

**Plea for Justice Program**

<http://www.plea4justice.org>

**Golden Badge**

<http://goldenbadge.tumblr.com/>

**Tennessee State Community Council - Sevier County Division**

<http://50states.ning.com/profile/TennStateCommunityCouncil>

---

*c/o* **National Judicial Conduct and Disability Law Project, Inc.**  
7519 W. 77<sup>th</sup> Avenue ▪ Crown Point, Indiana 46307  
(o) 219.865.6774 Ext. 1 (tf) 888.478.4439 Ext. 1 (f) 219.865.6355

*Via Email & U.S. Priority Mail*

February 10, 2014

Dennis A. Rendleman, Ethics Counsel  
Center for Professional Responsibility,  
American Bar Association  
321 North Clark Street – 17th Floor  
Chicago, Illinois 60654

**RE:** Proposed Expansion of Criminal Prosecutors' Specific Responsibilities With Regard  
To Whistleblowers Per Model Rules of Professional Conduct

Dear Mr. Rendleman:

The grassroots good government advocates known as the Plea for Justice Program (P4J), Golden Badge, and Tennessee State Community Council – Sevier County, Division (TennSCC-SCD) coalesced to tender the enclosed disciplinary complaint to the Board of Professional Responsibility of the Supreme Court of Tennessee. We share our complaint with the American Bar Association (ABA) because, in our view, it underscores an undue tension between America's criminal justice system and the country's efforts to encourage good faith disclosures of serious public and/or private sector misconduct, as well as provide reasonable whistleblower/political participation/witness protection. Our corresponding request is that the ABA formally consider proposing a model rule of professional conduct by which the specific responsibilities of prosecutors include an obligation to reasonably determine when an arguable need to deter alleged criminal activity through conviction and corresponding punishment is outweighed by a patent state and/or federal government interest in encouraging good faith attempts to disclose serious public and/or private sector misconduct, as well as in reasonable whistleblower/political participation/witness protection.

Dennis A. Rendleman, Ethics Counsel

**RE:** Proposed Expansion of Criminal Prosecutors' Specific Responsibilities With Regard To Whistleblowers Per Model Rules of Professional Conduct  
February 10, 2014 - Page Two

*Our Coalition Seeks To Address The Potent Synergy Of  
Certain Disciplinary Rule Loopholes, Wrongful Convictions, And The Elusiveness Of  
Retaliatory Criminal Prosecutions*

---

The late Professor Fred C. Zacharias and Professor Bruce A. Green explain that . . .

. . . most ethics codes address prosecutors' screening function solely through provisions forbidding prosecution on less than probable cause. These provisions fail to implement the intuition (accepted by many prosecutors) that it is unreasonable for a prosecutor to pursue a case when he has significant doubts about the defendant's guilt, even though a conviction might be obtained. Likewise, the codes seem to allow prosecutors to offer questionable evidence unless they 'know' it to be false, even though exploiting unreliable evidence may lead to an unjust conviction.

Zacharias, Fred C. and Green, Bruce A., "The Duty To Avoid Wrongful Convictions: A Thought Experiment In The Regulation Of Prosecutors", 89 *B.U.L. Rev.* 1 at 22 (2009). (internal footnotes omitted).

Shortly before professors Zacharias and Green noted the foregoing and other connections between disciplinary rule loopholes and wrongful convictions in America, attorney Joseph M. Kelleher, while a law student, observed the following:

By holding that a speaker cannot recover for the infliction of a retaliatory prosecution if the prosecutor can point to evidence sufficient to establish probable cause, the Hartman Court essentially signaled a shift in constitutional values. In fact, the current Court, by failing to provide deterrents to zealous law enforcement officials in this area, has failed to protect against the 'chilling effect' that is historically anathema to speech. Although facilitating law enforcement efforts to hold criminals responsible for unlawful conduct is a necessary and admirable endeavor, this Note respectfully suggests that this is not necessarily the ultimate value to which our society subscribes. Indeed, as an amendment to constitutionally delegated executive power, the people's right to freely criticize their own government without the fear of reprisal stands out as a value more seminal to American identity than ensuring that every possible prosecution that could be brought, is in fact brought.

Dennis A. Rendleman, Ethics Counsel

**RE:** Proposed Expansion of Criminal Prosecutors' Specific Responsibilities With Regard To Whistleblowers Per Model Rules of Professional Conduct  
February 10, 2014 - Page Three

Kelleher, Joseph M. - NOTE: Retaliatory Prosecution Claims Under *Hartman v. Moore*: Law Enforcement's End-Run Around The First Amendment, 18 *Temp. Pol. & Civ. Rts. L. Rev.* 315 at 349-350 (2008). (internal footnotes omitted).

The chilling effect that Kelleher references coincides with an aspect of "criminalizing whistleblowers" that P4J, Golden Badge, and TennSCC-SCD seek to challenge through a national public awareness campaign and the outreach at hand to professional advocates as well as scholars.

