

Some Ethics Questions Are Hard to Answer



Imagine the following scenario. A defendant is on trial for bank robbery and is charged with robbery.

During the trial, the prosecutor repeated the theme that “actions speak louder than words.”

During her summation, the prosecutor showed a PowerPoint slide to the jury with the heading “ACTIONS SPEAK LOUDER THAN WORDS.” The slide contained a still from the movie *The Shining*, depicting Jack Nicholson in his role as a violent psychopath who used an ax to break through a door while attempting to kill his family. The slide featured the words spoken by Nicholson in the movie as he stuck his head through the broken door — “Here’s Johnny!”

The prosecutor commented that the character was “saying some very unthreatening words, ‘Here’s Johnny.’ But if you have ever seen the movie *The Shining*, you know how his face gets through that door. So, again, I just point that out to illustrate. It’s not just the words; it’s what you do before and what you do after the words that matters. And that’s what makes this a robbery.”

After the prosecutor concluded her summation to the jury, defense counsel objected to the photo’s use. During a colloquy, the trial judge offered a curative instruction, but stated, “If I do that though, I’m underscoring again, the prosecution’s arguments.” Defense counsel ultimately agreed that “it may be best left alone.” As a result, the court did not give a curative instruction. The jury convicted the defendant of second-degree robbery. On appeal, defendant argued that the prosecutor’s use of the PowerPoint slide during summation denied defendant a fair trial.

What do you think of the prosecutor’s conduct? Was it ethical? Did it violate the Rules of Professional Conduct?

This is not a hypothetical or a law school exam question. It happened in New Jersey, in *State v. Williams*, 243 A.3d 647 (N.J. 2021).

Here’s what happened next. On appeal,

the Appellate Division affirmed the conviction. The New Jersey Supreme Court reversed, however, concluding that that

“The Rules are silent about overzealous prosecutors, or about where prosecutors, or attorneys in general, must draw a line.”

prosecutor’s comments and use of the PowerPoint slide were prejudicial error.

Despite the Court’s unanimous Opinion, the Court rejected the defendant’s suggestion that New Jersey adopt a rule requiring prosecutors to provide opposing counsel with any planned PowerPoint presentations, noting that the State has no duty to do so.

Everyone with whom I have discussed the case asks the same question. Is what the prosecutor did ethical? Yet the New Jersey Supreme Court never discusses that aspect of the case. Never. Not once. Even worse, it is not clear that the conduct violated any ethics rules.

Words such as “ethics,” “ethical” and

“Rules of Professional Conduct” do not appear in the New Jersey Supreme Court’s Opinion, yet that is the question that keeps surfacing.

Neither the New Jersey nor the Pennsylvania Rules of Professional Conduct address this type of conduct directly. Assuming, for sake of argument, that they should.

Therein lies the rub. Can or should ethical rules or guidelines apply to every situation?

Throughout its discussion of the prosecutor’s conduct, the New Jersey Supreme Court acknowledged that prosecutors have a challenging position in the criminal justice system because they must represent “vigorously the state’s interest in law enforcement and at the same time help assure that the accused is treated fairly, and that justice is done.” The Court never strays into the ethics arena. Nor does it raise or answer any questions about whether the prosecutor crossed an ethical line during her closing.

A close examination of the Rules of Professional Conduct offers no guidance. In fact, the Rules are silent about

over-zealous prosecutors, or about where prosecutors, or attorneys in general, must draw a line.

In a 2015 article in *Marquette Law Review*, “The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail to Prevent Truthful Witnesses from Being Discredited Through Unethical Means,” Syracuse University Law Professor Todd A. Berger concluded that “absent voluntary compliance, current ethics rules cannot adequately prevent” criminal defense attorneys from discrediting witnesses whose testimony they know is truthful. Berger does not address, however, how to prevent prosecutors from essentially doing the same thing.

Conversely, in an article in *Hofstra Law Review*, American University Law Professor Angela Davis discussed “The Legal Profession’s Failure to Discipline Unethical Prosecutors,” and concluded that “National, state, and local bar associations should begin prosecutorial reform efforts by conducting in-depth investigations and evaluations of state disciplinary proceedings to determine (a) why they have not been effective in remedying

prosecutorial misconduct; and (b) whether and what changes might make the process more effective.”

Until the American Bar Association amends the Model Rules of Professional Conduct, or individual states modify their Rules, some prosecutors will continue to act like Damon Williams’ prosecutor in New Jersey, whose conduct was unjustified for many reasons. Meanwhile, prosecutors and defense counsel will be left not with disciplinary options, but the limited guidance of the New Jersey Supreme Court and other courts encouraging “counsel to disclose to each other and the court any visual aids intended to be used during closing argument, but ... not require[ing] that practice.” ■

Daniel J. Siegel, a member of the Editorial Board of The Philadelphia Lawyer, is the principal of the Law Offices of Daniel J. Siegel, LLC and chair of the Pennsylvania Bar Association Legal Ethics Committee. He provides ethical and disciplinary guidance to other attorneys, and can be reached at dan@danieljsiegel.com.



CONNER & ASSOCIATES
PC
RESTRUCTURING ADVISORY | TAX | LITIGATION

Strategic Litigation Consulting

Board-Level Consulting, Damages Modeling, Forensic Accounting, and Expert Testimony in matters of:

- Insolvency, Turnaround, and Bankruptcy
- White-Collar Crime and Tax Investigations
- Shareholder Disputes, Buyouts, and Court-Ordered Dissolutions
- Boards of Directors of Public Companies and their Audit and Corporate Governance Committees

*“Serving
the needs of
our clients
since 1991”*

Kevin J. Conner, CPA, MST
Managing Director
e-mail: kconner@connercpa.com

110 South State Street, Suite 200 | Newtown, Pennsylvania 18940

Tel: 215.860.3322 | www.connercpa.com