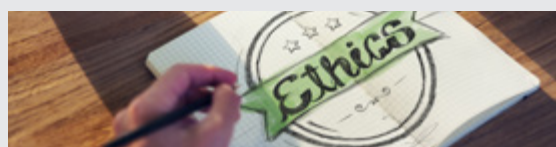
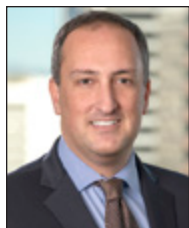


Q&A



LAWYER LIABILITY AND ETHICS

Prosecutors Do Not Have Higher Ethical Standards for Personal Conduct



Joseph Brophy

Last month this column discussed a disciplinary proceeding before the Supreme Court of Kansas arising out of a parking lot accident between a golf cart driven by Lawyer and an unoccupied pickup truck.

Lawyer failed to report the accident, then lied to the police when they investigated the hit and run. Ultimately, Lawyer paid for the damage outside of the criminal or civil legal system. But the matter found its way to the Kansas State Bar's Office of Disciplinary Administrator (ODA).

As was explained in more detail in last month's column, the Kansas Supreme Court at oral argument did not seem pleased that such a minor, non-legal incident made it before the highest court in the state. If you have nothing better to do, you can look the oral argument up on YouTube by searching "Kansas Supreme Court 125,500."

After last month's column, on February 10, 2023, the court issued its opinion. The court took the unusual step of rejecting the parties' joint recommendation of a 90-day suspension of Lawyer's license with the suspension being stayed while Lawyer was placed on probation for one year. Instead, the Supreme Court of Kansas imposed a lesser sanction of censure. The court declined to impose the agreed-to suspension because the court rejected the justification for the suspension advanced by both parties—the fact that Lawyer was an assistant county prosecutor at the time of his misconduct and prosecutors are held to a higher ethical standard than other lawyers. While prosecutors have heightened duties in some circumstances, those duties are not always present.

ER 3.8 imposes "special" responsibilities

on prosecutors since certain tasks are unique to the prosecutor's office. Prosecutors are not merely advocates but are also viewed as "a minister of justice," obligated to see that a criminal defendant receives procedural justice and that guilt is decided on the basis of sufficient evidence. Or as it is sometimes stated, prosecutors are obligated to seek justice, not merely convictions.

In its opinion, the Kansas court found all the "heightened prosecutorial duty" cases cited by the parties to be factually distinguishable because the prosecutors in those cases engaged in misconduct while acting in the scope of their official prosecutorial duties. The court rejected the ODA's argument that ER 3.8 applied to Lawyer because his misconduct involved misrepresentations made to law enforcement during the investigation of the parking lot hit and run. The court found that regardless of who Lawyer made the misrepresentations to, there was no dispute that his misconduct occurred in his private life, outside the scope of his official prosecutorial duties.

The court's opinion was unsurprising given the multiple questions from the bench at oral argument expressing concern about setting a bad precedent in the interpretation of ER 3.8. Of particular concern was the lack of notice to prosecutors in either the text or comments to ER 3.8 that the heightened standards of conduct set by the rule would apply to conduct outside of a prosecutor's official duties.

So congratulations to all the prosecutors in the Sunflower State, who have just learned that if they lie to the police when they are off the clock, they will face no greater punishment than any other lawyer. Just watch where you are going when parking those golf carts. ■

Joseph Brophy is a partner with Jennings Haug Keleher McLeod in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@jbkmlaw.com.

Why Almost Nobody in Arizona Serves the Minimum Time for a DUI

Hon. Gerald A. Williams
North Valley Justice Court

For misdemeanor DUIs, the mandatory minimum jail time for a first offense is either 10, 30, or 45 days. So why do convicted drunk drivers often serve no more than three days in jail? Rightly or wrongly, people in a position to make public policy have softened the consequences of a drunk driving conviction.

Arizona law establishes mandatory minimum jail sentences for misdemeanor DUI offenses based on the defendant's blood alcohol content (BAC). The charge alleging a .08 BAC is often incorrectly known as being over the legal limit because it is possible to be convicted of DUI with a lower BAC if a person is impaired to the slightest degree. A.R.S. § 28-1381(A)(1). Both require 10 days in jail; but nine of those days can be suspended if the defendant completes an alcohol screening and subsequent counseling program. Longer periods of confinement can trigger a home detention opportunity in most jurisdictions.

Defendants convicted of an extreme DUI are eligible to serve the balance of their time at home if they serve at least 20% of their initial term in jail; but home detention does not mean they are required to stay home. A judge can authorize defendants to go to work, to school, to church, to medical appointments, and to shop for groceries while serving home detention.

On November 1, 2022, the Arizona Court of Appeals published an opinion that significantly changed a standard element of DUI sentences. A.R.S. § 28-1382(I) provides that a portion of mandatory DUI jail time may be suspended if a defendant installs a certified interlock ignition device on any vehicle that the defendant operates for one year. That part of the DUI statute was amended to provide an incentive for defendants to actually obtain an interlock, rather than simply continue to drive after their license had been suspended.

Courts and MVD historically interpreted A.R.S. § 28-1382(I) to require the defendant to install an interlock on at least one vehicle in order to qualify for the suspended jail time, as the statute seemingly plainly requires. However, in *State v. Stowe*, _ P.3d _, 2022 WL 16559423, 1 CA-CR 21-0422 (Ariz. Ct. App. 2022), the Arizona Court of Appeals concluded that it was "absurd" to require a defendant to install an interlock in order to comply with the requirement for the jail time to be suspended.

In *Stowe*, the trial judge sentenced the defendant to serve 45 days in jail; but suspend-

ed all but 14 days if she would install an interlock for 12 months. She served the 14 days; but admitted she did not install an interlock. She claimed she sold her car and had not driven since her sentencing.

The State did not dispute that the defendant no longer owned a car; but maintained she still needed to serve the additional 31 days in jail. The court in *Stowe* concluded the defendant complied with the interlock statute, even though she never installed one, because she allegedly did not drive for a year. (Not owning a vehicle does not conclusively establish that someone is not driving.)

While the appellate court in *Stowe* may have intended that it be applied only to retroactive fact patterns, some defendants are now requesting, at the time of sentencing, that their jail time be suspended in advance, based on a promise they will not drive for a year. Given the current law, these requests are appropriate and are accepted by some judges.

So let's do the math.

Someone sentenced to 30 days in jail based on an Extreme DUI (BAC of between .15 and .20) conviction can, with an interlock credit, have 21 days of their sentence suspended. Of the remaining nine days, seven can be served on home detention. A.R.S. §§ 11-251.15(J)(3) & 28-1382(A)(1). Consequently, the Defendant's actual jail sentence is for two days.

For Super Extreme DUI (BAC of .20) convictions, the minimum jail sentence is 45 days. A.R.S. § 28-1382(A)(2). However, with 31 of those days suspended with an interlock credit, and with nine days on home detention, the balance in jail is three days.

None of these substantial reductions in jail time means there are not meaningful consequences for drunk driving. The fines, assessments, and surcharges are very significant. There are also collateral consequences affecting someone's driver license and vehicle insurance. Even so, most, if not all, are not serving lengthy jail sentences. But there is another complication.

As a consequence of COVID, many jails are no longer allowing "work release" for prisoners to be released during the day to attend to their jobs or school. For jail sentences of more than two days, a judge must actually allow work release, up to 12 hours a day, six days a week "unless the court finds good cause to not allow the release and places those findings on the record." A.R.S. § 28-1387(C). The unavailability of work release has resulted in many judges either delaying or not ordering lengthy misdemeanor jail sentences. ■

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