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## Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals

Richard H. Underwood

*University of Kentucky College of Law*, [runderwo@uky.edu](mailto:runderwo@uky.edu)

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## Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals

BY RICHARD H. UNDERWOOD\*

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\* Spears-Gilbert Professor of Law, University of Kentucky College of Law. B.S. 1969, J.D. 1976, The Ohio State University; Coauthor, TRIAL ETHICS (Little, Brown & Co. 1988); Chairman, Ethics and Unauthorized Practice Committees of the Kentucky Bar Association. The views expressed in this article are not, in any sense, the official views of the Kentucky Bar Association or any of its committees.

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## I. INTRODUCTION

### A. *The View from the Ethics Committee*

Seymour Wishman provides us with the following vignette revealing a particular prosecutor's ethical sensitivity:

[The former prosecutor turned defense lawyer was discussing a notoriously crooked cop with a group of other lawyers, including Wishman.]

"I convicted Whelan when I was in the prosecutor's office," Darren said.

....

"I went to trial [on the charge]. . . . I poured it on in the summation. I was screaming, 'This worm of a cop, this blight on the reputation of many honest, dedicated men in blue.' I probably even said 'rotten apple.' I got the conviction and it was a terrific win."

....

. . . "Well, right after that I left the D.A.'s office, and the first person who came and asked me to represent him was Whelan."

....

"And since I had a new job, defending criminals, he asked me to represent him on the appeal. I told him he had to be out of his mind."

"You can't try to reverse a conviction you were responsible for," Ashley said. "It'd be a clear conflict of interest."

"Right. That's what I told the guy. Then he asked me to handle his civil service appeal. He'd been a cop for eighteen years with a lot of money tied up in a pension he'd lose because of the conviction. Although it was only a civil appeal, I didn't think I'd be allowed to take it, but I agreed to send a letter to the ethics committee. I figured I'd tell them the facts and leave it up to them."

"That's hopeless," Ashley said. "If you have a serious ethical question, they never give you an answer in time."

"You're right. It took seven months, but in this case the civil service appeal had to wait for the outcome of the criminal appeal anyway."

"So what happened?" Norman asked.

"As usual, my letter and the response from the ethics committee were published in the law journal for the benefit of the entire bar. The committee, in its collective wisdom, said, in essence, 'What kind of lawyer would even ask such a question?' I called Whelan and told him I couldn't get his pension back for him. 'No problem,' he said. He'd learned that morning that his conviction had been reversed on the grounds that the prosecutor had been too inflammatory and overreaching in his summation."

"So you not only got the guy's conviction, but his acquittal and pension, too," Ashley said.

"Terrific!" I said. "Some lawyer!"<sup>1</sup>

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<sup>1</sup> SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* 189, 190-91 (1981).

Clearly, practitioners need more than an old-fashioned ethics committee that speaks through the bar journal every other month. They need an ethics hotline providing qualified and meaningful advice "on tap."<sup>2</sup> On the other hand, Wishman's dialogue also suggests that a lawyer may know the "correct" answer, but may want to use the ethics committee for public relations purposes.

In my experience, lawyers use the ethics committee as a lightning rod to draw the anger of the client—they use the committee to provide a necessary and authoritative "no" answer that the lawyer would rather not give the client directly. Worse still, instead of struggling with the Code or Rules, too many lawyers use the committee as a crutch, and ultimately as a justification for overlooking conflicts and other ethical problems. I call such lawyers "frequent fliers." They will take any case no matter the circumstances, send in a request for an "Advisory Opinion" to the ethics committee to cover themselves, and ignore the problem until the ethics committee intervenes. All that can happen, they think, is that the court (or in a worst case scenario, the disciplinary tribunal) will grant them the benefit of some hardship exception (avoiding disqualification) or a defense in a disciplinary proceeding, especially in light of the fact that the fault lies with "that damned Ethics Committee." This is nothing less than systematic professional irresponsibility, for the business of "resolving conflicts of interest is primarily the responsibility of the lawyer undertaking the representation."<sup>3</sup>

A fair percentage of the "frequent fliers" are part-time prosecutors.<sup>4</sup> Somewhere between 25 and 35 percent of all requests for advisory opinions that are sent to the Kentucky Bar Association Ethics Committee come from prosecutors.<sup>5</sup> On the other hand, I must also concede that part-time prosecutors face a mind-boggling array of conflicts rules, cases and opinions, and that they have

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<sup>2</sup> See Richard H. Underwood, *Confessions of an Ethics Chairman*, 16 J. LEGAL PROF. 125 (1992).

