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AUG. 4 2017 9:07 AM

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# When Prosecutors Bully

Defense lawyers who get threatened by opposing counsel rarely have a recourse. Here's how that could change.

*By Jessica Brand*



Nicolas "Nico" LaHood, district attorney of Bexar County, Texas.

Nico LaHood

**A** prosecutor has enormous power over a criminal defendant's fate, and a defense attorney is often the only person standing in his or her way. A diligent defense attorney will speak out when a prosecutor withholds critical information, relies

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in fault for missing evidence, or engages in other egregious behaviors. Some prosecutors enjoy going toe to toe with opposing counsel, or at least recognize that our system of justice requires such skirmishes. Others seek revenge.

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In February, San Antonio District Attorney Nico LaHood allegedly did just that. **LaHood was prosecuting Miguel Martinez, who stood accused** of shooting a graduate student named Laura Carter in the head during a drug deal gone bad. Martinez's trial derailed soon after it began. On the second day, the government disclosed that its star witness, who was also a possible suspect in the killing, had once had a sexual encounter with a prosecutor in the DA's office.

The defense argued that the relationship gave the witness a motive to help the government and gave the government a reason not to investigate or charge the witness. The defense accused prosecutors of violating their constitutional duty by failing to disclose that information before trial. The defense lawyers asked for a mistrial and indicated they may ask the judge to bar further prosecution.

According to defense pleadings, LaHood threatened to shut down the opposing counsels' practice during a meeting in the judge's chambers. He allegedly said he would "go to the media and do whatever it took" and that he did "not care what happened to him." Their client would also be at risk, LaHood allegedly said, because he would be "better prepared for trial the next time" and he would "pick a better jury." The defense lawyers, Christian Henricksen and Joe Gonzalez, asked for a mistrial. Trial Judge Lori Valenzuela granted their motion.

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In March, the defense moved to bar future prosecution. At a hearing the following month, LaHood denied under oath that he'd threatened the lawyers' livelihoods. He claimed the defense's allegations were false and accused the defense attorneys of acting in bad faith when they alleged prosecutorial misconduct.

Valenzuela, who had observed the incident, then took the stand. (Valenzuela did not preside over this April hearing, as she was a witness to the events at issue.) She described how, without provocation, LaHood had threatened to make sure the defense lawyers never got appointed on another case, becoming so enraged that she feared "somebody would get hurt physically." She explained that LaHood may have committed misdemeanor official oppression, a crime that occurs when an **official uses his power to "mistreat" others or impede them in the exercise of their rights.**

LaHood, who won elected office **with the help of endorsements** from future NBA Hall of Famers Tim Duncan and Tony Parker, came into the DA's office promising meaningful reforms, including **improved mental health treatment and better resources for juveniles.** But since his victory in the 2014 election, the Democrat has become an **outspoken supporter** of the anti-vaccination movement, **has warned** that citizens must protect the Constitution against Sharia law, and said that the Black Lives Matter movement **should be dubbed** "Black Lives Matter only when law enforcement is involved." Recently, **he barred a newspaper** from a press briefing after it provided unfavorable coverage. (LaHood's office did not respond to requests for comment for this article.)

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The threats LaHood made during the Martinez case aren't just an indicator that he has the wrong kind of temperament to be a district attorney. They also reveal that there's reason to question the integrity of the justice system in San Antonio.

For the criminal justice system to work, defense attorneys must be allowed to provide zealous, unfettered representation. That often requires them to do things that upset prosecutors. They must interview victims, searching for inconsistencies in their accounts to use during cross-examination at trial. Sometimes, they must stand up and

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call a state's witness a liar. And if a prosecutor fails to turn over exculpatory evidence, they must allege a constitutional violation and ask for sanctions, up to and including a mistrial or outright dismissal.

## **When defense lawyers worry prosecutors may retaliate, they're no longer acting with their clients' best interests in mind.**

When prosecutors threaten defense lawyers for doing their jobs, they chill that representation. Henricksen, one of the defense attorneys LaHood threatened, believed his career in San Antonio was over. Gonzalez, Martinez's other defense attorney, believed LaHood's "position of power" meant the DA was capable of following through on his threats. Mark Stevens, who later joined Martinez's defense team, told me recently that he worries about the effect of LaHood's threats on other defense lawyers. "Our elected district attorney, based on no wrongdoing on the part of two well-

respected lawyers, flies into a rage and threatens them in the presence of a district judge," Stevens said. "If he has so little self-control that he does that to two good lawyers in the presence of the judge, what else is he capable of doing to other lawyers who are less well-respected when a judge is not around?"

If a prosecutor believes a defense lawyer is engaging in misconduct, he or she has every right to present that argument to a judge and request a sanction. But when a prosecutor threatens a defense lawyer for doing his job, as LaHood allegedly did, he jeopardizes the defendant's ability to receive strong advocacy in that case and hurts those defendants that come later. Whether it's conscious or not, bullying makes defense lawyers less willing to engage in the type of behavior that helps their clients but upsets the government. They may hesitate to spend weeks searching for a government witness. They may decide not to file aggressive motions requesting more discovery, instead taking the government at its word that it has fulfilled its obligations. They may also be more likely to chalk up the government's withholding of exculpatory evidence to an honest mistake that doesn't

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require discussions rather than ask for judicial intervention. This is precisely what Henricksen believed LaHood wanted. “He was pushing [the defense]” to just “drop it,” he testified during the April hearing.

When defense lawyers worry that prosecutors may retaliate, they are no longer acting with their clients’ best interests in mind. That’s bad for both criminal defendants and criminal justice.

Unfortunately, reckless behavior by prosecutors **is rarely checked**. Lawyers are reluctant to file bar complaints, afraid that prosecutors will withhold favorable plea deals or provide bare-minimum discovery in cases down the line. When they do file complaints, **most of them go nowhere fast**. Likewise, courts **seldom chastise** prosecutors for unethical behavior. Until that changes, there is little incentive for prosecutors to change their ways.

But it’s possible that change could be coming in San Antonio. The judge tasked with deciding whether to bar future prosecution of Martinez found that LaHood had indeed threatened his defense lawyers, crediting the testimony of the attorneys and Valenzuela over LaHood’s ardent denials. While the judge declined to preclude a second trial, he described LaHood’s behavior as “unprofessional” and “uncalled for,” noting that the district attorney could be “subject to sanctions in another tribunal.”

Stevens also recently filed a complaint against LaHood with the state bar. (**The contents of the complaint are confidential.**) Henricksen said he may also file a complaint. “I have worked on it, but I haven’t pulled the trigger yet, because it’s been a difficult thing to do,” he told me, adding, “I don’t fully know what the consequences will be.”

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