MARTINE LAW TRAINING UPDATE

PROSECUTORIAL MISCONDUCT

15 Categories Every Judge and Attorney Should Recognize and Avoid

Introduction

Although this training update is titled *"Prosecutorial Misconduct,"* it is important to distinguish between misconduct and error. *Misconduct* suggests a deliberate violation of a rule or practice—or at least a grossly negligent transgression—while *error* typically reflects a mistake of the kind all trial lawyers make from time to time. Yet the difference in terminology does not change the bottom line. Even prosecutorial error, when sufficiently serious, can deprive a defendant of a fair trial. *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009). For that reason, this update does not attempt to parse whether a particular instance should be labeled "misconduct" or "error." That distinction is best left to the appellate courts. Our focus here is practical: identifying improper prosecutorial conduct in all its forms so trial attorneys can recognize it, object to it, and preserve the issue for review.

The Repeating Generational Problem: The role of a prosecutor in Minnesota, and across the country, is unlike that of any other attorney. A prosecutor is not merely an advocate seeking victory at all costs, but an officer of justice with a unique ethical responsibility: to ensure that justice is done. This duty extends even to protecting the rights of the accused, though doing so may weaken the State's case.

As the Minnesota Supreme Court has long recognized:

> *"Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial.". State v. Henderson,* 620 N.W.2d 688, 701-02 (Minn. 2001). *"The prosecutor's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). *"The prosecutor is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public."* Id. at 817 (quoting I *ABA Standards for Criminal Justice,* The Prosecution Function 3-1.1 and commentary at 3.7 (2d ed.1979)).

Despite decades of clear appellate guidance, prosecutorial misconduct still appears with troubling frequency in trial records. The problem is not a lack of legal clarity, the rules are well established, but rather the tendency of each new generation of prosecutors to repeat the same mistakes. Consequently, most appellate opinions addressing prosecutorial misconduct today are issued as nonprecedential decisions. These opinions seldom chart new territory; instead, they restate principles long settled in prior published cases. The result is a familiar cycle: prosecutors commit the same errors, defense counsel objects, the trial court rules, and the appellate courts once again remind us of the governing standards.

This training update is designed to interrupt that cycle. By setting out the 15 categories of prosecutorial misconduct most commonly encountered in Minnesota courts, we aim to provide judges, prosecutors, and defense counsel with a shared framework for recognizing misconduct when it occurs, understanding why it matters, and taking prompt corrective action.

Practical Use of This Resource

- **Prosecutors** should use this update as a reminder of their professional obligations and as a tool for internal training. The goal is not only effective advocacy but advocacy that remains firmly within ethical boundaries.
- **Defense attorneys** must be alert to misconduct as it occurs. Prompt objections are essential—not only to protect the fairness of the trial but also to create a record for appeal. A clear record enables defense counsel to request cautionary instructions and ensures appellate courts can meaningfully review the issue.

- **Judges** are understandably cautious about intervening without an objection. But the Minnesota Supreme Court has made clear that trial courts also bear responsibility for curbing prosecutorial misconduct. In *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006), the Court emphasized that *"reducing the incidence of prosecutorial misconduct is a shared obligation and trial courts have a duty to intervene and caution the prosecutor, even in the absence of objection."* In short, when misconduct threatens the fairness of trial, the court must act—whether or not counsel objects.

The ultimate goal is prevention: fewer repeated mistakes, fewer mistrials, and stronger public trust that our criminal justice system is committed to both vigorous prosecution and scrupulous fairness.

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1. Shifting The Burden of Proof from the State to the Defense

Core Rule: It is misconduct for a prosecutor to suggest—directly or indirectly—that the defendant must present evidence or call witnesses to prove innocence. The State always carries the full burden of proof. *State v. Race*, 383 N.W.2d 656 (Minn. 1986).

