’s consideration of a release-dismissal agreement hampers the prosecutor’s ability to conform to professional standards in deciding whether to prosecute. This potential conflict of interest increases in magnitude in direct proportion to the seriousness of the charges of police wrongdoing.

Justice O’Conner’s concurring opinion recognized the dissent’s concerns about abuse and the use of the criminal justice system to avoid a meritorious claim of police misconduct, but she rejected a per se rule prohibiting such agreements because of the facts of the case. When Rumery entered into the release agreement in exchange for dismissal of his criminal charges, Rumery was represented by counsel. The release agreement was in writing. The criminal court engaged in a colloquy with Rumery and held that the agreement was entered knowingly, intelligently and voluntarily. Justice O’Conner found that there was no overreaching by the prosecutor and thus approved the release-dismissal agreement. She cautioned, however, that courts must carefully screen release-dismissal agreements.

**Practice Tip**

The criminal side of a prosecutor’s office should generally not suggest a dismissal of criminal charges in exchange for a release of civil claims. If defense counsel in a criminal matter approaches a prosecutor about the possibility of a release-dismissal agreement, the defense attorney should referred to the civil side of the prosecutor’s office to discuss specifics.

If the defense and civil side of the office come to a release-dismissal agreement, a supervisor on the criminal side should review the agreement and underlying criminal case and independently determine whether to dismiss the criminal case in accordance with the proposed agreement.

The trial court should thereafter be directed to the *Rumery* decision and especially consideration of Justice O’Conner’s concurring opinion.
(h) Limitations On Prosecutor’s Discretionary Charging Decision

Unit of Prosecution. The double jeopardy “unit of prosecution” concept may limit a prosecutor’s discretion concerning the number of counts filed when the “unit of prosecution” encompasses more than one count. Cases in this area are difficult to reconcile. “Unit of prosecution” cases are analyzed in THE QUEST FOR JUSTICE 2005, at pages 159-164, available at the Washington Association of Prosecuting Attorneys and Kitsap County Prosecutor’s Office websites.

Fixed Formula. A prosecutor’s fixed formula eliminating prosecutorial discretion will be closely scrutinized by the court. State v. Pettitt, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980) (prosecutor had mandatory policy of filing habitual criminal complaints against all defendants with 3 or more prior felonies; “In our view, this fixed formula which requires a particular action in every case upon the happening of a specific series of events constitutes an abuse of the discretionary power lodged in the prosecuting attorney.’’); State v. Massey, 60 Wn. App. 131, 138-39, 803 P.2d 340, review denied, 115 Wn.2d 1021 (1990), cert. denied, 499 U.S. 960, 111 S. Ct. 1584, 113 L. Ed. 2d 648 (1991) (defense claim that prosecutor had mandatory policy of seeking declination hearing in all juvenile cases involving first degree murder rejected due to evidence that a declination hearing was not sought in a first degree murder case involving a 12 1/2 year old defendant).


In State v. Ahluwalia, 143 Wn.2d 527, 22 P.3d 1254 (2001), a mistrial was declared when the jury acquitted on first degree murder but hung on the lesser included offense of second degree murder. Retrial on second degree murder was affirmed because the constitution does not prohibit retrial on a hung offense. Although not raised by the defense, the Ahluwalia court questioned the prosecutor’s failure to refile an amended charging document actually charging second degree murder after the hung jury since the defendant was never formally charged with second degree murder.

Practice Tip

If a jury acquits on the primary charge but hangs on a lesser included offense, the prosecutor must make sure to file an amended charging document charging the lesser included offense prior to retrial on the lesser offense.

The prosecution may always amend charges to an inferior degree, even after the defense rests. State v. Peterson, 133 Wn.2d 885, 948 P.2d 381 (1997).
Forced Speedy Trial Waiver. Although prosecutors are given broad discretion in the timing of filing additional counts, a trial court may deny a prosecution motion to amend a charging document when the prosecutor’s tardy action places the defense in the position of going to trial unprepared on the new charges or having to waive the defendant’s speedy trial rights and seek a continuance to be properly prepared. *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997) (trial court’s dismissal of three significant trafficking in stolen property charges filed three business days before trial upheld; absent an explanation, the long delay in filing additional charges suggests less than honorable prosecution motives to harass the defendant).

**Practice Tip**

Prosecutors can easily avoid the result in *Michielli* by the prompt submittal of discovery to the defense and a similarly prompt written plea offer specifically listing “holdback” charges which will be filed if the defendant rejects the plea offer.

General Versus Special Crimes. When a special (and more specific) statute punishes the same conduct as a general statute, the special statute applies and the accused can only be charged under the special statute. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984).

Selective Prosecution. A prosecutor’s charging decision is subject to constitutional constraints. One of the constraints prohibits a prosecution decision based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687 (1996).


The threat of a risk of increased punishment if a defendant rejects a plea offer and proceeds to trial is accepted as legitimate given the “simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.” *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 668-69, 54 L. Ed. 2d 604 (1978) held:

**Supreme Court Comment**

“We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.”.
In *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999), the prosecutor initially charged one count of residential burglary. After the defendant rejected the prosecution’s plea offer, the prosecutor timely filed ten additional counts of burglary, unlawful possession of firearms, and trafficking in stolen property. The jury convicted the defendant on all counts. The original plea offer was for county jail time. The trial court imposed an exceptional sentence below the minimum 252 month standard range. In finding no prosecutorial vindictiveness and remanding the case for resentencing, the court said:

The only evidence that Bonisisio presented suggesting prosecutorial vindictiveness was defense counsel’s assertion that in approximately 18 years of practice in Kitsap County he had “never had charges this severe brought against any individual charged with crimes where no one was physically harmed.” Conspicuously absent was any evidence regarding Kitsap County’s treatment of similarly situated defendants. There was not a single description of a specific incident where Kitsap County failed to charge a defendant suspected of multiple burglaries after the defendant rejected a plea bargain. Nor was there data indicating that the Kitsap County prosecutor’s office deviated from its normal practice and procedures in pursuit of Bonisisio. Given the absence of evidence supporting the prosecutorial vindictiveness claim, the trial court did not err in denying Bonisisio an evidentiary hearing.

In *State v. Korum*, 157 Wn.2d 614, ¶22, 141 P.3d 13 (2006), after withdrawal of the defendant’s guilty plea, the prosecutor charged the defendant with additional counts as promised during the plea negotiation process. The defendant was convicted of the additional charges. Holding that the prosecutor’s decision to add charges after the defendant withdrew his guilty plea did not constitute prosecutorial vindictiveness nor give rise to the post-trial presumption of vindictiveness, the court said:

There is no analytically relevant distinction between a defendant’s failure to plead guilty and a defendant’s decision to withdraw a guilty plea. The plea bargaining process encourages a defendant to forgo his trial rights in the attempt to resolve a case. A plea bargain must be knowing, intelligent, and voluntary precisely because the defendant surrenders his constitutional trial rights. *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). A defendant’s failure to plead guilty and a defendant’s decision to withdraw a plea both amount to a failure of the plea bargaining process and return the defendant and the prosecutor to square one, at which point the defendant may exercise his right to proceed to trial.

(i) **Charging Sentence Enhancements**

Sixth Amendment Right To Jury Trial. In *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 1219-25, 143 L. Ed. 2d 311 (1999), the defendant was convicted of using a firearm during a carjacking where the federal statute made criminal the taking of a motor vehicle from the person or presence of another by force and violence or by intimidation. A 15 year penalty was imposed, or a 25 year sentence required if serious bodily injury resulted. The defendant was told at arraignment that he faced 15 years, but was sentenced to 25 after the trial court found that serious bodily injury resulted. Neither the indictment nor jury instructions mentioned the serious bodily injury language. The Supreme Court in a 5-4 decision reversed the conviction, holding that a jury was required to determine the fact of “serious bodily injury” before the 25 year penalty could be imposed.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 43 (2000), the defendant was charged under a New Jersey law with second degree possession of a firearm for an unlawful purpose, which carried a prison term of 5 to 10 years. Under New Jersey’s hate crime statute, an enhanced sentence was permitted if a trial judge found, by a preponderance of the evidence, that the defendant committed the crime with a purpose to intimidate a person or group because of race. After the defendant pled guilty, the prosecutor filed a motion to enhance the sentence, and the trial court thereafter found by a preponderance of the evidence that the shooting was racially motivated and sentenced the defendant to a 12 year term on the firearms count. Relying on *Jones*, the Supreme Court reversed the sentence.

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

In *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), relying on *Apprendi*, the Supreme Court invalidated Arizona’s death penalty process wherein the trial judge was permitted to determine the presence or absence of aggravating factors for imposition of the death penalty.

In *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2543, 159 L. Ed. 2d 403 (2004), relying on *Apprendi*, the Supreme Court invalidated Washington’s Sentencing Reform Act wherein a trial judge was authorized to increase a defendant’s standard range sentence upon a finding of the existence of aggravating factors. “[E]very defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”

A trial court’s finding that a case involved domestic violence did not violate *Blakely* because the finding did not increase the defendant’s maximum punishment. *State v. Felix*, 125 Wn. App. 575, 105 P.3d 427, review denied, 155 Wn.2d 1003 (2005).

In *Spokane v. Wilcox*, 143 Wn. App. 568, 179 P.3d 840 (2008), the Court of Appeals held that a defendant is not entitled to a jury determination of the fact of a breath test refusal in
a DUI case because the driver’s license suspension consequence of a breath test refusal finding by the trial court is not a penalty. Accordingly, Apprendi and Blakely do not apply because the defendant’s statutory maximum punishment for DUI was not increased as a result of the trial court’s breath test refusal finding.

The lesson of Apprendi and Blakely is clear. The Sixth Amendment requires a prosecutor to plead and prove beyond a reasonable doubt to a jury any fact (other than the fact of a prior conviction) which increases the statutory maximum punishment for the charged crime.


In State v. Recuenco, 163 Wn.2d 428, ¶23, 180 P.3d 1276 (2008), the Supreme Court clarified that under const. art. I, §21, a defendant is entitled to have the prosecution prove a charged sentence enhancement beyond a reasonable doubt, and that a trial court lacks authority to sentence on an enhancement which fails to meet this standard. See also State v. Brown, ___ Wn. App. ____, 184 P.3d 1284 (Div. 3 June 10, 2008) (When a defendant is charged with more than one alternative means of committing an offense which carries different seriousness levels, a trial court must use the lowest seriousness level in sentencing the defendant absent a special interrogatory indicating the jury unanimously finds that the defendant committed the offense by a means with a higher seriousness level.).


Comment  Recuenco is clear. Washington’s constitution requires sentence enhancements to be charged in the prosecutor’s charging document, and requires the enhancement to be proven beyond a reasonable doubt to the factfinder.

In jury trials, prosecutors should submit the sentence enhancement to the jury through the use of a special verdict form.

Prosecutors should be careful to distinguish pre-Recuenco Washington cases only discussing the federal right to jury and Blakely. Cf. State v. Richard, 144 Wn. App. 27, 180 P.3d 863 (2008) (Blakely does not require a jury to determine whether a defendant’s hunting violation under RCW 77.15.410(1) resulted in the death of a deer in order to impose the mandatory $2,000 criminal wildlife penalty assessment of RCW 77.15.420(1)(b)); and Spokane v. Wilcox, 143 Wn. App. 568, ¶¶20-24, 179 P.3d 840
(2008) *Blakely* does not prohibit a trial court from finding the defendant refused a breath test because the mandatory maximum sentence is not increased. Thus, the question of whether the defendant refused to submit to a breath test need not have been submitted to a jury).

Although *Blakely* and its progeny do not require the prosecution to plead a sentence enhancement and prove it beyond a reasonable doubt, *Recuenco* is clear that Washington’s right to jury constitutional provision so provides.

(9) **Role In First Appearance And Preliminary Hearing**

A prosecutor should not communicate with a defendant at the first appearance hearing unless a waiver of counsel has been entered, except for the purpose of assisting the defendant in obtaining counsel or in arranging for the defendant’s pretrial release. A prosecutor should make reasonable efforts to make sure the defendant is advised of the right to counsel, and the procedure for obtaining counsel. A defendant should be given a reasonable opportunity to obtain counsel. ABA Standard 3-3.10(a).

A prosecutor should not seek to obtain a waiver of important pretrial rights from an unrepresented defendant, including the right to a preliminary hearing. ABA Standard 3-3.10(c).

If the defendant is in custody, a prosecutor should not seek to delay the preliminary hearing without good cause. ABA Standard 3-3.10(e).

A prosecutor should be present at a preliminary hearing. ABA Standard 3-3.10(f)

A person who is arrested without a warrant shall have a judicial determination of probable cause no later than 48 hours following the person’s arrest unless probable cause has been judicially determined prior to such arrest. *Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991); CrR 3.2.1(a); JuCR 7.3(a); CrRLJ 3.2.1(a).

Any accused detained in jail must be brought before the court as soon as practical after the detention, but no later than the close of business on the next court day. If the accused is unavailable due to physical or mental disability, the court may for good cause enlarge the time prior to the preliminary hearing. CrR 3.2.1(d); JuCR 7.3; CrRLJ 3.2.1(d).

At a preliminary appearance, the court shall provide for a lawyer, determine pretrial release, and orally inform the accused: (i) of the nature of the charge against the accused; (ii) of the right to be assisted by a lawyer at every stage of the proceedings; and (iii) of the right to remain silent, and that anything the accused says may be used against him or her. CrR 3.2.1(e); CrRLJ 3.2.1(e). See also JuCR 7.4.

If no charging document is filed at a preliminary appearance, an accused shall not be detained for more than 72 hours after the defendant’s detention in jail or release on conditions, whichever occurs first. Computation of the 72 hour period does not include...
any part of Saturdays, Sundays or holidays. CrR 3.2.1(f); JuCR 7.3(c); CrRLJ 3.2.1(f).

A person arrested for an offense involving domestic violence as defined by RCW 10.99.020 shall be required to appear in person before a magistrate within one judicial day after the arrest. RCW 10.99.045(1).

A person who is charged with an offense involving driving while under the influence as defined in RCW 46.61.502, driving under age twenty-one after consuming alcohol as defined in RCW 46.61.503, or being in physical control of a vehicle while under the influence as defined in RCW 46.61.504, shall be required to appear in person before a judicial officer within one judicial day after the arrest if the defendant is served with a citation or complaint at the time of the arrest. RCW 46.61.50571(1).

(10) Disclosure Of Evidence By The Prosecutor

(a) **Brady** Evidence Must Be Disclosed

A prosecutor should make timely disclosure to the defense 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.” ABA Standard 3-3.11(a). As a minister of justice, a prosecutor is not simply an advocate. “This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, including consideration of exculpatory evidence known to the prosecution.” Comment to ABA Standard 3-3.11(a). See also RPC 3.8(d), which says:

The prosecutor in a criminal case shall 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 the tribunal all mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). The Supreme Court has since held that the prosecution’s duty to disclose *Brady* evidence is applicable even though there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 2399, 49 L. Ed. 2d 342 (1976).

**Caution**  *Brady* evidence includes impeachment evidence as well as exculpatory evidence.

Caution

Brady evidence is not limited to a prosecutor’s knowledge of the evidence. In fact, a prosecutor’s good faith is irrelevant to a Brady analysis. Brady evidence includes evidence known by the entire prosecution team, including law enforcement.

Brady evidence includes evidence unknown to the prosecutor but known to law enforcement and other members of the prosecution team. Thus, in order to comply with Brady, the prosecutor must seek out all Brady evidence from members of the prosecution team and disclose the evidence to the defense or risk violating Brady. As Brady noted, the good or bad faith of the prosecutor is not relevant to analysis of an alleged Brady violation.

This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see Brady, 373 U.S., at 87, 83 S. Ct., at 1196-1197), the prosecution’s responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.


Practice Tip

What is Brady evidence? Obviously prosecutors should disclose all evidence favorable to the prosecution to convince the defense to accept the prosecutor’s plea offer. If the evidence is negative to the prosecution, the evidence is probably Brady evidence which must be disclosed.

When in doubt, wise prosecutors will disclose. If the evidence is not admissible, a motion in limine is the proper method of dealing with Brady evidence. Self suppression by the prosecutor is not.

In Benn v. Lambert, 283 F.3d 1040, cert. denied, 537 U.S. 942, 123 S. Ct. 341, 154 L. Ed. 2d 249 (9th Cir. 2002), a Pierce County death penalty conviction was reversed due to the prosecutor’s failure to disclose all impeachment evidence concerning a key prosecution witness. Although some impeachment evidence was disclosed, the Ninth Circuit chastised the prosecutor for suppressing exculpatory and impeachment evidence that would have destroyed the credibility of its principle witness.

Here, the state failed to take any measures to safeguard the system against treachery. To the contrary, the state suppressed material exculpatory and impeachment evidence that would have destroyed the credibility of its principal witness, severely undermined its theory of motive, and left it without substantial evidence of premeditation or an aggravating circumstance.

Benn, 283 F.3d at 1062. Circuit Judge Trott’s concurring opinion provides a more aggressive criticism of the prosecutor’s actions.
Lord Acton, the celebrated 19th century British historian and student of politics, formulated an observation about government and human nature that aptly, and regrettably, fits this case: “Power tends to corrupt, and absolute power corrupts absolutely.” It was for this reason that over one hundred years earlier, the Framers of our Constitution meticulously separated the powers given by the People to our government and erected against each a structural series of checks and balances designed to confront the potential for abuse. Then, by enacting the Bill of Rights, the Framers made certain that basic principles of a fair and just trial could not be episodically overridden, even by a unanimous legislature, an overzealous executive, or a wayward judiciary.

*     *     *

This case provides us with a textbook example of the abuse of executive power contemplated by Montesquieu, Lord Acton, and the Framers of our Constitution. Rather than adhere to the clear letter of the law, which itself is the ultimate check against arrogation of power, the prosecutor apparently deliberately withheld from the trial court and from the jury admissible evidence that would cause any fairminded person to have grave reservations about the credibility of a key government witness.

*     *     *

The law and the truth-seeking mission of our criminal justice system, which promise and demand a fair trial whatever the charge, are utterly undermined by such prosecutorial duplicity. Although our Constitution guarantees to a person whose liberty has been placed in jeopardy by the State the right to confront witnesses in order to test their credibility, that right was willfully impaired in this case. By unlawfully withholding patently damaging and damning impeachment evidence, the prosecutor knowingly and willfully prevented Benn from confronting a key witness against him. Such reprehensible conduct shames our judicial system.

Prosecutors routinely take an oath of office when they become stewards of the executive power of government. That oath uniformly includes a promise at all times to support and defend the Constitution of the United States. Fortunately, the great majority of all prosecutors appreciate the solemnity of this oath. However, if a prosecutor fails to abide by this undertaking, it is the duty of the judiciary emphatically to say so. Otherwise, that oath becomes a meaningless ritual without substance.

Benn, 283 F.2d at 1062-64 (Trott, C.J., concurring) (emphasis added).

Caution The Washington State Bar Association will sanction a prosecutor for failing to disclose Brady evidence to the defense.

Michael R. Johnson, WSBA No. 2985, retired, was admonished by the Washington State Bar Association for his actions in the Benn prosecution. Washington State Bar News, October 2004, at page 52.
Comment | Any agreement with a witness for favorable testimony, no matter how minor the agreement, is *Brady* evidence which must be disclosed.

A prosecutor has a duty to disclose an agreement with a witness for favorable testimony. *State v. Vavra*, 33 Wn. App. 142, 146, 652 P.2d 959 (1982) (conviction reversed for nondisclosure of agreement between prosecutor and witness that if witness testified favorably, prosecutor would make statement on witness’ behalf in witness’ unrelated sentencing in another county); *State v. Soh*, 115 Wn. App. 290, 62 P.3d 900, *review denied*, 150 Wn.2d 1007 (2003), *cert. denied*, 540 U.S. 1220, 124 S. Ct. 1521, 158 L. Ed. 2d 156 (2004) (State Patrol, with prosecutor and co-participant’s attorney present, made promise of a “substantial reduction of the charges” against co-participant, including agreeing not to pursue numerous auto theft offenses outside the county. Co-participant’s attorney never disclosed offer to co-participant. Prosecution did not disclose to Soh, but Soh found out and made motion to dismiss. Held prosecutorial misconduct, but no prejudice to Soh.).

No *Brady* violation occurs when the prosecution knew but failed to disclose the fact that a witness would not be testifying after the prosecutor outlined the witness’ testimony in opinion statement. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004) (court questions whether the failure to call a witness is evidence subject to the *Brady* rule).

Alert | Prosecutors differ concerning how to handle the situation involving *Brady’d* law enforcement personnel, i.e. officers who may be impeached based upon previous false sworn statements, testimony and/or judicial findings of a lack of credibility.

Some prosecutors choose to provide the impeachment information to the defense and call the officer to testify.

Other prosecutors refuse to call the officer, thus avoiding having to deal with the officer’s credibility issues and collateral circumstances with the jury. Such a *Brady’d* officer is effectively of no value to the prosecution or law enforcement agency.

The *Kitsap County Deputy Sheriff’s Guild* case pending before the Supreme Court will likely have an impact on how prosecutors deal with *Brady’d* officers.

Public policy is violated by reinstating an officer who repeatedly shows a lack of candor and inability to obey either sheriff’s department policies, Washington Rules of Evidence, or direct orders from his superiors. Such an officer’s “proven record of dishonesty prevents him from useful service as a law enforcement officer.” *Kitsap County Deputy Sheriff’s Guild v. Kitsap County*, 140 Wn. App. 516, ¶26, 165 P.3d 1266 (2007), *review granted*, 163 Wn.2d 1038 (2008) (arbitrator’s reinstatement through collective bargaining agreement vacated).
The constitution does not require the government to disclose material impeachment evidence prior to entering into a plea agreement with the defense. *United States v. Ruiz*, 536 U.S. 622, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002) (“Fast Track” plea agreement requiring defense to waive right to receive information which the government might have had regarding “impeachment information relating to any informants or other witnesses” does not violate the constitution.).

**Caution**

A prosecutor’s “flagrant misbehavior” embracing a reckless disregard for the prosecution’s constitutional *Brady* obligations justifies dismissal of a criminal case.

