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PROSECUTORIAL ETHICS: THE CASE FOR THE PER SE RULE

I. Introduction

The integrity of the legal system is essential to public confidence in government.[1] Without public confidence, the rule of law loses its meaning.[2] The prosecutor is often the most visible participant in the criminal justice system, and thus, even the appearance of impropriety in the prosecutor's behavior erodes the public trust.[3] He has a duty to seek justice and truth, not only to convict.[4] This duty creates a dual role for the prosecutor: he is both an advocate seeking to obtain convictions and a minister of justice attempting to discover the truth.[5] The public expects him to fulfill these functions to the best of his ability and to act fairly in executing all of his responsibilities.

There are, however, instances where the prosecutor's conduct prevents a fair trial. This Note will discuss the ethical problems faced by the prosecutor who litigates both civil and criminal cases arising out of the same dispute or set of facts. These ethical issues arise in two situations: where the prosecutor's prior private practice conflicts with his current position or where the prosecutor simultaneously maintains a private practice that conflicts with his position as prosecutor.[6] In either situation, the prosecutor confronts ethical considerations bear-

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-1 (1980) [hereinafter MODEL CODE]. " 'Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity.' " MODEL CODE EC 9-1 n.1 (quoting Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 499, 141 A. 866, 868 (1928)).

2. "Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude." MODEL CODE, *supra* note 1, EC 1-5.

3. United States v. Prantil, 764 F.2d 548, 553 (9th Cir. 1985); United States v. Johnston, 690 F.2d 638, 643 (7th Cir. 1982) (en banc). *See also* Carey, *The Role of the Prosecutor in a Free Society*, 12 CRIM. L. BULL. 317, 319 (1976) [hereinafter Carey]; Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U.L. REV. 98 (1975) [hereinafter Felkenes].

4. D. NISSMAN, THE PROSECUTION FUNCTION 7 (1982) [hereinafter PROSECUTION FUNCTION]; Berger v. United States, 295 U.S. 78, 88 (1935).

5. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 198 (1988) [hereinafter *Virtuous Prosecutor*].

6. Not all state prosecutors work as full time prosecutors. In New York, for example, if a county has fewer than forty thousand inhabitants, the prosecutor does not have to work full-time; he can maintain a private practice. N.Y. COUNTY LAW § 700(8) (McKinney 1989). *See also* STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION at 58-60 (ABA Project on Standards for Criminal Justice, Approved Draft 1971) [hereinafter PROSECUTION STANDARDS].

ing directly on his impartial role as minister of justice.[7] Part II of this Note discusses the obligations of the prosecutor and the professional standards that govern his conduct. Part III examines some of the factors that can generate prosecutorial misconduct, and Part IV presents the case law governing such ethical dilemmas. Part V considers the shortcomings in the present case law and argues that the existing law inadequately deters unethical behavior. In order to deter unethical behavior, Part VI recommends the adoption of a "per se" rule, which would prohibit a prosecutor's involvement in criminal cases that overlap with cases from their private practices.

II. Obligations of the Prosecutor

A. Professional Standards

The American Bar Association (ABA) has issued two sets of rules governing the professional conduct of lawyers. The first was the 1969 Model Code of Professional Responsibility (the Model Code),[8] articulating the norms within which a lawyer was supposed to function. Within a few years, courts of a large majority of jurisdictions adopted the Model Code.[9] There have been subsequent amendments dealing largely with advertising and prepaid legal services.[10]

The Model Code, however, was not especially helpful when a lawyer faced a particular situation because it offered no guidance on how the norms should be applied. Furthermore, as the practice of law became increasingly complex, several deficiencies in the Model Code became apparent.[11] First, it did not take into account the roles, such as advisor or mediator, that a lawyer may play in contexts other than litigation.[12] Second, it did not recognize the development of both law firms and clients into complex organizations and thus failed to deal

7. *See infra* notes 71-105 and accompanying text.

8. MODEL CODE, *supra* note 1, Preliminary Statement, at 1. There are three separate but interrelated parts in the Model Code: the Canons, the Ethical Considerations (EC) and the Disciplinary Rules (DR). Each section has its own purpose. The canons express, in general terms, the standards of conduct expected of lawyers in their dealings with the public. The ethical considerations represent objectives towards which members of the legal community should aspire. The disciplinary rules are mandatory. They state the minimum level of conduct required of a lawyer; below that level, a lawyer can be subject to disciplinary action. *Id.*

9. G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT xxxiv (1985 & Supp. 1989) [hereinafter HAZARD].

10. *Id.*

11. *Id.* at xxxv.

12. *Id.*

adequately with the complex issues involved in conflicts.[13] The structure of the Model Code also presented problems because, although only its Disciplinary Rules were supposed to be binding, in practice, lawyers were often only held to the standards expressed in the Canons and Ethical Considerations.[14]

In 1977, the ABA appointed the Special Commission on Evaluation of Professional Standards (the Kutak Commission) to examine the Model Code's problems and to determine whether it should be modified or replaced.[15] The Kutak Commission recommended a complete revision of the Model Code, putting it into a restatement format with black letter rules and comments following.[16] After much debate and redrafting, in August 1983, the ABA formally adopted the Model Rules of Professional Conduct (Model Rules).[17]

The Model Rules are organized around two main categories: rules governing the conduct of a law practice and those governing ancillary legal elements of lawyering.[18] The Model Rules are better integrated than is the Model Code because they take a functional approach to the problems that arise in law practice.[19] The Model Rules also deal explicitly with the varied roles of lawyers, such as advocate or counselor, that lawyers perform.[20]

Once the ABA adopted the Model Rules, they were submitted to the states for consideration. The states could adopt, modify or reject the Model Rules; thus far, many states have formally adopted them, although in some instances with significant modifications.[21]

The American Bar Association issued the Model Code of Professional Responsibility to delineate "fundamental ethical principles" to

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at xxxviii.
18. *Id.*
19. *Id.* at xxxviii.1.
20. *Id.*
21. In New York, adoption of the Model Rules of Professional Conduct was particularly drawn out, with an amended version being adopted recently to go into effect on September 1, 1990. 203 N.Y.L.J. 92, S1 (Supp. 1990). This was the first major overhaul of the Professional Responsibility Code since 1969. *Id.* The New York State Bar had proposed several amendments to the four appellate division departments, and, on April 5, the appellate division departments issued a joint report incorporating some of those recommendations. *Id.* The justices also added some provisions of their own to the joint report. *Id.* The process was lengthy largely because of a conflict over whether an attorney's duty to his client should prevail over all other duties, such as telling the court when perjury had been committed. *Id.* These disputes were largely resolved in favor of the attorney's obligation of confidentiality to his client. *Id.*

guide lawyers.[22] According to Ethical Consideration 5-1, nothing should interfere with the exercise of a lawyer's professional judgment for his client's benefit.[23] The Model Code notes that a lawyer is always under a dual obligation: his obligation to his client and his obligation to the legal system.[24] These responsibilities apply equally to a lawyer in private practice or to a public prosecutor.[25] Ethical Considerations 7-13 and 7-14 deal specifically with prosecutors. Ethical Consideration 7-13, in particular, recognizes that the prosecutor's duty is to seek justice rather than simply to convict.[26] Thus, he is not in the position of the usual advocate; it is the dual role within the system which puts additional burdens on the prosecutor.[27] The Model Code also requires the prosecutor to disclose evidence that tends to mitigate or negate the guilt of the defendant.[28] In addition, the prosecutor is not to file charges against a defendant where there is no probable cause to support the charges.[29]

The Model Code's provisions dealing with conflicts are generally vague. There is a strong emphasis on preserving the client's confi-

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22. MODEL CODE, *supra* note 1, Preamble.

23. MODEL CODE, *supra* note 1, EC 5-1. It states:

> [t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

24. MODEL CODE, *supra* note 1, EC 7-1.

25. The Model Code focuses primarily on the ethical obligations of an attorney in private practice. Some sections deal with issues and conflicts faced by a government attorney who returns to private practice. *See, e.g.*, MODEL CODE, *supra* note 1, EC 9-3, DR 9-101(B); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1983) [hereinafter MODEL RULES]. There are also some sections that discuss the prosecutor's role within the judicial system. *See, e.g.*, MODEL CODE, *supra* note 1, ECs 7-13, 7-14, DR 7-103.

26. MODEL CODE, *supra* note 1, EC 7-13.

27. *Id.*

> [The prosecutor is] . . . the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt not escape nor innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

28. MODEL CODE, *supra* note 1, DR 7-103(B). The MODEL RULES, *supra* note 25, has a similar provision. *See infra* notes 41-42 and accompanying text.