A. Commenting on Failure to Call Witnesses or Present Evidence

- **Improper:** A prosecutor may not argue that the defendant's failure to call certain witnesses or produce evidence suggests guilt. *State v. Race*, 383 N.W.2d 656 (Minn. 1986); *State v. Mayhorn*, 720 N.W.776 (Minn. 2006).
- **Exception:** If the defense advances a specific theory, the State may point out the lack of supporting evidence for that theory.
  - *State v. Race*, supra – permissible to note that the defense claim of a vandalized life raft was unsupported by the evidence.
  - *State v. Gassler*, 505 N.W.2d 62 (Minn. 1993) – permissible to argue that the defendant's claim of an alternative perpetrator in opening statement was not supported by the evidence.
  - *State v. Haynes*, 725 N.W.2d 524 (Minn. 2007) – no reversible error where prosecutor briefly cross-examined about absent witnesses, did not stress the issue, and avoided it in closing.

B. Arguing the Case Is "Undisputed"

- **Improper:** Prosecutors may not argue that the State's case—or key elements of it—are "undisputed" or "unrefuted." Such statements imply the defense had an obligation to dispute the evidence, shifting the burden improperly.
  - *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004) – error where prosecutor argued that identity was the only issue "in dispute."

Practice Point: Defense attorneys must be alert to burden-shifting language in both cross-examination and closing argument. Objections should emphasize that the defendant has no obligation to present any witnesses or evidence, and that the burden rests entirely on the State.

2. Injecting Issues Broader Than Guilt or Innocence

Core Rule: It is misconduct for a prosecutor to introduce race, socioeconomic status, or unrelated personal matters into trial when those issues are not relevant to guilt or innocence. Such arguments improperly invite bias and distract jurors from the evidence.

A. "Other World" Arguments and Racial References

- **Improper:** Asking jurors to evaluate the case through irrelevant racial or socioeconomic lenses.
    - *State v. Ray*, 659 N.W.2d 736 (Minn. 2003) – improper to describe defendants as *"three Black males from the hood."*
    - *State v. Clifton*, 701 N.W.2d 793 (Minn. 2005) – improper for prosecutor to describe the "hood" of North Minneapolis as defendant's environment, a world wholly outside the jury's own.
    - *State v. Dobbins*, 725 N.W.2d 492 (Minn. 2006) – improper to describe defendant's "world" as different from "our world."
    - *State v. Cabrera*, 700 N.W.2d 469 (Minn. 2005) – improper to suggest defense counsel was engaging in "racist speculation."

- **Permissible if Tied to Evidence:** Limited references may be allowed if they are brief, tied to facts in the record, and not aimed at aligning jurors against the defendant.
    - *State v. Jackson*, 714 N.W.2d 681 (Minn. 2006) – permissible to reference "gang world" to explain motive.
    - *State v. Paul*, 716 N.W.2d 329 (Minn. 2006) – permissible to discuss "real world" difficulties in securing witness cooperation.
    - *State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006) – reference to "drug world" might have been proper by itself, but the reference crossed the line when prosecutor aligned herself with the jury by saying it was "foreign to all of us."

B. Irrelevant Character Attacks

- **Improper Gratuitous Attacks on the Defendant's Lifestyle, Fidelity, or Personal Relationships that have no Bearing on Guilt:**
  - *State v. Dobbins*, 725 N.W.2d 492 (Minn. 2006) – improper to question defendant about infidelity and paternity issues unrelated to charges.
  - *State v. Mayhorn*, supra – improper to ask nearly 40 questions about "baby mamas" and whether the defendant lied to girlfriends.

- **Improper Derogatory Labels:**
  - *State v. Buggs*, 581 N.W.2d 329 (Minn. 1998) – improper to call defendant a "coward" with a "twisted" thought process.
  - *State v. Ives*, 568 N.W.2d 710 (Minn. 1997) – improper to call defendant a "would-be punk with a pathetic little life."
  - *State v. Washington*, 521 N.W.2d 35 (Minn. 1994) – improper to use fables/analogies ("scorpion by nature") to argue defendant acted due to bad character.

Practice Points:

- Prosecutors may argue context (e.g., gang dynamics, drug culture) if supported by the record, but they must avoid aligning with the jury against a "foreign" world or referencing race/socioeconomic status.
- Defense attorneys should object promptly when prosecutors inject stereotypes, irrelevancies, or derogatory labels.
- Judges should be prepared to intervene sua sponte when inflammatory rhetoric threatens trial fairness.

3. Accusing the Defendant of Tailoring Testimony

Core Rule: It is misconduct for a prosecutor to argue or suggest that a defendant tailored testimony simply because the defendant was present at trial and heard the evidence. Such comments penalize the defendant's constitutional right to be present and to confront witnesses. *State v. Davis*, 735 N.W.2d 674 (Minn. 2007).