Although accidental or merely negligent governmental conduct in failing to provide *Brady* evidence does not justify dismissal, “flagrant misbehavior” embracing a reckless disregard for the prosecution’s constitutional *Brady* obligations did justify a trial court’s discretionary decision to dismiss a criminal case. *United States v. Chapman*, 524 F.3d 1073, 1088 (9th Cir. 2008) (“[First, a] district court may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation. [Second,] [i]f the conduct does not rise to the level of a due process violation, the court may nonetheless dismiss under its supervisory powers.”) (citation omitted).

In this case, the district court was clearly troubled by the government’s conduct and its failure to own up to its actions. We are similarly troubled, both by the AUSA’s actions at trial and by the government’s lack of contrition on appeal. The government attorneys who appeared in the original AUSA’s stead on the critical day of the hearing on the motion to dismiss the indictment told the trial court that they “took this matter extremely seriously” and conceded that the government made a “very serious mistake in terms of [its] discovery obligations.” Before us, however, these same attorneys have attempted to minimize the extent of the prosecutorial misconduct, completely disregarding the AUSA’s repeated misrepresentations to the court and the failure to obtain and prepare many of the critical documents until after the trial was underway. Instead, they claim for the first time on appeal that none of the 650 pages were required disclosures under *Brady/Giglio*. When the district court first indicated that it was inclined to dismiss the indictment, it noted that it was “concerned [that] any lesser sanction [would be] like endorsing [the AUSA’s conduct].” See *Barrera-Moreno*, [*United States v. Barrera-Moreno*, 951 F.2d 1089 (9th Cir. 1991)] 951 F.2d at 1091 (noting that the court’s supervisory powers can be used “to deter future illegal conduct”). The government’s tactics on appeal only reinforce our conclusion that it still has failed to grasp the severity of the prosecutorial misconduct involved here, as well as the importance of its constitutionally imposed discovery obligations. Accordingly, although dismissal of the indictment was the most severe sanction available to the district court, it was not an abuse of discretion.
(b) Compliance With Discovery Requests

A prosecutor should make a reasonably diligent effort to comply with a proper defense discovery request. ABA Standard 3-3.11(b). Many experienced prosecutors promptly disclose most, if not all, of their evidence to defense counsel to assist counsel in persuading the defendant that a guilty plea is in the defendant’s best interest. Comment to ABA Standard 3-3.11(b).

**ABA Comment**
Many experienced prosecutors disclose most if not all of their evidence to the defense as soon as possible to assist defense counsel in persuading the defendant that a guilty plea is in the defendant’s best interest.


A prosecutor under the discovery court rules has a continuing duty to promptly disclose newly discovered evidence, even if the evidence is discovered during trial and is intended to be used during rebuttal. *State v. Brush*, 32 Wn. App. 445, 455-56, 648 P.2d 897 (1982), *review denied*, 98 Wn.2d 1017 (1983).

Although a prosecutor has no duty to turn over police reports, it was misconduct for the prosecutor to fail to disclose that the witnesses’ statements were the result of hypnosis. *State v. Coe*, 101 Wn.2d 772, 784, 684 P.2d 668 (1984).

**Caution**
Prosecutors must promptly disclose impeachment or rebuttal evidence when there is a “mere reasonable possibility” that the prosecution intends to use the evidence at trial.


**Caution**
A witness’ recantation must be disclosed to the defense, even if the prosecutor does not believe the recantation.

A prosecutor must disclose prior criminal convictions of witnesses intended to be called for trial if that information is in the knowledge, control or possession of any member of the prosecution office. *State v. Copeland*, 89 Wn. App. 492, 497-98, 949 P.2d 458 (1998). Query whether a prosecutor’s office’s access to the Judicial Information System creates an obligation under *Copeland* to search that database for witness convictions?

**Caution**

A prosecutor must disclose prior criminal convictions of witnesses intended to be called for trial.

A witness’ arrest or pending criminal charges need not be disclosed because that evidence is not admissible impeachment evidence.


**Comment**

The prosecution and defense have a court rule continuing duty to promptly disclose additional material or information. “Promptly” means at the moment of discovery or confirmation.

CrR 4.7(h)(2) and CrRLJ 4.7(g)(2) places upon the prosecution and defense a continuing duty to promptly disclose additional material or information which is subject to disclosure. “Promptly” means “at the moment of discovery or confirmation.” *State v. Oughton*, 26 Wn. App. 74, 79, 612 P.2d 812, *review denied*, 94 Wn.2d 1005 (1980).

The discovery rules are a two-way street intended to prevent last-minute surprises, trial disruption and continuances. As such, the trial court has the role of regulating traffic over the rough areas in a manner that does not provide one party with an unfair advantage and place the other at a disadvantage. *State v. Hutchinson*, 111 Wn.2d 872, 877-78, 766 P.2d 447 (1989).

**(c) Intentional Ignorance Of Damaging Evidence**

A prosecutor should not intentionally avoid pursuing evidence because it may damage the prosecution’s case or assist the defense’s case. ABA Standard 3-3.11(c).

It is unprofessional for defense counsel to “adopt the tactic of remaining intentionally ignorant of relevant facts known to the accused in order to provide a ‘free hand’ in the client’s defense.” ABA Standards for Criminal Justice–The Defense Function Standard 4-3.2(b). Similarly, it is unprofessional for a prosecutor to engage in a comparable tactic. “The duty of the prosecutor is to acquire all the relevant evidence without regard to its impact on the success of the prosecution.” Comment to ABA Standard 3-3.11(c).
Comment  Although prosecutors have no duty to search for potentially exculpatory evidence, wise prosecutors understand their role as “ministers of justice” and make sure that law enforcement conducts a thorough investigation to avoid later surprises.

The State has no duty to search for potentially exculpatory evidence. *State v. McNichols*, 128 Wn.2d 242, 249, 906 P.2d 329 (1995) (jail personnel had no obligation to assist a DUI suspect in obtaining additional tests, but only not to interfere in a suspect’s efforts to do so); *State v. Martinez*, 78 Wn. App. 870, 877, 899 P.2d 1302 (1995), *review denied*, 128 Wn.2d 1017 (1996) (arson defendant asserted that prosecution had duty to seek out and retain a furnace held and ultimately destroyed by insurance company that defense claimed started fire; Held: no duty by prosecution to obtain exculpatory evidence held by others during an investigation).

**(d) Destruction Or Loss Of Evidence–Material Exculpatory Evidence**

The Fourteenth Amendment and const. art. I, §3 require that criminal prosecutions conform with prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense. To comport with due process, the prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994), citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413 (1984) and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The Washington Supreme Court has explained that evidence must clear two hurdles before it can be considered “materially exculpatory evidence.”

In order to be considered “material exculpatory evidence”, the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

*Wittenbarger*, 124 Wn.2d at 475, citing *Trombetta*, 104 S. Ct. at 2534.

A defense showing that the evidence might have exonerated the defendant is not enough to transform the evidence into “materially exculpatory evidence.” *Wittenbarger*, 124 Wn.2d at 475.

If the destroyed or lost evidence meets both prongs of the *Wittenbarger/Trombetta* test and is thus “materially exculpatory evidence,” then the good or bad faith of the police or prosecutor in failing to preserve that evidence is irrelevant. *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988). When “materially exculpatory evidence” has been lost or destroyed, charges must be dismissed. *Wittenbarger*, 124 Wn.2d at 475.
A .241 blood alcohol sample disposed of by a hospital according to its standard procedure was not materially exculpatory evidence in a vehicular homicide case because the exculpatory value of the blood was not apparent. In fact, the level was more than twice the legal limit and was at best only potentially useful to the defense. *State v. Donahue*, 105 Wn. App. 67, 18 P.3d 608, review denied, 144 Wn.2d 1010 (2001).

(e) Destruction Or Loss Of Evidence–Potentially Useful Evidence

“Potentially useful evidence” is evidence which, had it been preserved, might have exonerated the defendant. In regard to this type of evidence, a defendant must show bad faith on the part of the police in destroying or failing to preserve such evidence. *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988).

The reasons for treating these two types of evidence—materially exculpatory and potentially useful—differently has been explained as follows:

Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, that “[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.” Part of it stems from our unwillingness to read the “fundamental fairness” requirement of the Due Process Clause, as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it.”


The Supreme Court in *Arizona v. Youngblood* illustrated how courts are to treat “potentially useful evidence.” In *Youngblood*, a young boy was sexually assaulted. A doctor took semen swabs from the boy’s rectum and collected the boy’s clothes which had semen stains. The clothes were not refrigerated, which would have helped preserve any potential evidence, and no tests were performed on the samples or clothes for over a year. When tests finally were performed the results were inconclusive. The Supreme Court explained why the evidence that was not preserved was not “potentially useful evidence.”

The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*. Second, we made clear in *Trombetta* that the exculpatory value of the evidence must be apparent “before the evidence was destroyed.” Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy’s clothing; this evidence was simply an avenue of
investigation that might have led in any number of directions. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.

*Arizona v. Youngblood*, 109 S. Ct. at 336 (internal citations omitted).

In *Illinois v. Fisher*, 540 U.S. 544, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004), the defendant was charged with cocaine possession in 1988. The defense made a discovery request seeking all physical evidence the prosecution intended to use at trial. The prosecution responded that all such evidence would be made available at a reasonable time. Four tests conducted by the state crime lab confirmed the substance seized from the defendant was cocaine. The defendant failed to appear and remained a fugitive for over ten years. He was finally caught in Tennessee in November 1999. The defense thereafter learned from the prosecution that the cocaine had been destroyed in September 1999 in accordance with established police evidence retention policies. The Supreme Court upheld the conviction, holding that the substance destroyed was at best “potentially useful evidence” requiring the defense to show police bad faith in the destruction of the evidence. Since police followed their normal evidence retention policy and acted in good faith, the defense failed to prove a constitutional violation.


**(f) Duty To Obtain Material Or Information Held By Others**

CrR 4.7(d) and CrRLJ 4.7(d) regulate a defendant’s discovery request when the material or information sought is held by others and is not in the possession or control of the prosecution. The rules say–

**(d) Material Held by Others.** Upon defendant’s request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting authority shall attempt to cause such material or information to be made available to the defendant. If the prosecuting authority’s efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

The clear language of CrR 4.7(d) and CrRLJ 4.7(d) say that the prosecution must attempt to obtain all material or information sought by the defense when that information is held by others if the information is discoverable pursuant to CrR 4.7(a)(1) and (a)(2) or CrRLJ 4.7(a)(1) and the information was held by the prosecution. The rules continue that if the prosecution’s efforts at obtaining the defense requested information are unsuccessful, the court may then issue subpoenas or other orders to cause such material to be made
available to the defense.

Initial Defense Burden to Show Materiality. If one were to only analyze CrR 4.7(d) and CrRLJ 4.7(d) based upon the text of the rule, the defense would be entitled to ask for and compel the prosecution to seek anything and everything held by others which would be discoverable pursuant to CrR 4.7(a)(1) and (a)(2) or CrRLJ 4.7(a)(1).

CrR 4.7(d) and CrRLJ 4.7(d) have been substantially modified by case law with the additional requirement that the prosecution’s obligations under CrR 4.7(d) and CrRLJ 4.7(d) are only triggered when the defense first shows that the requested items held by others would be material to the presentation of the defendant’s defense.

In State v. Sherman, 59 Wn. App. 763, 767-70, 801 P.2d 274 (1990), the prosecution agreed to a defense request to obtain IRS records from the complaining witness, but failed to do so. The Court of Appeals affirmed the trial court’s CrR 8.3(b) dismissal due to the prosecution’s failure to follow up to ensure that the records were produced in a timely fashion.

Practice Tip

Under Blackwell, the defense must first show materiality before the burden shifts to the prosecution to attempt to obtain evidence held by others. If a prosecutor has a good faith belief that the defense requested evidence held by others is not material, the prosecutor may decline to attempt to obtain the evidence.

The Blackwell Court distinguished Sherman wherein the prosecutor agreed to obtain evidence held by others but was unsuccessful in obtaining it.

The lesson of Sherman is clear. Prosecutors should not agree to seek to obtain evidence held by others unless absolutely sure the evidence will in fact be obtained.

In State v. Blackwell, 120 Wn.2d 822, 829-32, 845 P.2d 1017 (1993), the trial court dismissed a prosecution based upon Sherman when the prosecution failed under CrR 4.7(d) to provide police personnel records as requested by the defense. Distinguishing Sherman because the prosecution in Blackwell never agreed to provide the requested records, the Supreme Court held, citing CrR 4.7(e)(1), that the defense had the initial burden under CrR 4.7(d) of showing the materiality of the police personnel records to the preparation of the defense’s case before the prosecution had a duty under CrR 4.7(d) of attempting to obtain the records. The Supreme Court reversed the trial court’s dismissal because the defense failed to make a materiality showing, saying at 120 Wn.2d at 829-30 (citations omitted) (emphasis in original):

Defense counsel instead argued that the service records/personnel files are material because they could lead to exculpatory evidence of improper police conduct and/or arrests based on race and excessive force that might rebut the officers' claim of proper police conduct. This reasoning was persuasive to the trial court, which apparently relied on the broad discovery language of CR 26(b)
as a basis for its order. We reject this rationale.

Defense counsels’ broad, unsupported claim that the police officers’ personnel files may lead to material information does not justify automatic disclosure of the documents.

A defendant must advance some factual predicate which makes it reasonably likely the requested file will bear information material to his or her defense. A bare assertion that a document “might” bear such fruit is insufficient. Our review of the record indicates that no such showing of materiality was made in this case.

If a prosecutor has a good faith belief that the defense’s request for items held by others lacks a showing of materiality to the defense’s preparation of its case, the prosecutor may refuse to attempt to obtain the requested information pursuant to Blackwell. The defense may then seek a court order requiring the prosecution to seek to obtain the records as authorized by CrR 4.7(e) and CrR 4.7(d), or CrRLJ 4.7(e) and CrRLJ 4.7(d), as interpreted by Blackwell.

| Practice Tip | Prosecutors should consider obtaining certain items for the defense even if their materiality is not clear. Items such as jail booking photos and 911 calls are relatively easy for the prosecutor to obtain, and often actually help the prosecution’s case. |

The prosecutor may want to consider seeking the requested information even if the defense fails to make a materiality showing. Requested items such as booking photos or 911 calls are not that difficult for the prosecutor to obtain and may ultimately assist the prosecution. From a trial court’s perspective, a prosecutor’s refusal to provide this type of defense requested item may be technically permitted under the rules but rarely will advance the prosecutor’s reputation for professionalism. Of course, given the Sherman holding, prosecutors should take great care in agreeing to obtain items in the hands of third parties unless the prosecutor is sure the items will be obtainable.

Initial Defense Burden to Show Prosecutor’s Obligation. CrR 4.7(d) and CrRLJ 4.7(d) require the prosecution to provide defense requested items held by third parties only when those items “would be discoverable if in the knowledge, possession or control of the prosecuting attorney[.]”

| Comment | Even if the defense makes a showing that an item held by others is material to the defense as required by Blackwell, CrR 4.7(d) or CrRLJ 4.7(d) require the defense to also show that the item is included in the list of the prosecution’s discovery obligations under CrR 4.7(a)(1) and (a)(2) or CrRLJ 4.7(a)(1) before the burden shifts to the prosecutor to attempt to obtain the item. |
Practice Tip

Items such as training manuals are not included in CrR 4.7(a)(1) and (a)(2) or CrRLJ 4.7(a)(1), and thus are not discoverable from the prosecution even if the prosecutor has the item in the prosecutor’s possession.

While the prosecutor should not interfere with the defense’s effort to obtain a non-discoverable item such as a training manual, the prosecutor should reject the defense’s request of the prosecutor to obtain such items.

CrR 4.7(a)(1) and (a)(2), and CrRLJ 4.7(a)(1), set forth the prosecution’s discovery obligations. These prosecutor discovery obligation rules are very specific concerning the discovery the prosecutor is required to provide to the defense.

Often, the defense requests items held by third parties which are not included in CrR 4.7(a)(1) or (a)(2), or CrRLJ 4.7(a)(1). Absent the caveat discussed previously concerning items such as booking photos or 911 calls, prosecutors should generally decline to attempt to obtain items outside the purview of CrR 4.7(a)(1) or (a)(2), or CrRLJ 4.7(a)(1). A prosecutor certainly should not interfere with the defense’s efforts to obtain items held by third parties. But a prosecution is not, nor should it be, the defense investigator. Items such as officer training manuals are not included in the prosecutor’s discovery obligation under CrR 4.7(a)(1) or (a)(2), or CrRLJ 4.7(a)(1), and thus are not included as discoverable items in CrR 4.7(d) or CrRLJ 4.7(d). If the defense truly wants items such as officer training manuals, the defense can obtain the manuals.

(g) Receipt Of Privileged Defense Materials

In Gomez v. Vernon, 255 F.3d 1118, cert. denied, 534 U.S. 1066, 122 S. Ct. 667, 151 L. Ed. 2d 581 (9th Cir. 2001), prison inmates brought suit against prison officials alleging retaliation for exercise of the inmates’ right to access to courts. Letters from the inmates’ counsel to the inmates relating to the lawsuit were seized by prison officials and turned over to the prison’s lead counsel. Counsel reviewed the documents, and did not inform opposing counsel. Over the next five months, prison counsel received ten additional copies of such documents. Eight months after obtaining the documents, prison counsel contacted the Idaho Bar Association for an opinion and was advised to read no more documents and turn over to the court those documents in prison counsel’s possession. This was not done, and ultimately a motion was filed by prison counsel based upon information obtained from the inmate correspondence. The trial court found bad faith, and imposed $4,500 in sanctions against prison counsel.

Practice Tip

Excellent advice from the Ninth Circuit. When a prosecutor receives privileged defense materials and is in doubt about what to do, ask the court.
In affirming the sanctions, the Ninth Circuit said at 255 F.3d at 1134-35:

The notion that receipt of privileged communications imposes a duty on counsel to take some reasonable remedial action is hardly a novel concept. It stems from common sense, ethical rules and the origins of the privilege. Of course, had Department counsel entertained any doubt that they possessed the materials improperly, the opinion of the Idaho State Bar representative should have dispelled it. Yet–and this is particularly troubling for us, as it was for the trial court–the attorneys continued to collect and read documents after being advised by the state bar to send the documents to the court.

*     *     *

Department counsel’s actions in this case do not pass even the most lenient ethical “smell test.” They knowingly disregarded advice from the bar counsel and bypassed questions of ethics in an effort to gain advantage in this litigation.

*     *     *

The result here does not set up an impractical or insurmountable hurdle for counsel facing an ethical dilemma concerning privileged documents. The path to ethical resolution is simple: when in doubt, ask the court.

(h) Handling Sensitive Evidence

In Reid v. Pierce County, 136 Wn.2d 195, 961 P.2d 333 (1998), relatives of several decedents sued the county and various governmental employees based on allegations that the county employees had appropriated and displayed photos of decedents’ corpses at an office party. The Supreme Court held that the plaintiffs could not maintain their claims for negligent infliction of emotional distress or outrage because none of them were present when the photographs were appropriated or displayed to others, and that the plaintiffs had not presented a sufficient record on which to establish a right of action based on a constitutional right to privacy. The court did hold, however, that the plaintiffs had stated actionable claims for common law invasion of privacy.

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<th>Practice Tip</th>
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<td>Prosecutors frequently come in contact with sensitive and private photos, reports and other evidence. Prosecutors should be very careful when dealing with such evidence and handle the evidence as if the prosecutor would not want the evidence exposed “before the public gaze” if the evidence involved the prosecutor or the prosecutor’s family.</td>
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The prosecution has a duty under CrR 4.7 of providing the defense with copies of sexually explicit materials in a child pornography case, subject to protective orders limiting dissemination of the materials, when the prosecution intends to use the evidence at a hearing or trial. State v. Boyd, 160 Wn.2d 424, 158 P.3d 54 (2007).
(i) Bill Of Particulars

A defendant has a constitutional right to be informed of the nature and cause of the accusation against him or her to enable the defense to prepare its defense and to avoid a subsequent prosecution for the same crime. *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

This constitutional right of a criminal defendant to be appraised with reasonable certainty as to the charges against him or her is ordinarily satisfied by a charging document which charges a crime in the language of the statute, where the crime is defined with certainty within the statute. *State v. Merrill*, 23 Wn. App. 577, 580, 597 P.2d 446, review denied, 92 Wn.2d 1036 (1979); *State v. Grant*, 89 Wn.2d 678, 686, 575 P.2d 210 (1978).

The omission of any element of the charged crime, statutory or otherwise, renders the charging document constitutionally defective. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Charging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial. *Kjorsvik*, 117 Wn.2d at 102.

In judging the sufficiency of a charging document, the law is clear that the prosecution need not allege its supporting evidence, theory of the case or whether or not it can prove its case. *United States v. Buckley*, 689 F.2d 893 (1982), cert. denied, 460 U.S. 1086, 103 S. Ct. 1778, 76 L. Ed. 2d 349 (1983); *State v. Bates*, 52 Wn.2d 207, 324 P.2d 810 (1958).

If the charging document states each element, but is vague as to some other matter significant to the defense, a bill of particulars is capable of amplifying or clarifying particular matters that are essential to the defense. *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985).

In determining whether to order a bill of particulars in a specific case, a court should consider whether the defense has been advised adequately of the charges through the charging document and all other disclosures made by the government since full discovery obviates the need for a bill of particulars. *United States v. Long*, 706 F.2d 1044 (9th Cir. 1983); *United States v. Giese*, 597 F.2d 1170 (9th Cir.), cert. denied, 444 U.S. 979, 100 S. Ct. 480, 62 L. Ed. 2d 405 (1979).

**Comment** The defense is not entitled to a bill of particulars if (1) the charging document includes all statutory and court-created elements of the crime, and (2) the defense has been provided full discovery.

