



## GSU law prof asks Georgia bar to investigate prosecutor over withheld evidence

5:21 pm, December 11th, 2013

A Georgia State University professor has asked the State Bar of Georgia to open an investigation into whether an assistant Fulton County district attorney should be disciplined after he withheld exculpatory evidence from defense lawyers during a sexual molestation case and it resulted in a new trial being ordered earlier this month.

Clark Cunningham, a professor of legal ethics at the GSU College of Law, wrote that ADA Demone Lee's conduct during the trial, which led to a conviction for defendant Jon Thieme, was comparable to cases of prosecutorial misconduct that have led to disbarment in some cases.

As reported in the Daily Report last week, Thieme was sentenced to 25 years in prison after his conviction in March on one of two counts of child molestation. After the trial, defense attorneys Barry Hazen and Michael Jacobs overheard a juror ask Lee why he had not questioned Thieme or the victim's mother about assertions that he had been anally sodomized, the basis for one of the counts.

Lee responded that he "didn't push the anal sodomy [count] because the kid said it didn't happen," the lawyers said.

The defense lawyer subsequently filed a motion for a new trial, arguing that Georgia law and legal ethics require that evidence indicating that the key witness had lied was essential, exculpatory information that should have been disclosed to the defense.

Lee admitted to withholding the information, and on Dec. 3 – the day the state's response to the motion for new trial was due – the office of District Attorney Paul Howard signed a consent order agreeing to a new trial.

When the Daily Report asked the bar about the matter, General Counsel Paula Frederick pointed to Bar Rule 3.8, "Special Responsibilities of a Prosecutor," as being potentially relevant to Lee's handling of the case. Section d says that a prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense." The maximum penalty for violating Rule 3.8 is a public reprimand.

On Tuesday, Cunningham wrote to Fredrick; Julayaun Waters, chair of the bar's Disciplinary Board investigative panel; Anthony Askew, chair of the board's Review Panel; and former bar President Robin Frazier Clark, asking whether the board should initiate a grievance against Lee, and whether the bar should petition the Georgia Supreme Court to suspend Lee pending any disciplinary proceedings.

"I am not filing a grievance against Demone Lee," wrote Clark. "I do not know him and have no relationship with any of the attorneys or parties involved in the Thieme case. I write this letter in the spirit of the Georgia Rule of Professional Conduct (GRPC) 8.: "A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority."

Cunningham wrote that the DA's signing of the consent order "avoided judicial inquiry into his conduct as well as any inquiry into the conduct of any other attorney in the Fulton County District Attorney's office."

"As to whether Demone Lee poses a substantial threat of future harm to the public, also to be considered is whether he continues to exercise the wide discretion and powers of a prosecutor and whether there are institutional protections and deterrents in place to prevent a recurrence of the conduct described by the consent order."

Cunningham said he had emailed a copy of the letter to Howard's office, but the DA did not immediately respond to a request for comment.

Defense attorney Lawrence Zimmerman, who wrote Thieme's motion for new trial and the consent order, said he and Thieme's co-counsel had seen the letter.

"My only comment at this point is that any intentional act of hiding evidence is a very serious violation and clearly, someone, in this case, Mr. Thieme, suffered and still suffers (he is incarcerated) at the hands of another lawyer who may only care about a conviction," said Zimmerman in an email.

"Whether or not Mr. Lee is disciplined does not make a difference to me, but I hope that the rules change to encourage prosecutors, those outliers, who may not play by the rules and may look the other way. If these allegations were instead made against a criminal defense attorney, trust me, the prosecutors would have already held a rally to indict, or disbar said attorney. As Prof. Cunningham stated in his letter, prosecutors are basically held harmless when these things occur."

Hazen offered a one-word observation: "Wow!"



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