A. Improper Comments Without Evidence of Tailoring

- **Improper:** Suggesting the defendant shaped testimony after hearing witnesses, absent proof of fabrication.
  - *State v. Davis*, 735 N.W.2d 674 (Minn. 2007) – improper to question or argue tailoring without evidence.
  - *State v. Dobbins*, 725 N.W.2d 492 (Minn. 2006) – improper to question defendant about ability to tailor testimony based on courtroom presence (harmless error in that case).
  - *State v. Buggs*, 581 N.W.2d 329 (Minn. 1998) – caution to prosecutors: repeated emphasis on defendant's presence may lead to reversal.

B. Exception – Actual Evidence of Tailoring

- **Permissible:** When the record shows that the defendant changed the story after learning the State's evidence, a prosecutor may argue tailoring.
  - *State v. Ferguson*, 729 N.W.2d 604 (Minn. App. 2007) – permissible to argue tailoring where defendant initially denied seeing victim but later changed testimony after receiving discovery.

Practice Points:

- Prosecutors should avoid generic "tailoring" arguments; they must anchor any tailoring claim in specific, proven inconsistencies.
- Defense counsel should object to tailoring accusations not supported by evidence, emphasizing the constitutional right to attend trial.
- Judges should sustain objections where tailoring comments rely only on the defendant's presence in court rather than actual evidence.

4. Asking "Were They Lying" Questions

Core Rule: It is generally improper to ask one witness to comment on the credibility of another witness. This most often occurs when prosecutors cross-examine defendants by asking whether other witnesses were "lying." Such questions invade the jury's exclusive role in determining credibility. *State v. Pilot,* 595 N.W.2d 511 (Minn. 1999).

A. Improper "Were They Lying" Questions

- **Improper:** Directly asking a defendant to label another witness as a liar.
  - *State v. Pilot*, 595 N.W.2d 511 (Minn. 1999) – improper to ask defendant whether other witnesses were lying; invades the jury's role.
  - *State v. Morton*, 701 N.W.2d 225 (Minn. 2005) – improper cross-examination with "were they lying" questions where it suggested jury must find witnesses lied in order to acquit.
  - *State v. Wren*, 738 N.W.2d 378 (Minn. 2007) – improper to ask police officer to comment on credibility of defendant's statements.

B. Limited Exception – When Credibility Is the Central Issue

- **Permissible in Limited Circumstances:** Minnesota has adopted a narrow exception: *"Were they lying"* questions may be permitted only when the defense has affirmatively put the credibility of the State's witnesses at the center of its case.
  - *State v. Pilot*, supra – flexible rule adopted, permitting such questions when useful to clarify testimony or evaluate a witness who claims everyone else is lying.
  - *State v. Dobbins*, 725 N.W.2d 492 (Minn. 2006) – no error where defense argued that a State witness was the real shooter, putting credibility directly at issue.

- **When the Exception Applies:** If the defense theory is "the State's witnesses are not telling the truth" (e.g., a specific witness framed the defendant, or all of them colluded), the prosecutor may, in a limited way, ask the defendant if that witness was lying. This is where the exception applies.

C. Why the Exception Is So Narrow: The rationale is simple:

- The defense may argue that the State's witnesses are either mistaken or untruthful. When that credibility challenge is the *core* of the defense, a narrowly framed "were they lying" question may be used to clarify whether the defendant is claiming deliberate perjury or simply an honest mistake.

- But even then, the question is dangerous — appellate courts have repeatedly warned that it should be used sparingly and only when credibility of the State's witnesses is the central issue.

Practice Points:

- Prosecutors should avoid "were they lying" questions unless credibility is the central issue and the question clarifies testimony.
- Defense counsel should object to such questions as improper credibility commentary and preserve the record for appeal.
- Judges should recognize the risk of prejudice and restrict questioning to the evidence, ensuring the jury's role in assessing credibility is preserved.

5. Eliciting Inadmissible Evidence (see related category 14)

Core Rule: It is misconduct for a prosecutor to deliberately elicit testimony or introduce evidence that the court has ruled inadmissible, or that is clearly inadmissible under the rules of evidence. Such conduct undermines the fairness of the trial, creates a risk of prejudice, and often forces curative instructions or mistrials.