29. MODEL CODE, *supra* note 1, DR 7-103(A).

dences and secrets.[30] This obligation continues after the termination of the attorney-client relationship.[31] Canon Five stresses the need for a lawyer to exercise his independent professional judgment for the benefit of his client. Several of the Canon Five ethical considerations deal with the interests of multiple clients.[32] A lawyer is to avoid any employment that would adversely affect his judgment with respect to a client.[33] Ethical Consideration 5-15 enunciates some of the elements he should weigh, although they are not too precise.[34]

The Model Code does not specifically deal with a conflict that arises out of the prosecutor's simultaneous government and private practice. Ethical Consideration 7-14 indicates that a government lawyer should not initiate litigation which he knows is unfair, and that he should not use litigation to bring about unjust results.[35] In addition, Canon Nine admonishes a lawyer to "avoid even the appearance of professional impropriety."[36] The ethical considerations accompanying Canon Nine express particular concern for actions that are not illegal but, because the actions might appear unethical to a lay person, undermine the judicial system as a whole.[37]

Under the Model Rules, there are five requirements imposed on a prosecutor governing the conduct of a trial.[38] These include, for example, refraining from prosecuting a charge that is unsupported by probable cause, as well as disclosing any evidence that either mitigates or negates the defendant's guilt.[39] The rule in essence reiterates the prosecutor's constitutional obligations to the accused, but it is broader in scope.[40] Under *Brady v. Maryland*[41] only *material* exculpatory evidence must be disclosed.[42]

The Model Rules have some precise statements governing conflicts among clients and with former clients, and different tests apply in the

30. *See* MODEL CODE, *supra* note 1, ECs 4-1, 4-2, 4-5, DR 4-101(B).

31. MODEL CODE, *supra* note 1, EC 4-6.

32. *See, e.g.,* MODEL CODE, *supra* note 1, ECs 5-14, 5-15, 5-16.

33. MODEL CODE, *supra* note 1, EC 5-14.

34. *See* MODEL CODE, *supra* note 1, EC 5-15. Some of the elements that are to be considered include whether his judgment would be impaired, how great the differing interests are likely to be and whether his loyalty will be divided. *Id.*

35. MODEL CODE, *supra* note 1, EC 7-14.

36. MODEL CODE, *supra* note 1, Canon 9.

37. *See* MODEL CODE, *supra* note 1, ECs 9-1, 9-2, 9-6.

38. *See* MODEL RULES, *supra* note 25, Rule 3.8. *See also supra* notes 26-29 and accompanying text.

39. MODEL RULES, *supra* note 25, Rule 3.8(a), (d).

40. *See supra* note 27 and accompanying text.

41. 373 U.S. 83 (1963).

42. *Id.* at 87 (emphasis added).

two cases.[43] There are two primary concerns in both instances: protecting the confidences of the client and protecting the attorney's duty of loyalty.[44] For example, Rule 1.9 of the Model Rules indicates that a lawyer shall not, after representing a client in a matter, use any information obtained in that representation to the disadvantage of a former client.[45] With concurrent conflicts, a stricter test is employed. If the representation is directly adverse to another client, the attorney cannot represent the second client unless two conditions are met.[46] The first is that the lawyer must reasonably believe that the representation will not adversely affect the relationship with the other client.[47] The second is that both clients consent, after being fully informed of the conflict and attendant risks.[48]

With successive conflicts, the test is somewhat less restrictive. Rule 1.9 employs a "substantially related" standard to determine whether the attorney can accept the second representation.[49] The substantial relationship test was first articulated in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*[50] The Southern District of New York put it in the following terms: "the former client need show no more than that the matter embraced within the pending suit wherein his former attorney appears on behalf of his adversary is substantially related to the matters or cause of action wherein the attorney previously represented him."[51]

The substantial relationship test has been applied in many different cases.[52] Courts look at both the issues and the facts to determine whether the cases are sufficiently similar for the attorney to be disqualified. The primary purpose of the rule is to protect all the dimensions of the professional relationship between the attorney and his client, especially the confidences and secrets that the client has disclosed.[53] Courts have expressed concern in these cases about clients' being able to expect the attorney's undivided loyalty.[54] The two ca-

43. *See, e.g.*, MODEL RULES, *supra* note 25, Rules 1.7, 1.9, 1.10.
44. *See* MODEL RULES, *supra* note 25, Rules 1.7 comment, 1.9 comment.
45. *See* MODEL RULES, *supra* note 25, Rule 1.9(b).
46. MODEL RULES, *supra* note 25, Rule 1.7(a).
47. MODEL RULES, *supra* note 25, Rule 1.7(a)(1).
48. MODEL RULES, *supra* note 25, Rule 1.7(a)(2).
49. *See* MODEL RULES, *supra* note 25, Rule 1.9(a).
50. 113 F. Supp. 265 (S.D.N.Y. 1953).
51. *Id.* at 268.
52. *See generally* Trone v. Smith, 621 F.2d 994 (9th Cir. 1980); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977); United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955).
53. Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980).
54. *See* Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 232-33 (2d Cir. 1977).

nons of the Code most often invoked are Canon Four, which requires an attorney to maintain his client's confidences, and Canon Five, which requires an attorney to exercise his independent professional judgment on behalf of his client.[55]

The substantial relationship test does not automatically apply simply because two cases arise out of the same general event. In *Unified Sewerage Agency v. Jelco Inc.*,[56] the same law firm represented the contractor in a dispute with the electrical contractor and also represented another subcontractor in a dispute with the contractor.[57] The court held that there had been informed consent on the part of the contractor.[58] In addition, the court concluded that, although both actions arose out of the same construction project, each was its own distinct, non-overlapping cause of action and disqualification was not required.[59]

There is no easy method of determining in advance whether a court will decide that the attorney should be disqualified under the substantial relationship test.[60] Indeed, some cases, such as *Unified Sewerage Agency v. Jelco Inc.*,[61] would at first seem to require disqualification, although that is not what the court decided. A concern with the attorney's being in a position where he could breach his client's confidences, thereby violating his duty of loyalty to his client, underlies all the decisions.[62]

B. The Prosecutor's Obligations

The prosecutor performs a unique function in the criminal justice system.[63] The government he represents has an obligation to govern impartially; this obligation imposes a fundamental duty on the prosecutor to seek justice rather than simply to seek convictions.[64] As a servant of the law, the prosecutor's obligation is twofold: to ensure

55. *See, e.g., id.* at 234-35.

56. 646 F.2d 1339 (9th Cir. 1981).

57. *Id.* at 1342-43.

58. *Id.* at 1346.

59. *Id.* at 1351.

60. *See, e.g.,* Evans v. Artek Systems Corp., 715 F.2d 788 (2d Cir. 1983); Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975); United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955).

61. 646 F.2d 1339 (9th Cir. 1981).

62. Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980).

63. ETHICAL CONSIDERATIONS IN PROSECUTION 1 (John J. Douglass ed. 1977) [hereinafter ETHICAL CONSIDERATIONS]. *See also* PROSECUTION FUNCTION, *supra* note 4, at 7.

64. PROSECUTION FUNCTION, *supra* note 4, at 7. *See also* MODEL CODE, *supra* note 1, EC 7-13; Carey, *supra* note 3, at 319.

that criminal behavior is punished and to protect a defendant's rights.[65] Thus, the prosecutor must refrain from wrongful conduct designed to secure an unjust conviction while, at the same time, using every legal means to secure a just one.[66] There are, therefore, two conflicting forces pulling on the prosecutor: the obligation to protect the rights of the accused, and the obligation to enforce the rights of the public to be free from crime.[67]

The prosecutor represents all the people within his jurisdiction, and yet he owes a certain responsibility to those accused of crimes.[68] This responsibility to the accused is rooted in the nature of the American criminal justice system as demonstrated by the constitutional protections of the rights of the criminally accused.[69] Some of the protections include the prosecutor's obligations to turn over to the accused

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65. PROSECUTION FUNCTION, *supra* note 4, at 2.

66. Berger v. United States, 295 U.S. 78, 88 (1935). *See also supra* note 27.

67. Thompson v. State, 163 Ga. App. 35, 36, 292 S.E.2d 470, 471 (1982). *See also* Carey, *supra* note 3, at 320.

68. 163 Ga. App. at 36, 292 S.E.2d at 471. The prosecutor has a duty to disclose "evidence . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." MODEL CODE, *supra* note 1, EC 7-13. DR 7-103 is in accord. MODEL CODE, *supra* note 1. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Court held that where a prosecutor withholds material evidence favorable to the accused, due process is violated. The prosecutor's good or bad faith is irrelevant in making the due process determination. *Id.* Thus, the ethical and constitutional standards in this area are essentially identical. *See also* Felkenes, *supra* note 3, at 118; Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984). Capra argued that the *Brady* determination is very difficult to review on appeal because of several factors. First, there are many pressures on the prosecutor that prevent him from looking at the evidence in his files as potentially exculpatory. *Id.* at 405-06. Second, there are too many and varied tests for the courts to apply depending on the circumstances of the request. *Id.* at 409-11. Third, any review is of necessity speculative. The evidence was not admitted so the appellate court must try to determine what would have happened had the evidence been admitted. *Id.* at 411-15. Capra proposed *in camera* judicial review of the prosecutor's evidence prior to trial as a method of resolving many of the issues courts have confronted in *Brady*'s wake. *Id.* at 427-30.

