

May 9, 2023

Disciplinary Board of the Supreme Court of Pennsylvania
District IV
437 Grant Street, Suite 1300
Pittsburgh, PA 15219
(412) 565-3173

Re: Complaint Regarding Attorney Stephen Andrew Zappala, Jr. (Attorney ID# 41254)

To the Disciplinary Board:

We write to bring your attention to recent allegations of improper conduct by Stephen Zappala, the District Attorney of Allegheny County, and ask the Board to investigate whether D.A. Zappala violated the Rules of Professional Conduct.¹

The conduct in question goes to the heart of one of the prosecutor's greatest powers: the power to pursue charges. Media reports reflect that on two separate occasions, D.A. Zappala's office based the decision to pursue charges on impermissible grounds.

More specifically, in 2021, news outlets reported that D.A. Zappala retaliated against a defense lawyer who was critical of his office policies by forbidding line prosecutors from offering plea deals to that lawyer's clients. In March 2023, news outlets reported that one day following the Allegheny County Democratic Committee's endorsement of the county's public defender for the position of District Attorney, a supervising attorney in the prosecutor's office met with line prosecutors, "referenced the election," and instructed them "to be cautious in offering plea deals."² Shortly afterward, according to the media report, two prosecutors declined to dismiss weak charges, citing the pending election and endorsement result.

We believe that the conduct described in these news reports is prohibited by the Rules of Professional Conduct and is contrary to the American Bar Association's Criminal Justice Standards for the Prosecution Function.

¹ See "About the District Attorney," Allegheny County District Attorney, at <https://tinyurl.com/97zy363w>. We do not have personal knowledge of the practices of the District Attorney's Office or the events that have been the subject of media reports and base this complaint on the articles and sources cited herein. The Rules of Professional Conduct note that lawyers should "aid in securing their observance by other lawyers." (Preamble, No.12.) Senior Fellow Rudovsky and Professor Lobel join in their personal capacities only and their views are not necessarily those of the Penn Carey School of Law or the University of Pittsburgh School of Law.

² Paula Reed Ward, *Allegheny County public defender, legal experts question ethics of district attorney's office*, TribLive, Mar. 24, 2023, at <https://tinyurl.com/2ud3dswp>.

I. Factual Background

A. News Outlets Report That Zappala Retaliated Against A Black Defense Lawyer Who Called The Prosecutor's Office "Systematically Racist"

In 2021, news outlets reported that D.A. Zappala "sparked outrage in the legal community" by forbidding "all of the deputy prosecutors in his office from offering plea deals to the clients of a prominent Black attorney."³

During a court hearing, Judge Anthony Mariani asked the lawyer, Milton Raiford, "whether Raiford thought the DA's office offered his clients of color worse plea deals based on their race."⁴ In response, Raiford told Judge Mariani that "the DA's office is systematically racist," and that "the criminal justice system is systematically racist."⁵

Five days later, D.A. Zappala "emailed all of his deputy prosecutors forbidding them from offering any plea deals to Raiford or his clients."⁶ Zappala wrote:

On May 13th we experienced another issue of unprofessional conduct in the courtroom of Judge Mariani, this one involving Attorney Milt Raiford. The transcript will evidence what is presently considered a convoluted critical diatribe. You are being advised of what actions will be taken.

Effective immediately, in all matters involving Attorney Milton Raiford, no plea offers are to be made. The cases may proceed on the information as filed, whether by general plea, nonjury or jury trial. Withdrawal of any charges must be approved by the front office. Any discussions with Mr. Raiford shall be memorialized. There will be no exceptions regarding Mr. Raiford unless approved by the front office...⁷

Professor Bruce Green, a former federal prosecutor who is now professor of legal ethics and criminal law at Fordham Law School, commented on the report, stating: "For the most part, you don't hear of prosecutors doing this because they realize it's unfair and unethical."⁸

³ Jerry Lambe, *County DA Allegedly Forbade Offering Plea Deals to Clients of Black Attorney Who Called His Office "Systematically Racist,"* Law & Crime, June 2, 2021, at <https://tinyurl.com/2p8eetk9>.