<sup>3</sup> MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES] Rule 1.7 cmt. 14 (1983); KY. SUP. CT. R. 3.130, Rule 1.7 cmt. 14 (Michie/Bobbs-Merrill 1992).

<sup>4</sup> Cf. Ethics Comm. of the Kentucky Bar Ass'n Op. [hereinafter Kentucky Op.] E-350 (1992): "We note that in the past, prosecutors have tended to take cases . . . and then request ethics opinions. The thought seems to be that representation is proper until such time as the Committee responds to the particular scenario . . . ."

<sup>5</sup> See KY. SUP. CT. R. 3.530 ("Advisory Opinions—Informal And Formal") (Michie/Bobbs-Merrill 1992). This Rule was recently amended to provide a "hotline" for telephone opinions.

little to go by in the way of readily available guidelines.<sup>6</sup> This article attempts to provide some guidelines.<sup>7</sup>

### *B. The Tactical and Practical Significance of the Conflicts Rules for Part-Time Prosecutors*

There is no "prosecutorial exception" in the Model Code or in the Model Rules,<sup>8</sup> and charges of prosecutorial misconduct are

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<sup>6</sup> The Kentucky Bar Association is preparing a collection of the state's ethics opinions, judicial ethics opinions, and selected rules and statutes governing the regulation of lawyers and judges, with indices and some limited commentary, for publication as the KENTUCKY BAR ETHICS HANDBOOK. The need for such a handbook was noted by the Model Rules Committee in a report recommending the adoption of a version of the ABA Model Rules. As chairman of that committee, and as editor of the preliminary draft of this handbook, I hope to see it in circulation by the end of 1992 under the auspices of the Lawyer's Professionalism Committee.

Law review articles on prosecutors and conflicts of interest are few and far between. Among the most straightforward are John O. Kizer, *Legal Ethics and the Prosecuting Attorney*, 79 W. VA. L. REV. 367 (1977); H. Richard Uviller, *Commentary: The Virtuous Prosecutor In Quest Of An Ethical Standard: Guidance From The ABA*, 71 MICH. L. REV. 1145 (1973); and Timothy W. Bjorkman, Comment, *The Part-Time State's Attorney in South Dakota: The Conflict between Fealty to Private Client and Service to the Public*, 27 S.D. L. REV. 24, 28 (1981). The leading texts on "prosecutorial misconduct" pay remarkably little attention to the details of the subject. See, e.g., BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (1985); JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT (1985). Of the ethics texts dedicated especially to prosecutorial ethics, only JOHN J. DOUGLASS, ETHICAL ISSUES IN PROSECUTION (1988), deems conflicts of interest a topic worthy of a survey, devoting an entire chapter to the subject.

Useful A.L.R. annotations include: Romualdo P. Eclavea, Annotation, *Disciplinary Action Against Attorney For Misconduct Related To Performance Of Official Duties As Prosecuting Attorney*, 10 A.L.R. 4th 605 (1981); Erwin S. Barbre, Annotation, *Prosecuting Attorney As A Witness In Criminal Cases*, 54 A.L.R. 3d 100 (1973); T.J. Griffin, *Disqualification Of Prosecuting Attorney On Account Of Relationship With Accused*, 31 A.L.R. 3d 953 (1970); R.F. Chase, Annotation, *What Constitutes Representation Of Conflicting Interests Subjecting Attorney To Disciplinary Action*, 17 A.L.R. 3d 835 (1968); B.C. Ricketts, Annotation, *Constitutionality And Construction Of Statute Prohibiting A Prosecuting Attorney From Engaging In The Private Practice Of Law*, 6 A.L.R. 3d 562 (1966); and W.C. Moldoff, Annotation, *Constitutionality And Construction Of Statute Against Public Attorney Representing Private Person In Civil Action*, 82 A.L.R. 2d 774 (1962).

<sup>7</sup> I focus most of my attention on part-time prosecutors, but the coverage is necessarily general in some places. I also rely to a very large extent on Kentucky materials, and to a lesser extent on personal experiences. Nevertheless, the part-time prosecutor problem is neither local nor parochial. Accordingly, I refer to cases, statutes, and interpretive gloss from around the country. The notes show that, for the most part, the results *should* be the same in both Code and Rules jurisdictions.

