

Prosecutorial ethics: Part two

Last month this column focused on prosecutorial ethics. And shortly after it went to print, the Minnesota Supreme Court issued its decision in *In re Pertler*,¹ an important ruling on this topic. Thomas Pertler served as Carlton County Attorney from January 2005 to November 2018. From the chief of police, who understood his own ethical and constitutional obligations, Mr. Pertler learned that an investigation into an officer on the Cloquet Police Department substantiated that the officer had provided incomplete information in a search warrant application, conducted an incomplete investigation, and was subsequently disciplined (suspended) for the misconduct. Contemporaneous correspondence makes it clear Mr. Pertler understood that this information (relevant to the credibility of the officer) was both constitutionally and ethically required to be disclosed in cases where the officer's testimony was material.

Inexplicably, though, Mr. Pertler chose not to disclose this information to attorneys in his office handling cases involving the officer; he appears not to have taken any action at all on the information. Without explaining why,

Mr. Pertler did ask an assistant county attorney in his office to draft a *Brady/Giglio* disclosure policy around this time—but once it was drafted, he did not adopt the policy, train his staff about it, or tell anyone what he knew. Inevitably, attorneys in the Carlton County Attorney's Office later learned of the officer's misconduct, and that Mr. Pertler had known this information for some time.

I would like to pause to consider how those attorneys must have felt. Imagine the dread, helplessness, and anxiety in learning that your office had essentially abdicated its constitutional and ethical responsibilities with respect to cases where disclosure would have been required. I imagine, but do not know, that Mr. Pertler must have felt this way as well.

Mr. Pertler was defeated in the November 2018 election, a short time after all of this information started coming to light. Before the election, line prosecutors started dismissing cases involving the officer, many of them felonies—a few involving domestic assault or other crimes of violence. The newly elected county attorney, upon being sworn in, undertook a review of cases involving the officer. The 19 previously dismissed cases remained dismissed, and an additional eight convictions were dismissed, with records expunged, including one case in which the defendant was incarcerated and subsequently released after his conviction was vacated.

Far-ranging impacts

Now let's reflect upon the many people affected by this conduct. Think of all the victims of the alleged crimes that had been charged. None of them received justice. Think of each of the defendants, who had been charged and in some cases convicted without the due process they were entitled to. Think of the defense counsel, including many public defenders, who were stymied in their efforts to effectively represent their clients. Think of the law enforcement personnel charged with protecting and serving the people of Carlton County whose work went for naught, tainted by the misconduct of one of their colleagues.

Ordinarily, the Office of Lawyers Professional Responsibility does not accept anonymous complaints. The allegation that prompted the investigation into Mr. Pertler's conduct was an exception. It can be difficult, despite reporting obligations under Rule 8.3, Minnesota Rules of Professional Conduct, for lawyers or staff to file a complaint against their supervisor. Even with potential protection under

state law for whistleblowers, this is a serious undertaking.

Ultimately, Mr. Pertler agreed to stipulate to disbarment, and the Court approved that disposition on September 16, 2020. This is the first Minnesota case I'm aware of where a lawyer was disbarred for conduct that occurred while acting as a prosecutor. In fact, very few prosecutors have been disbarred nationwide. Perhaps the most well-known case is the one involving Michael Nifong, the North Carolina district attorney who prosecuted the matter that became known as the "Duke LaCrosse Case." Mr. Nifong was disbarred in 2007 because he withheld discovery, including potentially exculpatory DNA evidence; directed a witness to withhold evidence; lied to the court and opposing counsel regarding the DNA evidence; and lied to disciplinary authorities investigating his misconduct.

In researching the appropriate disposition for Mr. Pertler's case, this Office repeatedly encountered research from academia questioning the lack of disciplinary enforcement for prosecutorial misconduct.² Indeed, the National Registry of Exoneration published a detailed study this fall entitled "Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement." The study—218 pages long and focused on cases where individuals were cleared based upon evidence of innocence—found that concealment of exculpatory evidence had occurred in 44 percent of exonerations; that prosecutors committed misconduct in 30 percent of exonerations; and that discipline (whether by an employer or regulatory bodies) was generally rare for prosecutors and, when imposed, was often "comparatively mild." The study also opined that one of the root causes of misconduct was ineffective leadership by those in command.

Although the September 2020 study came out after Mr. Pertler stipulated to disbarment, we (myself in particular) were heavily influenced by the lack of serious discipline for prosecutors who have engaged in serious misconduct, when considering the appropriate disposition for Mr. Pertler's case. Professional



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discipline is not punishment for the attorney, but rather is imposed to protect the public, protect the profession, and deter future misconduct by the lawyer and others. How can the purposes of discipline be served if serious misconduct is not met with serious discipline? Given the expansive scope of harm in this case, the fundamental dereliction of duty, and the precarious position in which his conduct placed other lawyers, we believed disbarment was the appropriate sanction, and the Court agreed.

What it means

The lesson here is not that any misstep by a prosecutor will get you disbarred. Disbarment remains rare. The lesson is that all prosecutor's offices, state or federal, must put in place, train personnel about, and follow policies that are focused on ensuring that ethical and constitutional obligations are met in every case. As with so many things, the tone is set from the top. If your office rewards or permits bad behavior—or behavior “close to the line”—you may be placing your license at risk, as well as the licenses of those you supervise. If

you do not have good policies and are not crystal clear about the consequences of failing to follow those policies, there is a risk that you will not effectively set the standard of conduct expected by the ethics rules.

I hope also that one of the lessons is that if you mess up, you must acknowledge that mistake and work to correct it—no matter how difficult or embarrassing it may be. Mr. Pertler, for inexplicable reasons, did not assist his office in solving the problem created by the lack of prior, timely disclosure, but instead put a deputy in charge and left his post after he lost the election, not even serving out his term until his successor was sworn in—a fact that also weighed in the recommendation for disbarment. Mr. Pertler did not raise any mitigating factors during our investigation, and we often do not know what crosses another bears.

I hope others learn the many lessons embedded in this case. I also hope it is a call to action for all leaders in prosecutor's offices to refocus on ensuring you are leading in an ethical manner, and that you have in place the policies and procedures necessary to assist your staff

in meeting their obligations. In 2014, the American Bar Association issued Formal Opinion 467, “Managerial and Supervisor Obligations of Prosecutors under Rule 5.1 and Rule 5.3.” It offers good guidance on steps to take to set the tone from the top. The opinion discusses the importance of a culture of compliance, an effective up-the-ladder reporting structure, and the need for discipline and clear remedial measures when policies are violated.

I know this is far easier said than done. Thank you to all of the prosecutors that understand your duty and lead by example as “ministers of justice.” I know that cases like Mr. Pertler's are the exception, not the rule, but given the importance of the position, everyone must stay vigilant. As always, our ethics line is open to assist you in meeting your ethical obligations. ▲

Notes

¹ *In re Pertler*, __ N.W.2d __, A20-0934, 2020 WL 5552562 (mem) (9/16/2020).

² See, e.g., Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 *Hostra Law Review* 847 (2010).