⁴ *Id.*

⁵ *Id.*

⁶ Paula Reed Ward, *Zappala: No plea deals to Black attorney who called his office "systematically racist,"* TribLive, June 2, 2021, at <https://tinyurl.com/2jc266kj>.

⁷ This is a partial quote from the text of the email as reflected in a document titled "Raiford Response," which appears to be the press release and other materials Zappala released publicly, at <https://tinyurl.com/yc4f7jmp>. We did not see news coverage containing the full text of Zappala's email, but it is quoted in Ward's article, *Zappala: No plea deals to Black attorney who called his office "systematically racist,"* TribLive, June 2, 2021, at <https://tinyurl.com/2jc266kj>.

⁸ Paula Reed Ward, *Zappala: No plea deals to Black attorney who called his office "systematically racist,"* TribLive, June 2, 2021, at <https://tinyurl.com/2jc266kj>.

A group of eleven Allegheny County state representatives and senators sent a letter to Zappala, reprimanding him for this “unethical policy,” and emphasizing his obligations as a “minister of justice” under Rule 3.8 of the Pennsylvania Rules of Professional Conduct.⁹ The letter called on Zappala to apologize to the residents of Allegheny County for “using the position that they entrusted to [him] to pursue vengeance and not justice” and to open his office to review by a special prosecutor.¹⁰ According to the letter, Zappala’s policy “resulted in Judge David R. Cashman halting the administration of plea agreements, calling [the] policy ‘fundamentally wrong.’”¹¹

The president of the Allegheny County Bar Association said that Zappala’s alleged missive “undermines access to justice and interferes with the rights guaranteed to criminal defendants under the Sixth Amendment by effectively negating these particular clients’ right to counsel. Should these instructions from District Attorney Zappala be carried out, this would be unethical and retaliatory to criminal defendants based on ideological differences between the District Attorney and their defense counsel.”¹²

The defense lawyer, Milton Raiford, was subjected to a public reprimand for his own conduct in two cases where he refused to represent his clients. One of the two instances occurred after Zappala’s plea bargain ban against Raiford, and the consent petition signed by Disciplinary Counsel notes that Raiford’s conduct “stemmed from the public revelation a week earlier” that Zappala “instructed his staff not to extend any plea offers to Respondent’s clients without special front office approval, in retaliation for Respondent’s criticism of the District Attorney’s office While this does not justify Respondent’s failure to discharge his responsibilities to his client and the Court, it explains and mitigates his misconduct.”¹³ Though Zappala’s conduct was a mitigating factor in Raiford’s separate ethics matter, the extent of any investigation by the Disciplinary Board into Zappala’s conduct remains unclear.

B. News Outlets Report That a Supervisor in Zappala’s Office Referred to Zappala’s Primary Campaign Against the Chief Public Defender as a Reason for Line Prosecutors “To Be Cautious in Offering Plea Deals”

In March 2023, the day after the Allegheny County Chief Public Defender was endorsed by the Allegheny County Democratic Committee in the upcoming primary election for District Attorney, Deputy District Attorney Melissa Hong-Barco, a supervisor, “spoke to staff . . . and referenced the election and D.A. Zappala losing the endorsement. One employee recounted that

⁹ Paula Reed Ward, *In Letter, State Representatives Demand Zappala Rescind Policy Prohibiting Plea Offers to Black Attorney*, TribLive, June 4, 2021, at <https://tinyurl.com/nwc79t7s>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Allegheny County DA Stephen Zappala Allegedly No Longer Offering Plea Deals to Attorney Who Called Out Systemic Racism in Criminal Justice System*, CBS News Pittsburgh, KDKA News, June 2, 2021, at <https://tinyurl.com/rxfc643p>.

¹³ *Office of Disciplinary Counsel v. Milton E. Raiford* (Attorney Registration 49055), Joint Petition in Support of Discipline On Consent. 39 DB 2022. Signed by Daniel S. White, Disciplinary Counsel, Mar. 10, 2022 and Milton E. Raiford, Mar. 9, 2022.

