

NIFONG Texas Style

By Renée E. Moeller and Robert “Bob” S. Bennett, The Bennett Law Firm, P.C.

As Kathleen Parker, columnist for The Washington Post Writers Group has pointedly suggested, we now can add a “new verb to our American lexicon – adding ‘to Nifong’ to those moments which “call for activities that do not require elaboration, such as “Bobbitt,” “Bork,” and “Lewinsky.” We can “now ‘Nifong’ someone when we want to trump up criminal charges based on flimsy evidence allegedly for political purposes.” How does this assessment of Nifong’s actions hold up under analysis of the Texas Disciplinary Rules of Professional Conduct (TDRPC)? Quite well in fact!

Former North Carolina District Attorney, Michael B. Nifong now faces an ethics nightmare over his actions during the prosecution of a sexual assault case. If Nifong was in Texas, he would be facing many of the same or similar charges of ethical violations as have come to haunt him in North Carolina.

Nifong’s first mistake was his inflammatory statements to the press. The North Carolina State Bar indicated that it had opened a case against Mr. Nifong a little more than two weeks after the underlying sexual assault occurred. The Bar cited 40 quotations and eight paraphrased statements made to newspaper and television reporter, saying many of them amount to “improper commentary about the character, credibility and reputation of the accused” or their alleged unwillingness to cooperate. Additionally, Nifong stated he was “convinced there was a rape, yes, sir.”

If Nifong was in Texas, the Bar would specifically cite Texas Disciplinary Rule of Professional Conduct (TDRPC) 3.07 regarding trial publicity:

- (a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding.

This rule is violated under TDRPC 3.07(b)(1) by making a statement that refers to the character, credibility, or reputation of a party and under TDRPC 3.07(b)(4), by expressing an opinion as to the guilt or innocence of a defendant or suspect in a criminal case. Very closely tied to charge violations of TDRPC 3.07, Nifong could easily be charged with violation of TDRPC 3.09, which states that “[a] prosecutor in a criminal case shall exercise reasonable care to prevent persons employed or controlled by the prosecution in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.”

Fighting a case in the media as opposed to the courtroom has long been a practice in both the civil and criminal arenas. It is one that ethically speaking, is extremely dangerous because it is easy to step over the line.

In Texas, Nifong would face charges under TDRPC 3.03(a)(1) “making false statement of material fact or law to a tribunal” concerning his written filings and oral statements that he and his office had produced all exculpatory materials to the defense.

The concealing of such evidence, is also a violation of TDRPC 3.04(a) in unlawfully obstruct[ing] another party’s access to evidence.

According to the testimony of Nifong’s DNA expert, Brian Meehan, Nifong and Meehan agreed to exclude certain test results from other results turned over to defense attorneys. In Texas this would be a violation of TDRPC 3.04(e) in request[ing] a person other than a client to refrain from voluntarily giving relevant information to another

party; and could be judged as a violation of 3.04(b) in assist[ing] a witness to testify falsely.

These allegations have caused conflicts, and Nifong, in a delayed reaction sometime after his recusal as prosecutor was called for, eventually requested that he be permitted to step down and that the Office of the Attorney General take up the prosecution. Along with his other actions, the delay in recusing himself, would leave Nifong open in Texas to charge violations of TDRPC 1.06 and 3.08. Rule 1.06 states that “a lawyers shall not represent a person if the representation of that person reasonably appears to be or become adversely limited the lawyers or law firms own interest. The Comments to the rules help to shed additional light on the subject, and Comment 4 to Rule 1.06 clarifies that a conflict of interest exists “in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyers own interests or responsibilities to others.” Nifong and his office clearing showed that they are not and were not disinterested prosecutors.

It is clear from the above analysis that if Nifong had been a prosecutor in Texas, his ethical problems would be the same. This conclusion should be a warning to Texas prosecutors that “Nifonging” can have serious consequences.