A. Eliciting Excluded or Clearly Inadmissible Evidence

- **Improper:** Attempting to present evidence that the trial court has specifically ruled inadmissible, or that is plainly barred by the rules.
  - *State v. Fields*, 730 N.W.2d 777 (Minn. 2007) – improper for prosecutor to elicit (or attempt to elicit) clearly inadmissible evidence.
  - *State v. Brown*, 739 N.W.2d 716 (Minn. 2007) – improper to cross-examine defendant about shoeprint evidence previously ruled inadmissible; curative instruction was required.
  - *State v. Ray*, 659 N.W.2d 736 (Minn. 2003) – misconduct where prosecutor repeatedly elicited testimony previously ruled inadmissible.

- *State v. Williams*, 525 N.W.2d 538 (Minn. 1994) – improper to elicit inadmissible hearsay and "drug courier profile" evidence through officer testimony.
- *State v. Fields*, 730 N.W.2d 777, footnote 1 (Minn. 2007) "….. attempts to elicit clearly inadmissible evidence, even if that evidence was not previously ruled inadmissible by the district court, may constitute misconduct."

B. Practice Boundaries

- Even if the court has not yet ruled, prosecutors have a duty to avoid asking questions designed to elicit inadmissible hearsay, character evidence, or prior misconduct unless clearly permitted by the rules.
- If a prosecutor "slips in" prejudicial evidence under the guise of another question, appellate courts may find misconduct even without a pretrial ruling.

Practice Points:

- **Prosecutors** must scrupulously respect evidentiary rulings and should err on the side of caution when questioning witnesses.
- **Defense attorneys** should object promptly to any attempt to elicit barred or inadmissible evidence and request curative instructions (or, in egregious cases, a mistrial).
- **Judges** should enforce prior rulings, stop improper questioning midstream, and consider strong curative measures when the jury hears inadmissible evidence

6. Misstating the Burden of Proof

Core Rule: It is highly improper for a prosecutor to misstate the State's burden of proof beyond a reasonable doubt. Any suggestion that the standard is lower—or that the jury should "weigh" stories equally—is misconduct. *State v. Coleman*, 373 N.W.2d 777 (Minn. 1985).

Examples of Misconduct:

- *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002) – improper to argue that jury should "weigh the story in each hand and decide which is most reasonable."
- *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004) – improper to equate DNA probability statistics with proof beyond a reasonable doubt.

Practice Points:

- Defense counsel should object whenever a prosecutor minimizes the burden or reframes "reasonable doubt" as a balancing test.
- Judges should remind jurors of the CRIMJIG definition of reasonable doubt and issue cautionary instructions if needed.

7. Misstating The Presumption of Innocence

Core Rule: It is misconduct for a prosecutor to mischaracterize the presumption of innocence. The presumption applies throughout trial and is only overcome if the State proves guilt beyond a reasonable doubt. *State v. Salitros*, 499 N.W.2d 815 (Minn. 1993).

Examples of Misconduct:

- *State v. Jensen*, 242 N.W.2d 109 (Minn. 1976) – improper to argue the presumption of innocence is a shield for the innocent, not "a cloak for the guilty."
- *State v. Salitros*, 499 N.W.2d 815 (Minn. 1993) – prosecutor may not distort the presumption of innocence.

Permissible Statements:

- *State v. Young*, 710 N.W.2d 272 (Minn. 2006) – not improper to argue that the defendant is presumed innocent until the State meets its burden (consistent with CRIMJIG 3.02).

Practice Points:

- Prosecutors must stick to the CRIMJIG instruction language.
- Defense counsel should object to any suggestion that the presumption fades during trial or belongs only to the "truly innocent."

8. Expressing A Personal Opinion - Vouching

Core Rule: Prosecutors may not inject personal opinions, become unsworn witnesses, or vouch for the credibility of witnesses. Advocacy must be based on the evidence, not the prosecutor's personal beliefs.

- The "personal opinion" rule is designed to prevent an attorney, whether a prosecutor or a defense attorney, from becoming an unsworn witness and otherwise personally attaching himself or herself to the cause which he or she represents. As applied to the prosecutor, the rule helps avert exploitation of the influence of the prosecutor's office. *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991), ABA Standards Relating to the Prosecutor's Function, 3-5.8(b) and Commentary (1979).