Former Sevier County and Hamblen County, Tennessee Deputy Sheriff Mark P. Lipton, featured in the enclosed disciplinary complaint, focused our coalition leaders on prosecutors' "screening function" and how related concerns correspond with a niche in the spectrum of potential whistleblower retaliation. P4J, Golden Badge, and TennSCC-SCD have gone forth accordingly to spotlight criminal prosecutions of whistleblowers in which ostensibly, their "truth telling" is not the targeted activity. We categorize related problem areas as (1). criminal prosecutions purportedly unrelated to First Amendment activities that are retaliatory as a matter of fact if not law; (2). prosecutions of "noble crimes",<sup>1</sup> *i.e.* garden variety crimes – such as property conversion – that facilitate disclosures of serious public and/or private sector misconduct; and (3). heightened scrutiny pursuant to which whistleblowers are criminally prosecuted when others similarly situated would not be and/or are punished relatively harshly.<sup>2</sup>

Obviously with regard to Mark P. Lipton, our coalition contends that Attorney General James Dunn, Assistant District Attorney George Ioannides, and Assistant District Attorney Ashley McDermott were obliged and failed to reasonably determine when an arguable need to deter alleged criminal activity through conviction and corresponding punishment is outweighed by a patent state and/or federal government interest in encouraging good faith attempts to disclose serious public and/or private sector misconduct, as well as in reasonable whistleblower/political participation/witness protection. Our coalition also contends that Mr. Lipton's prosecution is a particularly egregious example of what can go unchecked should probable cause determinations, open-file policies, and liberal credibility contests combine to shield prosecutors from professional discipline for arguably specious

---

<sup>1</sup> Attorney Michael McCray supplied our coalition with this phrase. Attorney McCray is General Counsel for Federally Employed Women – Legal Education Fund, and chief organizer for the annual Whistleblower Summit for Civil and Human Rights in Washington, D.C.

<sup>2</sup> Unless selective prosecution among whistleblowers becomes a problem, this third category anticipates prosecutions that are ostensibly unrelated to whistleblowing.

Dennis A. Rendleman, Ethics Counsel

**RE:** Proposed Expansion of Criminal Prosecutors' Specific Responsibilities With Regard To Whistleblowers Per Model Rules of Professional Conduct  
February 10, 2014 - Page Four

prosecutions of whistleblowers. To thwart that prospect throughout America, we earnestly request your office to undertake the model rule promulgation herein proposed.

Copied on this correspondence are professional advocates with a direct interest in this matter and scholars as well as practitioners who have written most directly on related subjects that/who our coalition has identified so far. Hopefully the ABA's Center for Professional Responsibility will create a formal opportunity to receive, exchange, and address our collective input. Arrangements are being made for related panel discussions at the 2014 Whistleblower Summit for Civil and Human Rights in Washington, D.C.

Please feel free to contact me with any questions or comments. I can be reached as follows: (o) 219.865.6774 Ext. 1; (tf) 888.478.4439 Ext. 1; (f) 219.865.6355; (e) [crenshaw-logical@njcdlp.org](mailto:crenshaw-logical@njcdlp.org)

Your consideration is greatly appreciated.

Sincerely,

**Plea for Justice Program; Golden Badge; and  
Tennessee State Community Council - Sevier County Division**

by: *Zena Crenshaw-Logal*

---

Attorney Zena Crenshaw-Logal, Project Spokesperson\*

*\*Bar admissions limited to 7<sup>th</sup> Cir. C.O.A.*

ZDCL/abm

**Enclosures:** Memorandum Of Complaint with Exhibits A-P, *Plea for Justice, et al. v. James Dunn, et al.* before the Board of Professional Responsibility of the Supreme Court of Tennessee

*Via U.S. Mail* – cc(w/encl):

- National District Attorneys Association
- Association of Prosecuting Attorneys
- National Black Prosecutors Association
- National Hispanic Prosecutors Association
- Tennessee District Attorneys General Conference

Dennis A. Rendleman, Ethics Counsel

**RE:** Proposed Expansion of Criminal Prosecutors' Specific Responsibilities With Regard To Whistleblowers Per Model Rules of Professional Conduct  
February 10, 2014 - Page Five

- National Criminal Justice Association
- Government Accountability Project
- National Whistleblower Center
- Center for Prosecutor Integrity
- Professor Bruce Green - Fordham University School of Law
- Professor Margaret Z. Johns - U.C. Davis School of Law
- Edward M. Genson, Esq.
- Professor Angela J. Davis - American University Washington College of Law
- Professor Bennett L. Gershman - Pace University School of Law
- Professor Stanley Z. Fisher - Boston University School of Law
- Professor Wayne R. LaFave - University of Illinois College of Law
- Professor Shelby A.D. Moore - South Texas College of Law
- Joseph M. Kelleher, Esq.
- Professor Bruce L. Hay - Harvard Law School
- Professor Paul Butler - Georgetown Law
- Douglas J. McNamara, Esq.
- Kenneth Rosenthal, Esq.
- Associate Dean and Professor Melanie D. Wilson - Univ. of Kansas School of Law
- Sarah Hughes, Esq.
- Professor George F. Cole - Univ. of Connecticut, Political Science Dept.