69. *See also* PROSECUTION FUNCTION, *supra* note 4, at 4; Miranda v. Arizona, 384 U.S. 436, *reh'g denied sub nom.* California v. Stewart, 385 U.S. 890 (1966), *later appeal sub nom.* State v. Miranda, 104 Ariz. 174, 450 P.2d 364, *cert. denied*, 396 U.S. 868 (1969); Mapp v. Ohio, 367 U.S. 643, *reh'g denied*, 368 U.S. 871 (1961), *overruled on other grounds*, United States v. Leon, 468 U.S. 897 (1984); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

> It can not be overemphasized that our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence. The constitutional and statutory safeguards provided for one accused of crime are to be applied in all cases. The worst criminal, the most culpable individual, is as much entitled to the benefit of a rule of law as the most blameless member of society.

Donovan, 13 N.Y.2d at 153-54, 193 N.E.2d at 631, 243 N.Y.S.2d at 845. *See generally* U.S. CONST. preamble, art. III, § 2, amend. IV, amend. V, amend. VI.

potentially exculpatory evidence[70] and not to do anything that intentionally prejudices the defendant's rights, such as referring to evidence the prosecutor knows is inadmissible.[71]

III. Elements that Promote Prosecutorial Misconduct

The problem with this description[72] of the prosecutor and his role in the criminal justice system is that it is couched in ideal terms. In theory, the prosecutor's role is a balance between justice and obtaining as many convictions as possible. However, one of the easiest ways for a prosecutor to demonstrate his effectiveness is by pointing to his conviction statistics.[73] This method of demonstrating professional competence can often overcome the countervailing pressure to be fair.[74] As a result, failure to obtain enough convictions can put the prosecutor's career in jeopardy.[75] A prosecutor is subject to the critical review of the media, the police and the victims of crimes, all of whom, without concern for the ethical implications of his actions, are likely to view the prosecutor more favorably if he is "tough on crime."[76]

Although theoretically the prosecutor's role is to balance justice and convictions, often society's sole concern is seeing defendants convicted.[77] The public expects the prosecutor to prosecute; it does not expect him to be sympathetic to the rights of defendants.[78] These pressures to convict often breed a conviction psychology in the prosecutor's office;[79] the conviction psychology can generate overzealous prosecution. A consequence of overzealous prosecution can be prosecutorial misconduct.[80]

The pressure on the prosecutor that generates a "conviction psychology" is not the only cause of prosecutorial misconduct. There are flaws in the judicial system itself that encourage, or at least do little to deter, impropriety on the part of prosecutors. One problem with the

70. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963); *see also supra* note 67.

71. PROSECUTION FUNCTION, *supra* note 4, at 7, 8.

72. *See supra* notes 26-29, 38-42, 63-71 and accompanying text.

73. *Virtuous Prosecutor, supra* note 5, at 205. *See also* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106 (1968-69) [hereinafter Alschuler].

74. *Virtuous Prosecutor, supra* note 5, at 206. *See also* Alschuler, *supra* note 73, at 106 n.138.

75. *Virtuous Prosecutor, supra* note 5, at 205. *See also* Felkenes, *supra* note 3, at 117.

76. *Virtuous Prosecutor, supra* note 5, at 205 n.40. *See also* Felkenes, *supra* note 3, at 114.

77. *Virtuous Prosecutor, supra* note 5, at 198. *See also* Felkenes, *supra* note 3, at 118.

78. *Virtuous Prosecutor, supra* note 5, at 205 n.39; Felkenes, *supra* note 3, at 117.

79. *Virtuous Prosecutor, supra* note 5, at 204, 205.

80. *Virtuous Prosecutor, supra* note 5, at 199. *See also* Carey, *supra* note 3, at 323.

prosecutor's position from an ethical standpoint is the identity of his client. Model Code Ethical Consideration 5-1 states "[n]either his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."[81] The government is the prosecutor's client[82] and the government has a duty to govern impartially.[83] Yet given the prosecutor's role in society, it is likely that his loyalties to third parties, such as victims, may influence his decision-making process.[84] No matter how impartial he strives to be, these pressures on the prosecutor exist and potentially influence his discretionary decisions. Those pressures also make it difficult to determine when a prosecutor is striving to attain the goals of, while not violating the tenets of, Ethical Consideration 5-1.[85]

Another element that allows misconduct is the lack of definition in the prosecutor's role.[86] On the one hand, he holds a quasi-judicial role because he is an officer of the court and therefore is required to be impartial and to see that justice is done.[87] On the other hand, he is also an advocate seeking a conviction, and thus an integral part of the adversary process, which conflicts with his role as an officer of the court.[88] The conflicting nature of these dual roles makes it difficult for a prosecutor to comply adequately with either.

In addition, a prosecutor has tremendous discretion in terms of case selection and the conduct of a criminal prosecution.[89] No other person has more control over an individual's life, liberty or reputation than the prosecutor.[90] Judges often allow prosecutors more discretion and exert less control in criminal cases than they do in other kinds of

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81. MODEL CODE, *supra* note 1, EC 5-1.

82. *See* MODEL CODE, *supra* note 1, EC 7-13.

83. *See supra* notes 63-71 and accompanying text.

84. *See supra* notes 72-79 and accompanying text.

85. Ethical Consideration 1-5 indicates that lawyers "should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise." MODEL CODE, *supra* note 1, EC 1-5. It also indicates that "obedience to the law exemplifies respect for law." *Id.* These are general ideals towards which members of the legal profession should strive. *See also supra* note 2.

86. *Virtuous Prosecutor, supra* note 5, at 201.

87. Felkenes, *supra* note 3, at 117.

88. *Id.* at 118.

89. *Virtuous Prosecutor, supra* note 5, at 201. *See also* Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955) (concluding that the prosecutor's exercise of discretion has more impact and control over an individual's liberty and reputation than the action of any other public official); Ganger v. Peyton, 379 F.2d 709, 713 (4th Cir. 1967); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 825 (1987) (Scalia, J., concurring); Heckler v. Chaney, 470 U.S. 821, 832 (1985).

90. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 814 (1986); ETHICAL CONSIDERATIONS, *supra* note 63, at 2. *See also* Carey, *supra* note 3, at 321.

litigation.[91] In addition, no other branch of government can review a prosecutor's decision to charge someone with a crime,[92] nor can the prosecutor be forced by any branch to begin a prosecution.[93] Thus, the ambiguous nature of both the prosecutor's client and role combined with the pressures to convict and the wide discretion accorded to a prosecutor have created an environment in which misconduct can flourish.[94]

A lack of clearly articulated standards of conduct to guide prosecutors also fosters unethical behavior.[95] Indeed, the Model Code and the Model Rules seem only to reiterate, in broad terms, the prosecutor's constitutional duties to the accused. The prosecutor, however, already knows his constitutional obligations; he looks to the Model Code and the Model Rules for ethical guidance in situations which do not present constitutional issues. Unfortunately, neither provides such guidance.

Another element within the judicial system that does little to deter prosecutorial misconduct is the judicial reluctance to reverse convictions in all but the most blatant cases of impropriety.[96] Indeed, the

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91. A. GOLDSTEIN, THE PASSIVE JUDICIARY, PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 4 (1981).

92. MODEL CODE, *supra* note 1, DR 7-102 prohibits a lawyer from filing a suit or taking other measures on behalf of a client when the only purpose is to harass or maliciously injure another person. The prosecutor is bound by DR 7-102 when he makes his charging decisions. He is also bound by DR 7-103(A) which requires a prosecutor not to file a charge he knows is unsupported by probable cause.

93. Heckler v. Chaney, 470 U.S. 821 (1985). *See also* PROSECUTION FUNCTION, *supra* note 4, at 2.

94. *Virtuous Prosecutor*, *supra* note 5, at 202.

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants . . . . With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone . . . . It is in this realm — in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Carey, *supra* note 3, at 320-21 (quoting Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC. 18 (1940)).

95. *Virtuous Prosecutor*, *supra* note 5, at 201.