In *State v. Paschall*, 197 Wash. 582, 85 P.2d 1046 (1939), the court held that it was not prejudicial error to deny a motion for a bill of particulars when the state’s attorney had disclosed to the defendant’s attorney practically all of the facts concerning which evidence the government intended to use at trial. See also *State v. Merrill*, 23 Wn. App. at 580 (trial court properly denied motion for bill of particulars where the defendant was made aware through discovery of all the information available to the prosecutor for
proving the offense); and *State v. Grant*, 89 Wn.2d at 686-87 (trial court properly denied motion for bill of particulars stating “the officer’s report is about as much as the court could compel the prosecutor to furnish (the defendant)”).

The precise time that a crime has been committed need not be stated in the charging document unless the time is a material ingredient, and the information is not thereafter subject to attack for imprecision. *State v. Gottfriedson*, 24 Wash. 398, 64 P. 523 (1901); *State v. Myrberg*, 56 Wash. 384, 105 P. 622 (1909); *State v. Oberg*, 187 Wash. 429, 60 P.2d 66 (1936).

The prosecution may rely on a continuing course of conduct rather than charging a separate count for each isolated act. *State v. Stockmyer*, 83 Wn. App. 77, 87, 920 P.2d 1201 (1996) (State did not have to identify a specific incident in the two hour period as the basis for assault and manslaughter charges); *State v. Gooden*, 51 Wn. App. 615, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988) (no need to specifically identify which acts of prostitution were being relied upon when there is a continuing course of conduct); *State v. Love*, 80 Wn. App. 357, 908 P.2d 395, *review denied*, 129 Wn.2d 1016 (1996) (multiple instances of drug possession may constitute a continuing course of conduct forming the basis for a single charge of possession of a controlled substance with intent to deliver).

The “continuing course of conduct” doctrine is the underlying reason why the prosecution need not identify a specific punch at a particular moment in time in a fight to prove assault, the exact penetration at a particular moment in time to prove rape, or the exact act in order to prove obstructing a law enforcement officer.

Prosecutors should be careful when responding to a defense request for a bill of particulars. Defense counsel in misdemeanor cases routinely seek bills of particular buried in their notice of appearance boilerplate citing CrRLJ 2.4(e). Prosecutors should respond by providing a charging document listing all the statutory and court-created elements of the crime, along with full discovery. As discussed, nothing more is required. Yet some defense counsel believe that a bill of particulars is more a form of discovery rather than a charging document sufficiency doctrine. Such a belief leads to the incorrect conclusion that the defense is entitled to know the prosecution’s theory of the case, in writing, prior to trial, by asking the court to essentially require the prosecution to provide its closing arguments to the defense. Prosecutors should point out that CrRLJ 2.4’s heading is “Complaint–Citation And Notice–Sufficiencies” and that the discovery rules are located in CrRLJ 4.7.
PART VI – PLEA DISCUSSIONS

(1) Availability for Plea Discussions

The prosecutor should have a general policy of consulting with the defense concerning “disposition of charges by plea.” ABA Standard 3-4.1(a). Such a policy, however, does not impose an obligation to make concessions. Comment to ABA Standard 3-4.1(a).

Absent defense counsel’s approval, a prosecutor should not discuss plea negotiations with a represented defendant. When a defendant properly waives counsel, a prosecutor may engage in plea discussions. It is wise to make a record of such discussions. ABA Standard 3-4.1(b). Prosecutors should make reasonable efforts to correct an unrepresented person’s misunderstanding of the prosecution role. A prosecutor is not on the defendant’s side. Comment to ABA Standard 3-4.1(b).

A prosecutor should not make false statements to defense counsel or an unrepresented accused during the course of plea negotiations. ABA Standard 3-4.1(c). Defense counsel are understandably reluctant to negotiate a criminal case with a prosecutor who cannot be trusted. Comment to ABA Standard 3-4.1(c).

For criminal cases handled under the Sentencing Reform Act, RCW 9.94A.421 authorizes a prosecutor during plea negotiations to do any of the following:

1. Move for dismissal of other charges or counts;
2. Recommend a particular sentence within the sentence range applicable to the offense or offenses to which the offender pled guilty;
3. Recommend a particular sentence outside of the sentence range;
4. Agree to file a particular charge or count;
5. Agree not to file other charges or counts; or
6. Make any other promise to the defendant, except that in no instance may the prosecutor agree not to allege prior convictions.

In a case involving a crime against persons as defined in RCW 9.94A.411, the prosecutor shall make reasonable efforts to inform the victim of the violent offense of the nature of and reasons for the plea agreement, including all offenses the prosecutor has agreed not to file, and ascertain any objections or comments the victim has to the plea agreement.

A Sentencing Reform Act defendant is normally expected to plead guilty to “the charge or charges which will adequately describe the nature of his or her criminal conduct or go to trial.” RCW 9.94A.450(1). RCW 9.94A.450(2) describes various circumstances where a plea agreement to a charge which may not fully describe the nature of the criminal conduct is proper, including the following:
(a) Evidentiary problems which make conviction on the original charges doubtful;

(b) The defendant's willingness to cooperate in the investigation or prosecution of others whose criminal conduct is more serious or represents a greater public threat;

(c) A request by the victim when it is not the result of pressure from the defendant;

(d) The discovery of facts which mitigate the seriousness of the defendant's conduct;

(e) The correction of errors in the initial charging decision;

(f) The defendant's history with respect to criminal activity;

(g) The nature and seriousness of the offense or offenses charged;

(h) The probable effect on witnesses.

**Propriety Of Plea Negotiation**

The Supreme Court accepted the legitimacy of plea negotiation in *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604 (1978) (citation omitted).

While confronting a defendant with the risk of more severe punishment clearly may have a “discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable”--and permissible--“attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

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<td>Plea negotiation is an accepted feature of the criminal justice system, and should be encouraged when properly administered. <em>Santobello v. New York</em>, 404 U.S. 257, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427 (1971).</td>
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**Agreed Improper Criminal History**

After agreeing that certain juvenile offenses counted in defendant’s offender score, defendant filed a personal restraint petition asserting that the sentencing document was...
invalid on its face due to the washing out of some juvenile convictions. The prosecution argued that the mutual mistake could not be corrected since it had detrimentally relied on the plea agreement and could not now file holdback charges due to the running of the statute of limitation. The court held that the defendant was entitled to be sentenced under the correct offender score even though the parties agreed to the incorrect criminal history because the prosecution cannot by plea agreement agree to less criminal history than exists nor more criminal history than exists. In re Goodwin, 146 Wn.2d 861, 876-77, 50 P.3d 618 (2002). See also RCW 9.94A.421(6) (“[I]n no instance may the prosecutor agree not to allege prior convictions.”).

**Comment**

It is improper for a prosecutor to agree to less criminal history than exists or to more criminal history than exists.

(c) Immigration Consequences

Federal immigration law is extremely complex. RCW 10.40.200 provides criminal defendants with a statutory right to notice of possible immigration consequences prior to entry of a guilty plea. RCW 10.40.200(2) provides:

Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. A defendant signing a guilty plea statement containing the advisement required by this subsection shall be presumed to have received the required advisement. If, after September 1, 1983, the defendant has not been advised as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty. Absent a written acknowledgement by the defendant of the advisement required by this subsection, the defendant shall be presumed not to have received the required advisement.

In State v. Littlefair, 112 Wn. App. 749, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020 (2003), the portion of the statement of defendant on plea of guilty form dealing with immigration consequences was crossed out. Finding a violation of RCW 10.40.200, the Court of Appeals held that a Canadian defendant was entitled to withdraw his guilty plea. The proper immigration advisement can be found at the guilty plea forms at CrR 4.2(g)(6), JuCR 7.7(11), and CrRLJ 4.2(g)(6).
(d) Promising Leniency To Another AKA “The Package Deal”

A prosecutor may offer a package deal where one defendant agrees to plead as charged upon the reduction of charges for another. However, prosecutors must take great care to make sure the court is fully advised of the parameters of the situation. In State v. Williams, 117 Wn. App. 390, 399-400, 71 P.3d 686 (2003), review denied, 151 Wn.2d 1011 (2004) (harmless error and conviction affirmed) (footnotes omitted), the prosecution improperly failed to notify the court of a package deal involving a reduced charge for defendant’s son if the defendant pled guilty as charged. After discussing that a guilty plea is involuntary and invalid when it is obtained by mental coercion overbearing the will of the accused, the Court of Appeals discussed a prosecutor’s obligation to the trial court in such situations.

In State v. Cameron, [30 Wn. App. 229, 633 P.2d 901 (1981)] this court followed federal precedent and recognized that “special care should be taken in reviewing guilty pleas entered in exchange for a prosecutor's promise of lenient treatment of a third party.” Although package deal plea agreements are not per se impermissible, federal courts are concerned that “they pose an additional risk of coercion not present when the defendant is dealing with the government alone…Quite possibly, one defendant will be happier with the package deal than his codefendant(s); looking out for his own best interests, the lucky one may try to force his codefendant(s) into going along with the deal.” Thus, “a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person other than the accused … might pose a greater danger of inducing a false guilty plea by skewing the risks a defendant must consider.” Federal courts require the government to inform the court that the codefendants are entering pleas as part of a package deal to allow the court to take the requisite special care in the case of package deals. Indeed, one court has stated that disclosure of the existence of a package deal is “crucial” at the hearing on the guilty plea so that the court “may probe as deeply as needed into the possibility that one defendant is pleading guilty against his will in order to make it possible for his codefendant to obtain the benefit of a favorable plea and sentencing recommendation.”

Comment

Prosecutors must take great care when offering a package deal because the prosecutor’s actions will be examined very closely by trial and appellate courts, and perhaps the Washington State Bar Association.

Any threat to charge an uncharged third party, especially a relative of the defendant, not made in good faith is unethical and renders a plea involuntary.

It is wise to discuss the merits of the proposed action with other prosecutors before offering a package deal.
(e) **Policy Of Refusing To Negotiate Under Certain Circumstances**

A prosecutor’s policy of refusing to negotiate in a criminal case when compelled to disclose the identity of an informant in a civil forfeiture proceeding arising out of the incident did not violate due process. The prosecution has a legitimate interest in protecting the identity of confidential informants. *State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2003).

(f) **Waiver Of Right To Appeal**

A prosecutor may negotiate for a plea agreement which includes an agreement to waive the right to appeal a criminal conviction. As with the waiver of other constitutional rights, the waiver of the right to appeal must be made intelligently, voluntarily, and with an understanding of the consequences. *State v. Lee*, 132 Wn.2d 498, 939 P.2d 1223 (1997).

(g) **Charitable Contributions**

In April 2006, it came to light that a Kennewick assistant city attorney and a contract public defender were stealing money paid by DUI defendants as part of their diversion agreements. The money was intended for a local youth program dealing with troubled teenagers. Ultimately, both attorneys were convicted on bribery charges in federal district court. The assistant city attorney was sentenced to 30 months. The public defender received an 18 month prison term. Both were ordered to pay over $80,000 in restitution. Both attorneys are suspended pending investigation by the WSBA.

**Caution**

Prosecutors are prohibited by statute from negotiating criminal cases through a defendant’s payment of charitable contributions unless a specific state statute permits such a contribution.

Recognizing the need for legislation, the Washington Association of Prosecuting Attorneys drafted a bill dealing with diversion agreement charitable contributions. Enacted in 2007, RCW 10.01.220 provides:

A city attorney, county prosecutor, or other prosecuting authority may not dismiss, amend, or agree not to file a criminal charge in exchange for a contribution, donation, or payment to any person, corporation, or organization. This does not prohibit:

1. Contribution, donation, or payment to any specific fund authorized by state statute;
2. The collection of costs associated with actual supervision, treatment, or collection of restitution under agreements to defer or divert; or
3. Dismissal following payment that is authorized by any other statute.
(h) Permissible Plea Agreements

Washington recognizes three possible pleas: (a) not guilty, (b) not guilty by reason of insanity, and (c) guilty. CrR 4.2(a) and CrRLJ 4.2(a). A conviction may be obtained by means of (a) a jury verdict of guilty, (b) a bench finding of guilty, or (c) the acceptance by the court of a guilty plea. RCW 9.94A.030(12).

In adult felony cases, the prosecutor has statutory authority to negotiate with the defense for an agreement whereby the defendant pleads guilty to certain charges and whereby the prosecution either drops other charges or recommends a particular sentence within the standard sentence range. RCW 9.94A.421.

If the defendant pleads guilty pursuant to such an agreement, both the defendant and the prosecutor must file with the court their understanding of the defendant’s criminal history before the plea is entered. The validity of the agreement may be determined at the same hearing at which the plea is accepted. CrR 4.2(e). If the defendant wishes to take advantage of a plea bargain without admitting guilt, the approved procedure is the Alford plea. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).


In State v. Ehli, the prosecution agreed to drop a sexual exploitation of a minor charge and four possession of depictions charges and to prosecute a single dealing in depictions and four possessions in exchange for the defendant waiving a jury trial and proceeding via a bench trial on stipulated facts. The prosecutor also agreed to make specific sentencing recommendations if the defendant was found guilty. The Court of Appeals held that such an agreement did not amount to a cognizable plea agreement upon which the defendant could rely.

(2) Fulfillment Of Plea Discussions

A prosecutor may advise the defense of the position the prosecutor will take concerning disposition. A prosecutor should not, however, promise that the court will impose a specific sentence nor imply a greater power to influence a case’s disposition than exists. ABA Standard 3-4.2(a) and (b).

A prosecutor should honor all plea agreements unless the defendant fails to comply with the agreement. ABA Standard 3-4.2(c). A prosecutor’s refusal to honor a plea agreement undermines the voluntariness of the defendant’s guilty plea. Comment to ABA Standard 3-4.2(c).
(a) Guilty Plea When Defendant Claims Innocence–The Alford Plea

In *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), the prosecution had a strong case of first degree murder. The defendant was advised by competent counsel, and intelligently concluded that he should plead guilty to second degree murder rather than being tried for capital first degree murder. Holding that no constitutional error occurred in accepting a guilty plea from a defendant who claimed innocence, the Supreme Court held that a valid waiver of constitutional rights and guilty plea occurs when a defendant asserting innocence enters a guilty plea if strong evidence of actual guilt exists which provides a factual basis for the guilty plea.

CrR 4.2(d), JuCR 7.6(b) and CrRLJ 4.2(d) require a trial court be satisfied that there is a factual basis for a guilty plea before accepting the plea as voluntary. CrR 4.2(d) does not require a trial court to be convinced beyond a reasonable doubt that a defendant is guilty. It is enough for the trial court to conclude there is sufficient evidence for a jury to find guilt. The factual basis for the guilty plea may come from any source the trial court finds reliable, and not just the admissions of the defendant. *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976) (public policy does not require a trial when a defendant pleads guilty claiming innocence, citing *Alford*).

(b) Guilty Plea To Reduced Charge Lacking Factual Basis

The choice to plead guilty to a lesser charge is voluntary if it is based on a defendant’s informed review of all the available alternatives. The trial court must find a factual basis to support the original charge, and determine that the defendant understands the relationship of his conduct to that charge. *In re Barr*, 102 Wn.2d 265, 269-70, 684 P.2d 712 (1984) (Multiple counts of statutory rape reduced to indecent liberties by forcible compulsion to which defendant pled guilty. The record lacked evidence of forcible compulsion but was sufficient to support the original statutory rape charges. Conviction affirmed).

**Practice Tip** *In re Barr* is clear. A trial court need only find a factual basis for the original crime charged, not the lesser amended charge filed by the prosecution pursuant to plea negotiations.

Prosecutors should take care to make sure sufficient evidence is filed with the trial court to support the initial charge when a defendant pleads guilty to a lesser charge. A cursory Probable Cause Statement should be supplemented by additional evidence, including the filing of properly redacted police reports.
(c) Pro Se Guilty Plea Waiver Of Counsel

Unlike the colloquy safeguards required by the Sixth Amendment when a defendant seeks to waive counsel and proceed to trial, the Sixth Amendment does not require an extensive colloquy when a defendant seeks to waive the right to counsel and plead guilty. *Iowa v. Taylor*, 541 U.S. 77, 124 S. Ct. 1379, 1383, 158 L. Ed. 2d 209 (2004).

<table>
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<th>Supreme Court Comment</th>
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<td>The Sixth Amendment is satisfied when a pro se defendant wishing to waive the right to counsel and plead guilty is informed by the trial court of the nature of the charges against the accused, the accused’s right to be counseled regarding a guilty plea, and of the range of allowable punishments attendant upon the entry of a guilty plea. Unlike when a pro se defendant seeks to waive counsel and proceed to trial, an extensive court colloquy is not required when a pro se defendant seeks to waive counsel and plead guilty.</td>
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(d) Duty To Honor Plea Agreement

A prosecutor fulfills the duty to honor a plea agreement when the prosecutor makes the promised recommendation. The prosecutor need not make the recommendation with “enthusiasm.” *United States v. Benchimol*, 471 U.S. 453, 105 S. Ct. 2103, 2105, 85 L. Ed. 2d 462 (1985). A prosecutor must truthfully explain the reason for the plea agreement and recommendation when asked by the defense to do so. The defense cannot complain when the underlying reasons given for the recommendation were unfavorable to the defense because the prosecution has no duty to make the recommendation with any degree of advocacy. *State v. Peterson*, 37 Wn. App. 309, 312-13, 680 P.2d 445 (1984).

A prosecutor breaches a plea agreement when the prosecutor makes the agreed recommendation for a standard range sentence, but highlights the existence of aggravating factors. A plea agreement is a contract, and the test concerning a prosecutor’s breach is whether the prosecutor contradicted, by word or conduct, the contracted recommendation promised to the defendant. *State v. Jerde*, 93 Wn. App. 774, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999); *State v. Williams*, 103 Wn. App. 231, 11 P.3d 878 (2000), review denied, 143 Wn.2d 1011 (2001).

<table>
<thead>
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<th>Caution</th>
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<tr>
<td>Prosecutors should not agree to expunge any record as part of a plea agreement.</td>
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Even though no statutory authority existed, the prosecution was required to expunge the criminal record when it agreed to do so as part of a plea agreement. *State v. Shineman*, 94 Wn. App. 57, 971 P.2d 94 (1999).
PART VI. PLEA DISCUSSIONS

**Caution**

A prosecutor may contest a defendant’s request for a sentence less than recommended by the prosecutor.

The prosecutor must take great care, however, to make sure the court understands that the prosecutor is responding to the defense’s request for a lesser sentence but still supports the prosecutor’s agreed-upon recommendation.

A prosecutor may contest a defendant’s request seeking a lesser sentence than recommended by the prosecutor so long as the prosecutor makes clear that the prosecutor continues to make the agreed upon recommendation and is only responding to the defense request for a lesser sentence. A prosecutor has a duty to not misrepresent the record or hold back relevant information from the sentencing court. *State v. Hixson*, 94 Wn. App. 862, 973 P.2d 496 (1999).

When a prosecutor breaches a plea agreement, the defendant has the option of specific performance of the plea agreement, or withdrawal of his or her guilty plea. The defendant’s choice of remedy controls unless there is a compelling reason not to allow that remedy. *State v. Miller*, 110 Wn.2d 528, 535-37, 756 P.2d 122 (1988). When a defendant pleads guilty to multiple counts at the same time in the same proceeding and the prosecutor thereafter breaches the plea agreement, all guilty pleas must be withdrawn if the defendant chooses withdrawal as the remedy. *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003).

When a defendant breaches a plea agreement, the prosecution has the option of specific performance of the plea agreement, or rescinding the plea agreement. *State v. Thomas*, 79 Wn. App. 32, 36-37, 39, 899 P.2d 1312 (1995).

**(e) Witness Wants To Address Court At Sentencing**


**(f) Duty To Advocate Court’s Ruling On Appeal**

support of trial court’s manifest injustice finding).

(3) Record Of Reasons For Felony Dismissal

A prosecutor should make a record of the reasons explaining why felony criminal charges are dismissed. ABA Standard 3-4.3. Given the volume in misdemeanor courts, this requirement only applies to felony dismissals. Comment to ABA Standard 3-4.3.
PART VII – THE TRIAL

(1) Calendar Control

Trial calendar control should be vested with the court. A prosecutor should provide the court with relevant information concerning the order of cases on a calendar. ABA Standard 3-5.1.

RCW 10.46.085 limits a court’s discretion in granting continuances in certain cases. When the victim is under age eighteen and the crime involves a violation of RCW 9A.64.020 (incest), RCW 9.68 (obscenity and pornography), RCW 9.68A (sexual exploitation of children) or RCW 9A.44 (sex offenses), the court may not grant a continuance of the trial date unless the court finds “substantial and compelling reasons” for the continuance and “the benefit of the postponement outweighs the detriment to the victim.”

The Board for Judicial Administration has approved Advisory Case Processing Time Standards. The standards provide for the following Filing to Resolution Time Standards:

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<th>90%</th>
<th>98%</th>
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<tr>
<td>Superior Court Criminal</td>
<td>4 mo.</td>
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<tr>
<td>Superior Court RALJ</td>
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<tr>
<td>Ct/Limited Juris Criminal</td>
<td>3 mo.</td>
<td>6 mo.</td>
<td>9 mo.</td>
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Trial judges must take notice of an appellate court’s docket and should set cases for trial so that an attorney will not have cases in both courts on the same day. Cases set for hearing by an appellate court generally have precedence over those set by a trial court on the same date where an attorney is counsel in both cases. *State v. Hartwig*, 36 Wn.2d 598, 600, 219 P.2d 564 (1950).

(2) Courtroom Professionalism

(a) Professionalism And The Dignity Of Judicial Proceedings

ABA Standard 3-5.2(a) provides that “[a]s an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.”

“While courtroom litigation is understandably contentious at times, the prosecutor’s attitude communicates the professional relationship that exists between the prosecutor,
defense counsel and judge.” Comment to ABA Standard 3-5.2(a).

**ABA Comment**
“Judicial proceedings are no place for rudeness, overbearing, or oppressive conduct which often diverts the proceedings by the intrusion of such factors as personality, acrimonious exchanges between advocates and between advocates and witnesses, and histrionics designed to sway jurors by other than admissible evidence.

In the end, respect for law “derives in large measure from the image that the administration of justice presents. It is not enough that justice be done; there must also be the appearance of fairness.”