Hong-Barco told them to be cautious in offering plea deals.”¹⁴ An investigation could reveal more about the substance of that meeting. While a supervisor may properly urge caution, here what followed is troubling. Over the next two days, two prosecutors refused to dismiss criminal charges “because of politics,” according to the TribLive report.¹⁵ Both prosecutors cited the upcoming primary and the Allegheny County Democratic Committee’s endorsement of the chief public defender.¹⁶ In both cases, the accused were represented by public defenders.

On March 7, 2023, Assistant District Attorney Lou Emmi proceeded to trial on a firearms case after the court had suppressed the firearm due to an illegal seizure.¹⁷ According to the defense attorney:

The judge then called the attorneys into chambers to ask why they were having a trial, [the defender] recalled. “The DA said, ‘Well, your honor, it’s the season,’” [the defender] recounted. “Judge Satler looked outside and pointed out the window and said, ‘You mean spring?’” . . . According to [the defender], Emmi responded, “‘*No. It’s election season. And given the endorsement and the race that’s going on, I don’t have discretion to dismiss the case.*’” [The defender] described Satler as being “flummoxed” by the response, and said the judge called Emmi’s explanation “ridiculous.”¹⁸

The media reported that “[t]he prosecutor called no witnesses and presented no evidence. A transcript of the proceedings showed that Emmi attempted to add a transcript from the suppression hearing into the record and nothing else. [The defender] objected, noting that with the gun evidence having been thrown out there was nothing to introduce. Emmi had no response. [Judge] Satler found the defendant not guilty on both the firearm and vehicular counts.”¹⁹

On March 8, another assistant public defender had a similar encounter with Assistant District Attorney Heather Schultz:

[The defender] said he was speaking with Assistant District Attorney Heather Schultz about a client charged with DUI and illegal gun possession. The public defender said he offered for his client to plead guilty to the DUI. [The defender] recalled that Schultz,

¹⁴ Ward, *Allegheny County public defender, legal experts question ethics of district attorney’s office*, TribLive, Mar. 24, 2023, at <https://tinyurl.com/2ud3dswp>. Deputy District Attorney Hong-Barco is named in the article as a supervisor in the office’s Community Impact Unit and on the Allegheny DA website as an administrator of the office’s intern program. Deputy Hong-Barco was also named in reporting about a 2022 dispute when Zappala’s office announced that it was “looking at additional issues” regarding a judge who was alleged to have failed to sign an arrest warrant. It was reported that a Deputy Sheriff, who was later disciplined, sent Hong-Barco some Facebook posts of one of the judge’s friends, and Hong-Barco claimed to be reviewing them. J.T. O’Toole. *Update: Police lobbied DA, courts for probe of progressive magistrate*. PublicSource, July 29, 2022, at <https://tinyurl.com/4wfk8rpy>.

¹⁵ Ward, *Allegheny County public defender, legal experts question ethics of district attorney’s office*, TribLive, Mar. 24, 2023, at <https://tinyurl.com/2ud3dswp>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

who joined the office in 2019, responded, “You know we don’t have a bunch of discretion on gun cases anyway. *Since it’s election season and (Zappala) not getting the endorsement, we have even less.*” The defendant had a nonjury trial before Judge Anthony M. Mariani on the gun charge and was acquitted. [The defender] had argued that a firefighter who responded to the incident first had removed the gun from the vehicle and, as such, police couldn’t prove that the defendant had possession of the weapon. The defendant then separately pleaded guilty to the DUI charge.²⁰

When a reporter asked Zappala to comment on Hong-Barco’s instruction “to be cautious in offering plea deals,” Zappala insisted that he didn’t know “what [Hong-Barco] said or didn’t say” to line prosecutors during the meeting on March 6th and no direction took place.²¹ Zappala questioned the reporter for relying on the word of two defense attorneys, implying that the allegations were false: “These are both (public defenders) telling you these things? That’s interesting,” he said. “Defense attorneys tell the truth all the time? You live on the moon. Everybody has an agenda.”²² Yet, Zappala acknowledged that misconduct may have occurred, telling media that it was a close call whether to terminate ADA Emmi, but that supervisors spoke to him and moved him to a different unit.