96. United States v. Young, 470 U.S. 1, 16, *on remand*, 758 F.2d 514 (10th Cir.), *on reconsideration*, 767 F.2d 737 (10th Cir. 1985). *See* United States v. Modica, 663 F.2d 1173, 1178 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); *see also Virtuous Prosecutor*, *supra* note 5, at 201. " '[F]lagrant abuses of professional standards . . . seem to be occurring more frequently . . . [T]he reasons include the fact that competitive and ambitious prosecutors . . . are emboldened to flaunt . . . admonition . . . by the inaction of the trial judges who fail to stop such improper advocacy conduct in its tracks . . . .' " 1984 ABA

Supreme Court has shown almost total deference to the prosecutor's exercise of discretion, conduct and judgment.[97] A verbal reprimand from a judge, without graver consequences for the prosecutor, is an ineffective deterrent.[98] In addition, judicial inaction in the face of impropriety "breeds a deplorably cynical attitude towards the judiciary."[99] When misconduct enables a prosecutor to obtain convictions he might not otherwise have gotten, and the sanctions against the misconduct are virtually non-existent,[100] prosecutors have an incentive to use unethical techniques.[101]

The Supreme Court, when reviewing cases alleging various forms of prosecutorial misconduct, looks at the fairness of the trial and not the culpability of the prosecutor to determine whether a new trial should be granted.[102] A defendant is entitled to all of the constitutional protections to ensure a fair trial. However, nothing is said about the ethi-

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Standing Committee on Professional Discipline, *The Judicial Response to Lawyer Misconduct* at I.6 [hereinafter *Judicial Response*] (quoting United States v. Falk, 605 F.2d 1005, 1016 (7th Cir. 1979) (Swyger, J., dissenting), *cert. denied*, 445 U.S. 903 (1980)).

97. *See, e.g.*, Smith v. Phillips, 455 U.S. 209, *on remand*, 552 F. Supp. 653 (S.D.N.Y. 1982), *aff'd*, 717 F.2d 44 (2d Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984); Mabry v. Johnson, 467 U.S. 504 (1984), *on remand*, 752 F.2d 313 (8th Cir. 1985); United States v. Goodwin, 457 U.S. 368, *on remand*, 687 F.2d 44 (4th Cir. 1982). *See also* Gershman, *The Burger Court and Prosecutorial Misconduct*, 21 CRIM. L. BULL. 217, 225 (1985) [hereinafter *Burger Court*]. Gershman argues that several themes emerge from the Burger Court's treatment of cases alleging that prosecutorial misconduct interfered with the defendant's right to a fair trial: (1) that there has been a curtailment of the federal courts' supervisory power to discipline and deter prosecutorial misconduct; (2) that there has been undue deference to the Executive Branch; (3) that new procedural rules have been implemented that make proof of prosecutorial misconduct virtually impossible; and (4) that there has been a refusal to articulate or require ethical standards for prosecutors. *Id.* at 218. *See also* Bd. of Educ. of N.Y. City v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979).

98. *Burger Court*, *supra* note 97, at 225. *See also* Carey, *supra* note 3, at 323. Carey stated, "[t]he most that an overzealous prosecutor risks is losing a case on appeal that was weak to begin with. And, even that risk is scarcely significant as courts, understandably reluctant to free a guilty criminal, accept the prosecutor's pleas that the error was harmless." *Id.*

99. *Judicial Response*, *supra* note 96, at I.6 (quoting United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742, *reh'g denied*, 329 U.S. 826 (1946)).

100. Two studies have been conducted reviewing cases from the last twenty-five years; neither report uncovered an instance where the prosecutor was punished for contemptuous behavior. N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT 186 (1973). *See also Burger Court*, *supra* note 97, at 224-25.

101. *Burger Court*, *supra* note 97, at 224.

102. Smith v. Phillips, 455 U.S. 209, 219 (1982) (on *habeas corpus* review, the Supreme Court reversed the Second Circuit's determination that prosecutor's failure to disclose that one juror was actively seeking employment as an investigator with the prosecutor's office denied the defendant due process). *See also Burger Court*, *supra* note 97, at 220.

cal dimensions of the trial. At the very least, the prosecutor's ethical obligations regarding his conduct are designed to coincide with a minimal level of constitutional protection thereby providing the defendant with a fair trial.[103] However, by failing to even acknowledge the ethical issues some cases present, the Supreme Court effectively discourages prosecutors from considering their conduct from an ethical standpoint as well as a constitutional one.[104] Such inaction encourages the prosecutor to flaunt his ethical duties, knowing that as long as no specific constitutional right is violated, there will be no reversal.[105]

IV. Prosecutors in Civil and Criminal Trials

In many cases, courts have confronted issues arising out of a prosecutor's involvement in criminal and civil cases with a nexus in the same set of facts.[106] Although cases, for example, where the prosecutor both prosecutes the defendant and represents the defendant's victim in a civil suit appear to present serious conflicts of interest for the prosecutor,[107] the reviewing court seldom reverses the conviction or disqualifies the prosecutor. There are other cases, however, where the court does intervene.[108] Currently the law takes a case by case approach to these issues.

The courts that view the prosecutor's conflict as serious enough to require reversal do so for several reasons. One important reason is to ensure that the prosecutor exercises fair and independent discretion, to which the defendant is entitled,[109] when the prosecutor goes for-

103. *See* MODEL CODE, *supra* note 1, EC 7-21 and DR 7-103; MODEL RULES, *supra* note 25, Rules 1.8, 1.11. *See also supra* note 68 and accompanying text.

104. *Burger Court*, *supra* note 97, at 225.

105. United States v. Young, 470 U.S. 1, 16 (prosecutor's remarks, while having no place in the proper administration of justice, did not undermine the fundamental fairness of the trial), *on remand*, 758 F.2d 514, *on reconsideration*, 767 F.2d 737 (10th Cir. 1985). The prosecutor is always subject to discipline by the local bar, even if his conduct does not rise to a level requiring reversal of the conviction. However, the threat of potential punishment does not seem to provide a sufficient deterrent. *Burger Court*, *supra* note 97, at 225.

106. *See, e.g.*, Jones v. Richards, 776 F.2d 1244 (4th Cir. 1985); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); Hughes v. Bowers, 711 F. Supp. 1574 (N.D. Ga. 1989), *aff'd*, 896 F.2d 558 (11th Cir. 1990); Brown v. State, 242 Ga. 536, 250 S.E.2d 438 (1978).

107. *See supra* notes 72-105 and accompanying text.

108. *See, e.g.*, Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); Hughes v. Bowers, 711 F. Supp. 1574 (N.D. Ga. 1989), *aff'd*, 896 F.2d 558 (11th Cir. 1990); Sinclair v. State, 278 Md. 243, 363 A.2d 468 (1976).

109. *See, e.g.*, Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 824-25 (1987) (Scalia, J., concurring); Bauers v. Heisel, 361 F.2d 581, 590 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); United States v. Cox, 342 F.2d 167, 192 (5th Cir.), *cert. denied*, 381

ward with a case.[110] Different groups within a prosecutor's jurisdiction will have varying ideas about which cases warrant the most active prosecution; therefore, the prosecutor should be detached from, and impartial towards, the various elements in his jurisdiction.[111] The prosecutor's fundamental obligation is to seek justice and the only way he can effectively do so is by being impartial towards the conflicting political groups within his jurisdiction.[112] The prosecutor cannot possibly prosecute every crime, and therefore he must distinguish those that merit prosecution from those that do not.[113] Consequently, the prosecutor decides who will be prosecuted and for what, and, in so doing, he generally exercises a significant degree of unreviewable discretion.[114] As a result, a prosecutor who has any personal interest or stake in the case may fail to exercise his discretion impartially.[115]

The exercise of impartial discretion in commencing a prosecution was the Fourth Circuit's concern in *Ganger v. Peyton*.[116] In that case, the attorney who prosecuted Ganger for assault also represented Mrs. Ganger in her divorce proceeding, which was based on the same assault.[117] Ganger testified that the prosecuting attorney had offered to drop the criminal charges if Ganger made a favorable property settlement in the divorce action.[118] The court of appeals did not accept the state's argument that Ganger had not been harmed by that which the court considered improper conduct.[119] In trying to serve two masters, the state and Mrs. Ganger, the prosecutor might have allowed interests other than justice to influence his decision to proceed with the criminal case.[120] The court held that because it did not know, and could not ascertain, what would have happened if the prosecutor

U.S. 935 (1965); United States v. Brokaw, 60 F.Supp 100, 101 (S.D. Ill. 1945); Macon v. Commonwealth, 187 Va. 363, 373, 46 S.E.2d 396, 401 (1948).

110. *See* Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967).

111. ETHICAL CONSIDERATIONS, *supra* note 63, at 3. *See also* Carey, *supra* note 3, at 320.

112. The Model Code also imposes a duty on all lawyers to be impartial and to avoid allowing others to influence the decision-making process. *See* MODEL CODE, *supra* note 1, Canon 5, DR 5-101.