**(b) Exchanges Between Lawyers**

ABA Standard 3-5.2(b) provides that “[w]hen court is in session, the prosecutor should address the court, not opposing counsel, on all matters relating to the case.” Courtroom professionalism mandates that lawyers not address each other during a hearing or trial. Such a breach of professionalism is especially acute when the spectacle created by the lawyers occurs in front of a jury. Comment to ABA Standard 3-5.2(b).

**(c) Prompt Compliance With Court Orders**

ABA Standard 3-5.2(c) says: “A prosecutor should comply promptly with all orders and directives of the court, but the prosecutor has a duty to have the record reflect adverse rulings or judicial conduct which the prosecutor considers prejudicial. The prosecutor has a right to make respectful requests for reconsideration of adverse rulings.”

**(d) Code Of Professionalism**

A prosecutor is entitled to know court formalities concerning standards of conduct, including proper forms of address, where to stand, and where the prosecutor is allowed to be in the courtroom during trial. Prosecutors should cooperate with the court and bar by taking the lead in developing a written professionalism code concerning these matters. Comment to ABA Standard 3-5.2(d).

**(e) Sanctions Against Counsel For Violation Of Court Orders**

The United States Supreme Court affirmed a two day contempt jail sentence against a defense attorney who in a non-capital case repeatedly asked witnesses about life in prison without the possibility of parole despite the trial judge’s repeated admonitions to not do so. *Pounders v. Watson*, 521 U.S. 982, 117 S. Ct. 2359, 2363, 138 L. Ed. 2d 976 (1997) (citation omitted).
Advocacy that is “fearless, vigorous, and effective” does not extend to disruptive conduct in the course of trial and in knowing violation of a clear and specific direction from the trial judge.

A prosecutor’s thrice violation of a court order prohibiting the introduction of testimony concerning the fact that the defendant was lodged in the King County jail merited reversal of the conviction due to prosecutorial misconduct. \textit{State v. Tweedy}, 165 Wash. 281, 288, 5 P.2d 335 (1931).

A prosecutor’s violation of an order in limine prohibiting evidence concerning the defendant’s desertion from the military was prejudicial error, meriting reversal of the conviction. \textit{State v. Smith}, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937).

Dismissal of a criminal case was proper when after agreeing to an order authorizing a defense expert examination of child witnesses, the prosecutor told the parents that she knew of no authority for the court to order such evaluations. The prosecutor also told the parents that if they wanted to protect their children, the prosecutor would do her best to support them in doing so. \textit{State v. Stephans}, 47 Wn. App. 600, 604-5, 736 P.2d 302 (1987) (footnote omitted).

We do not say that a prosecuting attorney—or any lawyer, for that matter—is barred from discussing a court order with a potential witness. We would hope that any such discussion would be conducted on a professional basis, and that it would be well seasoned with common sense. We do say that under no circumstances may a prosecuting attorney counsel, or suggest his approval of, disobedience. It should not be necessary to point out that the proper avenue to vindicate a disagreement with an order is an appeal. Finally, we see no remedy that would have served the interests of justice short of dismissal.

All attorneys, including prosecutors, are reminded that stringent remedies are available and sometimes necessary when attorneys cannot understand the need to adhere to orders in limine prohibiting the introduction of evidence. \textit{State v. Ransom}, 56 Wn. App. 712, 713, n.1, 785 P.2d 469 (1990) (prosecutor warned not to repeat violation of order in limine during retrial).

In \textit{State v. Dugan}, 96 Wn. App. 346, 350-53, 979 P.2d 885 (1999), the defendant in an assault and false imprisonment case claimed on direct examination that he tried to help the victim overcome a drinking problem and characterized himself as a “kind of a health nut.” During cross examination, the prosecutor asked: “Well, isn’t it true you had your bond revoked because you used marijuana during the pendency of this case, and were put back in jail.” The trial court held the prosecutor in contempt and imposed a $200 sanction. Without deciding whether the question was improper, the Court of Appeals reversed the contempt sanction because the prosecutor did not violate RCW 7.21.010 by violating a court order or behaving in a disorderly, contemptuous, or insolent manner that tended to disrupt or interrupt the proceedings so severely as to warrant immediate sanction.
Query whether the prosecutor committed misconduct, however. Clearly the prosecutor wanted the jury to know (1) that the defendant’s bail bond was revoked, and (2) that the defendant used marijuana. Assuming that the prosecutor properly asked the question knowing in advance that witnesses were available to impeach the defendant if the defendant denied the question, would evidence of a bond being revoked or a defendant’s use of marijuana (not during the incident or while testifying) be relevant and admissible evidence?

First, evidence that a court revoked a defendant’s bail is not relevant to any issue before the jury. Even if somehow relevant under ER 401 and ER 402, such evidence would very likely be excluded under ER 403 given the very low probative value and the substantial prejudice to the defendant. Second, evidence of alcohol or drug usage is generally inadmissible to impeach a witness’ character unless the substance was used while the witness was perceiving the event or while testifying in court. *State v. Tigano*, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021 (1992); *State v. Russell*, 125 Wn.2d 24, 83, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995); *State v. Stockton*, 91 Wn. App. 35, 42, 955 P.2d 805 (1998).

Additionally, the Dugan prosecutor unnecessarily risked a defense motion for mistrial and dismissal because double jeopardy bars retrial after a defense request for mistrial is granted when the prosecutor’s misconduct is intended to provoke the defense into seeking the mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982).

**Caution**

A prosecutor should ask the court outside the jury’s presence for permission to ask a question which may not be admissible and injects the trial with collateral matters involving a high likelihood of prejudicing the defendant.

Simply asking the question and hoping for the best (1) diminishes the bench’s respect for the prosecutor, (2) risks a mistrial, (3) may risk a dismissal if the court finds the question was intended to provoke a defense mistrial request, and (4) may result in Bar discipline.

A prosecutor this close to the ethical line (or over it) should outside the jury’s presence request permission from the court to ask the question. The high likelihood that the court will disallow such a question supports a reasonable conclusion that the question is improper. A prosecutor who chooses not to ask for court permission prior to asking such a question for fear the court will not let the jury hear the question acts in bad faith. Anything less than asking the court for permission in advance risks possible mistrial and dismissal of the case, and/or Bar discipline.
(f) Police Intrusion Into Attorney-Client Communication During Trial

In *State v. Granacki*, 90 Wn. App. 598, 603-4, 959 P.2d 667 (1998) (citations omitted) (footnotes omitted), during a recess in a robbery trial, the lead detective sitting at counsel table pursuant to ER 615 read notes at defense table about defendant’s communications with counsel. The detective did not communicate what he saw to the prosecutor. In affirming the trial court’s dismissal of the case, the Court of Appeals noted that in addition to violating the defendant’s right to counsel, the detective also abused the trust the court placed in the detective by allowing him to remain at counsel table to assist the prosecutor.

There is also more than one purpose for dismissing a case where the State violates a defendant’s right to communicate privately with his or her attorney. The dismissal not only affords the defendant an adequate remedy but discourages “the odious practice of eavesdropping on privileged communication between attorney and client.” [T]here is no way to isolate the prejudice resulting from such an intrusion. Where the behavior is egregious, as it was here, the trial court does not abuse its discretion by presuming there was prejudice to the defendant's right to counsel. It is true that Detective Kelly had not communicated what he saw to the deputy prosecutor when the defense moved for a mistrial. But that does not prevent what he read from affecting either his own testimony or comments he made to the deputy prosecutor during trial.

We recognize this case is unusual. Normally misconduct does not require dismissal absent actual prejudice to the defendant. Even then, the trial court may properly choose to impose a lesser sanction because this is a classic example of trial court discretion. Had the court chosen to ban Detective Kelly from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone, we would not find an abuse of its discretion. But, based on the trial judge’s evaluation of all the circumstances and Detective Kelly's credibility, the sanction he imposed was also within his discretion.

| Caution | Do not get *Granacki’d!* Prosecutors should educate their ER 615 witnesses about *Granacki*. As *Granacki* teaches, courts have zero tolerance for an officer “peeking” at defense counsel’s table.

If a prosecutor sees that defense counsel’s or a defendant’s notes are left open during a recess, the prosecutor should make a record with the court that the prosecutor is concerned that witnesses or jurors may inadvertently observe the notes. The prosecutor should ask the court to suggest to defense counsel that counsel consider covering up the notes during breaks.

Query what you might do during a trial recess if you were a defense attorney; a police officer was sitting right next to you at counsel table, and you knew about *Granacki*? The defense ethics of “setting up” the officer by leaving attorney-client notes in plain view is
beyond the scope of these materials. Rather than claiming that the defense is somehow acting unethically in permitting attorney-client communications to be seen, a prosecutor is much better off simply avoiding being “Granacki’d” by letting the officer know about Granacki and making a record if necessary.

(3) Jury Selection

(a) Voir Dire Preparation

Jury selection is an important aspect of trial. Prosecutors should prepare for jury selection by considering questions to be asked, and should be knowledgeable in the exercise of challenges for cause and peremptory challenges. ABA Standard 3-5.3(a).

(b) Investigation Of Potential Jurors

The practice of conducting out-of-court investigation of jurors presents serious problems. Jury service is unpopular with many people, and juror investigation may make it even less likely that people will participate as jurors. Comment to ABA Standard 3-5.3(b). When it is necessary to conduct juror background investigations, the prosecutor should not harass nor embarrass potential jurors, nor invade their privacy. Whenever possible, an investigation should be limited to records and sources of information already in existence. ABA Standard 3-5.3(b).

(c) Purpose Of Voir Dire

Voir dire questions should be asked “solely to obtain information for the intelligent exercise of challenges.” A prosecutor should not argue the prosecution’s case to the jury during the jury selection process.

<table>
<thead>
<tr>
<th>ABA Comment</th>
<th>A prosecutor also should not use voir dire to present information which will not be admissible at trial. ABA Standard 3-5.3(c).</th>
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<tr>
<td></td>
<td>A prosecutor commits a substantial abuse of process by injecting inadmissible evidence during jury selection. Comment to ABA Standard 3-5.3(c).</td>
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CrR 6.4(b) and CrRLJ 6.4(b) provide that a voir dire examination shall be conducted “for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges.” A trial court is granted great discretion in determining how best to conduct the scope and content of voir dire. *State v. Davis*, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000).

The prosecutor improperly asked the following question of a juror: “[D]o you realize that the State has little or no choice in the cases which it brings to trial, so long as we believe that a felony has been committed and we know the persons who perpetrated the felony. Do you understand that, sir?” *State v. Badda*, 63 Wn.2d 176, 180, 385 P.2d 859 (1963).
The remarks made by the prosecuting attorney in the instant case go beyond expressions of belief in the guilt or innocence of the party on trial, statements uniformly held by the courts to be improper. The prosecuting attorney’s assertion implies that there reposes in the state a wisdom or knowledge superior to and apart from that of its officers—a knowledge, both impersonal and damning, which sets in motion the inexorable process of prosecution where guilt is known.

**d. Challenges For Cause**

RCW 4.44.150 through .190 govern challenges for cause. CrR 6.4(c); CrRLJ 6.4(c).

RCW 4.44.150 defines a challenge for cause as an objection to a juror, and may be either:

“(1) General; that the juror is disqualified from serving in any action; or (2) Particular; that the juror is disqualified from serving in the action on trial.”

RCW 4.44.160 defines a general challenge as:

“(1) A want of any of the qualifications prescribed for a juror, as set out in RCW 2.36.070 [or] (2) Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him or her incapable of performing the duties of a juror in any action.

RCW 2.36.070 provides that a person is competent to serve as a juror unless the person:

“(1) Is less than eighteen years of age; (2) Is not a citizen of the United States; (3) Is not a resident of the county in which he or she has been summoned to serve; (4) Is not able to communicate in the English language; or (5) Has been convicted of a felony and has not had his or her civil rights restored.”

RCW 4.44.170 states that there are three particular challenges for cause.

(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

(2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

(3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

RCW 4.44.180 permits a challenge for implied bias pursuant to RCW 4.44.170(1) for any of the following reasons:

(1) Consanguinity or affinity within the fourth degree to either party.

(2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.

(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

When a challenge for actual bias is taken pursuant to RCW 4.44.170(2), “on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.” RCW 4.44.190.

**Comment**

A juror with preconceived ideas is insufficient to justify a challenge for cause. The question becomes whether such a juror can set the preconceived ideas aside.

Equivocal answers alone do not require a juror to be removed when challenged for cause. Rather, the question is whether a juror with preconceived ideas can set them aside. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

A juror in a DUI trial should have been excused because (1) he was a member of Mothers Against Drunk Drivers; (2) his niece had been killed by a drunk driver and (3) he stated that he did not think the DUI defendant would get a fair trial from jurors with his frame of mind. *Cheney v. Grunewald*, 55 Wn. App. 807, 810-11, 780 P.2d 1332 (1989) (citations omitted).

Actual bias is not presumed simply by Mr. Bauman’s association with a particular organization. Nor would his personal experience based upon the death of his niece alone disqualify him from serving on the jury. However, when these circumstances are coupled with the answer that he would not want six jurors with his frame of mind on the jury if he were in Mr. Grunewald’s position and that he would not receive a fair trial with six such jurors, sufficient actual bias was demonstrated to justify his removal for cause.

**Practice Tip**

When confronted with a defense challenge for cause for actual bias, the prosecutor should consider asking the juror the question posed in *Grunewald*:

“Juror X, if you were in the defendant’s position, do you think you would receive a fair trial with six jurors with your frame of mind?” If the juror answers no, the prosecutor should not object to the defense’s challenge.
A defendant who exercised a peremptory challenge of a juror following denial of a for-cause challenge to that juror and subsequently exhausted his six peremptory challenges was not deprived of his right to an impartial jury, in the absence of any showing that a biased juror sat on his panel. *State v. Fire*, 145 Wn.2d 152, 158, 165, 34 P.3d 1218 (2001).

If a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

* * *

If a defendant through the use of a peremptory challenge elects to cure a trial court’s error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted.

However, a conviction was reversed where the trial court rejected a defendant’s challenge for cause to a juror who demonstrated bias by admitting that she would have a very difficult time disbelieving a police officer. The defense used all but one peremptory challenge, but the challenged juror was seated and went on to deliberate. *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), *review denied*, 148 Wn.2d 1012 (2003).

**Practice Tip**

The lesson from *Fire* and *Gonzales* is clear. When a defense challenge for cause is denied by the trial court, the prosecutor needs to carefully consider using its peremptory challenge to remove the juror if the defense elects to allow the juror to be seated on the jury.

If the trial court should have granted the defense’s challenge, and the juror is seated, the conviction will be reversed on appeal. Of course, if the trial court properly denied the defense’s challenge, no successful appellate issue will arise.

The question for the prosecutor is: How lucky do you feel that the trial court was correct in denying the defense challenge?

Trial court practice varies widely concerning the process used for the exercise of for-cause challenges. When unsure, prosecutors should ask the court about the process to be followed prior to arrival of the jury panel. Confusion about the process in front of a jury panel may be interpreted by the jury as a lack of preparation by counsel.
(e) Peremptory Challenges

CrR 6.4(e) and CrRLJ 6.4(e) govern the exercise of peremptory challenges. Trial court practice varies widely concerning the process used for the exercise of peremptory challenges. When unsure, prosecutors should ask the court about the process to be followed prior to arrival of a jury panel. Confusion about the process in front of the jury panel may be interpreted by the jury as a lack of preparation by counsel.

Except as discussed below, a prosecutor may remove any potential juror for any reason up to the number of peremptory challenges permitted by court rule. Although called jury selection, the process is really more of a “juror de-selection” effort wherein the prosecutor should remove all potentially unfavorable jurors.

Practice Tip
If the court requires the prosecutor to publicly announce the name and/or badge number of the juror in order to exercise a for-cause challenge, the prosecutor may want to consider a statement such as: “The prosecution would like to thank and excuse Juror X.”

A prosecutor needs to carefully prepare in advance concerning the types and characteristics of jurors who may be unfavorable to the prosecution’s case. New prosecutors are encouraged to speak with more “seasoned” prosecutors about the “juror de-selection” process.

If the court requires the prosecutor to publicly announce the name and/or badge number of the juror in order to exercise a peremptory challenge, the prosecutor may want to consider a statement such as: “The prosecution would like to thank and excuse Juror X.”

A trial court may allow a party to exercise an unused peremptory challenge after the presentation of evidence. State v. Williamson, 100 Wn. App. 248, 996 P.2d 1097 (2000) (After jury sworn and prosecution’s first witness began to testify, a juror told the court that she knew the victim. The court refused to remove the juror for cause, but did allow the prosecution to exercise an unused peremptory challenge. Conviction affirmed, holding that trial court has broad discretion over the jury selection process.).

(f) Peremptory Challenges Based On Race

In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d 69 (1986), the prosecutor struck all black jurors from the venire during the trial of a black defendant. The Supreme Court reversed the conviction, holding that a person’s race is unrelated to his or her fitness to serve as a juror. Purposeful racial discrimination in the selection of a juror violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is supposed to secure. Additionally, jurors of color have a right to serve as jurors. “Exclusion of black citizens from service as jurors constitutes a primary
example of the evil the Fourteenth Amendment was designed to cure.”

In Snyder v. Louisiana, ___ U.S. ___, 128 S. Ct. 1203, 1207, 170 L. Ed. 2d 175 (Mar. 19, 2008) (quoting Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citations omitted) (internal quotes removed), a murder conviction and death sentence was reversed where the prosecutor struck all 5 of the black jurors from a panel of 36 potential jurors.

Batson provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race;

Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and

Third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

The Snyder prosecutor offered two reasons after the defense’s Batson objection was found to satisfy Batson’s first prong. The prosecutor claimed that the juror looked nervous, and that the length of trial would interfere with the juror’s student teaching obligation. Finding that both explanations were a pretext for racial discrimination, the Supreme Court noted that the trial court did not make any finding concerning the juror’s demeanor, and that the prosecutor did not exercise peremptory challenges against white jurors who also raised possible scheduling problems. “[I]t is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution.” Snyder, 128 S. Ct. at 1212.

Comment Snyder’s lesson is clear. When a prosecutor provides a race-neutral explanation for striking the challenged juror, the prosecutor had better have struck all jurors covered by the explanation or risk a racial discrimination pretext finding by an appellate court.

In Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 1770-71, 131 L. Ed. 2d 834 (1995), the court held that the race-neutral explanation tendered by the proponent of a peremptory challenge need not be persuasive, or even plausible. Here, the prosecutor’s proffered explanation for a peremptory challenge of a black male was that the juror had long, unkempt hair, a mustache and a beard. The explanation was held to be race-neutral and satisfied the prosecution’s burden of articulating a nondiscriminatory reason for the strike.

Several cases provide examples of acceptable prosecution race-neutral explanations justifying removal of minority jurors:

Juror’s brother had been convicted of armed robbery and juror was very vague on the topic of the death penalty. State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995);
Jurors’ comments indicating possible police bias. *State v. Wright*, 78 Wn. App. 93, 896 P.2d 713, review denied, 127 Wn.2d 1024 (1995);

Juror had considerable professional experience with people suffering from the effects of drugs and alcohol. *State v. Medrano*, 80 Wn. App. 108, 906 P.2d 982 (1995); and

Lone minority juror’s belief that juror was improperly stopped by police due to race. *State v. Rhodes*, 82 Wn. App. 192, 917 P.2d 149 (1996).


A trial court may *sua sponte* raise a *Batson* issue. *State v. Evans*, 100 Wn. App. 757, 998 P.2d 373 (2000). Unfortunately for the *Evans*’ prosecutor, the trial court failed to follow the *Batson* three-part procedure so the conviction was reversed.

**Caution**

Although the prosecution may raise a *Batson* challenge to the defense’s use of a peremptory challenge, the prosecutor better be correct under *Batson* if the court denies the defense’s peremptory challenge.

In *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236 (2001), a black defendant sought to strike the only black juror on the panel. The prosecution objected citing *Batson*. The trial court invited defense counsel to articulate a nondiscriminatory reason. Counsel said the juror was a pastor and retired from the military and “he would have been of an authoritarian mindset, so could give more credence to the state’s arguments and evidence.” The trial court denied the defense’s peremptory challenge, and required the juror to sit on the panel. The Court of Appeals found that the defense’s explanation was race-neutral, and reversed the conviction holding that improper denial of a peremptory challenge under *Batson* is not subject to harmless error analysis when the juror actually deliberates.

**Comment**

A *Batson* challenge may properly be raised upon dismissal of the only venire person from a constitutionally cognizable group.

“Trial courts are not required to find a prima facie case [of racial discrimination] based on the dismissal of the only venire person from a constitutionally cognizable group, but they may, in their discretion, recognize a prima facie case in such instances.” *State v. Hicks*, 163 Wn.2d 477, ¶31, 181 P.3d 831 (2008).

**(g) Peremptory Challenges Based On Gender**

Gender-based peremptory challenges violate Washington’s Equal Rights Amendment, const. art. XXXI, which provides that “[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex.” *State v. Burch*, 65 Wn. App. 828, 830 P.2d 357 (1992) (male defendant had standing to challenge prosecutor’s improper
removal of female jurors based upon gender; conviction reversed).

In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994), the government used 9 of its 10 peremptory challenges to remove male jurors in a paternity action, resulting in an all female jury. The Supreme Court held that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man. The State’s rationale justifying its decision to strike virtually all males was that it could reasonably have been based on the perception, supported by history, that men otherwise totally qualified to serve as jurors might be more sympathetic and receptive to the arguments of a man charged in a paternity action, while women equally qualified might be more sympathetic and receptive to the arguments of the child’s mother. The Supreme Court rejected the explanation because it was virtually unsupported and based on the very stereotypes that the law condemns.


**h) Peremptory Challenges Based On Sexual Orientation**

While the political arena is debating the rights and responsibilities to be accorded to persons based on sexual orientation, use of a peremptory challenge to exclude a juror based solely upon the juror’s sexual orientation may well be prohibited for the same reasons courts have so held with race and gender, i.e. protecting the equal protection rights of the potential juror against stereotypes based on classification within a particular group. *See Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (amendment to Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination held to violate equal protection).

