



# Between the Lines

## American Prosecutors Research Institute

The Research and Development  
Division of NDAA

### Mark Your Calendars

#### 2007

December: National Drunk & Drugged  
Driving (3D) Prevention Month [NHTSA,  
MADD, GHSA]

December 9–13: NAPC Conference  
(Nashville, TN)

December 15–31: *Drunk Driving. Over  
the Limit, Under Arrest* National  
Crackdown [NHTSA]

#### 2008

April 13–15: Lifesavers 26 Conference  
(Portland, OR)

April 21–27: Global Road Safety Week  
[World Health Organization]

May 21–June 3: *Click It or Ticket*  
Mobilization [NHTSA]

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## Reputation Management or What Color is Your Hat?

By David Wallace  
and KC Steckelberg

In the old Westerns, heroes stood against evil. You knew which person represented good and which one represented evil by the color of their hat. As prosecutors, we wear the white hat. We don't do this job for the pay; we do it because we believe we are doing good. We are protecting others from harm and seeking justice for our communities.

However, as time has gone by, some people have argued that the white hat has become slightly askew. Some people even contend that the hat is now black. Whether it is because of a personal case where a person feels wronged or by what is stated in the media about individual prosecutors, questions are being raised on how we prosecute individuals. Some of these questions are valid and should be raised. What the media does not talk about is the thousands of prosecutors who are doing good every day.

The media thrives on controversy. Reporting on the everyday work of a prosecutor has no controversy, so they look for the very few prosecutors who do something wrong or make a mistake. As with any group of individuals, there are a few bad apples and the public only hears about those few. As prosecutors, we must make sure that the public hears about the thousands of other prosecutors who do their jobs with integrity. We must demonstrate to the people we deal with every day in our communities that we wear the white hat, and we must do everything in our power to ensure that we have the right to wear it.

There are two ways to do that. First, we must follow the ethical rules in each of our states, especially when dealing with the media. Second, we can be a proactive force in the community.

### Ethics and the Media

Most states have a rule that says, in essence, when a prosecutor discusses a case or an investigation with the media, we are limited to what we can say. The ABA Model Rule 3.6 (Pre-2002) is the basis for most state ethics rules. It provides in part that a **lawyer:**

shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Note this includes all lawyers—the belief being that both sides are seeking a fair trial. Further it provides specific comments on what is appropriate in a criminal case, such as the person's name, what they're charged with, if and where the person was arrested, and the law enforcement agency investigating the case. Also, if the person has not been arrested, then information necessary to assist in the arrest of that person can be released. However, that is essentially the extent of the information we can, or should, discuss.

The commentary for Model Rule 3.6 lists items that should be considered prejudicial and not discussed with the media—including such things as the person's criminal record or reputation, any statements the person may have given to the police, an opinion on the guilt or innocence of the person charged, a discussion of any evidence that is inadmissible in the courtroom, or the physical evidence to be used to prove the case. These topics are land mines for a prosecutor when talking to the media. It is exactly what the media wants for their story, and it is exactly what a prosecutor must not discuss.<sup>1</sup>

It can be easy to fall into the trap on vehicular homicide cases or other emotional cases. In many communities around the country, a vehicular homicide is the major case of the year. There is an understandable outcry by the family of the victim and the media following the investigation and arrest. The person arrested may have prior drinking convictions, or there will be evidence that ties the person to the crime, even when the defendant is proclaiming his innocence. This type of information should remain with the prosecutor and not be discussed with the media, but only come out in the courtroom.

When we discuss the evidence of the case, or why we believe a person is guilty of the crime charged, we are violating our ethical responsibility to ourselves, the state bar, and even more importantly, our community. “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”<sup>2</sup> As a minister of justice, it is our duty to try the case in the courtroom, not in the media.

When we don’t follow the rules there are, and must be, consequences. It could be a reprimand by the state bar association, loss of our position as a prosecutor, or even disbarment. If this should happen, we lose the right to wear the white hat and we lose the respect of our community.