II. Prosecutors’ Leverage in Charging and Plea Bargaining Creates a Power Imbalance Ripe for Abuse

Prosecutors have immense power in our legal system.²³ They decide which criminal laws to enforce against which people, whether to plea bargain, and how severe a punishment to seek.²⁴

Professor Paul Butler, a former prosecutor, made a salient point on this issue: “American prosecutors have so much discretion, and there are so many criminal laws, that they can bring a case against virtually whomever they choose.”²⁵ On this point, a 2020 study provided the same hypothetical arrest scenario to 541 prosecutors across the country.²⁶ The prosecutors’ responses were disparate, ranging from felony charges with prison confinement, to misdemeanor charges, and for some, no charges at all.

Ninety-four percent of criminal cases are resolved by plea bargain, indicating that prosecutors determine the defendant’s fate in a great number of cases.²⁷ But a 2020 Vera Institute report notes that the plea bargain process rarely involves transparency or public scrutiny:

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *See, e.g., The Problem*, AccountabilityNY, at <https://accountabilityny.org/the-problem>.

²⁴ Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. Cal. L. Rev. 1123 (2020).

²⁵ Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 Yale L.J. 2176, 2197 (2013) (citations omitted).

²⁶ Baughman & Wright, *supra*.

²⁷ *Id.*

Bargains are usually struck with no witnesses present and made without investigation, testimony, impartial fact-finding, or adherence to the required burden of proof. Moreover, little to no documentation exists of the bargaining process that takes place between initial charge and a person’s formal admission of guilt in open court, and final plea deals that close out cases are themselves rarely written down or otherwise recorded. As such, plea deals, and the process that produces them, are largely unreviewable and subject to little public scrutiny.²⁸

Prosecutors have even more leverage under punitive sentencing regimes that increase sentences based on prior conviction enhancements and mandatory minimums. In that coercive context, the Vera Institute report points out that there is little actual oversight over how prosecutors exercise their plea bargaining power:

Prosecutors’ wide powers in plea bargaining still go largely unchecked, and there are no meaningful oversight mechanisms or procedural safeguards to protect against unfair or coercive practices. . . . Given this lack of regulation, concern has also grown over the extent to which innocent people are regularly being induced to plead guilty, as well as plea bargaining’s role in perpetuating racial and ethnic disparities in criminal case outcomes—for example, plea bargaining practices that send more Black people to prison or jail than similarly situated white people.²⁹

Despite this wide-ranging power, the Rules of Professional Conduct and Standards for the Prosecution Function impose ethical limitations on how prosecutors may exercise this power, as described below.

III. Rules of Professional Conduct

The Pennsylvania Rules of Professional Conduct set forth the governing standards for assessing the conduct of the District Attorney. We discuss the relevant rules below.

A. Rule 3.8: Special Responsibilities of a Prosecutor

Rule 3.8(a) prohibits prosecutors from “prosecuting a charge that the prosecutor knows is not supported by probable cause.”³⁰

In the cases referenced above, ADAs Emmi and Schultz refused to dismiss firearm charges, citing the election and the endorsement of the chief public defender. Both cases resulted in acquittals, but the more salient point is that in neither case was there seemingly sufficient

²⁸ Ram Subramanian, Léon Digard, Melvin Washington II, and Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining*, Vera Institute of Justice (2020) (internal citations committed), pp.3-4, at <https://tinyurl.com/ycy5xyzn>.

²⁹ *Id.*

³⁰ ABA Standard 3-4.3(b) specifically notes, “[a]fter criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.” Criminal Justice Standards for Prosecution Function, American Bar Association, at <https://tinyurl.com/444vdk9a>.

admissible evidence pointing to guilt on the firearms charge. In the case prosecuted by ADA Emmi, there appeared to be no admissible evidence at all, as the firearm had been suppressed and ADA Emmi “called no witnesses and presented no evidence.”³¹ If reports are accurate, the public defenders requested dismissal of the firearm charges in both matters and prosecutors cited only the election and the endorsement (and their general lack of discretion) as the reason not to dismiss the charges.

**B. Rule 5.1: Responsibilities of Partners, Managers and Supervisory Lawyers;
Rule 8.4(a): Misconduct**

Lawyers may be held responsible, under certain circumstances, for misconduct committed by others.