113. *Id. See also* Felkenes, *supra* note 3, at 110.

114. *See supra* notes 89-94 and accompanying text; *see also* Carey, *supra* note 3, at 320; Alschuler, *supra* note 73, at 105.

115. The Model Code recognizes that no attorney should have or acquire any interest in litigation in which he is involved. *See* MODEL CODE EC 5-3; *accord* MODEL RULES, *supra* note 25, Rule 1.8(j).

116. 379 F.2d 709 (4th Cir. 1967).

117. *Id.* at 711.

118. *Id.*

119. *Id.* at 714.

120. *Id.* at 713.

could have exercised his discretion impartially, the error could not be deemed harmless error.[121] As a result, the court held that Ganger's conviction was "constitutionally invalid."[122]

A prosecutor's failure to exercise his discretion impartially can lead to a misuse of the criminal justice system. In *Sinclair v. State*,[123] the defendant alleged that the prosecutor had not exercised impartial judgment in indicting him for fraud based on five bounced checks.[124] The prosecutor also represented plaintiffs to a civil suit in which Sinclair was the defendant.[125] Sinclair alleged that the state's attorney had threatened to indict him if he appealed the civil case ruling;[126] the day after Sinclair filed his appeal, the grand jury voted to indict him.[127] Sinclair alleged that the prosecutor had abused his official position in order to gain advantage for his clients in a civil matter.[128] The Maryland Court of Appeals held that there should have been an evidentiary hearing on Sinclair's allegations prior to the trial court's ruling on the defendant's motion to disqualify the prosecutor.[129] The court enunciated the principle that a prosecutor should be disqualified if a reasonable person would believe that the prosecutor had a financial or personal interest in the case.[130] Using criminal prosecution to obtain an advantage in a civil matter is specifically forbidden by Model Code DR 7-105 (1980). Yet the *Sinclair* court did not even mention the Model Code of Professional Responsibility; instead, the court based its decision on Maryland's public policy.[131]

The *Ganger* court's concerns were reiterated recently in *Hughes v. Bowers*,[132] a federal *habeas corpus* petition. Hughes had been con-

121. *Id.* at 714.
122. *Id.* at 711.
123. 278 Md. 243, 363 A.2d 468 (1976).
124. *Id.* at 246, 363 A.2d at 470.
125. *Id.* at 246, 363 A.2d at 470-71.
126. *Id.* at 247, 363 A.2d at 471.
127. *Id.*
128. *Id.*
129. *Id.* at 244-45, 363 A.2d at 470.
130. *Id.* at 255, 363 A.2d at 475.
131. *Id.* However, the disciplinary rules are supposed to be the litmus test of conduct such that any conduct violative of the disciplinary rules subjects the attorney to sanctions. MODEL CODE, *supra* note 1, Preliminary Statement. *See also supra* note 8.

In addition, MODEL CODE, *supra* note 1, EC 1-4 states, "[t]he integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials." There is no indication that reference to the proper authorities was made in the *Sinclair* case. The failure of lawyers and judges to refer incidents of misconduct to the proper authorities undermines the legal system's self-enforcement mechanisms.

132. 711 F. Supp. 1574 (N.D. Ga. 1989), *aff'd*, 896 F.2d 558 (11th Cir. 1990).

victed of manslaughter for the slaying of Murphey.[133] Hughes testified that he shot Murphey in self-defense, while the state's one eye witness, Murphey's son, Ralph, testified that Hughes fired the first shot.[134] Murphey's family hired a private attorney, Mitchell, to assist the prosecution as a special attorney.[135] During the trial, defense counsel made a *Brady* request[136] that the prosecution turn over any information relating to a life insurance policy on the victim and whether any of the state's witnesses could be affected by such a policy.[137] The special prosecutor responded by saying, " '[t]here is nothing in my file whatsoever whereby I could respond.' "[138] As a result of this statement, the trial court denied the request,[139] and the defendant, who had no actual knowledge of any existing policies, made no objection to the trial court's ruling.[140] In fact, there was a $50,000 policy payable to Murphey's estate, but only in the event of his accidental death.[141] As a result, if Murphey was the aggressor, the insurance company would not pay on the claim.[142] In addition, Mitchell knew of the policy because he had assisted the victim's wife in filing the claim form prior to the defense counsel's request.[143]

Based on these facts, the defendant asserted two claims in his *habeas corpus* petition: first, that he was denied due process by the prosecution's suppression of exculpatory evidence in violation of *Brady v. Maryland*;[144] and second, that the special prosecutor had conflicting interests as a representative of both the state and the family.[145] The court granted the petition on both grounds.[146] The court employed a standard that did not automatically prohibit the use of a special prosecutor.[147] In order to show a violation of due process, the court required the defendant to show either that the district attorney failed to retain control and management of the case or that there was specific misbehavior that prejudiced the defendant.[148] On the face of

133. *Id.* at 1576.
134. *Id.*
135. *Id.* at 1577.
136. *See supra* note 42 and accompanying text.
137. 711 F. Supp. at 1577.
138. *Id.* (quoting the trial transcript at 249).
139. 711 F. Supp. at 1577.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. 373 U.S. 83 (1963).
145. 711 F. Supp. at 1577.
146. *Id.* at 1581, 1584.
147. *Id.* at 1583.
148. *Id.*

the case, there was an appearance of impropriety and it seemed that the special prosecutor had a pecuniary interest in the case.[149] The court did not require an actual conflict standard,[150] but went on to say that "an actual conflict of interest arose when the defense moved for production of insurance policies."[151] Mitchell, as special prosecutor, had a duty to disclose the policy.[152] But Mitchell also had a conflicting interest in concealing it since, had Hughes been acquitted of manslaughter, the insurance proceeds would not be distributed.[153] The court held that Mitchell's deliberate concealment of the policy from both the defendant and the court was "a serious act of misbehavior that disregarded the rights of the defendant."[154]

The *Hughes* court applied a stricter test than the *Ganger* court did.[155] In *Ganger*, there was no affirmative, deliberate misconduct on the part of the prosecutor.[156] The *Ganger* court was concerned that the prosecutor's self-interest in the litigation meant that he could not exercise independent judgment with respect to at least three areas of official responsibility: whether he should decline to prosecute; whether he should reduce the charge; and whether he should recommend clemency, such as a suspended sentence.[157] The *Ganger* court held that the prosecuting attorney's dual representation violated the fundamental fairness requirement of the due process clause,[158] whereas *Hughes* required some specific misbehavior on the part of the prosecutor before it would term the trial fundamentally unfair.[159]

As the above cases suggest, the need for impartial exercise of discretion and the fundamental fairness of the defendant's trial are the two most frequently cited bases for reversals where the prosecutor's civil and criminal obligations conflict. In addition, the more general theme of avoiding the appearance of impropriety underlies these decisions.[160] Some courts are also concerned with the power the prosecutor possesses and the potential that he may use it for malicious ends.[161] Con-

149. *Id.* at 1584.
150. *Id.* at 1583.
151. *Id.* at 1584.
152. *Id.*
153. *Id.*
154. *Id.*
155. *See supra* notes 120-122 and accompanying text.
156. *See* Ganger v. Peyton, 379 F.2d 709, 714 (4th Cir. 1967).
157. *Id.* at 713.
158. *Id.* at 714.
159. Hughes v. Bowers, 711 F. Supp. 1574, 1583 (N.D. Ga. 1989), *aff'd*, 896 F.2d 558 (11th Cir. 1990).
160. *See, e.g.*, United States v. Prantil, 764 F.2d 548, 553 (9th Cir. 1985).
161. *See, e.g.*, Carey, *supra* note 3, at 319-21; Felkenes, *supra* note 3, at 109-10.

sistently restraining and controlling the prosecutor, therefore, is one way to prevent such abuses of power. Not all courts agree, however, that a prosecutor's violation of the principles discussed above[162] warrants an automatic reversal. Courts that take this view of the prosecutor's civil-criminal conflict tend to impose an arduous burden of proof upon the defendant.[163]

For example, in *Jones v. Richards*[164] the court affirmed the lower court's denial of a *habeas corpus* petition and found no constitutional violation where the special prosecutor also represented the victim's family.[165] Jones was driving a bus which collided with a passenger car and a child was killed in the crash.[166] The child's family hired a private attorney to bring a civil suit and to assist in the criminal prosecution.[167] At the superior court trial, the district attorney and the private attorneys jointly prosecuted the defendant.[168] The defendant claimed that the private prosecutor's involvement denied him a fundamentally fair trial with an independent prosecutor.[169] The court determined that the prosecutor made the decisions, such as whether to seek an indictment or whether to plea bargain, which were concerns in *Ganger*.[170] Thus, the court held that, although the use of private attorneys representing the victim's family in the civil suit as special prosecutors should not be encouraged, there was nothing in this case that violated the defendant's rights.[171]

The court distinguished *Ganger* by relying on the control the district attorney had over the special prosecutor. In *Ganger*, the state's attorney represented Mrs. Ganger, whereas in *Jones*, the state's attorney had no ties to the victim's family.[172] In addition, the state's attorney was the one who sought the indictment and determined the charges, not the special prosecutor.[173]

However, the distinction the court draws, while practical in theory, does not seem as strong in the *Jones* case as the court appears to indi-

162. *See supra* notes 109-59 and accompanying text.

