

Mark Lindquist and Jared Ausserer have violated various Rules of Professional Conduct when Lindquist appeared on a nationally aired cable television show, the Nancy Grace Show. Ausserer did not appear on the show but assisted Lindquist in his responses and later denied any involvement.

On October 22, 2014, Pierce County Prosecutor Lindquist charged Skylar Nemetz with one count of Murder in the First Degree in the shooting death of his wife, Cause No. 14-1-04212-6.¹ The case proceeded to trial more than a year later in early January 2016. The jury was impaneled and sworn on January 20, 2016.

During trial, the State was represented by DPAs Ausserer and Gregory Greer. After the State rested its case, Skylar Nemetz testified during the defense case. He told the jury he accidentally shot his wife while handling a firearm. Following Nemetz's testimony, but before the defense rested, Prosecutor Lindquist appeared on The Nancy Grace Show². The show was taped and aired on February 17, 2016. A large segment of the show was dedicated to coverage of the Nemetz trial. Lindquist spoke to host Nancy Grace about the case by telephone during the taping of the show. He spoke about the evidence in general and the testimony of the defendant. He participated in a discussion where Nancy Grace and others mocked Nemetz and his testimony. She and her guests clearly communicated their belief that his testimony was not credible. Transcripts of Lindquist's 2014 and 2016 appearances on this program and a DVD of the program are attached as Exhibit 1. A sample of Lindquist's comments follows below:

¹ The Information and The Declaration for Determination of Probable Cause were signed by Deputy Prosecuting Attorney (DPA) Jared Ausserer.

² The Nancy Grace Show, hosted by a former prosecutor, is well known to be heavily biased in its coverage of criminal trials in favor of the prosecution.

LINDQUIST: And that's the whole question. Was this an accident? Was it intentional? And that's why the defendant's experience with firearms is critical to the case. But it's not just that physical evidence, it's the behavior afterwards.

GRACE: Right.

LINDQUIST: The defendant never called 911. He never called for help. He seemed more focused on cleaning up the scene, disposing of the liquor bottles...

GRACE: Oh!

LINDQUIST: ... than getting help. And it's his actions combined with his statements...

GRACE: Behavioral evidence.

LINDQUIST: ... and his experience with firearms that add up to murder, rather than accident.

Following the Nancy Grace show airing, Nemetz's attorney, Mr. Michael Stewart, moved for a mistrial based on Lindquist's misconduct. Exhibit 2. The trial court, Judge Jack Nevin, held that none of the jurors had come forward to say that they had seen the program and he, therefore, denied Nemetz's motion for a mistrial. DPA Greer informed the court that he and Ausserer were not involved in Lindquist's decision to appear on the Nancy Grace show. Exhibit 3, Tacoma News Tribune article dated February 22, 2016. Unbeknownst to DPA Greer at the time, this was not true as to DPA Ausserer. In fact, DPA Ausserer accompanied Lindquist while Lindquist was being interviewed by Nancy Grace. DPA Ausserer, who is familiar with the facts of the Nemetz case, sat with Prosecutor Lindquist and provided information to Lindquist in preparation for the interview.

Lindquist told the News Tribune via email that his appearance on the show was part of his office's efforts to "communicate with the public about what we do and why." Exh. 3. "This

includes discussions of admissible evidence and theories we base charges upon. We are open and accessible to the media because that's one of the ways we communicate with the public. The Rules of Professional Conduct recognize the importance of communication with the public, and lawyers are allowed to be open and accessible so long as their comments do not have a 'substantial likelihood of materially prejudicing' the trial, which, as the judge held, did not happen here." *Id.*

When later questioned by the local newspaper about his appearance on Nancy Grace, Lindquist lied and said he was not familiar with the format of the Nancy Grace show when he agreed to appear. Exhibit 4, Tacoma News tribune Editorial dated February 24, 2016. Lindquist's statement is not true. Lindquist had in fact appeared on the Nancy Grace show to discuss the Nemetz case in October of 2014. *Id.* See also Exhibit 2, transcript of Nancy Grace show October 2014.

Lindquist and Ausserer have violated RPCs 3.6, which provides as follows:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

. . .