<sup>8</sup> See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.2 (1986); see also RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS § 14.4.4 (1988 & Supp. 1992); Advisory Comm., Missouri Bar Ass'n Op. [hereinafter Missouri Op.] 98 (1980), Laws. Man. on Prof. Conduct (ABA/BNA) 801:5253; Eclavea, *supra* note 6.

Ethics opinions from all 50 states dealing with the subject of prosecutors' conflicts of

common in criminal cases—a common defense tactic, if you will.<sup>9</sup> While critics of the disciplinary system complain that prosecutors are rarely punished for their misconduct,<sup>10</sup> severe disciplinary sanctions have been imposed on part-time prosecutors who have ignored conflicts of interest.<sup>11</sup>

Furthermore, the tactical implications of conflicts of interest cannot be ignored. A hard won conviction may be reversed.<sup>12</sup> On the private side of the practice fence, the prosecutor who takes a civil case in the face of an obvious conflict<sup>13</sup> invites a disqualification motion. Even if the motion does not succeed, the private client's case may be prejudiced by serious delay, and the client may suffer unnecessary expense as a result of collateral or "satellite" litigation. If the motion succeeds, the private client will also be deprived of a lawyer who has become knowledgeable about the case.<sup>14</sup> Conflicts will be exploited by the prosecutor's opponent. One commentator on prosecutorial misconduct opines in a black-letter "Comment," or tip (albeit in the context of the defense of criminal cases, when the prosecutor is performing in his public clothes): "Disqualification of the prosecutor may be an important tactical consideration, as well as an appropriate sanction. Any disruption of the prosecution team should benefit the defendant. Clearly, a motion to disqualify should not be frivolously made, but in the right circumstances, counsel should be mindful of its dual purpose."<sup>15</sup> The reader should take note that the appropriate-

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interest, including most of the opinions noted in this article, can be found in digest form in either OLIVAI MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (American Bar Found., 6 vols. to 1980) [hereinafter cited as MARU] or the Lawyers' Manual on Professional Conduct (ABA/BNA, opinions from 1980 to date) [hereinafter cited as ABA/BNA Man.]. Citations to ethics opinions will include both the original reference and any applicable digest reference.

<sup>9</sup> See EVAN THOMAS, THE MAN TO SEE: EDWARD BENNETT WILLIAMS: ULTIMATE INSIDER; LEGENDARY TRIAL LAWYER 419-20 (1991) ("Williams was so aggressive about accusing the prosecutors of misconduct that the assistant U.S. attorneys on the case began referring to the lawyer writing Williams's motions as 'Worse Yet.' After every paragraph alleging some unpardonable act of prosecutorial misconduct, the next paragraph would begin, 'Worse yet . . . .'").

<sup>10</sup> GERSHMAN, *supra* note 6, at ix ("Misconduct is commonly met with judicial passivity and bar association hypocrisy."); cf. LAWLESS, *supra* note 6, at 601 ("Bar associations seem to have a fear of disciplining prosecutors. It may be because of the political connections of the individual prosecutor or those of the chief prosecutor.").

<sup>11</sup> See cases cited *infra* note 18.

<sup>12</sup> See discussion *infra* note 18 and accompanying text; see also Griffin, *supra* note 6.

<sup>13</sup> See, e.g., discussion *infra* notes 236-42 and accompanying text; see also Griffin, *supra* note 6.

<sup>14</sup> MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 184 (1990).

<sup>15</sup> LAWLESS, *supra* note 6, § 13.16.



ness of the sanction seems to be a secondary consideration. The emphasis is on the tactical benefit to be gained by making the motion.<sup>16</sup>

The comments to the draft of the Restatement (Third) of the Law Governing Lawyers list the following "Sanctions and remedies for conflicts of interest":

- (i) discipline, malpractice and fee forfeiture;
- (ii) disqualification from participation in a matter;
- (iii) rescinding a prohibited contract, gift or other transaction;
- (iv) criminal sanctions;
- (v) denying admissibility of evidence;
- (vi) dismissing the client's action;
- (vii) reversing the determination of a case.<sup>17</sup>

All of these remedies<sup>18</sup> could have an impact on a prosecutor.

