

Professor Daniel S. Medwed leads out with prosecutorial ethics in 21st century

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—Professor Daniel S. Medwed

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What makes the American prosecutor different from its international counterpart?

This is the question Professor Daniel S. Medwed, a professor at Northeastern University School of Law, asked at the Thursday morning Ethics session of the Utah State Bar Fall Forum.

Apart from the fact that the American prosecutor does not wear a wig or a fancy gown, "the first major difference is that, in most countries, the prosecutors are civil servants," Medwed said. "They are in charge of presenting the case in a neutral manner."

In comparison, "American prosecutors are elected," Medwed said. "And since the 1850s, they are referred to as ministers of justice, zealous advocates who are supposed to be equally concerned with fairness to all people while protecting the community. How do they balance the roles?"

To show the dangers of an overzealous, misguided prosecutor, Medwed shared the example of the Boorn brothers, or what Medwed referred to as Boorn Identity One, a case that was the talk of Vermont in 1812.

"These two brothers had a horrible brother-in-law known for abusing their sister. One day the brother-in-law disappears and after an investigation bones were found on the family farm." According to Medwed, the brothers were charged with their brother-in-law's murder. "But then the brother-in-law returned to the farm. He was gone eight years. He was not dead, he was not even killed. He was off having fun in Burlington, who knows," Medwed laughed.

This case, according to Medwed, showed how easily people can be unfairly convicted. "But in 1989, we had a game changer with the arrival of DNA. It can free the good guy and catch the bad guy.

It's a tool, a precision instrument. But it is seldom available. The average case does not lend itself to DNA evidence. Only sex offenses and the occasional murder," he said.

According to Medwed, since 1989, 347 exonerations were documented. "We have studied those cases," he said, "because we want to see what went wrong. We need to change the mousetrap. We need to change the system to



Professor Daniel S. Medwed, Northeastern University speaking to Utah State Bar members at the Breakfast Session of the 2016 Fall Forum

make it better."

Of the 347 cases, Medwed said that prosecutors played a role in almost every case. "They rely on jailhouse informants. They rely on faulty evidence. They rely on faulty eyewitness identification," he said.

To improve the system, he asked the audience to consider three changes. "If prosecutors are really going to be ministers of justice, let's help them get there," he said.

Evidence should be disclosed before plea bargaining

"When it comes to plea bargaining, prosecutors hold all the cards," Medwed said. Comparing a prosecutor to a Conflict of Laws professor before a final exam, he said "they decide what to offer, under what conditions, with very little supervision."

Medwed shared the example of Chris

Ochoa and Richard Danziger who were charged with raping and killing a Pizza Hut employee in 1988. In order to save themselves from the threat of the death penalty, Ochoa confessed and implicated his friend, even though he and his friend were innocent.

"The risks were too high!" Medwed said. "Would you take that chance? Would you take the chance and roll that die?"

The current Rule of Professional Conduct, Rule 3.8, requires a timely disclosure of favorable material evidence to the defense. "But it's a trial right," Medwed said. "And 'favorable' and 'material' are narrowly defined. Defendants are allowed and encouraged, in my view, to plea blind," Medwed said. "We can change the rule!" he said. "We can expand it to define timely as prior to a plea bargain."

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Restrict forensic evidence to credited science

Medwed also asked the audience to consider restricting discredited science such as hair microscopy and bite mark comparisons. He shared the example of Kennedy Brewer who was convicted of murdering a three-year-old based upon bite marks found on the toddler's body.

"The prosecution's expert was discredited in his own community and the defense put forward their own expert that said the bite

marks were actually bug bites," Medwed said. Contrary evidence was not enough, and Brewer was convicted. Medwed suggested Utah consider crafting a new Rule of Professional Conduct which would make it an ethical violation to intentionally or knowingly present faulty or unreliable evidence.

"A vast majority of county prosecutors want to do the right thing," Medwed said. "But they are pressured to get the conviction. We need rules that allow prosecutors to be their best selves."

Support a Post-Conviction Role

Referring back to Brewer's case, Medwed said that Brewer sat in prison for 15 years even though Mississippi prosecutor's had DNA evidence that proved Brewer did not sexually assault and kill the toddler.

"Prosecutors fought tooth and nail to keep him in jail until a new prosecutor came in and more suspects were tested," Medwed said. The real murderer confessed quickly after he was confronted. "What happened to the role of minister of justice?" Medwed asked. "Why were more people not tested sooner? Pros-

ecutors are not bad people. But they are blinded to the possibility that they are wrong, and they defer to their colleagues."

In 2008, the American Bar Association issued two model rules which Medwed believes can help. "They say when a prosecutor learns of new, credible, and material evidence, they shall promptly disclose it and seek to remedy the conviction. Only three states have adopted these rules verbatim and 13 have adopted a modified version. But not Utah. Why are we not doing that here? I think that Utah can and should be a clear leader in this area."