**i) Peremptory Challenges Based On Religious Beliefs**

Washington’s constitution provides that no person shall be incompetent as a juror “in consequence of his opinion on matters of religion.” Const. art. I, §11–Religious Freedom says:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: Provided, however, That this article shall not be so construed as
to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county’s or public hospital district’s hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.


**Closure Of The Courtroom During Voir Dire**

A defendant’s right to a public trial is violated when the trial court closes the courtroom during voir dire absent compliance with *Bone-Club’s* criteria on courtroom closure. Defense counsel’s failure to object was ineffective assistance of counsel. The remedy is a new trial. *In re Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004). The five *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.
(k) English Requirement

The RCW 2.36.070(4) requirement that jurors must be able to communicate in English does not violate federal or state constitutions. The trial court is not required to provide an interpreter for a juror. *State v. Marsh*, 106 Wn. App. 801, 24 P.3d 1127, *review denied*, 145 Wn.2d 1012 (2001).

(l) Penalty Discussion In Non-Capital Case

The jury in a non-capital case may not be informed about the penalty for the charged crime because the jury has no sentencing function. This strict prohibition ensures impartial juries and prevents unfair influence on a jury’s deliberations. *State v. Townsend*, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001).

We hold that under our current precedent, informing the jury that the case is noncapital and failing to object to the trial court and prosecution doing the same, is deficient performance of counsel.


(m) Polling The Jury

The process of polling a jury after a verdict is reached by asking each juror whether the verdict was that juror’s verdict, and whether the verdict was the entire jury’s verdict cures any defect in the voting procedure. *State v. Havens*, 70 Wn. App. 251, 257, 852 P.2d 1120, *review denied*, 122 Wn.2d 1023 (1993).

| Practice Tip | Regardless of the verdict, a prosecutor should always ask the court to poll the jury. If the verdict is guilty, polling removes potential appellate issues. If the verdict is not guilty, polling makes sure that each juror voted to acquit. |

(n) Juror Misconduct During Deliberations

In *State v. Elmore*, 121 Wn. App. 747, 756, 90 P.3d 1110 (2004), two jurors sent notes to the judge during deliberation that another juror would not follow the law nor deliberate. The judge questioned the two jurors. The complained about juror was then questioned, and stated that the jury must decide on the credibility of testimony. The prosecutor moved over objection to remove juror. The judge believed the two jurors and removed the third juror, replacing that juror with an alternate. The Court of Appeals reversed the conviction, holding that where the record shows “any reasonable possibility that the impetus for a juror’s dismissal stems from his views on the merits of the case, the dismissal is error.”
(4) Communication With Jurors

(a) Private Communication

It is highly improper for a prosecutor to knowingly engage in private conversation with a potential juror or juror, regardless of the innocent purpose or trivial content. The mere fact that a prosecutor is seen speaking with a juror raises the question whether the verdict was reached solely on admissible evidence. Comment to ABA Standard 3-5.4(a).

(b) Addressing Jurors

A prosecutor should treat jurors with dignity and respect. ABA Standard 3-5.4(b). A prosecutor should not address jurors by individual name, and instead address a juror as “Juror No. X” or the jury panel as “members of the jury.” Comment to ABA Standard 3-5.4(b).

(c) Post-trial Communication

Once a jury is discharged, it is proper for a prosecutor to speak with jurors about the case. However, the prosecutor should not make comments or ask questions which will “tend to influence judgment in future jury service.” ABA Standard 3-5.4(c). Neither defense counsel nor the prosecutor should communicate with jurors in a manner that is critical of the verdict. Comment to ABA Standard 3-5.4(c).

Caution

Prosecutors must avoid the temptation to advise a juror post-verdict about suppressed evidence or a defendant’s criminal history. Such information was not admissible at trial, nor would it ever be admissible.

Communicating such information only serves (1) to undermine the juror’s faith in the jury’s present decision, and (2) to taint the juror by planting a seed for the next time the juror serves that there is harmful information about a future defendant which is unknown to the juror.

Prosecutors are encouraged to speak with jurors after the conclusion of a case by asking questions about the deliberation process and discussions. Prosecutors must refrain, though, from imparting information to jurors which was not a part of the evidence heard by the jurors.
(5) Opening Statement

(a) Statement Of Issues, Evidence And Inferences

A prosecutor’s opening statement “should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer.” The prosecutor must have a good faith belief the evidence will be available and admissible before discussing the evidence during opening statement. ABA Standard 3-5.5. The prosecutor should “scrupulously avoid any utterance that he or she believes cannot and will not later actually be supported by the evidence.” Comment to Standard 3-5.5.

A prosecutor’s opening statement should be “confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom.” State v. Campbell, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985).

Comment Despite this clear statement that a prosecutor may discuss issues, evidence and inferences drawn therefrom, trial courts frequently sustain defense objections to a prosecutor’s opening statement when the prosecution discusses likely issues in the case or specific evidence (especially a breath or blood test result or refusal).

Prosecutors should continue to assert their ability to discuss such matters during opening statement, and may want to consider having a copy of this ABA Standard and the Campbell case available to show the court if the court persists in sustaining such defense objections during a prosecutor’s opening statement.

(b) The Gallagher Dismissal

A trial court may dismiss charges immediately after the prosecution’s opening statement when it is clear beyond a reasonable doubt that (1) the statement affirmatively includes factual information which constitutes a complete defense to the charge, or (2) the statement fails to address a fact essential to a conviction. State v. Gallagher, 15 Wn. App. 267, 549 P.2d 499 (1976) (Gallagher was cited with approval in State v. Knapstad, 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986)). The Gallagher court reasoned that, when some fact is clearly stated leaving only an isolated and determinative issue of law, the court may resolve that issue in the interests of judicial economy.

In State v. Rapozo, 114 Wn. App. 321, 58 P.3d 290 (2002), the defense moved to dismiss after the prosecutor’s misdemeanor drug charge opening statement, claiming that the opening statement set out a complete defense to the misdemeanor charge (i.e. that the drug possessed was a felony, not misdemeanor, crime). The prosecutor’s motion to amend the charging document was denied.. The trial court’s “Gallagher” dismissal after
opening statement was affirmed.

A new prosecutor (and sometimes more senior ones) must make sure that the opening statement discusses facts in support of every element of each charged crime. Especially easy to forget is (1) an identification of the defendant as the person who will be shown to have committed the crime(s) and (2) a fact supporting the conclusion that the crime(s) occurred within the court’s jurisdiction (within the city limits if a municipal ordinance prosecution, within the unincorporated portion of the county if a county ordinance prosecution, within the county if a District Court prosecution, or within the state if a Superior Court prosecution). Generally, an address or statement where the crime occurred will be sufficient. See the comment to WPIC 4.20 (2nd ed. 2005), at pages 93-96, concerning a court’s jurisdictional element.

**Practice Tip**

Perhaps the easiest way for a prosecutor to avoid a “Gallagher” dismissal is for the prosecutor to use the elements, aka “to convict,” jury instruction for each count as a checklist of the elements which must be discussed during the prosecutor’s opening statement (and of course during closing argument).

If a prosecutor is confronted with a defense “Gallagher” motion to dismiss, and realizes the specific element was not discussed, the prosecutor should look very humbly at the trial court, confess guilt, and ask the court to exercise its discretion by letting the prosecutor re-open the opening statement. The defense will certainly object, but will be unable to legitimately show any prejudice. If the court decides to grant the motion to re-open, the prosecutor should realize how incredibly fortunate he or she was. If the trial court denies the motion and dismisses the case pursuant to *Gallagher*, the prosecutor can be assured that a lesson was well-learned which hopefully will never be repeated. If a new prosecutor has a “Gallagher” dismissal motion granted, the prosecutor should talk about it with others in the office. Many senior prosecutors will thus be able to “confess” their *Gallagher* moment.

(6) Presentation Of Evidence

(a) False Evidence Or Perjury

A prosecutor should not knowingly offer false evidence of any type, and must seek to withdraw such evidence upon discovery of its falsity. ABA Standard 3-5.6(a). Disciplinary action is appropriate when a prosecutor knows or reasonably should have known the falsity of submitted evidence. Comment to ABA Standard 3-5.6(a).

RPC 3.3(a)(4) prohibits a lawyer from offering evidence that the lawyer “knows to be false.” RPC 3.3(c) further requires that a lawyer shall promptly notify the tribunal when material evidence offered by the lawyer is subsequently determined to be false.

In *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000), a conviction was reversed when a prosecutor provided known false testimony in contradiction of testimony at a
prior trial.

In *Hayes v. Brown*, 399 F.3d 972, 988 (9th Cir. 2005), the prosecutor made a secret deal with co-suspect’s attorney contingent on the attorney not informing the client. The prosecutor asked the co-suspect during trial whether a deal was offered for his testimony, and argued that no perjury occurred because the co-suspect did not know of the secret deal with defense counsel. In reversing the murder conviction, the Ninth Circuit noted that the fact the witness did not commit perjury did not make the testimony truthful. “As we have noted, this is not the first time we have been confronted in recent years with schemes to place false or distorted evidence before a jury. Our criminal justice system depends on the integrity of the attorneys who present their cases to the jury. When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened.”

<table>
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<tr>
<th>Caution</th>
<th>A prosecutor has a duty to investigate possible perjury initiated by government witnesses, by defense counsel or by another witness.</th>
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In *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001), four co-defendants made deals to testify against Bowie. Before Bowie’s trial, a letter was found suggesting that the four co-defendants were framing Bowie. Police presented the letter to the prosecutor, who told police to just file the letter. Bowie’s murder conviction was reversed due to prosecutorial misconduct in failing to investigate the possible perjury and turn the letter over to the defense. “A prosecutor cannot avoid [the obligation to investigate and correct false testimony] by refusing to search for the truth and remaining willfully ignorant of the facts.”

In *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000), a prosecutor communicated with a bookkeeper who was represented by corporate counsel after the bookkeeper initiated contact. The bookkeeper asserted that the corporate attorney was attempting to prevent her from testifying truthfully. The Ninth Circuit held that the prosecutor did not violate ethical rules in speaking with the bookkeeper about her perjury allegations. The court was especially impressed with the prosecutor’s decision to initially advise the bookkeeper of her right to counsel and to give her the opportunity to contact substitute counsel.

(b) Presenting Inadmissible Evidence And Speaking Objections

A prosecutor should not knowingly offer inadmissible evidence, ask legally objectionable questions or make other impermissible comments or arguments in the presence of the judge or jury. ABA Standard 3-5.6(b). Merely offering known inadmissible evidence communicates to a jury that evidence rules are designed to keep information from the jury. Additionally, opposing counsel is left with no effective remedy once the jury has heard or seen the evidence. The tactic of speaking objections wherein inadmissible
information is communicated to the jury is improper. Comment to ABA Standard 3-5.6(b). Lastly, a strong case should not be jeopardized by the introduction of objectionable or merely cumulative information when that evidence may lead to reversal on appeal. Comment to ABA Standard 3-5.6(b).

**Practice Tip**

A prosecutor’s response to an opponent who uses speaking objections and other colloquy with the court to impart inadmissible information to the jury is not to act in kind.

The prosecutor should object, ask to have the jury excused, make a record of the improper conduct and ask the court to order counsel to discontinue the practice.

**(c) Display And Tender Of Evidence**

A prosecutor should not permit evidence to be seen by the jury unless there is a reasonable basis for its admission. When there is substantial doubt about an evidence’s admissibility, an offer of proof should be made and a ruling obtained prior to showing the evidence to the jury. ABA Standard 3-5.6(c).

**Comment**

Prosecutors must avoid the premature display of evidence, even if the evidence is later admitted.

Evidence should not be exposed to the jury’s view until it is offered for admission into evidence.
(7) Direct And Cross Examination

A prosecutor should interrogate all witnesses with due regard for the witness’ dignity and privacy, and “without seeking to intimidate or humiliate the witness unnecessarily.” ABA Standard 3-5.7(a). Otherwise vigorous cross examination is permitted, however. If the prosecutor honestly believes such questioning may be beneficial to the case, a prosecutor may ask “degrading, demeaning, or otherwise invasive or insulting questioning.” Comment to ABA Standard 3-5.7(a).

Cross examination is not precluded if a prosecutor believes a witness is telling the truth. But a prosecutor may not seek to discredit or undermine a witness who is testifying truthfully. ABA Standard 3-5.7(b).

(a) Miranda Warnings, Defendant’s Silence And Request For Counsel

The landmark case of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), at footnote 37 makes clear that a prosecutor may not “use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation.”

A prosecutor improperly questioned a defendant about the defendant’s exercise of Miranda rights from a card given to the defendant by an attorney. State v. Nemitz, 105 Wn. App. 205, 19 P.3d 480 (2001); State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996) (officer testimony that defendant did not answer and looked away held prejudicial comment on silence warranting reversal of conviction when defendant did not take the stand); State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) (conviction reversed where officer testimony and prosecutor comment during closing that defendant failed to contact officer after a request to do so); State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002) (conviction reversed where sergeant testified that defendant was uncooperative after arrest, and after Miranda warnings were given the defendant chose not to waive his rights and “would not talk to me”).

Caution

It is improper for a prosecutor to ask an officer whether a defendant said anything after Miranda warnings were given knowing that the defendant refused to speak and requested an attorney. State v. Curtis, 110 Wn. App. 6, 11-12, 37 P.3d 1274 (2002).

Once the suspect is arrested and Miranda rights are read, the government violates a defendant’s Fifth and Fourteenth Amendment rights by introducing evidence of his exercise of Miranda rights as substantive evidence of guilt. The reason for this is that the government, in reading these rights, implicitly assures the accused that he may assert his rights without penalty. Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).
In Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), the Supreme Court rejected a police protocol wherein Miranda warnings were not given during a custodial interrogation until after a confession was obtained. The Supreme Court reversed the conviction holding that given the improper police protocol designed to thwart Miranda’s purpose of reducing the risk of coerced confession, the statements made post-Miranda were inadmissible.

Defense counsel’s elicitation from a detective that the defendant was cooperative when arrested did not open the door to testimony on redirect that the defendant at the time of arrest did not appear surprised and did not deny sexual abuse charges as the detective “would normally expect to see.” State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004) (conviction reversed).

(b) Defendant’s In Custody Status

A prosecutor should not mention that a defendant is or was in jail without first giving the trial court an opportunity to weigh that information’s probative value against its prejudicial effect under ER 403. State v. Mullin-Coston, 115 Wn. App. 679, 693-94, n.8, 64 P.3d 40 (2002), affirmed on other grounds, 152 Wn.2d 107, 95 P.3d 321 (2004) (“But although references to custody can certainly carry some prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial.” Testimony properly admitted under facts of case when trial court’s permission sought in advance.).

(c) Defendant’s Demeanor On Arrest

A defendant’s demeanor upon arrest is only admissible when the demeanor is relevant to an element of the offense charged. State v. Perrett, 86 Wn. App. 312, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997).

(d) Defendant’s Reputation For Sobriety

In a possession of marijuana case, a defendant’s reputation for sobriety from alcohol and drugs is admissible when the defense asserts unwitting possession. Kennewick v. Day, 142 Wn.2d 1, 11 P.3d 304 (2000) (conviction reversed where trial court prohibited defense from eliciting reputation testimony).

(e) Alcohol Or Drug Use

A witness’ credibility may be impeached concerning alcohol or drug usage if there is a showing that the witness was using or influenced by the substances at the time of the incident or during the witness’ testimony. State v. Russell, 125 Wn.2d 24, 83, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995); State v. Tigano, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021 (1992) (trial court properly excluded defense impeachment evidence concerning a witness’ general drug addiction and usage).
A prosecutor in a felony hit and run case was properly allowed to impeach a defendant about his methamphetamine usage hours prior to the incident even though the defendant denied any involvement in the accident and claimed he fell asleep after smoking marijuana and woke up the next morning with this vehicle missing. *State v. Tueber*, 109 Wn. App. 640, 36 P.3d 1089 (2001), review denied, 146 Wn.2d 1021 (2002).

### (f) Bias And Motives


### (g) Criminal History Raised By Defense

Defense counsel asked defendant on direct examination whether the defendant had a criminal record. The defendant answered yes, that he had been in trouble but learned by paying his dues. The prosecutor on cross examination properly pointed out the two most recent crimes involved crimes of dishonesty. *State v. Perkins*, 97 Wn. App. 453, 457-59, 983 P.2d 1177 (1999), review denied, 140 Wn.2d 1006 (2000) (The prosecutor showed restraint under the circumstances given the defendant’s 11 prior convictions. The defense opened the door to the impeachment, and the crimes of dishonesty were admissible under ER 609(a)(2) as well.).

### (h) Impeachment–Evidence Of Prior Conviction To Attack Credibility

ER 609 permits impeachment by evidence of a witness’ prior conviction in certain circumstances for the purpose of attacking that witness’ credibility. Cross examination under ER 609(a), however, is limited to the fact of the conviction, the type of crime, and the punishment. Cross examination exceeding this limitation by delving into the specifics of the underlying criminal incident is irrelevant and likely to be unduly prejudicial. *State v. Copeland*, 130 Wn.2d 244, 284-85, 922 P.2d 1304 (1996) (during cross examination, the prosecutor committed misconduct by asking a defense witness about the witness’ previous assault conviction: “You beat her [the victim, and defense witness’s wife] black and blue and you burned her abdomen with a cigar, didn’t you?”).

ER 609(a)(2) involves impeachment by evidence that a witness was convicted of a prior crime involving dishonesty or false statement. In determining whether a prior conviction is one of dishonesty or false statement, a court should not inquire into the facts and circumstances surrounding the conviction, but rather only consider the elements and date of the prior conviction, the type of crime that it was, and the punishment imposed. If this limited information does not show that the crime involved dishonesty or false statement, the conviction is not admissible under ER 609(a)(2). *State v. Newton*, 109 Wn.2d 69, 743 P.2d 254 (1987).
An exception is made for burglary convictions. The court may look beyond the conviction to determine whether the burglary involved theft or some other type of crime. *State v. Schroeder*, 67 Wn. App. 110, 117, 834 P.2d 105 (1992).


ER 609(b)’s ten year time limit is tolled while a defendant was a fugitive from justice. *State v. Clarke*, 86 Wn. App. 447, 936 P.2d 1215, *review denied*, 133 Wn.2d 1018 (1997).

(i)  **Impeachment—Failure To Present Impeachment Evidence (Impeachment By Innuendo)**