## II. COMMONWEALTH OR STATE'S ATTORNEYS, COUNTY ATTORNEYS, AND CITY ATTORNEYS

Professional standards<sup>19</sup> call for the appointment of full-time,

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<sup>16</sup> For his part, Freedman appears to focus on the merits, while observing (correctly) that "[a]s with any motion, the issue for the court should not be whether the moving party has a tactical motive for making the motion, but whether the motion is meritorious." FREEDMAN, *supra* note 14, at 184. This view is consistent with MODEL RULES, *supra* note 3, 3.1 and 3.2, as well as the MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE] DR 7-102(A)(1) (1981). All of these standards permit the enjoyment of incidental delay gain or other tactical benefit, so long as the lawyer is also advancing a non-frivolous position or is primarily motivated by proper considerations.

<sup>17</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 cmt. e (Tentative Draft No. 4, 1991).

<sup>18</sup> For a case involving dismissal of an indictment due to prosecutorial misconduct, see *United States v. Lopez*, 765 F. Supp. 1433 (N.D. Cal. 1991). Part-time prosecutors should also consider the possibility that abuse of the public office for personal benefit or for the benefit of a private client might result in the loss of prosecutorial immunity. See LAWLESS, *supra* note 6, § 13.07 (1985) (citing *Beard v. Udall*, 648 F.2d 1264 (9th Cir. 1981)). On the other hand, *Beard* was "overruled" (at least to some extent) in *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986), and has not fared well in other circuits. See, e.g., *Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2323 (1992); *Grant v. Hollenbach*, 870 F.2d 1135 (6th Cir. 1989); Annotation, *When Is Prosecutor Entitled To Absolute Immunity From Civil Suit For Damages Under 42 U.S.C. § 1983: Post-Imbler Cases*, 67 A.L.R. Fed. 640 (1984).

<sup>19</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION [hereinafter CRIM. JUST., PROSECUTION FUNCTION] Standard 3-2.1 (1979) states, under the title "Prosecution Authority to be Vested in a Public Official": "The prosecution function should be performed by a *public* prosecutor who is a lawyer subject to the standards of professional conduct and discipline." (emphasis added).

public<sup>20</sup> prosecutors. The ABA Standards for Criminal Justice, The Prosecution Function, call for full-time prosecutors:

Standard 3-2.3. Assuring High Standards of Professional Skill:

. . . .

(b) Wherever feasible, the offices of chief prosecutor and staff should be full-time occupations.

. . . .

(d) . . . [C]ompensation for prosecutors and their staffs should be commensurate with the high responsibilities of the office and comparable to the compensation of their peers in the private sector.

Standard 3-2.2. Interrelationship of Prosecution Offices Within a State

<sup>20</sup> Kentucky and a few other rural states still permit the family of a victim to hire a private lawyer to prosecute. *Commonwealth v. Hubbard*, 777 S.W.2d 882 (Ky. 1989); *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert. denied*, 445 U.S. 904 (1980). For the view that this should not be permitted see *State v. Boykin*, 259 S.E.2d 883 (N.C. 1979). Needless to say, "modern" authorities view this state of affairs with alarm. WOLFRAM, *supra* note 8, § 13.10.1 n.35 (1986) (calling the practice "barbaric"). In America, even the "old writers" were troubled by private prosecution in capital cases, with Ciceronian observations that "where life or death is the issue 'it is always more honorable to defend than to prosecute,'" and that counsel should "never take blood money." GEORGE W. WARVELLE, *ESSAYS IN LEGAL ETHICS* 142 (1902) (citation omitted). Even those courts that tolerate private prosecutors have concluded that "[p]rivate counsel who undertakes the duties of prosecution may not become involved in any civil matter related to the criminal prosecution." *Hubbard*, 777 S.W.2d at 884 (citing MODEL CODE, *supra* note 16, DR 9-101(B)); *Cantrell v. Commonwealth*, 329 S.E.2d 22 (Va. 1985) (counsel hired by victim's family may participate with leave of court and agreement of public prosecutor but may not initiate a criminal case, appear before a grand jury, or take part in plea bargaining). Compare WARVELLE, *supra*, at 142-43:

[W]hile an attorney may be permitted to assist in a prosecution, it is yet a privilege that he should exercise with the utmost caution and circumspection . . . . If he represents private interests, it has been held in some states, he cannot be retained to assist in criminal prosecutions growing out of such interests . . . and the rule seems to be eminently salutary and just. . . . But, in any event, such retainers should be accepted with reluctance and only in extraordinary cases, where peculiar circumstances seem to justify the act. There is something revolting to the moral sense in the spectacle of counsel selling his talents to enable an individual to satisfy his thirst for vengeance, and this, in most cases, is just what counsel does when he accepts a private retainer to assist the prosecuting officer.

and *Kentucky Ops.*, *supra* note 4, E-157 and E-151 (1976), MARU, *supra* note 8, Nos. 11,127 and 11,133 (Supp. 1980) with *Jones v. Richards*, 776 F.2d 1244 (4th Cir. 1985); *Atkins*, 261 S.E.2d at 58 (lending support to the desire for retribution by noting that "in certain cases, the victim's family may wish to satisfy itself that the case is being vigorously prosecuted") and discussion of "over prosecution" in part VII, *infra*. But see *State v. Riser*, 294 S.E.2d 461 (W.Va. 1982) (private prosecutor assisted and also had parallel civil case for contingent fee, but case was not reversed because there was no contemporaneous objection).

(a) Local authority and responsibility for prosecution is properly vested in a district, county, or city attorney. Wherever possible, a unit of prosecution should be designed on the basis of population, caseload, and other relevant factors sufficient to warrant at least one fulltime prosecutor and the supporting staff necessary to effective prosecution.<sup>21</sup>

Nevertheless, while state statutes prohibiting private practice exist, and have been upheld,<sup>22</sup> the economic realities are such that many state and local governments will continue to rely upon part-time prosecutors.<sup>23</sup> In the discussions that follow, I will concentrate on the offices of the commonwealth and county attorneys in the Commonwealth of Kentucky. To a lesser extent, reference will be made to the office of the city attorney.

### A. Definitions

Commonwealth and county attorneys in Kentucky are allowed to have private practices<sup>24</sup> unless they serve a metropolitan area.<sup>25</sup>

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<sup>21</sup> CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standard 3-2.3(b), (c), -2.2(a); see also NATIONAL DISTRICT ATTORNEYS ASSOCIATION [hereinafter NATIONAL PROSECUTION STANDARDS] Standard 1.3 A.—Responsibilities:

The office of the prosecutor shall be a full-time profession. The prosecutor shall neither maintain nor profit from a private legal practice. In those jurisdictions unable to justify the employment of a full-time prosecutor, the prosecutor may serve part-time until the state determines that the merger of jurisdictions or growth of caseload necessitates a full-time prosecutor.

The prosecutor shall devote primary effort to his office, and shall have no outside financial interests which could conflict with that duty.

Selected portions of these standards are reprinted in RENA A. GORLIN, CODES OF PROFESSIONAL RESPONSIBILITY 409 (2d ed. 1990).

<sup>22</sup> Ricketts, *supra* note 6; Moldoff, *supra* note 6.

<sup>23</sup> See Bjorkman, *supra* note 6, at 28 (citing inability—or unwillingness—to pay competitive salaries). Regarding compensation see KY. REV. STAT. ANN. §§ 15.755(4)-(7), 15.765(1)-(3), and 15.770(5) (Michie/Bobbs-Merrill 1988).

<sup>24</sup> KY. REV. STAT. ANN. § 15.765(4) (Michie/Bobbs-Merrill 1988) (“The county attorney shall not be prohibited from engaging in the private practice of law.”); *id.* § 15.770(3) (“Assistant county attorneys shall not be prohibited from engaging in the private practice of law.”).

<sup>25</sup> KY. REV. STAT. ANN. § 15.755(3) (Michie/Bobbs-Merrill 1988):

In each judicial circuit containing a city of the first or second class or an urban-county government, or a city of the third class and a population of seventy-five thousand (75,000) or more, the Commonwealth’s attorney shall not engage in the private practice of law. The population of a judicial circuit shall, for the purpose of this statute, be determined by the most recent federal decennial census enumeration. All other Commonwealth’s attorneys shall not be prohibited from engaging in the private practice of law.