163. *Burger Court, supra* note 97, at 225 (arguing that the procedural standards the Supreme Court has established in various kinds of cases of prosecutorial misconduct make it almost impossible for a defendant to get a new trial).

164. 776 F.2d 1244 (4th Cir. 1985).

165. *Id.*

166. *Id*

167. *Id.* at 1245.

168. *Id.*

169. *Id.* at 1246.

170. *Id. See also supra* notes 156-59 and accompanying text.

171. *Id.* at 1247.

172. *Id.* at 1246.

173. *Id.*

cate. The private attorneys retained by the plaintiff represented themselves to the court as private prosecutors responsible for presenting the case,[174] thereby acting as co-counsel. In this capacity, they examined all of the state's witnesses and cross-examined half of the defense's witnesses,[175] and argued issues to the jury.[176] In addition, in the district court's *habeas corpus* proceeding, the state abdicated responsibility for the hearing to the private attorneys.[177] However, since the state was involved in the original trial, the district court declared that the state's relinquishment to the private attorneys was harmless error.[178]

It seems that the *Jones* court retreated somewhat from the *Ganger* standard. Although in *Ganger* it was only the state's attorney who was involved, the court did not seem to limit its holding to the facts of that case.[179] In *Jones*, the private attorneys acted very much like state's attorneys and had the same kind of conflict the court addressed in *Ganger*. Yet the distinction the *Jones* court drew between the state's attorney and the private attorney as special prosecutor essentially precluded relief for the defendant.

In *Brown v. State*,[180] the court drew the same kind of distinction as did the court in *Jones*, although with a less extensive analysis.[181] The defendant was charged with involuntary manslaughter and the victim's family hired an attorney both to represent them in a civil suit and to assist the district attorney as special prosecutor.[182] The court held that the simple fact that the special prosecutor also represented the family was not a ground for disqualification.[183] The basis for this conclusion was that the special prosecutor was subject to the district attorney's control.[184] In the *Brown* case, although the court did not explicitly state that the district attorney controlled the special prosecutor, the holding implies that the prosecutor was in fact subject to the district attorney's control. There are instances, however, where that is not the case.[185] The *Brown* court, as well as the *Jones* court,

174. *Id.* at 1245.
175. *Id.*
176. *Id.*
177. *Id.* at 1246.
178. *Id.*
179. *See* Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967).
180. 242 Ga. 536, 250 S.E.2d 438 (1978).
181. *Id.* at 536, 250 S.E.2d at 439.
182. *Id.*
183. *Id.*
184. *Id.*
185. *See infra* notes 192-208 and accompanying text.

seemed to place considerable trust in the district attorney's control over the special prosecutor which may not, in all cases, be justified.

Commonwealth v. Dunlap,[186] a per curiam affirmance of the lower court's decision in which the dissenting justices filed an opinion, demonstrates how divided courts are when dealing with these conflicts. In that case, the district attorney who prosecuted the criminal case simultaneously represented the victim in a civil suit arising out of the same violent assault.[187] The dissent declared that this kind of conflict should invalidate the conviction, even if no actual prejudice had been established.[188] In addition, the dissent stated, "[s]uch a rule is necessary in light of the substantial and sensitive responsibilities and vast discretion which are entrusted to the district attorney."[189] The dissenting justices highlighted the distinction between the prosecutor's professional responsibility obligations and those of a private attorney.[190] They went so far as to say that, "anytime a district attorney represents the victim in a civil suit at the same time that he is prosecuting the defendant, a conflict of interest exists."[191]

The closest that any court has come to articulating a per se rule is in *Young v. United States ex rel. Vuitton*,[192] a 1987 Supreme Court decision. In 1978, Louis Vuitton, S.A. ("Vuitton"), a French leather goods manufacturer, brought suit against several defendants for manufacturing imitation Vuitton handbags in violation of Vuitton's trademark.[193] Pursuant to an out-of-court settlement, the District Court for the Southern District of New York imposed a permanent injunction prohibiting future trademark violations.[194] In 1983, Vuitton, suspecting that the injunction was being violated, engaged the services of a private investigation firm to initiate an undercover "sting" operation.[195] Soon thereafter, Bainton, Vuitton's attorney in the original lawsuit, requested that the district court appoint him and his colleague to prosecute a criminal contempt proceeding against the de-

186. 474 Pa. 155, 377 A.2d 975 (1977) (prosecuting district attorney in an assault case also represented the victim in a civil suit based on the same assault).

187. *Id.* at 157, 377 A.2d at 975.

188. *Id.* at 156-57, 377 A.2d at 975.

189. *Id.* at 157, 377 A.2d at 975.

190. *Id.* at 158-59, 377 A.2d at 976.

191. *Id.* at 158-59, 377 A.2d at 976.

192. 481 U.S. 787 (1987).

193. *Id.* at 790.

194. The permanent injunction prohibited, inter alia, the "manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying [of] any product bearing any simulation, reproduction, counterfeit, copy, or colorable imitation" of Vuitton's registered trademark. 481 U.S. at 790-91.

195. *Id.* at 791.

fendants for violation of the injunction.[196] The court granted Bainton's request,[197] which prompted an appeal by the defendants.[198]

The Court of Appeals for the Second Circuit affirmed the appointment of Bainton to prosecute the contempt action, rejecting a claim that his appointment deprived the defendants of their right to be prosecuted by an impartial prosecutor.[199] On appeal to the United States Supreme Court, the defendants claimed that the district court's appointment of an interested attorney was erroneous, and further, that the district court lacked authority to appoint *any* private attorney as special prosecutor.[200] Although it affirmed the authority of a court to appoint private attorneys as special prosecutors,[201] the Court reversed the Second Circuit's holding,[202] reasoning that a district court does not have the authority to appoint a private attorney as a special prosecutor in a criminal contempt action *when that attorney has any interest in the underlying civil litigation.*[203] The *Young* holding is significant because of the Supreme Court's recognition that attorneys serving two masters with conflicting interests will serve neither effectively.[204] While the holding takes steps towards a per se rule, however, it does not reach far enough.

Young focused on a unilateral decision of a federal district court to appoint an interested private attorney as the sole special prosecutor. The district court in *Young* never referred the criminal case to the United States Attorney's Office,[205] and, in addition, appointed as special prosecutor the very attorney who obtained the injunction. The Supreme Court's analysis was thus largely directed at this limited instance of judicial overreaching. *Young* does not specifically address a situation where an existing prosecutor is involved in related civil litigation, or where a private attorney is hired by a litigant to assist a state or federal prosecutor who is already prosecuting a criminal action.[206] In neither of these two instances is a court in a position to

196. *Id.*
197. *Id.* at 792.
198. *Id.* at 793.
199. *Id.*
200. *Id.*
201. *Id.* at 793-96.
202. 481 U.S. 787 (1987).
203. *Id.* at 802 (emphasis added).
204. *See id.* at 803-09.
205. The United States Attorney's Office is vested with the authority to decide whether to prosecute a criminal action. A court does have the power to initiate criminal contempt prosecutions, but only where required by necessity borne of inaction or refusal by the United States Attorney's Office to prosecute. *Id.* at 801.
206. The *Young* majority, in a footnote, explicitly recognized that its holding would

exercise the type of broad decision-making that troubled the *Young* Court. Cases like *Ganger*,[207] *Dunlap*,[208] and *Jones*[209] fall into this category, and consequently, they raise issues that *Young* does not specifically address.

Moreover, the Court in *Young* based its decision on the supervisory powers of the courts.[210] It is not a constitutionally-based decision, and therefore does not bind state courts. The per se rule that this Note proposes would affect both state and federal courts alike.

V. Problems with the Current Law

Prosecutorial misconduct raises serious problems for the legal profession. It undermines public confidence in the judicial system; it can affect the defendant's constitutionally guaranteed right to a fair trial; and it impairs the efficiency of law enforcement.[211]

While some courts have reversed a conviction when confronted with a prosecutor's civil and criminal conflicts,[212] others have allowed

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not preclude a private attorney from assisting prosecutors already involved in the criminal action:

> The potential for misconduct that is created by the appointment of an interested prosecutor is not outweighed by the fact that counsel for beneficiary of the court order may often be most familiar with the allegedly contumacious conduct. That familiarity may be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution.

