

# Prosecutor's admission in Ferguson case troubling in many ways

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St. Louis County prosecutor Robert McCulloch recently admitted that he submitted false testimony to the grand jury that was considering charges against Darren Wilson, the police officer who shot and killed Michael Brown in Ferguson, Missouri.

McCulloch's statements set off a groundswell of social media commentary on the role of the prosecutor and a grand jury and the administration of justice — as well they should have. What has been lost, however, is the seemingly unabashed violation of a bedrock rule of legal ethics: Lawyers may not knowingly submit perjured testimony to a tribunal. Such conduct violates their sacrosanct duty of candor to the tribunal.

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was offering was false, then he arguably violated the rules of ethics.

McCulloch's description of the false testimony he provided to the grand jury is troubling. Lying under oath on a material matter to a tribunal is the very definition of perjury.

In a recent interview, however, McCulloch said that "[t]here were people who came in and, yes, absolutely lied under oath."

McCulloch seemed to excuse the use of perjured testimony because he "thought it was much more important to present anybody and everybody" to the grand jury, and because false statements were made on both sides of the investigation. In essence, McCulloch appeared to believe that the use of perjured testimony was acceptable because he offered all the false statements without discrimination, and because, in the end, it was the grand jury's responsibility to sort it all out.

According to McCulloch: "Just like any jury, [the grand jury] can believe all, part or nothing of any witness testimony."

McCulloch also disclaimed any intention of prosecuting any of the witnesses for perjury.

Those reasons for allowing witnesses to lie under oath do not meet legal ethical standards. Lawyers everywhere are governed by rules of professional conduct, and Missouri is no exception. The

rules apply to all lawyers, including prosecutors and criminal defense lawyers.

Missouri lawyers are forbidden from engaging "in conduct that is prejudicial to the administration of justice." MO. R. PROF. C. 4-8.4(d). On the issue of perjury or fraud, the Missouri Rules of Professional Conduct, MO R. PROF. C. 4-3.3(a), state:

a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

...

or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The rule could not be clearer: A lawyer shall not knowingly offer evidence he or she knows to be false. The official comments further amplify the basis for the rule; it stems from the "special duties of lawyers as officers of the

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court to avoid conduct that undermines the integrity of the adjudicative process.”

A grand jury — an adjudicative body that renders a binding legal decision on whether to indict — is entitled to the same duty of candor from prosecutors as a judge or jury at trial. MO. R. PROF. C. 4-1.0(m).

Under federal law, “[w]hoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.” 18 U.S.C. §1622.

While a lawyer’s ethical obligation arises only when he or she “knows” the evidence is false, under the Missouri rules, a lawyer’s knowledge of the falsity of the evidence presented can be inferred from the circumstances, and “the lawyer cannot ignore an obvious falsehood.”

Given McCulloch’s statements in his recent interview, it appears that he understood the evidence was false at the time he submitted it. He did not claim to have later learned of its falsity. To the contrary, he states that he made a deliberate decision to present “anybody and everybody,” including those who “absolutely lied under oath.”

As a matter of attorney ethics, if McCulloch knew the testimony was false

when he offered it, he should not have done so.

An additional disheartening aspect of prosecutors using perjured testimony in grand jury proceedings is that there is little recourse in court. Courts typically have addressed the issue only when the proceeding results in an indictment and

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the defendant, showing actual prejudice, moves to quash the indictment.

While the 9th U.S. Circuit Court of Appeals has declared that “[p]ermitting a defendant to stand trial on an indictment which the government knows is based on perjured testimony cannot comport with [a required] fastidious regard for the honor of the administration of justice,” *U.S. v. Basurto*, 497 F.2d 781, 786-87 (9th Cir. 1974), there is no ready solution where the use of perjured testimony results in no indictment.

McCulloch’s apparent breach of the rules of legal ethics further undermines the public’s faith in the criminal justice system. Perjured testimony in a grand

jury eviscerates trust in the administration of justice. Lawyers, as officers of the court charged with presenting evidence, have the ethical duty to safeguard that the evidence they present is not knowingly tainted.

Whether or not use of perjured testimony in the Wilson case corrupted the grand jury’s deliberations (although it is difficult to imagine that it did not; after all, the premise behind criminalizing perjury is that it undermines the fair administration of justice), if McCulloch knew witnesses were lying, he had an affirmative, independent duty, as a member of the bar and an officer of the court, not to permit them to testify.

Abraham Lincoln said it best: Any lawyer choosing the profession should “resolve to be honest at all events.” Honesty and integrity alone secure the just operation of our system of justice, which lawyers are charged with upholding.

Proffering perjured testimony is anathema to the rules of legal ethics and the rules that govern our system of justice. An attorney — an officer of the court whose highest duty is to justice as well as to his or her client — may not blithely offer false and perjured testimony consistent with his professional ethical obligations. **MLW**

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