We cannot defend ourselves by thinking that because the defense attorney did it, we can too. Whether or not it was done by the defense attorney should not be a factor in our actions. While the commentary for Model Rule 3.6 does mention that a party may respond when the opposing side has made prejudicial comments that will have a “salutary effect of lessening any resulting adverse impact on the adjudicative proceeding,” this is a dangerous road to go down. As the minister of justice, we must rise above that fight and, in the end, prove our case in a court of law.

### Being Proactive in Your Community

While it is improper for a prosecutor to discuss a current case with the public and the media, we should be advocates for public safety and justice within our communities. Whether the issue is ethics, law enforcement funding, criminal procedure, or public safety, prosecutors need and should lead the public debate.

As prosecutor, we have an obligation for openness with our community. How can this be accomplished? Do you:

- Get involved with your community;
- Speak at community groups;
- Meet with local public officials;
- Publish a local newsletter;
- Have a community prosecutor;
- Have a Web page to broadcast your message?

Traffic safety is one important topic to advocate in your community. In 2004, traffic crashes were the number one cause of death for individuals between the ages of two–34.<sup>3</sup> This has been the case for several years. Impaired driving will affect three out of every ten Americans in their lifetime.<sup>4</sup> It crosses age, sex, and race boundaries as it kills indiscriminately. Drowsy driving and elderly driving are growing concerns to the young and the old. Child restraints are usually not installed correctly, and making sure that a parent’s child is properly protected speaks volumes.

The Prosecuting Attorneys Association of Michigan developed a number of Power Point presentations with speaking points on a variety of traffic safety topics. The topics include Intoxicated

Driving, Running a Red Light, Distracted Driving, Motorcycles and Motorcycle Helmets, Sharing the Road with CMVs,<sup>5</sup> Child Safety Restraints, and Safety Belts.<sup>6</sup> The prosecutor can use these presentations and speak at any number of community groups on a prepared topic, on these kinds of issues that are important to the public. Concerns are raised with the facts, and suggestions are provided on how to be a safer driver, parent, and citizen. These presentations, as well as others on an assortment of topics, are now available through NDAA.

Your integrity and your reputation are your only real assets, and actions speak louder than words. For example, if you want to be known as an advocate for victims, how do you show that you care about them—over and above prosecuting criminal cases? Do you support a local domestic violence shelter? What are you doing during Crime Victim Rights Week? What do you do outside of your office that shows you care about the victims you see every day?

Robert Traver once said, “The DA is inevitably in daily collision with life at its most elemental level. He is like the intern on an ambulance call: he is constantly witnessing the naked emotions of his people—raw, unbuttoned and bleeding. . . . by virtue of his job the DA is the keeper of the public conscience.”<sup>7</sup>

As prosecutors, it is our job to see that justice is done. This must be true inside and outside of the courtroom. If we continue to fight for what we believe in, follow the rules, and fight to keep our communities safer, we are doing justice. Doing justice means we are the ones in the white hats, worn straight and proud.

*David Wallace is the Traffic Safety Resource Prosecutor for the Prosecuting Attorneys Association of Michigan and has held this position for the past seven years. Prior to holding this position, he was an assistant prosecuting attorney for 16 years.*

*KC Steckelberg is the Director of Public Affairs for the Prosecuting Attorneys Association of Michigan and has held this position for the past 11 years. She has lectured across the country on Reputation Management for Prosecutors.*

<sup>1</sup> It is important to note that most of the states also include statements in their ethical rules that a prosecutor must make every reasonable effort to prevent law enforcement officers from saying anything to the media that a prosecutor cannot say. See ABA Model Rule 3.8(e).

<sup>2</sup> Commentary, Model Rule 3.8

<sup>3</sup> NHTSA, Research Note (March 2007)

<sup>4</sup> NHTSA (2001)

<sup>5</sup> Commercial Motor Vehicles

<sup>6</sup> This winter, additional presentations will be developed on Elderly Driving, and Drowsy Driving.

<sup>7</sup> Small Town D.A., by Robert Traver, published by Dutton, 1954.

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**National District Attorneys Association**  
**American Prosecutors Research Institute**  
**National Traffic Law Center**  
99 Canal Center Plaza, Suite 510  
Alexandria, Virginia 22314  
www.ndaa.org

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