Id. at 806 n.17. (emphasis in original). The Fourth Circuit has interpreted *Young* similarly:

> *Young* obviously has relevance to the issue of . . . authorized participation in the prosecution of the contempt citation in this case, but it is not dispositive because it dealt with a significantly different issue: whether a contempt prosecution can be turned over completely to private, interested counsel. The issue here is whether and, if so, to what extent, private counsel for interested parties may be authorized to participate with government counsel in such a prosecution.
>
> *Young* flatly proscribes turning the prosecution completely over to private counsel for interested parties, but it certainly did not proscribe all participation by such counsel.

Person v. Miller, 854 F.2d 656, 662-63 (4th Cir. 1988).

207. 379 F.2d 709. *See supra* notes 116-22, 156-79 and accompanying text.

208. 474 Pa. 155, 377 A.2d 975 (1977). *See supra* notes 186-91 and accompanying text.

209. 776 F.2d 1244 (4th Cir. 1985). *See supra* notes 164-79 and accompanying text.

210. 481 U.S. at 808.

211. *Judicial Response*, *supra* note 96, at I.3. *See also* People v. Donovan, 13 N.Y.2d 148, 154, 193 N.E.2d 628, 631, 243 N.Y.S.2d 841, 845 (1963). "To disregard violation of [a] rule because there is proof in the record to persuade us of a defendant's guilt would but lead to erosion of [that] rule and endanger the rights of even those who are innocent." *Id.* at 154, 193 N.E.2d at 631, 243 N.Y.S.2d at 845.

212. *See supra* notes 116-59 and accompanying text.

the conviction to stand in the absence of prejudice, if the record contained sufficient evidence of guilt.[213] When an appellate court is presented with this kind of prosecutorial conflict, review of the case is complicated by two factors. First, the court is attempting to consider the prosecutor's pretrial conduct, much of which is subject to the prosecutor's discretion, and thus largely unreviewable. Furthermore, there is almost no written record of the pretrial activity for the court to review. All the court can review is the trial transcript and the transcript of any pretrial proceedings, but the prosecutor may have been influenced by conflicting pressures long before the actual trial.[214] As a result, a reviewing court cannot determine, for example, whether the prosecutor resisted entering into a plea bargaining agreement with the defendant or charged the defendant with a particularly serious offense because of some personal animus towards the defendant unrelated to the prosecutor's official functions.[215] Second, it can be very difficult for a reviewing court, when looking solely at the trial transcript, to determine whether there was prejudice.[216]

Neither the Model Code nor the Model Rules deal effectively with these problems that a prosecutor faces. Although the Model Rules have an explicit provision dealing with moving between government service and private practice, it is oriented to protecting the confidences of the client's adversary.[217] It attempts to screen former government attorneys so that they can return to private practice. It also attempts to protect the government's integrity, and thus the focus is on adverse relationships.[218] However, in cases where the prosecutor prosecutes the defendant and represents the defendant's victim, there

213. *See supra* notes 164-85 and accompanying text.

214. *See* Carey, *supra* note 3, at 319-20; Sinclair v. State, 278 Md. 243, 253, 363 A.2d 468, 474 (1976).

215. *See* Ganger v. Peyton, 379 F.2d 709, 712 n.4 (4th Cir. 1967); Sinclair v. State, 278 Md. 243, 363 A.2d 468 (1976).

216. *See* Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974) (the defendant's appointed counsel also represented the defendant's victim in an unrelated civil litigation). While it may be possible to recognize instances of gross professional incompetence from reading the trial transcript alone, relying simply on the trial transcript would not reveal instances of inadequate representation based upon the attorney's divided loyalties. *Id.* at 1245. *See also* Glasser v. United States, 315 U.S. 60, 76 (1941) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."). The problems the reviewing court faces when evaluating these cases are similar to the problems courts confront when they are evaluating decisions made under *Brady v. Maryland*. *See supra* note 68.

217. *See* MODEL RULES, *supra* note 25, Rule 1.11. The comment to Rule 1.11 recognizes that such a provision is needed to avoid "imposing too severe a deterrent against entering public service."

218. *See* MODEL RULES, *supra* note 25, Rule 1.11(b), (c).

is no adverse interest. Both the government and the victim have the same interest in seeing the guilty defendant punished. There is nothing that the prosecutor learns in the course of his prosecution that is likely to be helpful in the civil case, but the dual role gives the prosecutor leverage in the civil case.[219] Indeed, there are relatively few provisions addressed specifically to prosecutors.[220] Although both the Model Code and the Model Rules unquestionably apply to all lawyers and therefore also to prosecutors,[221] the examples and considerations deal overwhelmingly with problems faced by private attorneys. In addition, the provisions that are specifically tailored to prosecutors primarily seem to parallel the prosecutor's constitutional duty to the accused[222] and instruct him how to behave during a trial.[223] These provisions are vague and do not provide the prosecutor with any substantive guidance.

In addition, these provisions do not deal with the conflicts between a prosecutor's public and private responsibilities. Although both the Model Code and the Model Rules deal with conflicts between clients,[224] those provisions do not help the prosecutor because of the amorphous nature of his client.[225] The Model Rules allow a client to consent to certain conflicts, yet the prosecutor has no one to whom he may go to obtain the necessary consent. In addition, the private client cannot consent because he is both the source of the conflict and the beneficiary of it. The private client is not likely to be harmed by the conflict. The defendant, the criminal justice system and the integrity of the profession, because of the appearance of impropriety, are what stand to be harmed by the conflict.

This lack of guidance not only threatens the fairness of the defendant's trial, and increases the potential for misuse of the criminal process,[226] but also creates a general appearance of unfairness. One of a

219. *See, e.g., supra* notes 116-31 and accompanying text.

220. There are nine canons, one hundred thirty-nine ethical considerations and forty-one disciplinary rules in the Model Code. Of these, none of the canons, two ethical considerations and two disciplinary rules relate specifically to prosecutors. *See* MODEL CODE, *supra* note 1, ECs 7-13, 7-14, DRs 7-103, 7-107.

221. Currently, it is an open question whether state disciplinary rules apply to federal prosecutors. *See* United States v. Klubock, 832 F.2d 649 (1st Cir. 1987). Although some of the cases discussed in this note were federal court decisions, they were *habeas corpus* proceedings and the prosecutors in the original cases were state prosecutors.

222. MODEL RULES, *supra* note 25, Rule 3.8; MODEL CODE, *supra* note 1, EC 7-13; *see also supra* note 55.

223. MODEL CODE, *supra* note 1, DR 7-107.

224. *See, e.g.*, MODEL CODE, *supra* note 1, EC 5-3, DR 5-101; MODEL RULES, *supra* note 25, Rules 1.7, 1.9. *See also supra* notes 43-59 and accompanying text.

225. *See supra* notes 65-69 and accompanying text.

226. *See supra* notes 123-31 and accompanying text.

lawyer's duties is to "avoid even the appearance of professional impropriety."[227] Since a criminal defendant's rights are at serious risk, the impropriety that emerges in these situations threatens the fundamentals of the American justice system.[228]

VI. A "Per Se" Rule is Needed

The risks to defendants and the criminal justice system presented by cases where the prosecutor both prosecutes and represents the victim in a civil case cannot be allowed to continue unchecked. One restraint that could be imposed with relative ease is a "per se" rule barring a prosecutor from prosecuting anyone with whom he was, or is opposing in a civil suit.

The "per se" rule would be applied as early in the prosecution as a conflict emerged, but certainly before trial. The duty to invoke the "per se" rule would be on both attorneys, though usually it would be incumbent upon the prosecutor to invoke the rule because he is in the best position to know of a past or current contact with the defendant that poses a conflict. The defense attorney would also have a duty to invoke the rule whenever he learned that his client had some other contact with the prosecutor.

The "per se" rule would require knowledge of the conflict. The "per se" rule would not apply to situations where the prosecutor was an associate at a firm and is now prosecuting a client of his former firm, provided he had had no contact with the client while at the firm and did not discuss the case with any other attorneys. In such a scenario, there would be no conflict because the prosecutor would neither have, nor have had, any information that he could use to the defendant's detriment.