Improper Expressions of Personal Opinion:

- *State v. Blanche*, 696 N.W.2d 351 (Minn. 2005) – improper to use "I submit" and "I think" as personal opinion.
- *State v. Dobbins*, 725 N.W.2d 492 (Minn. 2006) – improper for prosecutor to say, "I would be honest if I testified."
- *State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006) – improper to suggest a witness was a "liar."

Improper Vouching: Vouching occurs "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Lopez-Rios*, 669 N.W.2d 603 (Minn. 2003).

- *State v. Hobbs*, 713 N.W.2d 884 (Minn. App. 2006) – improper to argue victim "told you the truth."

- *In re D.D.R.*, 713 N.W.2d 891 (Minn. App. 2006) – improper to say a child witness "can't" lie consistently.
- *State v. Lopez-Rios*, 669 N.W.2d 603 (Minn. 2003) – vouching occurs when prosecutor implies personal guarantee.

Permissible:

- *State v. Gail*, 713 N.W.2d 851 (Minn. 2006), no improper vouching where prosecutor argued that a State's witness was *"a believable person"* and *"frank and sincere"* where State was arguing that witness was credible based upon the evidence. The State may argue that particular witnesses were or were not credible as long as the comments are based on the evidence.
- *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991), the "personal opinion" rule is not designed to prevent the prosecutor from arguing that particular witnesses were or were not credible.

Practice Points:

- Defense attorneys should object when prosecutors use "I believe," "I think," or suggest truthfulness based on their authority.
- Prosecutors should ground all credibility arguments in specific record evidence.

9. Belittling The Defense

Core Rule: It is misconduct to belittle a defense in the abstract, disparage defense tactics, or suggest the defense was raised only to manipulate the jury. Prosecutors may argue that the *evidence* does not support a defense but may not demean the defense itself. *State v. Salitros*, 499 N.W.2d 815 (Minn. 1993).

Improper Examples:

- *State v. Williams*, 525 N.W.2d 538 (Minn. 1994) – improper to suggest defendant "had to" raise a particular defense.
- *State v. Salitros*, 499 N.W.2d 815 (Minn. 1993) – improper to refer to "common defense tactics" or "throwing in the kitchen sink."

- *State v. Bettin*, 244 N.W.2d 652 (Minn. 1976) – improper to call insanity a "pushbutton defense."
- *State v. Bashire*, 606 N.W.2d 449 (Minn. App. 2000) – improper to call consent "the oldest game in town."
- *State v. Jones*, 753 N.W.2d 677 (Minn. 2008) – improper to call defense an "old trick."

Permissible:

- *State v. Ashby*, 567 N.W.2d 21 (Minn. 1997) – permissible to argue allegations are easy to make but hard to prove.
- *State v. Davis*, 735 N.W.2d 674 (Minn. 2007) – permissible to call self-defense claim "preposterous" when argument tied to evidence.
- *State v. Graham*, 764 N.W.2d 340 (Minn. 2009) – permissible to argue defense was not supported by solid evidence.

Practice Points:

- Defense counsel should object when prosecutors disparage defense strategies rather than address evidence.
- Prosecutors should frame arguments around evidentiary weakness, not generalized attacks on defense theories.

10. Inflaming the Passions of the Jury

Core Rule: A prosecutor must avoid arguments that appeal to jurors' passions, prejudices, or sense of duty beyond the evidence. Appeals to sympathy, vengeance, or societal protection are improper. *State v. Porter, 526 N.W.2d 359 (Minn.1995).*

A. Accountability

- *State v. Salitros,* supra, Argument unduly emphasizing accountability, "Accountability is a lesson that this young man has not yet learned, and the State is asking you to teach it to him," is inflammatory and improper.
  i. However, it is proper for a prosecutor to talk about what the victim suffers and to talk about accountability, in order to help persuade the jury not to return a verdict based on sympathy for the defendant, but the prosecutor should not

emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving defendant guilty beyond a reasonable doubt. *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985)

B. Appeals to Justice

- *State v. McNeil*, 658 N.W.2d 228 (Minn. App. 2003) In a child sexual abuse case, it is improper for the prosecutor to tell the jury "You can't give her back her childhood. You can't give her back her virginity. But you can give her justice."