A prosecutor should not ask a question of a witness implying the existence of a fact when the prosecutor lacks admissible evidence to support the fact. Comment to ABA Standard 3-5.7(d).

```
Caution
If a witness admits an impeaching question, it is improper to introduce impeachment evidence to “prove” the impeachment.

However, a prosecutor has a duty to present impeachment evidence when a witness denies a question which tends to prejudice the defendant.

Prosecutors should not take the risk that the witness will admit the impeaching question. Before asking an impeachment question, the prosecutor must (1) have the impeachment evidence and/or witness available to testify concerning the impeaching matter, and (2) make sure to present the impeaching evidence and/or call the impeaching witness to “tie up” the impeachment question.
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While the prosecutor’s cross-examination questions to defendant and defense witness would have been entirely proper had they been foundation for rebuttal impeachment evidence, without this evidence, they were a flagrant attempt to place evidence before the jury that appeared to have been otherwise unavailable. *State v. Miles*, 139 Wn. App. 879, ¶14, 162 P.3d 1169 (2007) (prosecutorial misconduct to fail to present impeachment evidence; conviction reversed due to prosecutorial misconduct) (emphasis added).

“A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution grant criminal defendants the right to confront and cross-examine adverse witnesses. A prosecutor’s impeachment of a witness by referring to extrinsic evidence that is never introduced may violate a defendant’s right to confrontation. A prosecutor may not use impeachment as a means of submitting evidence to the jury that is otherwise unavailable. And a prosecutor who asks questions that imply the
existence of a prejudicial fact must be prepared to prove that fact.

It is improper for a prosecutor to fail to call an impeachment witness when a witness denies a question which tends to prejudice a defendant. *State v. Grover*, 55 Wn. App. 923, 936, 780 P.2d 901 (1989), *review denied*, 114 Wn.2d 1008 (1990); *State v. Avendano-Lopez*, 79 Wn. App. 706, 713, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007 (1996) (“It is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury.”).

A prosecutor’s impeachment of a witness by referring to extrinsic evidence which is never introduced may rise to a violation of the right to confrontation. “Deciding if the questions are inappropriate requires examining whether the focus of the questioning is to impart evidence within the prosecutor’s personal knowledge without the prosecutor formally testifying as a witness.” *State v. Lopez*, 95 Wn. App. 842, 855, 980 P.2d 224 (1999).

The defense does not waive a confrontation claim by failing to object to the question because an impeaching question is not per se improper. By the time the prosecutor fails to present evidence of the out-of-court inconsistent statement, it is too late to undo the prejudicing result of the impeachment question. If the trial court fails to require the prosecutor to produce evidence of the inconsistent statement, cross examination could be abused by misleading the jury into thinking the statements made in the prosecutor’s question were evidence. *State v. Babich*, 68 Wn. App. 438, 443, 842 P.2d 1053, *review denied*, 121 Wn.2d 1015 (1993) (citations omitted) (emphasis in original).

Traditional practice in Washington allows admission of a witness’ prior inconsistent statement for impeachment purposes. Proper impeachment by prior inconsistent statement utilizes a procedure in which the cross examiner first asks the witness whether he made the prior statement. If the witness admits the prior statement, extrinsic evidence of the statement is not allowed because such evidence “would waste time and would be of little additional value”. If the witness denies the prior statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter. In fact, as Professor Tegland points out, it may be error for the prosecutor not to introduce extrinsic evidence.

When a prosecutor is the only impeachment witness, a prosecutor’s “Didn’t you tell me...?” impeachment question of a defendant is improper because the question refers to an out-of-court inconsistent statement which cannot be “tied up” through the testimony of the impeaching witness—the prosecutor. In effect, the prosecutor is testifying through the question without ever having been subjected to defense cross examination. *State v. Donley*, 106 Wn. App. 1009, 2001 WL 472965, *review denied*, 144 Wn.2d 1021 (2001) [UNPUBLISHED OPINION].

**Impeachment—“I Don’t Remember”**

A party may not impeach a witness unless that witness’ credibility is of consequence to the case. A witness who does not remember cannot be impeached because there is no substantive evidence to impeach. *State v. Allen S.*, 98 Wn. App. 452, 464-65, 989 P.2d...
Based on the foregoing, we conclude that a person may be impeached if his or her credibility is a fact of consequence to the action, but not otherwise. We further conclude that a person’s credibility is not a fact of consequence when he or she fails to say anything pertinent to the case, regardless of whether he or she takes the witness stand. Examples include, but are not necessarily limited to, the person who refuses to testify; the person whose testimony is stricken; and the person who claims not to remember anything pertinent to the case. As a respected commentator explains, “If the witness claims a total lack of memory and gives no substantive testimony on the factual issue at hand, a prior statement by the witness is inadmissible regardless of whether the lapse of memory is genuine because ... there is simply no testimony to impeach.”

**(k) Impeachment—Impeaching One’s Own Witness—**

**Subterfuge Impeachment And The Primary Purpose Rule**

ER 607 provides that any party may attack the credibility of a witness, even a witness called by that party. However, a prosecutor may not impeach his or her own witness when the prosecutor’s primary purpose in calling the witness to testify is really a subterfuge to elicit inadmissible inculpatory evidence against the defendant through impeachment of the witness. *State v. Lavaris*, 106 Wn.2d 340, 345, 721 P.2d 515 (1986).

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<th>Caution</th>
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<td>Prosecutors must not call a witness so that the witness can be impeached with information prejudicial to the defendant.</td>
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<td>Impeachment deals with the witness being untruthful, not the prosecutor’s desire to pick which statement is substantively true.</td>
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<td>The Primary Purpose Rule, which requires the court to determine why the prosecutor actually called the witness, assumes the prosecutor is acting in good faith. A prosecutor who calls a witness as a pretext to have the jury hear impeachment evidence harmful to the defendant so that the prosecutor can argue the substantive truth of the witness’s initial statement does not act in good faith.</td>
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For example, in a DUI case, the passenger/girlfriend tells law enforcement at the scene that she is glad the defendant was stopped because he has three prior DUI convictions, has an alcohol problem and needs treatment. During a later prosecution interview with the passenger, she denies making the statement. The prosecutor decides to call the passenger to identify the defendant as the driver, and then asks about the passenger’s
statement concerning the defendant’s prior DUIs and alcohol problem. As expected, the witness denies making the statement. The prosecutor then “ties up” the impeachment by calling the officer to impeach the passenger by testifying about her statements at the scene.

Query: What is the prosecutor’s primary purpose in calling the passenger? Is it to be able to argue to the jury that the passenger is credible in identifying the defendant as the driver? Or is it to be able to argue that the passenger lacks credibility because she told one story to the police and another on the witness stand? Or is the primary purpose to have the jury confuse impeachment evidence (witness tells different versions and is not believable) with inadmissible substantive evidence that defendant really has three prior DUIs and an alcohol problem?

For more information on this topic, see the discussion about impeachment by contradiction in 5A K. Tegland, Washington Practice, Evidence §§227-229 (3rd ed. 1989).

(l) Impeachment–Limitation On Defense

Prosecutors must take great care in objecting to a defense’s attempt to impeach a witness concerning bias or a prior inconsistent statement. In State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998) (citations omitted) (footnote omitted), the prosecutor successfully objected to defense impeachment evidence claiming the defense did not lay a proper foundation for the impeachment witness’ testimony because the impeached witness was not asked about a specific conversation with the impeaching witness. Noting that traditional foundation questions are an optional tactic rather than a requirement, the court said:

Prerule case law required the examiner, before introducing extrinsic evidence of a prior inconsistent statement, to direct the declarant’s attention to the exact content of the allegedly contradictory statement as well as to the time and place where the declarant made the statement and to the persons present. Under ER 613(b), however, it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence. The traditional “foundation questions” on cross-examination are now an optional tactic rather than a mandatory requirement. If there is a foundation requirement for proof of bias, it is, at most, a foundation similar to that for a prior inconsistent statement.

(m) Leading Questions On Direct Examination

While the asking of leading questions on direct examination is generally not prejudicial error, a prosecutor’s repeated suggestions of desired answers through leading questions of the victim after objections were sustained along with other misconduct mandated reversal of the conviction. State v. Torres, 16 Wn. App. 254, 258-59, 554 P.2d 1069 (1976).
(n) “Liar” Questions And Comments On The Veracity Of Another


**Caution** A prosecutor commits misconduct by asking a witness whether the police are lying.

In *State v. Neidigh*, 78 Wn. App. 71, 79, 895 P.2d 423 (1995) (conviction affirmed because error harmless due to defense failure to object) (citation omitted), the Court of Appeals noted its frustration with prosecutors continuing to use “Are you calling the police liars?” questions and the defense’s failure to promptly object.

But the State is incorrect in its view that improper cross examination of this type is “never really very important to the case.” As a practical matter, if that were so, prosecutors would not waste their time planning such questions. As a legal matter, as shown by the result in *Padilla* and *Suarez-Bravo*, courts recognize that forcing the defendant into the role of accuser has the potential for turning a close case against the defendant.

And so we reject the suggestion, implicit in the State’s argument, that courts must and do wink at intentional and repeated unfair questioning by prosecutors under the rubric of harmless error. The tactics at issue are creating problems on appeal in far too many cases. Questions designed to force witnesses to accuse each other are out of bounds—as are inflammatory remarks, incitements to vengeance, exhortations to join the war against crime or drugs, comparisons to notorious criminals, name-calling, appeals to prejudice, patriotism, wealth, or class bias, comments on the defendant’s failure to testify or exercise of another constitutional right, improper remarks about defense counsel, and hints of violence, crimes, or important inculpating information that has been kept out of evidence.

The most obvious responsibility for putting a stop to such conduct lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line.

“Mistaken” or “got it wrong” questions may be permissible if relevant and helpful to a jury in its effort to sort through conflicting testimony when there are conflicts between part but not all of various witnesses’ versions of the event. *State v. Wright*, 76 Wn. App. 811, 821-23, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010 (1995) (“got it wrong” question improper here because there was nothing to clarify; both versions were
completely at odds—either the police or the defendant was correct about what occurred). Prosecutors should take great care asking “mistaken” questions given the Wright court’s holding that the prosecutor’s questions were improper.

**o Limitation Of Defendant’s Right To Confront**

Reversible error was committed when the defense was not permitted to cross examine an officer concerning the officer’s exact secret location where he observed the defendant’s actions. *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002).


**Caution**

Prosecutors should be careful when asking a court to limit a defendant’s ability to present evidence or limit the scope of defense cross examination. Significant constitutional protections are involved which will certainly get an appellate court’s attention.

**p Opinion On Defendant’s Guilt**

A witness, whether lay or expert, “may not give an opinion as to the defendant’s guilt … because it invades the jury’s role to make an independent evaluation of the facts.” Such testimony is “particularly prejudicial when it is expressed by a government official, such as a police officer.” *State v. Thompson*, 90 Wn. App. 41, 46, 950 P.2d 977, *review denied*, 136 Wn.2d 1002 (1998) (citations omitted).

In *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001), the prosecution was allowed to play the defendant’s taped interview to the jury without redacting accusatory statements made by the interviewing officer. The officer told the defendant that his story “doesn’t make sense” and he needs to “start tellin’ the truth.” The officer also said the defendant was lying. The Supreme Court held that admission of the officer’s statements were improper, but harmless. *See also State v. Jones*, 117 Wn. App. 89, 68 P.3d 1153 (2003) (conviction reversed due to improper officer testimony that he told the defendant during questioning that the officer did not believe the defendant) and *State v. Saunders*, 120 Wn. App. 800, 86 P.3d 232 (2004) (officer’s statement that defendant failed to always give truthful answers was improper opinion testimony, but error harmless.).

In *State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004), *review denied*, 154 Wn.2d 1009 (2005), using the “Reid Investigative Technique” wherein an officer is trained to observe body behavior indicating signs of deception, the officer testified that he determined the defendant was deceptive during an interview. The Court of Appeals reversed the conviction, holding that the officer’s ER 702 opinion was not based on a theory generally accepted in the scientific community. The Barr court distinguished *Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993), wherein an officer with experience observing
alcohol impairment was permitted to testify in a DUI case that the defendant was “obviously intoxicated and affected by the alcoholic drink” and that the defendant “could not drive a motor vehicle in a safe manner.” The Barr court noted that Washington law permits lay witness testimony as to another’s degree of impairment if the witness observed that person.

**(q) Privilege Invocation**

A prosecutor should not call a witness knowing the witness will claim a privilege in front of the jury. ABA Standard 3-5.7(c).

**(r) Remarks By Defense Counsel**

A prosecutor may cross examine a defendant about defense counsel’s opening statement when during opening statement counsel told the jury that the defense was asserting mistaken identity because the defendant did not rob anyone, but the defendant made a statement during the investigation admitting to taking the money. *State v. Rivers*, 129 Wn.2d 697, 708-9, 921 P.2d 495 (1996).

After the defendant testified that someone else committed the crime, the prosecutor cross examined the defendant about an omnibus stipulation wherein defense counsel asserted a general denial/entrapment defense. In reversing the conviction, the court held that inconsistent statements by defense counsel were inadmissible hearsay necessitating a new trial when the statements were used as the truth of the matter asserted to impeach a defendant. *State v. Williams*, 79 Wn. App. 21, 28-31, 902 P.2d 1258 (1995).

**(s) Self Incrimination Assertion**

The privilege against self incrimination extends only to witnesses who have “reasonable cause to apprehend danger from a direct answer.” A witness’ assertion does not by itself establish the risk because that inquiry is for the court. The privilege is available to those who claim innocence. *Ohio v. Reiner*, 532 U.S. 17, 121 S. Ct. 1252, 149 L. Ed. 2d 158 (2001) (Babysitter properly asserted Fifth Amendment when called as witness in prosecution of father of baby who had died of shaken-baby syndrome. Even though the babysitter denied any involvement in death; she had reasonable cause to apprehend danger from her answers since she had spent extended periods alone with the baby preceding death, and the defense’s theory of the case was that the babysitter was responsible.).

Generally, a witness must assert the privilege against self incrimination on a question by question basis. In some limited circumstances, however, the trial court may allow a blanket assertion of the privilege. *State v. Delgado*, 105 Wn. App. 839, 18 P.3d 1141 (2001) (trial court properly allowed blanket assertion of privilege where defense attempted to call a witness who was facing charges arising out of the same incident).
Caution  
Prosecutors should take care when the defense calls a witness who may have a reasonable ground to assert the privilege against self incrimination. When in doubt, a prosecutor should notify the court of the possibility that a witness may provide incriminating testimony, and suggest appointing an attorney for the witness prior to the witness’ testimony.

A court may stay civil proceedings and postpone discovery, or impose protective orders or other conditions when parallel criminal proceedings are pending and a civil defendant seeks to preserve the privilege against self incrimination. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 16 P.3d 45 (2000), review denied, 143 Wn.2d 1012 (2001).

(t) Shielding Witness From Difficult Questions

It is improper under the confrontation clause for a prosecutor to shield a witness from answering difficult questions. The opportunity to cross examine means more than simply the opportunity to see a witness in court. The prosecutor must elicit damaging testimony from a witness. A failure to do so puts the defendant in the position of eliciting the damaging testimony and then cross examining the witness, or waiving his or her confrontation rights. *State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997) (In a child sex prosecution, the child was found competent to testify, yet when the child took the stand at trial, the prosecutor asked her only innocuous questions and the child was not cross examined. The conviction was reversed.).

A prosecutor did not improperly shield a witness when the prosecutor told the child to say “I don’t want to talk about it” to the most difficult questions where the witness only said that during direct examination and answered all defense cross examination questions. *In re Grasso*, 151 Wn.2d 1, 84 P.3d 859 (2004).

(u) Vouching For A Witness’ Credibility

An arresting officer’s awards and commendations are generally inadmissible vouching evidence. ER 608(a) permits evidence of a witness’ credibility only if the evidence refers to truthfulness or untruthfulness, and only after the witness’ truthfulness has been attacked. Award and commendation evidence is inadmissible under ER 608(a) absent evidence that the awards supported a witness’ truthfulness and are offered in response to an attack on the witness’ credibility. *State v. Smith*, 67 Wn. App. 838, 842-43, 841 P.2d 76 (1992).
Caution

Improper vouching for a witness’ credibility takes many forms. Examples of improper vouching include:

- Evidence of an arresting officer’s awards and commendations
- Evidence of a witness’ failure to obtain leniency from the prosecutor
- Evidence of a witness’ fear of the defendant (unless an element of the crime or a previous attack on the witness’ credibility)
- Asking an expert whether the witness gave any indication of lying
- Evidence of one witness’s belief that another witness is telling or is not telling the truth

A prosecutor improperly vouches for a witness’ credibility and commits misconduct when a witness is asked about the prosecutor’s failure to provide the witness leniency during a previous prosecution of the witness. *State v. Kron*, 63 Wn. App. 688, 700, 821 P.2d 1248, review denied, 119 Wn.2d 1004 (1992).


In a sexual abuse case, an expert may not be asked whether the victim gave any indication she was lying about the abuse. *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992).

A prosecutor commits misconduct when a question seeks to compel a witness to give an opinion on whether another witness is telling the truth. No misconduct occurs when a prosecutor asks an open ended question and a detective provides an unsolicited response commenting that the detective believed another witness. *State v. Hughes*, 118 Wn. App. 713, 77 P.3d 681 (2003), review denied, 151 Wn.2d 1039 (2004) (defense counsel can remedy the situation by objecting and moving to strike).

It is improper for a prosecutor to ask a witness about the witness’ agreement to tell the truth in exchange for a sentencing recommendation. It is also improper vouching to inquire about a witness’ past performance under an agreement that required truthful testimony. *United States v. Brooks*, 508 F.3d 1205 (2007) (convictions affirmed because prejudice from improper vouching reduced by curative instruction).

(v) Witness Whereabouts Known To Prosecutor But Not Defense

Defense counsel told the prosecutor in open court that even though the defense did not subpoena a police officer who was endorsed on the prosecutor’s witness list, the defense wanted to call the officer. Later that day, the witness appeared and waited in the hallway. The prosecutor saw the officer in the hallway and told the officer the prosecutor was not going to call the officer as a witness. The officer left. The Court of Appeals held that the
prosecutor had a duty to advise the court and counsel of the witness’ presence. *State v. Simonson*, 82 Wn. App. 226, 917 P.2d 599, *review denied*, 130 Wn.2d 1012 (1996) (trial court did not err in denying defense request for continuance to relocate the officer because the officer’s testimony would have been inadmissible).

(8) Closing Argument

A prosecutor during closing argument may argue all reasonable inferences from the admissible evidence. A prosecutor may not intentionally misstate the evidence nor mislead the jury. ABA Standard 3-5.8(a). “[S]ome prosecutors have permitted an excess of zeal for conviction or a fancy for exaggerated rhetoric to carry them beyond the permissible limits of argument … [A]s the Supreme Court has remarked [in *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 633, 79 L. Ed. 2d 1314 (1935) (conviction reversed due to prosecutorial misconduct)], ‘while he may strike hard blows, he is not at liberty to strike foul ones.’” Comment to ABA Standard 3-5.8.

A prosecutor should not express personal opinions as to the truth or falsity of any evidence or the defendant’s guilt. ABA Standard 3-5.8(b). This kind of impermissible closing argument is easily avoided by saying “The evidence shows …” Comment to ABA Standard 3-5.8(b).

Prosecutors should not during closing argument appeal to a jury’s prejudices or biases concerning a defendant’s race, religion, or ethnic background. Comment to ABA Standard 3-5.8(c).

Prosecutors should not make arguments which digress from the evidence such as predictions about the effect of an acquittal on lawlessness in the community. ABA Standard 3-5.8(d). Prosecutors and defense counsel should not use arguments which personally attack the opponent. Comment to ABA Standard 3.5-8(d).

(a) The Supreme Court Warning To Prosecutors

In *State v. Belgarde*, 110 Wn.2d 504, 519-20, 755 P.2d 174 (1988), the court reversed a conviction due to prosecutorial misconduct in closing argument despite defense counsel’s failure to object or seek other corrective action from the trial court. In rejecting the Belgarde majority’s result which shifts defense counsel’s responsibility for correcting a prosecutor’s misconduct during closing argument entirely to the trial judge, Justice Callow said the following in his part dissenting, part concurring opinion:

In the past it has been the rule that appellate courts would review alleged misconduct only if the defense objected to the misconduct at trial and requested a corrective instruction. Prosecutors and trial courts who rely hereafter on the defense to have any responsibility to guide prosecutorial conduct delude themselves.

The majority now sends a clear message—prosecutors stray from the law and the evidence at your peril; trial judges control the prosecutor within those boundaries and expect nothing from the defense or face reversal of a guilty verdict no matter
how conclusive the proof or how meticulously conducted the trial.

Subsequent cases discussed hereafter show that Justice Callow was correct. Washington appellate courts, pursuant to a defendant’s due process right to a fair trial, have increasingly found constitutional error justifying reversal based upon a prosecutor’s improper closing argument despite trial counsel’s failure to raise the issue before the trial court.

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**Caution**

Prosecutors be warned!! An appellate court’s finding of improper prosecutorial closing argument (no doubt designated as prosecutorial misconduct despite the lack of bad mens rea on the prosecutor’s part) could lead to bar sanctions as well as reversal of a conviction even though the impropriety could have been cured by the trial court through a curative instruction had defense counsel objected at trial.

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**b) Acquit Rather Than Convict On Lesser Permitted**


**c) Appeal To Jury’s Fear Of Crime AKA “Send A Message” Prohibited**

A prosecutor’s appeal to a jury’s fear of criminal conduct where the jury is told an acquittal will “send a message” permitting future lawless conduct is improper. Such an argument improperly appeals to a jury’s emotion about future conduct regardless of the sufficiency of the evidence in the case upon which the jury is called to decide.

Many examples of improper “send a message” closing arguments made by prosecutors can be found.

*State v. Brown*, 35 Wn.2d 379, 385-86, 213 P.2d 305 (1949) (prosecution on sodomy charges; prosecutor’s argument that “this will become a city of sodomy” if jury acquits improper, but not reversible).

*State v. Huson*, 73 Wn.2d 660, 662-3, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S. Ct. 886, 21 L Ed. .2d 787 (1969) (prosecutor’s comments to effect that jury would be responsible for many, many killings of innocent people if they said a jealous husband or suitor could go out and commit cold-blooded murder and that defendant had gotten away with being a criminal for 25 years were improper; Held: objections to argument were waived where defense counsel made no objection and requested no curative instruction but adopted strategy of telling jury, which could have but did not return death verdict, that prosecutor was unfair and that his argument was an inflammatory tirade) [Query whether conviction would be reversed post-Belgarde?]