There must also be a sufficiently close nexus of facts in order to require "per se" exclusion of the prosecutor. The civil and criminal cases would have to emerge out of the same transaction or set of facts in order to require "per se" exclusion of the prosecutor. Otherwise, a private attorney who decided to enter public service could find his career severely constrained in terms of the scope of cases he would be free to prosecute because of his prior private practice. Thus, in *Ganger v. Peyton*,[229] there is clearly a sufficient nexus; the same assault

227. MODEL CODE, *supra* note 1, Canon 9. There may be times when a lawyer's conduct appears unethical to the layman. MODEL CODE, *supra* note 1, EC 9-2. It is important that a lawyer avoid even the appearance of impropriety that might undermine the layman's confidence in the judicial system. *Id.*

228. *See supra* notes 209-25 and accompanying text.

229. 379 F.2d 709 (4th Cir. 1967).

was at the heart of both the criminal and civil cases. There is also a sufficient nexus in *Sinclair v. State*[230] where the same bad checks were the basis for both the criminal prosecution and the civil suit.

Although the nexus requires the same transaction or set of facts, the parties do not necessarily have to be the same for the "per se" rule to apply. Thus, a prosecutor who represented the victim in a drunk driving accident would be "per se" excluded from prosecuting the driver. In such a situation, the concern that a prosecutor will not exercise his discretion independently and the appearance of impropriety create the same issues as in a case such as *Ganger v. Peyton*.[231] Here again, the prosecutor would have the requisite knowledge of the conflict thereby requiring that the "per se" rule be applied.

Although at first glance, this might seem to be similar to the substantial relationship test, the concerns are different. With the substantial relationship test, the primary concern is preventing the attorney from using one client's confidences to benefit another client.[232] In the cases where the prosecutor has a civil-criminal conflict, the concerns are with the fundamental fairness of the defendant's trial,[233] the integrity of the judicial system[234] and an appearance of impropriety.[235] The attorney is also not switching sides as in most of the substantial relationship cases, where the attorney is taking the opposite side from the one where he represented the first client. Instead, the attorney as prosecutor and the attorney as civil representative to the victim is in both cases opposing the defendant. In addition, the "per se" rule applies in more discrete situations than the substantial relationship test. The conflicts at issue in cases where the "per se" rule would be invoked arise out of the same event. With the substantial relationship test, that is not necessarily the case.[236]

Invoking the "per se" rule would require the prosecutor to inform the judge of the conflict. The prosecutor should not go to the judge on an *ex parte* basis, but should inform defense counsel beforehand.

The "per se" rule excluding the prosecutor does not require exclusion of the prosecutor's entire office. However, it does require the

230. 278 Md. 243, 363 A.2d 468 (1976).

231. 379 F.2d 709 (4th Cir. 1967). *See supra* notes 116-22 and accompanying text.

232. *See supra* notes 44, 49-54 and accompanying text.

233. *See, e.g.,* Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); *see also supra* notes 156-58 and accompanying text.

234. *See, e.g.,* Sinclair v. State, 278 Md. 243, 362 A.2d 468 (1976); *see also supra* notes 123-31 and accompanying text.

235. *See* MODEL CODE, *supra* note 1, Canon 9; *see, e.g.,* United States v. Prantil, 764 F.2d 548 (9th Cir. 1985).

236. *See* Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1981); *see also supra* notes 56-59 and accompanying text.

creation of a chinese wall in the office so that the prosecutor has no contact at all with the ongoing prosecution.[237] It also requires that the new prosecutor not be exposed to any of the former prosecutor's work product, even though the second prosecutor had no conflict. If the second prosecutor just stepped into the former's shoes, there would be no check on whether the former prosecutor had exercised his discretion independently or allowed personal animus to interfere with his decision making in deciding to prosecute the defendant. The prosecution would still be tainted by whatever countervailing duties of the first prosecutor.

In order for the "per se" rule to facilitate, rather than hinder, judicial economy, attorneys should to be severely disciplined for failure to comply. Where the prosecutor fails to draw attention to a conflict the rule would have arguably covered, the conviction should automatically be reversed and the case remanded for a new trial.[238] Although an automatic reversal rule might initially seem too harsh, there are several reasons why it is necessary to a smooth functioning of the "per se" rule. First, it alleviates the burden of appellate review. Appellate review of these conflicts is particularly difficult.[239] Second, and perhaps most important, is the deterrent effect achieved by the automatic reversal rule. Given the reliance on conviction statistics as a measure of professional competence,[240] the threat of a reversal looms large in the prosecutor's mind. However, if the reversal is not automatic, thereby leaving open the possibility of convincing the appellate court that the conduct was harmless error, then the "per se" rule would not work and the courts would be left with a case by case analysis. On the other hand, if the defense attorney failed to invoke the rule after his client told him of his other relationship with the prosecutor, he would be deemed to have waived his right to challenge the prosecutor's independence.

A "per se" rule would have many advantages. First, it would create a bright-line standard which would eliminate uncertainty while

237. United States v. Helmsley, 726 F. Supp. 929, 937 (S.D.N.Y. 1989); United States v. Poindexter, 698 F. Supp. 300, 312-13 (D.D.C. 1988).

238. The Supreme Court has been reluctant to adopt "per se" rules of reversal. *See, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673 (1985); United States v. Young, 470 U.S. 1, *on remand*, 758 F.2d 514, *on reconsideration*, 767 F.2d 737 (10th Cir. 1985); United States v. Cronic, 466 U.S. 648 (1984). The object of the "per se" rule advocated here is not automatic reversal, but an automatic application of the rule when a prosecutor participates in both the criminal and civil sides of a case. The automatic reversal of a conviction for violation of the rule is to give the rule some teeth and an incentive for prosecutors to abide by it.

239. *See supra* notes 212-16 and accompanying text.

240. *See supra* notes 73-77 and accompanying text.

not inhibiting effective advocacy.[241] A lack of clearly articulated standards can lead to prosecutorial misconduct,[242] for a lawyer who is unsure of his proper function and role cannot effectively administer justice.[243]

Second, a "per se" rule would help protect a defendant's rights. If the prosecutor had a part-time private practice, then he would be "per se" excluded from any matters that involved the same facts, thus helping to ensure that the prosecutor's discretion was being exercised impartially.[244] The rule would also remove any appearance of impropriety or conflict.

A third advantage to the "per se" rule is that it would not be overly burdensome. The ABA's Model Rules recognize that requiring disqualification of all government attorneys when one attorney has a conflict would work undue hardship on the government.[245] The "per se" rule would require the attorney to be effectively insulated from the prosecution and ensure that he have no contact with those involved in the prosecution.[246]

Fourth, a "per se" rule removes the opportunity for misusing the criminal process for gains in related civil litigation. The "per se" rule would prevent the prosecutor from indicting an opponent in a civil

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241. PROSECUTION STANDARDS, *supra* note 6, at 6.

242. *See Burger Court*, *supra* note 97, at 225. *See also supra* notes 72-105 and accompanying text.

243. PROSECUTION STANDARDS, *supra* note 6, at 9. The ABA also agrees on the need for clear standards defining the lawyer's role. MODEL CODE, *supra* note 1, Preliminary Statement, at n.7 (quoting *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958)).

> The grounds for the lawyer's particular obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services [the legal profession] might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective.

Id.

244. There are some state disciplinary rules that prohibit prosecutorial involvement on both the criminal and civil sides of a case. *See* Ganger v. Peyton, 379 F.2d 709, 712 n.3 (4th Cir. 1967)(citing Virginia State Bar, Legal Ethics Comm., Ops. No. 1 (Aug. 5, 1942), No. 32 (June 30, 1951), No. 117 (March 29, 1963), No. 121 (Jan. 11, 1963), No. 131 (Oct. 2, 1963)). However, even a clear state bar disciplinary rule did not prevent the prosecutor's misconduct in *Ganger*.

245. MODEL RULES, *supra* note 25, Rule 1.10 comment.

246. The entire prosecutor's office cannot be excluded from the prosecution without severely restricting lawyers' professional mobility. Therefore, the "per se" rule is required as an initial matter to prevent the prosecutor from ever being involved in the prosecution of a client he formerly defended. The "per se" rule would protect both the defendant's rights and the prosecutor's office.

litigation. Thus, even if the prosecutor wanted to misuse the process, he would be prevented from doing so.

A "per se" rule would be practical and easy to enforce. Judicial reversals of convictions obtained where the "per se" rule should have been invoked would serve to deter future misconduct by prosecutors, since they would know that the rule would be enforced.[247] Without such rigid enforcement, the "per se" rule would do nothing to reduce the number of prosecutorial conflicts presented on appeal.

VI. Conclusion

The judicial system, with the pressures it puts on the prosecutor, has created a situation in which a defendant's rights are often put at risk. A "per se" rule would resolve many of the problems with which courts must grapple when presented with a defendant who claims prosecutorial conflict of interest. A clear standard would benefit all in the criminal justice system.

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247. *Judicial Response, supra* note 96, at I.6.