C. Personalizing the Argument

- *State v. Johnson*, 324 N.W.2d 199 (Minn. 1982) Arguments that invite the jurors to put themselves in the shoes of the victim are considered improper.

D. Permissible:

- *State v. Gates*, 615 N.W.2d 331 (Minn. 2000) – It is permissible for a prosecutor to discuss accountability and urge jurors not to decide a case based on sympathy for the defendant -- "Everyone loses if the persons responsible are not held accountable. And what we ask you to do ... is render a verdict that is fair and just. One that is a confirmation of the truth.".

Practice Points:

- Prosecutors may argue accountability and fairness but must avoid inflammatory rhetoric.
- Defense counsel should object when prosecutors use arguments designed to arouse anger, sympathy, or fear rather than focus on the evidence.

11. Commenting on a Defendant's Failure to Testify

- **Core Rule:** It is misconduct for a prosecutor to directly or indirectly comment on the defendant's decision not to testify. This violates the Fifth Amendment and Minn. Const. art. I, § 7 (guarantees the right to remain silent). *Griffin v. California*, 380 U.S. 609 (1965) U.S. Supreme Court forbids comment on silence.

- **M.S. 611.11 No Presumption from Failure to Testify.** "The defendant in the trial of an indictment, complaint, or other criminal proceeding shall, at the defendant's own request and not otherwise, be allowed to testify; but failure to testify shall not create any presumption against the defendant, nor shall it be alluded to by the prosecuting attorney or by the court."

Improper Examples:

- *State v. DeRosier*, 695 N.W.2d 97, 107 (Minn. 2005) Comment on a defendant's election not to testify is per se reversible error if (1) the comment is extensive, (2) the comment stresses to the jury that an inference of guilt from silence is a basis for conviction, and (3) there is evidence that could have supported an acquittal.
- *State v. Naylor*, 474 N.W.2d 314 (Minn. 1991) Prosecutor's statements that "we're never going to know what happened" but that the "defendant knows the truth" was improper but not prejudicial where comment was brief and not emphasized and other evidence was overwhelming.
- *State v. Johnson*, 679 N.W.2d 378 (Minn. App. 2004) Where consent defense was raised in a sex case it was improper for prosecutor to argue that "There is not a single witness who can stand up and say I heard" the victim consent.
- *State v. Coley*, 468 N.W.2d 552, 555 (Minn. App. 1991) prosecutor's repeated references to defense's failure to contradict testimony indirectly alluded to his failure to testify.
- *State v. Whittaker*, 568 N.W.2d 440 (Minn. 1997) Prosecutor may not indirectly draw attention to failure to testify.

Practice Points:

- Prosecutors must argue from evidence presented, not from defendant's silence.
- Defense counsel should immediately object to any such comment and request a curative instruction.
- Judges must stop improper commentary *sua sponte* if necessary to protect constitutional rights.

12. Misusing *Spreigl* Evidence

Core Rule: *Spreigl* (prior bad acts) evidence is admissible only for limited purposes (e.g., motive, intent, absence of mistake) and must never be used to suggest that the defendant has a propensity to commit crime*. State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

Overarching Concern*: State v. Ness*, 707 N.W.2d 676 (Minn. 2006) – In clarifying *Spreigl* evidence admissibility standards and balancing test, the court stated, " We recently said that the "overarching concern" over the admission of *Spreigl* evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts.

The Ness Five-Step Test for *Spreigl* Evidence (*State v. Ness*, at 686):

1. The State must clearly indicate what the *Spreigl* evidence is offered to prove.
2. The State must prove the defendant's participation in the prior act by clear and convincing evidence.
3. The evidence must be relevant and material to the State's case.
4. The probative value of the evidence must outweigh its potential for unfair prejudice.
5. The trial court must give the jury a cautionary instruction on the proper use of *Spreigl* evidence.