State v. Belgarde, 110 Wn.2d 504, 507-9, 755 P.2d 174 (1988) (conviction reversed despite defense counsel’s failure to object where misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct; prosecutor asserted defendant was associated with a “deadly group of madmen” and “butchers that kill indiscriminately,” likening defendant’s American Indian membership to “Kadafi” and “Sean Finn” of the Irish Republican Army).

State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992) (prosecutor committed misconduct by telling jury that a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby “declaring open season on children”; conviction reversed and dismissed on other grounds).


State v. Gaff, 90 Wn. App. 834, 954 P.2d 943 (1998) (Prosecutor’s emotional appeal in sexual predator commitment trial to society’s general fear of crime equating uneasy sleep and noises in the night to the fear of “someone like” the defendant was misconduct; judgment affirmed since no objection by defense counsel).

State v. Rivers, 96 Wn. App. 672, 673-76, 981 P.2d 16 (1999) (conviction reversed due to “highly inappropriate” prosecutorial closing argument where prosecutor argued defendant was a “vicious rocker” “predator” and “jackal” who was relying on “the pajama crowd” in-custody defense witnesses who will be “welcomed in the shower” if they say the defendant was involved).

A very careful prosecutor’s closing argument focusing on the facts of the case and the jury instructions was approved where the prosecutor said: “Applying the facts to the law, in other words, saying what the definition means in reality out there on the streets, that is your job. You are going to tell this community whether or not shooting a gun out a vehicle on the freeway at another moving vehicle and killing someone is first degree murder or if it is not.” State v. Pastrana, 94 Wn. App. 463, 972 P.2d 557, review denied, 138 Wn.2d 1007 (1999) (prosecutor did not ask jury to render a decision inconsistent with its duty of applying the law to the facts). Prosecutors should be very careful making such an argument. One mistaken word or sentence made during the heat of closing argument encouraging the jury to act based upon future fears is misconduct creating the possibility of reversal on appeal and bar sanction.
(d) Appeal To Sympathy, Emotion Or Passion

**Prohibited**


**Caution**

It is improper for a prosecutor to argue that jurors should put themselves in the victim’s position because this argument asks the jury to depart from their duty to decide the case objectively.

The argument also improperly asks the jury to decide the case from the perspective of the victim and permits it to consider sympathy or prejudice. *State v. Carter*, No. 51787-2-I, 119 Wn. App. 1036, 2003 WL 22839804 (Dec. 1, 2003) [UNPUBLISHED OPINION].

It is misconduct for a prosecutor to argue that a deceased victim’s spirit will be quieted by a guilty verdict. *State v. Moran*, 119 Wn. App. 197, 81 P.3d 122 (2003), review denied, 151 Wn.2d 1032 (2004) (error harmless).

(e) Association With Others

When statements made by a prosecutor are based upon the evidence presented at trial and not upon racial or religious stereotyping, a prosecutor may comment on cultural association. *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003) (discussion about cultural association within the Sikh community permissible). The *Dhaliwal* court distinguished the extremely improper argument made by the prosecutor in *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988).

(f) Conscience Of The Community Permitted Unless To Inflame

A prosecutor’s appeal to the jury to act as the conscience of the community is proper unless the comments are specifically designed to inflame the jury. *State v. Finch*, 137 Wn.2d 792, 840-2, 975 P.2d 967 (1999), cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999).

**Comment**

Although a “conscience of the community” closing argument is permissible, query whether a jury really understands the meaning of the phrase “conscience of the community.”
(g) Consciousness Of Guilt Permitted


**Practice Tip**

“Consciousness of guilt” arguments can be very effective. Permissible examples include:

- Defendant’s refusal to submit to court-ordered taking of hair samples
- Defendant’s providing false information to police, including false names, aliases, a false date of birth, or false version of events
- Defendant’s refusal to submit to field sobriety tests
- Defendant’s refusal to submit to breath or blood test
- Defendant’s witness tampering
- Defendant’s flight from scene

(h) Defendant Name Calling Prohibited

A prosecutor’s characterization of defendant as a “drunken homosexual” during a sodomy trial was prejudicial where prosecution witnesses testified that the defendant had not been drunk and no proof of homosexual behavior existed other than the activity for which the defendant was being prosecuted. *State v. Rose*, 62 Wn.2d 309, 313-14, 382 P.2d 513 (1963) (conviction reversed).

It was improper for a prosecutor to refer to the defendant as a “mad dog” and to the defendant and his friends as “four punks in a car.” *State v. Music*, 79 Wn.2d 699, 716, 489 P.2d 159 (1971), judgment vacated on other grounds, 408 U.S. 940, 92 S. Ct. 2877, 33 L. Ed. 2d 764 (1972). *See also State v. Belgarde*, 110 Wn.2d 504, 507-9, 755 P.2d 174 (1988) (conviction reversed despite defense counsel’s failure to object where misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct; prosecutor asserted defendant was
associated with a “deadly group of madmen” and “butchers that kill indiscriminately,” likening defendant’s American Indian membership to “Kadafi” and “Sean Finn” of the Irish Republican Army).

It is improper for a prosecutor to link a defendant’s behavior to that of a “mongrel mutt,” especially in a case where the prosecution was previously made aware that the defendant had concerns about his race and national origin becoming an issue. *State v. Barajas*, 143 Wn. App. 24, ¶54, 177 P.3d 106 (2007) (error harmless).

(i) **Defendant’s Actions Before And After Incident Permitted**

Even though a defendant does not testify, it is proper for a prosecutor based upon admissible evidence to argue defendant’s actions before and after the incident logically imply the defendant committed the crime. *State v. Barker*, 103 Wn. App. 893, 14 P.3d 863 (2000), *review denied*, 143 Wn.2d 1021 (2001) (prosecutor properly argued in robbery case that defendant must be robber because he visited the robbed store several times prior to the robbery but was not seen in the store after robbery).

(j) **Defendant’s Failure To Call Witness Or Provide Evidence (The Missing Witness Doctrine)**

In *State v. Blair*, 117 Wn.2d 479, 488, n.1, 816 P.2d 718 (1991), the prosecutor in a drug dealing case commented during closing argument on the defense’s failure to call witnesses whose names appeared on slips of paper found at the defendant’s apartment. Many of the names were first names only. The defendant testified that the names and numbers on the papers represented personal loans and amounts owed to him from card games, and not a list of drug customers as asserted by the prosecution.

The Supreme Court held that the “missing witness” rule as stated in WPIC 5.20 applies to the defense as well as the prosecution. The prosecutor’s missing witness argument was held to be proper because the witnesses were peculiarly available to and only known by the defendant. The Supreme Court rejected the defense argument that the prosecutor’s comments shifted the burden of proof, noting that the defendant chose to waive his right to silence by testifying.

**Comment** Despite the holdings in *Blair*, *Russell* and *Cheatam*, trial courts are inexplicably reluctant to give WPIC 5.20 when properly requested by the prosecution.

While permitting prosecutors to argue a missing witness theory to a jury in an appropriate case is helpful, prosecutors should continue to press for the giving of WPIC 5.20. The instruction is not only available to the defense.
In *State v. Russell*, 125 Wn.2d 24, 90, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995), the defendant did not testify but presented several witnesses. During cross examination of a prosecution witness, the witness stated that the defendant gave her a ring (belonging to the murder victim) shortly after the murder and told her he had purchased it in Canada. The prosecutor during closing argument asked why the defense did not call the person who sold the ring to the defendant. The Supreme Court held that the missing witness rule applied. Thus the prosecutor’s closing argument was proper because the comments at issue were based on testimony elicited by the defense.

In *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003), the defendant did not testify but the defense called the defendant’s aunt who testified that the defendant and another person worked with the aunt. The aunt continued that the other person probably called the defendant at home to wake him for work, thus implying that the defendant was at home at the time of the rape. The aunt also testified that she never heard of a day when the other person was unable to reach the defendant. The prosecutor during closing argument commented on the defense’s failure to call the other person to support the defense’s alibi theory.

The defense asserted that the missing witness rule cannot apply when a defendant chooses not to testify. Rejecting this argument, the Supreme Court noted that there was no comment by the prosecutor discussing the defendant’s failure to testify. Rather the prosecutor’s comment concerned the defense’s failure to call a witness after the defense presented testimony raising the point that the absent witness telephoned the defendant. 150 Wn.2d at 654.

The *Cheatam* court held that the uncalled witness was peculiarly available to the defense and that her absence was not satisfactorily explained. Thus, the prosecutor’s missing witness closing argument was proper. The court rejected a defense argument that the prosecutor’s argument was improper because the prosecution could also have called the witness, saying at 150 Wn.2d at 653-54 (citations omitted):

> However, being peculiarly available to a party does not mean that if the other party could call the witness, the doctrine is inapplicable. Instead, it means that there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

*Blair*, 117 Wn.2d at 490, 816 P.2d 718 (quoting *State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968)). Availability “is to be determined based upon the facts and circumstances of that witness’s ‘relationship to the parties, not merely physical presence or accessibility.’ ” [The uncalled witness] was peculiarly available to the defense.
A prosecutor considering a defense missing witness closing argument should carefully read Blair, Russell and Cheatam.

It is likely that defense will object during the prosecutor’s closing argument on this topic and that the trial court’s instincts might well be to not permit the argument.

Accordingly, a prosecutor should seek court permission in advance to make a defense missing witness argument to avoid having the prosecutor’s closing argument interrupted and to ensure the greatest chance of gaining approval by the trial court.

(k) Defendant’s Non-Testimonial Trial Demeanor

Prohibited

A prosecutor during closing argument may not refer to a defendant’s non-testimonial demeanor observed during trial because such a comment encourages the jury to draw a negative inference about the defendant’s character rather than a witness’ demeanor while testifying. State v. Klok, 99 Wn. App. 81, 992 P.2d 1039, review denied, 141 Wn.2d 1005 (2000) (prosecutor improperly referred to defendant during closing as “the guy who has been laughing through about half of this trial”).

(l) Defendant’s Right To Make Closing Argument

A defendant has a Sixth Amendment right to present a closing argument, even during a bench trial. State v. DeVries, 109 Wn. App. 322, 34 P.3d 927 (2001), reversed in part, 149 Wn.2d 842, 72 P.3d 748 (2003) (In juvenile case, trial court denied defense opportunity to present closing argument. Court of Appeals reversed the conviction and remanded. Supreme Court found insufficient evidence, and dismissed.).

(m) Defendant’s Right To Remain Silent–Pre-Arrest Silence

When a defendant does not take the witness stand, a prosecutor violates a defendant’s Fifth Amendment right to remain silent by commenting during closing argument on the defendant’s refusal to answer pre-arrest questions and by arguing that the defendant was being a “smart drunk” by looking away during initial questions. State v. Easter, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996).

Although a prosecutor may impeach a testifying defendant with pre-arrest (pre-Miranda warnings) silence as a prior inconsistent statement under ER 607, the prosecutor may not use the defendant’s pre-arrest silence to argue that the defendant is guilty based upon the silence. Impeachment evidence is limited solely to showing a witness is untruthful, and may not be used to argue that the witness is guilty or even that the facts contained in the

In summary, often distinguished as prearrest silence and postarrest silence, the Supreme Court has established two basic rules: one based upon the Fifth Amendment right to remain silent before *Miranda* warnings are given and one based upon due process under the Fourteenth Amendment when the State issues *Miranda* warnings promising defendants that their silence will not be used against them.

The Fifth Amendment prohibits impeachment based upon the exercise of silence where the accused does not waive the right and does not testify at trial. Due process under the Fourteenth Amendment also prohibits impeachment based on silence after *Miranda* warnings are given, even if the accused testifies at trial. However, no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of *Miranda* warnings …

We have concluded that even when the defendant testifies at trial, use of prearrest silence is limited to impeachment and may not be used as substantive evidence of guilt. In circumstances where silence is protected, a mere reference to the defendant’s silence by the government is not necessarily a violation of this principle; however, when the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated.


A prosecutor may properly comment on a defendant’s silence in response to pre-investigatory accusations by a supervisor. *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (privilege against compulsory self-incrimination is irrelevant to a citizen’s decision to remain silent when under no official compulsion to speak).

(n) Defendant’s Right To Remain Silent–Post-Arrest Silence

A prosecutor’s comment on the refusal of a defendant to testify is a remnant of the “inquisitorial system of criminal justice” which the Fifth Amendment prohibits. *Griffin v. California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 1232, 14 L. Ed. 2d 106 (1965) (conviction reversed).

*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 1625, n.37, 16 L. Ed. 2d 694 (1966) prohibits the prosecution from making closing arguments relating to a defendant’s post-arrest silence to infer guilt from such silence.
(o) Defendant’s Right To Remain Silent–Partial Silence

When a defendant does not remain silent and instead speaks with police, the prosecutor may comment on what the defendant fails to say. *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001) (capital conviction affirmed, but penalty reversed); *State v. Belgarde*, 110 Wn.2d 504, 511-12, 755 P.2d 174 (1988) (Prosecutor may comment on defendant’s failure to discuss the events at trial as related in a statement previously given to police, and prosecutor may challenge inconsistent assertions made by a defendant. “This ‘partial silence’ at the time of the initial statement is not insolubly ambiguous, but ‘strongly suggests a fabricated defense and the silence properly impeaches the later defense.’ Such questioning does not violate due process as the defendant has waived the right to remain silent concerning the subject matter of his statement.”) (citation omitted).

A prosecutor may not comment in a multiple count trial on a testifying defendant’s failure to deny having raped one victim when he only testified to events involving a second victim. *State v. MacDonald*, 122 Wn. App. 804, 95 P.3d 1248 (2004), review denied, 153 Wn.2d 1006 (2005) (convictions reversed).

(p) Defendant’s Right To Remain Silent–“Undisputed” Evidence

A prosecutor may refer in general terms that the evidence is “undisputed” or “unrefuted” so long as the statement does not necessarily draw the attention of the jury to the fact a defendant did not testify. *State v. Ashby*, 77 Wn.2d 33, 459 P.2d 403 (1969). However, a prosecutor’s comment that there was “absolutely” no evidence to explain why a defendant was present where drug deals occurred was improper because only the defendant (who did not testify) could have offered an explanation. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728-29, 899 P.2d 1294 (1995).

Caution

Prosecutors should be very careful with “undisputed evidence” arguments. If the only explanation could come from a non-testifying defendant, the “undisputed evidence” argument improperly shifts the burden of presenting evidence to the defense and reversal is a likely possibility.


(q) Defendant’s Tailoring Testimony To Evidence

If a defendant testifies, a prosecutor during closing argument may state that the defendant, “unlike all the other witnesses,” had a benefit before testifying because “he gets to sit here and listen to the testimony of all the other witnesses before he testifies.”
Such a comment does not violate or infringe on a defendant’s Fifth and Sixth Amendment rights to be present at trial and confront his accusers, nor his Fourteenth Amendment right to due process. *Portuondo v. Agard*, 529 U.S. 61, 120 S. Ct. 1119, 1127, 146 L. Ed. 2d 47 (2000).

In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness’s ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant’s presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.


**Practice Tip**

The *Portuondo*-approved closing argument is persuasive in minimizing or even completely destroying the defendant’s version of the events. Whenever a defendant chooses to testify, the prosecutor should consider arguing during closing argument that the defendant tailored his or her testimony to the evidence.

To avoid trial objections and possible appellate scrutiny, prosecutors should probably not stray from the prosecutor’s argument in *Portuondo*.

**Defense Counsel’s Missing Witness Argument Made Under The Guise Of Lack Of Evidence**

The defense may not raise the WPIC 5.20 missing witness doctrine when the missing evidence is unimportant or cumulative. The doctrine also does not apply when the missing witness is equally available to both parties. *State v. French*, 101 Wn. App. 380, 4 P.3d 857 (2000), *review denied sub nom. State v. Barraza*, 142 Wn.2d 1022, 20 P.3d 945 (2001) (prosecutor’s improper argument that the defense can call the missing officers justified an invited error response to defense’s improper missing witness argument). *See also State v. Thomas*, 150 Wn.2d 821, 851-52, 83 P.3d 970 (2004) (in *Brady* context, court questions whether a prosecutor’s knowledge that a witness will not testify can be characterized as evidence).
Prosecutors should routinely seek a motion in limine prohibiting the not uncommon improper defense argument that the prosecution’s failure to call a witness constitutes reasonable doubt under WPIC 4.01 arising from the lack of evidence.

A timely motion in limine provides the trial court with time to consider why this defense argument is improper under French, and also greatly increases the likelihood that the court will prohibit defense counsel from making the argument.

Waiting to respond to this improper defense argument places a prosecutor in a difficult situation. Should the prosecutor improperly shift the burden to call the witness to the defense arguing invited error as in French? Should the prosecutor “testify” during closing argument and explain why the witness’ testimony was unnecessarily cumulative or why the witness was otherwise unavailable due to vacation, etc.? Should the prosecutor point out that the WPIC 5.20 missing witness instruction was not given, and that it was improper for the defense to argue law not given to the jury? Should the prosecutor seek a jury instruction saying that a missing witness is not lack of evidence under WPIC 4.01 and hope an appellate court does not find the instruction to be an improper trial court comment on the evidence? None of these options provide a satisfactory response to the improper defense argument that lack of witness equals lack of evidence equals reasonable doubt.

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**s) Defense Theory Not Supported By The Evidence Permitted**


**t) Disparaging Or Minimizing Defense Counsel Prohibited**

A prosecutor commits misconduct by implying that defense counsel believed the defendant was guilty and by asking the jury if it was going to let “a bunch of city lawyers come down here and make your decision” with a “bunch of city doctors who drive down here in their Mercedes Benz?” *State v. Reed*, 102 Wn.2d 140, 146, 684 P.2d 699 (1984) (Pacific County murder conviction reversed. “These statements suggest not the dispassionate proceedings of an American jury trial, but the impassioned arguments of a character from Camus’ *The Stranger*” wherein the prosecutor accused the hero of immorality because he did not cry at his mother’s funeral.).
A prosecutor commits misconduct by arguing that the prosecutor has a “very different job
than the defense attorney” because the prosecutor has “an oath and obligation to see that
justice is served.” *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), review
denied, 148 Wn.2d 1012 (2003) (conviction reversed). The prosecutor failed to
recognize that justice is also served by a defense lawyer’s zealous representation of his or
her client.

It may be misconduct for a prosecutor to call defense counsel a magician who wants to
divert the jury’s attention away from the evidence against the defendant. *State v. Nasi*,
OPINION] (citing cases from other jurisdictions questioning use of the words “magician”
or “tricks” when speaking about defense counsel; conviction affirmed).

It is misconduct for a prosecutor to malign a defense attorney by claiming that only the
prosecution and its witnesses are interested in the truth. *State v. Banks*, No. 58924-5-I,
waived because trial counsel failed to object).

**(u) Inconsistent Theories In Separate Co-Defendant
Trials**

In the California case of *In re Sakarias*, 35 Cal.4th 140, 106 P.3d 931 (Cal. 2005), cert.
(2005), a prosecutor argued inconsistent and irreconcilable factual theories in two
separate death penalty trials of co-defendants. The court held that where the available
evidence points clearly to the truth of one theory and the falsity of the other, the
conviction will only be reversed for the defendant against whom the false theory was
used.

A prosecutor’s decision to argue factually inconsistent positions in separate trials against
a defendant and his accomplice did not warrant federal habeas relief for the defendant
absent clearly established federal law prohibiting such prosecutorial conduct as
determined by the Supreme Court. *Shaw v. Terhune*, 380 F.3d 473 (9th Cir. 2004) (if
error did occur, it was harmless).

**(v) Inferences From Evidence Permitted**

A prosecutor has wide latitude in a closing argument to “draw and express reasonable
inferences from the evidence.” *State v. Mak*, 105 Wn.2d 692, 698, 718 P.2d 407, cert.

Given the wide latitude during closing argument, error does not occur until it is clear that
a prosecutor is expressing a personal opinion rather than arguing an inference from the
(w) **Inferences From Evidence—“Liar” Permitted If Not Personal Opinion**

A prosecutor may comment on a witness’ veracity so long as the comment is based upon the evidence and is not a personal opinion or otherwise beyond the record. *State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

A prosecutor properly argued that the defendant lied because the defendant took the stand and admitted he deliberately misstated when speaking with the police and a reporter. *State v. Jordan*, 106 Wn. App. 291, 298-99, 23 P.3d 1100, *review denied*, 145 Wn.2d 1013 (2001) (prosecutor’s remarks were not a comment of personal beliefs but a recap of the evidence presented by the defendant).

A prosecutor commits flagrant misconduct by saying that “this prosecutor believes that [the defendant] got up there and lied.” *State v. Horton*, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (ineffective assistance of counsel found where defense attorney failed to object to prosecutor’s belief expressed during closing that defendant was a liar; conviction reversed).  

(x) **Inferences From Evidence—Not Guilty Means Witnesses Lied Is Flagrant Misconduct**

A prosecutor commits flagrant misconduct by arguing that the jury was required to completely disbelieve the officers’ testimony in order to acquit. *State v. Barrow*, 60 Wn. App. 869, 874-76, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991) (jurors need not disbelieve officers’ testimony to acquit because a jury may entertain a reasonable doubt that the defendant committed the crime); *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997) (prosecutor committed flagrant misconduct by arguing that jury could only acquit if it found complaining witness lied or was confused, and by arguing that there was no reasonable doubt because there was no evidence the witness was lying or confused; conviction reversed even though defense failed to object at trial); *State v. Wheless*, 103 Wn. App. 749, 14 P.3d 184 (2000) (prosecutor’s either/or argument highly improper–either jury must find officers were lying and acquit or find that officers were telling the truth and convict–because a third option exists that the jury may reject the officers’ credibility without finding that the officers lied; conviction reversed); and *State v. Miles*, 139 Wn. App. 879, ¶26, 162 P.3d 1169 (2007) (prosecutorial misconduct to present jury with false choice of believing prosecution witnesses or believing defense witnesses; conviction reversed due to prosecutorial misconduct).
(y) Invited Error Response Rule

While the trial judge has responsibility to maintain decorum and should deal with improper defense arguments to blunt the need for the prosecutor to respond, the prosecutor may not use the invited error doctrine to justify crossing the line into unprofessional conduct. Instead, the prosecutor should respond within ethical boundaries by objecting to counsel’s conduct. Two improper arguments do not make for a right result. United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 1042-46, 84 L. Ed. 2d 1 (1985) (Chief Justice Burger’s outrage at improper tactics by both sides, with emphasis directed at prosecutor’s use of invited error rule to commit error; held that reversal of conviction not required, but counsels’ conduct inexcusable).

**Caution**

The invited error doctrine does not apply to prosecutorial misconduct. Relying on an “invited error” argument to justify a prosecutor’s improper actions is an extremely risky strategy because both reversal of the conviction and possible WSBA sanction is put in play. Appellate courts will closely scrutinize the prosecutor’s actions in “invited error” cases.


A prosecutor committed misconduct by arguing that he believed a prosecution witness in response to a defense argument that the prosecutor did not have the courage to dismiss the action. State v. Sargent, 40 Wn. App. 340, 344-45, 698 P.2d 598 (1985) (After recognizing the general rule that improper prosecution arguments invited by the defense are not grounds for reversal unless the remarks are so prejudicial that an instruction would not cure them, the Court of Appeals cited the Young court’s reevaluation of the invited error rule and reversed the conviction because the improper prosecution argument bolstered the credibility of the only witness directly linking the defendant to the crime).  