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Lindquist's appearance on a national cable program aired in the evening, when jurors are no longer in court. The program was taped and aired during the course of a jury trial. The content of the program included discussing the evidence and mocking the defendant's testimony is a

violation of RPC 3.6. In the passage quoted earlier herein, Lindquist gave what amounts to a closing argument on why the defendant was guilty of murder rather than the killing having been accidental. There is no legitimate purpose for Lindquist to have made such an appearance nor for DPA Ausserer to assist and accompany him.

Comment 5 to RPC 3.6 provides that “there are certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to . . . a criminal matter, or any other proceeding that could result in incarceration.” The comment specifies:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

. . .

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

. . .

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

RPC 3.6 Comment 5. By appearing with Nancy Grace and the other guests, who mocked Nemetz’s testimony, and by speaking about the evidence, including a motive for murder, and by stating that the evidence adds up to murder, Lindquist and Ausserer have violated both the letter and the spirit of RPC 3.6.

Lindquist and Ausserer have also violated RPC 3.8, which provides that a prosecutor in a criminal case shall:

[E]xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor's action **AND that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused** and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

RPC 3.8(f). The comments to RPC 3.8 make it clear that “a prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”

“In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. . . . [A] prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.” RPC 3.8 Comment 5.

The American Bar Association standards provide that “knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.” RPC 3.8, Comment 1. RPC 8.4 provides as follows:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

. . .

(d) engage in conduct that is prejudicial to the administration of justice;

. . .

(k) violate his or her oath as an attorney;

. . . or

(n) engage in conduct demonstrating unfitness to practice law.

Lindquist has a history of violating RPCs 3.6 and 3.8. He issues many press releases and public statements. He relies on the “affidavit of probable cause” as his guide. He has told deputy prosecutors to include prejudicial information in the affidavit of probable cause so he can justify speaking about it publicly. For instance, he has told DPA Penner to include criminal history information in an affidavit so Lindquist can justify speaking publicly about a suspect’s criminal history. (Whistle Blower Report). Exhibit 5, Page 36.

Here, Lindquist’s repeated knowing disregard and systematic abuse constitute misconduct. A lawyer holding public office assumes legal responsibilities that go beyond those of other citizens. Lindquist’s abuse of public office renders him unable to fulfill the professional role of lawyer and renders him unfit to practice law. RPC 8.4 Comment 5.

Lindquist and Ausserer have also violated RPC 3.3. by allowing DPA Greer to unwittingly engage in conduct that misled the court. DPA Greer told the court that he and Ausserer were not involved in the decision to be on the Nancy Grace show. Lindquist and Ausserer let this misrepresentation stand without correcting it. Ausserer was present when DPA Greer made these remarks to the court. Never did Ausserer correct the record with the court and inform the court that he, Ausserer, personally accompanied Lindquist during the taping of the Nancy Grace segment in February 2016 during the course of the trial. The remarks to the court were misleading and should have been corrected by Lindquist and/or Ausserer immediately. To date, the misimpression given to the court has not been corrected by Ausserer or Lindquist. Their failure to do so constitutes a violation of RPC 3.3.

In his Motion for Mistrial, defense attorney Michael Stewart told the Court that DPA Ausserer and DPA Greer did not participate in the Nancy Grace Show interview. One can easily

infer from his comments that Ausserer also misled Mr. Stewart about his own involvement, thereby violating RPC 4.1.

Finally, Lindquist lied to the News Tribune when he falsely claimed he was not familiar with the format of the Nancy Grace show. His intentional false and misleading statement to the newspaper constitutes a violation of RPC 4.1, which provides as follows:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

RPC 4.1. The comments to the rule provide that a “lawyer is required to be truthful when dealing with others on a client's behalf.” RPC 4.1 Comment 1.

CONCLUSION

Nearly one year ago bar complaints were filed against Mark Lindquist and DPA Ausserer. Amongst the allegations against each were complaints that each violated RPC 3.6 and RPC 3.8 by their inappropriate comments in the media, to include social media. One would think the prior complaints would deter future behavior of this sort. On the contrary, the brazenness of the Nancy Grace interview in the middle of a hugely publicized trial proves fair trials and justice in Pierce County are at continued risk as long as these prosecutors are permitted to practice law.


JOHN CAIN