Improper Example:

- *State v. Peterson*, 530 N.W.2d 843 (Minn. App. 1995) the prosecutor committed misconduct by arguing *Spreigl* evidence as proof of guilt. In closing, the prosecutor compared the charged offense and the *Spreigl* act, referring to "two boys" and suggesting that believing the incidents were unrelated would "stretch reality and common sense too far." Because one boy was involved only in the *Spreigl* incident, this argument invited the jury to use prior bad-act evidence as propensity proof.

Practice Points:

- *Spreigl* evidence may be admitted for limited purposes (e.g., motive, intent, identity), but prosecutors MUST not argue that its similarity to the charged offense proves the defendant has a criminal disposition.
- Defense attorneys should object to any direct or indirect attempt to use *Spreigl* evidence as character evidence.
- Judges should issue clear limiting instructions at the time of admission and in final jury instructions.

13. Speculating About Events Without a Factual Basis

Core Rule: Prosecutors may not speculate about events or facts that are not supported by the trial record. Argument must be grounded in admitted evidence and reasonable inferences. *State v. Thompson*, 578 N.W.2d 734 (Minn. 1998).

Improper Examples:

- *State v. Bradford*, 618 N.W.2d 782 (Minn. 2000) The prosecutor committed misconduct by engaging in speculation about the events surrounding the victim's death, even to the point of creating dialogue.
- *State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006) – prosecutor engaged in misconduct when suggesting facts unsupported by record.
- *State v. McDaniel*, 777 N.W.2d 739 (Minn. 2010) – improper to speculate in closing argument about defendant's thought process without any factual basis.
- Suggesting motives or actions not in evidence ("He must have hidden the weapon somewhere we didn't find").
- Filling evidentiary gaps with conjecture rather than from reasonable inferences tied directly to the evidence.

Practice Points:

- Defense counsel should object to speculative remarks and request curative instructions.
- Prosecutors may argue inferences but must tie them directly to the evidence.
- Judges should distinguish between "reasonable inference" and "speculation" and remind jurors accordingly.

14. Soliciting Improper or Highly Prejudicial Testimony (see related category 5)

Core Rule: It is misconduct to elicit testimony that is irrelevant, inflammatory, or highly prejudicial, particularly when it is designed to appeal to emotion rather than illuminate facts. *State v. Brown*, 739 N.W.2d 716 (Minn. 2007).

Best Practice: Any time a prosecutor desires to make an inquiry of doubtful propriety, the prosecutor should seek permission from the trial court in chambers before asking the question. *State v. Brown*, 739 N.W.2d 716 (Minn. 2007).

Improper Examples:

- *State v. Ray*, 659 N.W.2d 736,745 (Minn. 2003) – misconduct where prosecutor repeatedly attempted to elicit testimony that had previously been ruled inadmissible.
- *State v. Fields*, 730 N.W.2d 777, 782 and ft 1 (Minn. 2007) – attempting to elicit or actually eliciting clearly inadmissible evidence, even if that evidence was not previously ruled inadmissible by the district court, may constitute misconduct.
- *State v. Van Wagner,* 504 N.W.2d 746, 750 (Minn.1993), the court reversed prophylactically when the state repeatedly asked a police witness to provide inadmissible hearsay evidence. "The state's questioning, overall, was simply too pointed and persistent to make an innocent explanation plausible." *Id.*

Practice Points:

- Prosecutors should prepare witnesses to avoid straying into excluded or prejudicial areas.
- Defense attorneys should object promptly and consider motions for mistrial if prejudice is severe.
- Judges must safeguard against prejudicial testimony, stopping questioning immediately and striking testimony when necessary.

15. Injecting Self Into Proceedings: "I", "We", "Me"

Core Rule: A prosecutor must never inject personal identity or authority into trial by repeatedly using "I," "we," or "me" in a way that implies personal credibility or government endorsement. This risks turning the prosecutor into an unsworn witness. *State v. Leutschaft*, 759 N.W.2d 414, 425 (Minn. App. 2009)

Improper Examples:

- *State v. Mayhorn,* 720 N.W.2d 776 (Minn. 2006) Prosecutor telling the jury, "We aren't a part of Defendant's world."
- *State v. Abendroth*, 2006 WL 2598207, unpublished, (Minn. App. September 12, 2006) Prosecutor in closing argument, "I've tried a lot of cases, and I know…."
- *State v. Abendroth*, 2006 WL 2598207, unpublished, (Minn. App. September 12, 2006) Prosecutor telling the jury, "If my children were involved…"
- *State v. Leutschaft*, 759 N.W.2d 414, 425 (Minn. App. 2009) the use of the first-person pronoun "I" indicates that the prosecutor has injected his or her personal opinion into an argument. However, the phrase "the state submits" does not inject the personal opinion of the prosecutor, in contrast to the phrase "I think").
- *State v. Everett*, 472 N.W.2d 864 (Minn. 1991) improper for prosecutor to personally attach himself to the cause which he represents. As applied to the prosecutor, the

rule helps avert exploitation of the influence of the prosecutor's office. ABA Standards Relating to the Prosecutor's Function, 3-5.8(b) and Commentary (1979).

Practice Points:

- Prosecutors may argue that evidence supports credibility but must avoid "I/we/me" statements or government endorsements.
- Defense attorneys should object to improper "I/we/me" statements as vouching.
- Judges should instruct prosecutors to reframe arguments around the evidence, not personal opinions.

Final Thought – A Word on Style and Zeal in Advocacy

The ethical limits we impose on prosecutors do not—and should not—require sterile, passionless advocacy. Minnesota courts have repeatedly affirmed that vigorous argument is permissible so long as it remains tethered to admissible evidence and accurate law. For example, in *State v. Gates*, 615 N.W.2d 331, 341 (Minn. 2000), the Court upheld a conviction despite strong prosecutorial argument, emphasizing that vigorous advocacy tied to the evidence is permissible even when delivered with passion.

In practice, a prosecutor can and should be persuasive, expressive, animated — provided every rhetorical flourish is grounded in the record, does not introduce personal belief or authority, and avoids impermissible boundaries such as vouching, burden shifting, or appeals to bias.

Prosecutors should feel confident to prosecute with vigor, eloquence, and rhetorical strength. The ethical rules do not require a prosecutor to be bland, formulaic, or emotionless — they simply require that the zeal be tethered to admissible evidence, law, and appropriate argument. As a leading commentary puts it, "a good closing argument should be passionate and heartfelt but still within the limitations of a lawyer's legal and ethical obligations." Minnesota Office of Lawyers Professional Responsibility**.**

Pervasive Prosecutorial Misconduct: *State v. Vialard*, No. A24-1222, slip op. at 28–29 (Minn. App. Aug. 18, 2025) (nonprecedential). The Court of Appeals reversed a conviction for obstruction of justice and remanded for a new trial after finding **"**pervasive prosecutorial misconduct." Id at 28. The court emphasized that the misconduct was not "sporadic" or "minimal," but widespread and repeated throughout trial. Because of this pervasiveness, the misconduct could not be considered harmless beyond a reasonable doubt. The court concluded: "We therefore conclude that the prosecutor failed to meet his affirmative obligation to ensure that Vialard received a fair trial, and instead sought a conviction at any price." *Id.* at 29.

Final Practice Point: The most effective way for prosecutors to ensure their advocacy stays on the right side of the line is to anchor every rhetorical flourish to a factual or evidentiary point, avoid speaking in first-person evaluative terms ("I believe," "I know," "we submit"), and continually check whether your argument is directed to permissible credibility, weakness, or support rather than injecting your own authority or opinion.

"Sustained. Prosecution will refrain from going 'dun dun *dunnnnnnn...*' during the witness' testimony."

Use of This Update for Training Purposes: This update is intended to serve as a practical training resource for prosecutors and criminal defense attorneys across Minnesota. By outlining the 15 categories of prosecutorial misconduct most often addressed in our courts, it provides judges and lawyers with a common framework for recognizing, preventing, and responding to improper conduct. The ultimate goal is prevention: fewer repeated mistakes, fewer mistrials, and greater public confidence that our criminal justice system remains committed to vigorous prosecution conducted with scrupulous fairness

This Training Update is also available on the Minnesota Judicial Training and Education website. While there, you can easily subscribe to receive email alerts when new updates are published. If you find this update helpful, please consider forwarding it to colleagues who would benefit from timely insights on Criminal and Family Law, Rules of Evidence, and Courtroom Procedure. With almost 4000 attorneys, judges, and legal professionals currently subscribed, these updates reflect our firm's core belief that "Legal Education Is the Soul of the Judiciary."

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