(z) Jury Experiments

It is improper for a prosecutor to invite a jury to conduct memory experiments to try to remember what they did on a particular day to explain why the prosecution’s witnesses had memory lapses because the experiments constituted extrinsic evidence. State v. Strandy, 49 Wn. App. 537, 544-45, 745 P.2d 43 (1987), review denied, 109 Wn.2d 1027 (1988) (harmless error). Similarly, it should be improper for the prosecution or defense in a DUI case to encourage the jury to consider extrinsic evidence by suggesting that the jury perform field sobriety tests to determine how easy/difficult they are to perform.

A jury’s reenactment of the evidence was proper where the jury did not consider any evidence outside the record. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Given that juror’s are expected to examine the evidence, query whether the prosecution
or defense may properly encourage a jury to reenact the evidence so long as the jury is careful to only consider the evidence?

**(aa) Jury Oath Violated**

A prosecutor does not commit misconduct by arguing that the jury would have to disregard the evidence in order to acquit or that the jury violates its oath by disregarding the evidence. It is improper, however, for a prosecutor to argue that the jury violates its oath by disagreeing with the prosecution’s theory of the case or by agreeing with the defense’s theory of the case. *State v. Coleman*, 74 Wn. App. 835, 838-39, 876 P.2d 458 (1994), *review denied*, 125 Wn.2d 1017 (1995) (prosecutorial misconduct, but harmless).

**(bb) Law Not Given To Jury Prohibited**

It is improper for a prosecutor or defense counsel to argue law not contained in the jury instructions. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984) (misconduct committed when prosecutor unilaterally argued that the defendant was guilty as an accomplice despite the lack of an accomplice instruction; conviction reversed).

**(cc) Literary Allusions**


**(dd) Matters Outside Record Prohibited**


A prosecutor’s comment during closing argument apologizing to the decedent’s mother for mispronouncing the decedent’s name was not misconduct but was “ill advised.” *State v. Dennison*, 115 Wn.2d 609, 622-23, 801 P.2d 193 (1990).
A prosecutor’s comments that there were incredible safeguards to prevent police officer perjury and that the court found probable cause were improper. *State v. Stith*, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993) (conviction reversed).


### (ee) Minimizing Jury Responsibility Prohibited

It is improper for a prosecutor to argue that if convicted the defendant may receive probation. *State v. Torres*, 16 Wn. App. 254, 262, 554 P.2d 1069 (1976) (conviction reversed due to cumulative error).

### (ff) Natural Indignation Permitted


### (gg) “Officers Of The Court” Permitted


**Comment** Although an “officers of the court” argument is permitted, query whether the jury understands the point being made with such a phrase.

### (hh) Personal Beliefs Prohibited

RPC 3.4(e) prohibits a lawyer from stating a personal opinion as to the justness of a cause, the credibility of a witness, or the guilt or innocence of a criminal defendant.

(ii) Personal Beliefs Prohibited, But Evidence

“Overwhelming” Permitted

A prosecutor may properly comment on the sufficiency of evidence by characterizing the evidence as “overwhelming evidence of guilt” and assert that there is “only one just and reasonable outcome” which is guilty. State v. Trout, 125 Wn. App. 403, 417-18, 105 P.3d 69, review denied, 155 Wn.2d 1005 (2005).

(jj) Privilege Arguments Prohibited

Like the constitutional privilege against self incrimination, the prosecution is not permitted to imply guilt when a defendant exercises his or her statutory right prohibiting the compelled production of marital privilege evidence. State v. Charlton, 90 Wn.2d 657, 662, 585 P.2d 142 (1978) (conviction reversed due to prosecutorial misconduct where prosecutor mindfully and flagrantly asked the jury to consider why the defendant’s wife was not called to support the defendant’s testimony).

(kk) Provoking Mistrial Prohibited

When a court grants a defense request for mistrial, reprosecution is generally permissible under the double jeopardy clause. A bar against retrial exists, however, when the prosecutorial misconduct is intended to provoke or goad a defense request for mistrial. Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083, 2088-89, 72 L. Ed. 2d 416 (1982). Although this rule generally applies to mistrials, the exception barring reprosecution also applies to appellate reversals resulting from prosecutorial misconduct. State v. Cochran, 51 Wn. App. 116, 118-19, 751 P.2d 1194, review denied, 110 Wn.2d 1017 (1988); State v. Lewis, 78 Wn. App. 739, 745, 898 P.2d 874 (1995), review denied, 128 Wn.2d 1012 (1996).

Caution

When a trial court grants a defense request for mistrial due to improper prosecutor actions or an appellate court finds that a prosecutor committed misconduct, the prosecutor is placed in a most difficult situation. The prosecutor should very carefully consider his or her reply when contending that the misconduct was not flagrant but was either unintentional (i.e. prosecutor is not competent under RPC 1.1) or a result of an emotional heat of the battle moment (i.e. things just got out of control but prosecutor knows conduct improper under RPC 3.4(e)’s prohibition against referring to matters outside record or personal opinions and/or RPC 3.5(d) prohibition against engaging in conduct intended to disrupt the tribunal and/or RPC 8.4’s myriad of prohibitions against misconduct). Tough choices!
(ll) Race, Color Or Nationality References Strictly Prohibited

It is improper and prejudicial for a prosecutor to refer to the defendants as Mexican-Americans while referring to the complaining witness as “Ms.” and “Mrs.” *State v. Torres*, 16 Wn. App. 254, 257, 554 P.2d 1069 (1976).

A prosecutor’s question asking the defendant whether he was an illegal immigrant was grossly improper. *State v. Avendano-Lopez*, 79 Wn. App. 706, 722-23, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007 (1996) (“The true test of our criminal justice system lies in how we treat the foreigner, the poor, and the disadvantaged, not in how we treat those born in this country, the wealthy or the “respectable” established citizenry. The dark shadow of arrogant chauvinism would eclipse our ideal of justice for all if we allowed juries to infer that immigrants, legal or illegal, were more likely to have committed crimes.”) (footnote omitted).

(mm) Results In Other Cases Prohibited


(nn) Vouching For A Witness’ Credibility

While it is improper for a prosecutor to personally vouch for the credibility of a witness, a prosecutor may argue inferences from the evidence in support of a witness’ credibility so long as it is clear the prosecutor is not expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

A prosecutor improperly vouched for a witness when arguing during closing that the police officer believed the defendant when she said the drugs belonged to her. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005) (conviction reversed due to prosecutorial misconduct).

A prosecutor improperly vouched for an officer’s and informant’s character by arguing facts not in evidence that (1) police would suffer professional repercussions if an untrustworthy informant was used, (2) police would discontinue using an informant if the police doubted the informant’s trustworthiness or sobriety, (3) informants can be trusted and are reliable, (4) when informants say something “it happens,” (5) when informants are instructed to do something, “they do it,” and (6) informants do not steal money from the police by taking drug money and hiding it in a secret compartment. *State v. Jones*, 144 Wn. App. 284, ¶23, 183 P.3d 307 (Div. 2 Apr. 29, 2008) (conviction reversed due to prosecutorial misconduct).
In *United States v. Edwards*, 154 F.3d 915, 923-24 (9th Cir. 1998), the key evidence in a drug distribution prosecution was cocaine found in a black bag. On the first day of trial, the defense’s opening statement asserted that there was no evidence tying the defendant to the bag and a police officer testified that nothing in the bag linked the cocaine to the defendant. That evening, the prosecutor called the defense and said that the prosecutor had been inspecting the black bag in the presence of two police officers, and looked under a piece of cardboard that served as support for the bottom of the bag and found a bail receipt bearing the defendant’s name. The bag had been in the custody of the Tacoma Police Department (along with the cocaine) for two years preceding the trial, but no one had previously discovered the receipt.

During closing argument, the prosecutor identified the bag as the key piece of evidence. In response to defense counsel’s questioning of the circumstances surrounding the “finding” of the defendant’s bail receipt in the bag, the prosecutor spent most of his rebuttal closing argument trying to convince the jury that the bail receipt had not been planted. The prosecutor claimed that given the circumstances of the police and prosecutor’s presence during the finding of the receipt, the fact that the receipt was found in the bag could not be denied.

In reversing the conviction, the Ninth Circuit found that the prosecutor’s vouching was serious because the prosecutor did not simply make an isolated comment about the credibility of a particular witness. Instead, the prosecutor in effect vouched for the evidence and witnesses by acting as a silent witness for the prosecution when describing the circumstances under which the bail receipt was found by the prosecutor while the police were present.

In sum, we conclude that when a prosecutor is personally involved in the discovery of a critical piece of evidence, when that fact is made evident to the jury, and when the reliability of the circumstances surrounding the discovery of the evidence is at issue, the prosecutor’s participation in the trial of the defendant constitutes a form of improper vouching. Having determined that the error in this case was not harmless, we reverse.
(9) Facts Outside The Record

Unless facts are generally known within the court’s jurisdiction or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, prosecutors should not refer to or argue facts outside the record during trial or on appeal. ABA Standard 3-5.9; ER 2.01(b) (judicial notice of adjudicative facts).

(a) Jury Questions–Defendant’s Right To Be Present

A defendant has a constitutional right to be present at all stages of a proceeding, including when a court receives and answers questions from a deliberating jury. *State v. Ratliff*, 121 Wn. App. 642, 646, 90 P.3d 79 (2004) (trial judge answered jury questions without notifying parties, and two of the answers provided jury with facts not in evidence; conviction reversed). *See also* CrR 6.15(f)(1) and CrRLJ 6.15(e)(1).

(b) Jury Questions–Comment On The Evidence

Const. art. IV, §16 prohibits a trial judge from commenting on the evidence to a jury. An impermissible judge’s comment communicates to the jury the trial judge’s personal belief regarding the merits of the case or allows the jury to surmise that the judge personally believes or disbelieves the evidence presented. *State v. Lane*, 125 Wn.2d 825, 837-38, 889 P.2d 929 (1995).

Caution  Prosecutors need to take special care when confronted with questions from a deliberating jury. Although it is very tempting to answer the jury’s question, especially when the admitted evidence easily provides the answer, any statement from the trial judge to the jury will be reviewed through a comment on the evidence perspective.

The safe response to a jury question, assuming a judge even needs to respond, is a statement such as: “You have heard the testimony, and received the exhibits and jury instructions. Please continue deliberating.” Although rather bland and non-responsive, the last trial a prosecutor wants to retry is one reversed on appeal due to an improper trial judge’s response to a jury question.

(c) Jury Receipt Of Extrinsic Evidence

It is misconduct for a jury to consider extrinsic evidence (evidence not admitted), and may be the basis for a new trial. In State v. Pete, 152 Wn.2d 546, 98 P.3d 803 (2004), the jury received one document that was not admitted into evidence and had a second admitted document taken from them. One document was the police officer’s written report which was marked but not admitted when the officer referred to the report to refresh the officer’s recollection. The second document was the defendant’s written and signed statement which had been admitted into evidence. As soon as the court learned of the mistake concerning the police report, the court instructed the bailiff to retrieve the officer’s statement. The bailiff also mistakenly retrieved the admitted statement by the defendant. The bailiff then returned the admitted document, and instructed the jury to disregard the non-admitted document during their deliberation. The Supreme Court ordered a new trial, holding that the error prejudiced the defendant. Tough result for the prosecutor.

Practice Tip

It is wise just prior to the jury leaving the courtroom to deliberate for a prosecutor to double-check that all the admitted exhibits are being taken by the bailiff, and that all the non-admitted exhibits remain in the courtroom.

(d) Re-Opening The Prosecution’s Case After The Defense Rests

A trial court has discretion to grant a prosecutor’s motion to reopen its case after the defense rests to answer a jury question, so long as the defense suffers no greater damage than the defendant would have suffered had the evidence been offered at the proper time. State v. Brinkley, 66 Wn. App. 844, 850, 837 P.2d 20 (1992) (defense not prejudiced when defense given time to prepare, the opportunity to cross examine the prosecution witnesses, and call witnesses on behalf of the defense).

(e) Suppressed Evidence And Defense Opening Door

The defense may open the door to admission of previously suppressed evidence. In State v. Gallagher, 112 Wn. App. 601, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003), the defense in a drug manufacturing trial successfully excluded evidence of used and unused syringes found in the defendant’s residence. During cross examination of a detective, defense counsel asked about the lack of various drug-related items. The prosecutor then asked the trial court to allow questioning about the syringes on redirect examination to refute the defense’s implication that there was no evidence of any drug activities in the house. The Court of Appeals held that the trial court’s ruling permitting admission of the previously suppressed items was proper because the defense opened the door to their admission.
Prosecutors confronted with this kind of situation should ask outside the jury’s presence for the court’s permission permitting the admission of previously suppressed evidence.

Given the trial court’s previous ruling suppressing the evidence, it is not proper to simply ask questions in front of the jury about the suppressed evidence and then claim after the fact that the defense opened the door.

The jury should not hear about suppressed evidence until and unless the court reverses its earlier suppression ruling.

The _Gallagher_ court was concerned that the defense would have improperly succeeded in “painting a false picture that no drug-related activities took place in the home” if the prosecution had not been allowed to ask about the syringes on redirect examination. 112 Wn. App. at 610.

**Comment**

Query the defense’s obligation under RPC 3.3(a) to not make a false statement of fact to a tribunal when the defense successfully suppresses evidence and then asserts during closing argument under WPIC 4.01 that a reasonable doubt exists due to the lack of [the suppressed] evidence?

It seems in such a situation that the prosecutor should be entitled to move to re-open the prosecution’s case pursuant to _State v. Brinkley_, 66 Wn. App. 844, 850, 837 P.2d 20 (1992), and be permitted to present the suppressed evidence pursuant _Gallagher_.

(10) Prosecutor Comments After Verdict

A prosecutor should not make critical public comments about a judge’s or jury’s verdict. ABA Standard 3-5.10. This Standard is not applicable to the rare case in which it is clear a crime was committed at the trial such as jury tampering. Comment to ABA Standard 3-5.10.

Prosecutors must be extremely careful when speaking with the media about a juror after a disappointing trial result. In August, 2000, King County settled a lawsuit brought by a former juror who claimed prosecutors damaged her reputation after a trial ended in a hung jury. The office wrote a letter of apology to the juror, and paid her legal fees of $9,500. The juror was the lone holdout in a murder trial. After a mistrial was declared based on the deadlocked jury, the trial prosecutor publicly accused the juror of sabotaging the case and alleged the juror held a grudge against police. The defendant was convicted by a second jury and is serving a life sentence. Seattle Times website at http://seattletimes.nwsource.com/news/local/html198/suit07m_20000907.html (visited September 7, 2000).
**Practice Tip**

Prosecutors must be careful to not make critical comments about a verdict. After a disappointing verdict, the prosecutor should probably return to the office as soon as possible without making a comment.

If a public comment is necessary, the following should be considered:

“The Prosecutor’s Office respects the role and decision of the jury. We are, however, very disappointed in the jury’s verdict in this case.”
PART VIII – SENTENCING

(1) Role In Sentencing

“The prosecutor’s status as a minister of justice makes it totally inappropriate to measure prosecutorial effectiveness by the severity of sentences imposed” by the court. Comment to ABA Standard 3-6.1(a). A prosecutor should make sure that a fair and informed judgment is made by the trial court, and should avoid unfair sentence disparities. ABA Standard 3-6.1(a).

A prosecutor should be given the opportunity to address the court and make a sentencing recommendation when the sentence is decided by a court. ABA Standard 3-6.1(b).

When a sentence is decided by a jury, the prosecutor should avoid unnecessarily presenting inflammatory evidence which may prejudice the jury’s guilt decision. Comment to ABA Standard 3-6.1(c).

A court of limited jurisdiction has the authority to sentence a defendant consecutively on each count, regardless of whether the total jail exceeds one year. Mortell v. State, 118 Wn. App. 846, 78 P.3d 197 (2003) (585 day consecutive sentence to be served in the Clark County jail upheld on three counts of second degree vehicle prowl and three counts of third degree theft).

(2) Relevant Sentencing Information

The prosecutor should provide complete and accurate information to the court for use in a presentence report. ABA Standard 3-6.2(a).

All unprivileged mitigating information known to the prosecutor should be disclosed to the defense and court before or at sentencing, unless the prosecutor is relieved of doing so by a court’s protective order. ABA Standard 3-6.2(b).

“The prosecutor shall not agree to withhold relevant information from the court concerning the plea agreement.” RCW 9.94A.460.

(a) Allocution

“Allocution is the right of a criminal defendant to make a personal argument or statement to the court before the pronouncement of sentence. It is the defendant’s opportunity to plead for mercy and present any information in mitigation of sentence. Washington recognizes the right of a defendant to allocute at sentencing.” State v. Canfield, 154 Wn.2d 698, ¶1, 116 P.3d 391 (2005) (A defendant at a revocation hearing has a limited right to allocute. A denial of that right must, however, be raised at the revocation hearing in order to preserve the issue for appeal.).
Although the right of allocution has its roots in the common law, Washington provides the right to allocute by statute and court rule. *Canfield*, 154 Wn.2d at ¶6. See RCW 9.94A.500(1) (court shall allow “allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed”); RCW 13.40.150(3)(d) (Prior to entering a dispositional order, the court shall “afford the respondent and the respondent’s parent, guardian, or custodian an opportunity to speak in the respondent’s behalf”); and CrRLJ 7.2(c) (“Before imposing sentence, the court shall afford the defendant, and the prosecuting authority, an opportunity to make a statement and to present information in extenuation, mitigation, or aggravation of punishment.”).

In *State v. Roberson*, 118 Wn. App. 151, 74 P.3d 1208 (2003), a sentence was reversed even though a juvenile failed to ask for allocution because the court failed to ask the juvenile directly whether he wanted to address the court as required by RCW 13.40.150(3)(d).

### (b) Criminal History Validity—Constitutional On Its Face


In *State v. Blunt*, 118 Wn. App. 1, 4-5, 71 P.3d 657 (2003), the defendant at a vehicular homicide sentencing remained silent during the court’s summary of the defendant’s prior DUI convictions. The Court of Appeals held that the prosecution met its burden of proving the prior DUI convictions with the following evidence, especially in light of the defense’s failure to object or present any contrary evidence:

To support the Oregon DUII, the State submitted a Deschutes County Circuit Court Judgment of Conviction and Order of Sentence/Probation indicating that “James Gary Blunt” (1) pled “guilty” to “DUII”; (2) was given 24 months of “supervised probation”; (3) was given “45 days in jail”; (4) would be given an “alcohol evaluation and counseling”; and (5) would have his driver’s license suspended for one year. The State also submitted chapter 813 of the Oregon Revised Statutes, “Driving Under the Influence of Intoxicants.” Exhibit 2.

To prove the 1993 Lewis County/Mossyrock DUI conviction, the State submitted a Lewis County District Court “Judgment and Sentence” indicating that James G. Blunt had been (1) found “guilty” of “DUI”; (2) “[s]entenced to serve 7 days in jail,” 183 days suspended and deferred for 2 years; (3) placed on “active Probation” for 12 months; and (4) ordered to “enter treatment program [within] 30 days.” Exhibit 4.
To prove the 1990 Lewis County DUI conviction, the State submitted a “Lewis County District Court Docket” computer printout that indicated that James Gary Blunt had pleaded and had been found guilty of “Driving While Intoxicated.” Exhibit 3. The State also called the Lewis County District Court Administrator, Pam Zimmerman, who testified that (1) court files for older cases like this one are destroyed after five years, RP 8/20/01 at 14-15; (2) the “docket” is maintained as “a reference for the Court,” RP 8/20/01 at 15; (3) nothing seemed out of order with this particular docket, which indicated James Gary Blunt's birth date, driver's license number, height, weight, and eye and hair color, RP 8/20/01 at 15-16; and (4) she had, however, encountered a prior error in the clerk's office such that she could not be “absolutely” sure that everything on this docket printout was correct, RP 8/20/01 at 18-19.

“[T]he State does not have the affirmative burden of proving the constitutional validity of a prior conviction before it can be used in a sentencing proceeding.” Ammons, 105 Wn.2d at 187. While the sentencing court cannot consider a prior conviction that is constitutionally invalid on its face, a conviction that is merely silent about whether a defendant’s rights were protected is not facially invalid. State v. Gimarelli, 105 Wn. App. 370, 375, 20 P.3d 430, review denied, 144 Wn.2d 1014 (2001) (citing Ammons, 105 Wn.2d at 189).

A prior conviction need not show that a defendant’s rights were not violated; rather, for the conviction to be constitutionally invalid on its face, the conviction must affirmatively show that the defendant's rights were violated. Gimarelli, 105 Wn. App. at 375. To require otherwise “would turn the sentencing proceeding into an appellate review of all prior convictions.” Ammons, 105 Wn.2d at 188. The phrase “on its face” has been interpreted to mean those documents signed as part of a plea agreement. Ammons, 105 Wn.2d at 187-89.

Failure to waive counsel is such a defect exhibiting a constitutionally invalid conviction on its face. State v. Herzog, 112 Wn.2d 419, 428-29, 771 P.2d 739 (1989) (explaining Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967)). A juvenile’s prior diversion agreements should not have been included in his criminal history because the agreements were not constitutional on their face since there was no indication of counsel or a valid waiver of counsel. State v. Phillips, 94 Wn. App. 313, 319-20, 972 P.2d 932 (1999).

An Oregon conviction by a non-unanimous jury of ten out of twelve jurors may be used to enhance a Washington sentence. State v. Gimarelli, 105 Wn. App. 370, 20 P.3d 430, review denied, 144 Wn.2d 1014 (2001).

(c) Criminal History Validity—Proof

Laws of 2008, ch. 231 amends RCW 9.94A.500 and provides for adult felony cases under the Sentencing Reform Act that the prosecutor’s presentation of criminal history is prima facie evidence. The court, however, must still find the criminal history was proven by a preponderance. Laws of 2008, ch. 231 is intended to abrogate the holdings concerning

**d) Disparate Sentences**

A court will examine an equal protection analysis when co-defendants receive different sentences only after a defendant can establish that the defendant is similarly situated with the other defendant “by virtue of near identical participation in the same set of criminal circumstances.” *State v. Caffee*, 117 Wn. App. 470, 480, 68 P.3d 1078, review denied, 149 Wn.2d 1023, *cert. denied*, 540 U.S. 1059, 124 S. Ct. 834, 157 L. Ed. 2d 716 (2003) (sentence affirmed when co-defendant pled guilty to lesser offense and defendant convicted of greater offense because the defendants were not similarly situated) (citation omitted).

**e) Judicial Vindictiveness Post-Trial**


**f) Rules Of Evidence Do Not Apply**


**g) Self Incrimination**

Neither a defendant’s guilty plea nor her statements at the plea colloquy function as a waiver of her right to remain silent at sentencing. Accordingly, the sentencing court committed error by drawing an adverse inference from the defendant’s silence. *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).

In *State v. Blunt*, 118 Wn. App. 1, 10-11, 71 P.3d 657 (2003), the defendant at a vehicular homicide sentencing remained silent during the court’s summary of the defendant’s prior DUI convictions, and then asserted on appeal that the trial court improperly relied on his silence citing Mitchell. The Court of Appeals rejected the defendant’s arguing, saying that Mitchell allows a court to consider that a defendant offered no evidence to challenge the accuracy of the prosecutor’s evidence when the prosecution met its burden of persuasion.

A juvenile has a Fifth Amendment right to refuse to participate in a sexual deviancy evaluation to determine if the juvenile was amenable for the Special Sex Offender Disposition Alternative. *State v. Diaz-Cardona*, 123 Wn. App. 477, 98 P.3d 136 (2004).
(h) Right To Counsel

A defendant has a Sixth Amendment right to counsel during his presentence interview with a presentence report writer. The writer violates that right by “deliberately eliciting” statements from the defendant regarding the charged crimes by asking the defendant to describe his version of the offense. *State v. Everybodytalksabout*, 161 Wn.2d 702, 166 P.3d 693 (2007).

(i) Sentencing Policy Memorandum

A county prosecutor’s general memorandum not directed at a particular proceeding sent to all county superior court judges announcing that the prosecutor’s office would no longer recommend drug offender sentencing alternative (DOSA) sentences was not an improper ex parte communication. *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005).