Rule 5.1(a) mandates that lawyers who are partners in a law firm or government agency or who otherwise have managerial authority, such as Zappala, shall make reasonable efforts to ensure that all lawyers conform to the Rules of Professional Conduct. Rule 5.1(b) requires that any supervising lawyer, such as Zappala, make reasonable efforts to ensure the subordinate lawyers conform to the Rules of Professional Conduct.

Rule 5.1(c) provides direct liability for another lawyer’s unethical conduct if: (1) the lawyer orders, or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 8.4(a) prohibits a lawyer from knowingly assisting or inducing another lawyer to violate or attempt to violate the Rules of Professional Conduct, or for one lawyer to violate the Rules through the acts of another.

Here, if Zappala directed subordinates to consider the election or the endorsement of the chief public defender in considering plea negotiations or dismissing charges, that would constitute violations of Rule 5.1(a) and (b). Under Rule 5.1(c), if Zappala ordered or ratified the conduct involved, or, given his direct supervisory authority, if he knew of the conduct without taking reasonable remedial action, Zappala is liable for any misconduct by subordinate prosecutors in his office, including any misconduct by ADAs Hong-Barco, Emmi and/or Schultz. The same holds true for Rule 8.4(a) if Zappala knowingly assisted or induced the subordinate prosecutors to violate the Rules of Professional Conduct.

C. Rule 8.4(d): Misconduct

Lawyers are prohibited by Rule 8.4(d) from engaging “in conduct that is prejudicial to the administration of justice.”

³¹ Ward, *Allegheny County public defender, legal experts question ethics of district attorney’s office*, TribLive, Mar, 24, 2023, at <https://tinyurl.com/2ud3dswp>.

If the media reports are accurate, Zappala violated Rule 8.4(d) by directing his prosecutors to deny plea bargains based on a personal dispute with defense attorney Raiford. Similarly, if Zappala, Hong-Barco, Emmi, or Schultz refused to dismiss cases or engage in plea bargaining to punish clients of an electoral rival of the District Attorney, improve Zappala's election chances, or on other impermissible grounds, that prejudiced the administration of justice and therefore constitutes a violation of this Rule.

IV. Standards for the Prosecution Function

The American Bar Association's Criminal Justice Standards for the Prosecution Function provide special guidance for the professional conduct and performance of prosecutors.³² The Pennsylvania Supreme Court has cited the Standards in many cases, relied upon the Standards in defining the proper role of a prosecutor,³³ and expressly adopted and applied the Standards' definition of proper prosecutorial closing argument.³⁴ Thus, these Standards are at least highly persuasive, if not binding, authority in interpreting the conduct at issue here.

Standard 3-1.6(a) prohibits a prosecutor from using "improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion."³⁵ Similarly, Standard 3-1.7(f) commands, "[t]he prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case."³⁶

Standard 3-4.4(b) specifically addresses the charging power, directing that "[i]n exercising discretion to file and maintain charges, the prosecutor should not consider: (i) partisan or other improper political or personal considerations; (ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor; or (iii) the impermissible criteria described in Standard 1.6 above."³⁷

To the extent that Zappala considered his political goals, here, the primary election, or acted in a manner calculated to retaliate against clients of his electoral opponent, the chief public defender, that would violate the ABA Standards.

³² Criminal Justice Standards for Prosecution Function, American Bar Association, at <https://tinyurl.com/444vdk9a>.

³³ See, e.g., *Off. of Disciplinary Couns. v. Fina*, 657 Pa. 317, 320 (2020); *Commonwealth v. Clancy*, 648 Pa. 179, 209 (2018).

³⁴ *Commonwealth v. Starks*, 479 Pa. 51, 56 (1978).

³⁵ Criminal Justice Standards for Prosecution Function, American Bar Association, at <https://tinyurl.com/444vdk9a>.

³⁶ *Id.*

³⁷ *Id.*

V. Conclusion

There is substantial evidence from the media reports to suggest that Zappala's handling of his charging and plea bargaining responsibilities violated the Rules of Professional Conduct and the Standards for the Prosecution Function. We ask the Disciplinary Board to conduct a full investigation of these matters.

Thank you for your consideration.

/s/

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/s/

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