Under Kentucky law, the commonwealth's attorney attends the circuit court (*Nisi Prius*) in his or her judicial circuit and prosecutes violations of the criminal and penal laws which are to be tried in that court.<sup>26</sup> The county attorney attends the district court (a court of limited civil and criminal jurisdiction) in his or her county and prosecutes criminal and penal laws within the jurisdiction of that court.<sup>27</sup>

Kentucky has followed the recommendations of the ABA Standards for Criminal Justice<sup>28</sup> by adopting a "unified and integrated prosecutor system":

Unified and integrated prosecutor system established.

It is hereby declared to be the policy of this Commonwealth to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the attorney general as chief law enforcement officer of the Commonwealth, in order to maintain uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the Commonwealth. To this end, a unified and integrated prosecutor system is hereby established with the attorney general as chief prosecutor of the Commonwealth.<sup>29</sup>

In this system, a commonwealth or county attorney can be called upon to serve as a special prosecutor outside of his or her regular jurisdiction:

Each regular Commonwealth's attorney and county attorney shall be, *ex officio*, a special prosecutor of the Commonwealth, and as such shall perform such duties and render such services, at such time and places, coextensive with the Commonwealth as may be required by the attorney general. The duties and services may include, but are not limited to, prosecution of or participation in action outside of his judicial circuit or judicial district when directed by the attorney general and assisting the attorney general in preparation and presentation of the Commonwealth's

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<sup>26</sup> KY. REV. STAT. ANN. § 15.725(1) (Michie/Bobbs-Merrill 1988).

<sup>27</sup> KY. REV. STAT. ANN. § 15.725(2) (Michie/Bobbs-Merrill 1988).

<sup>28</sup> See CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standard 3-2.2: Interrelationship of Prosecution Offices Within a State:

(b) In some states, conditions such as geographical area and population may make it appropriate to create a statewide system of prosecution in which the state attorney general is the chief prosecutor and the local prosecutors are deputies.

<sup>29</sup> KY. REV. STAT. ANN. § 15.700 (Michie/Bobbs-Merrill 1985).

position in criminal cases appealed to circuit court, Court of Appeals, and the Supreme Court.<sup>30</sup>

Furthermore, when a prosecuting attorney is disqualified: “[The prosecutor] shall certify such fact in writing to the attorney general who may direct another Commonwealth’s attorney or county attorney or an assistant attorney general as a special prosecutor to represent the Commonwealth in that proceeding.”<sup>31</sup>

In most judicial circuits<sup>32</sup> the commonwealth attorney is also expected to represent the interests of the Commonwealth in civil cases in the circuit court. The county attorney and his or her assistants<sup>33</sup> attend the fiscal court, and when so directed by the fiscal court they institute, defend and conduct all civil actions in which the county is interested.<sup>34</sup> A county attorney serving in a county or urban county that is part of a judicial circuit that includes a county in which there is located a city of the first or second class or an urban-county government<sup>35</sup> also attends to civil cases and proceedings in which the Commonwealth is interested.<sup>36</sup>

In the past, at least, city attorneys have also been assigned some prosecutorial duties.<sup>37</sup> In some areas the city attorney also served as the principal legal advisor to the local police force.<sup>38</sup> It would appear that these roles are no longer assigned to city attorneys in Kentucky. Indeed, the work of the city attorney is often contracted out to a local firm or firms. The specific duties assigned to a particular contract lawyer may be negotiable. Accordingly, generalizations about the public duties of the city attorney are hazardous.

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<sup>30</sup> KY. REV. STAT. ANN. § 15.730 (Michie/Bobbs-Merrill 1985); *see also infra* part IX.A.2 .

<sup>31</sup> KY. REV. STAT. ANN. § 15.733(4) (Michie/Bobbs-Merrill 1985); *see also id.* § 15.734 (disqualification of prosecuting attorney due to indictment on a felony charge; appointment of special prosecutor for duration of disqualification).

<sup>32</sup> The exceptions are Franklin County (the State Capital) and those counties in which there is a city of the first or second class, or an urban county government. KY. REV. STAT. ANN. § 69.010(1), (2) (Michie/Bobbs-Merrill 1980).

<sup>33</sup> KY. REV. STAT. ANN. § 15.770 (Michie/Bobbs-Merrill 1987) (called “assistant county attorneys” in the statute).

<sup>34</sup> KY. REV. STAT. ANN. § 69.210(1) (Michie/Bobbs-Merrill 1987).

<sup>35</sup> KY. REV. STAT. ANN. § 69.010 (Michie/Bobbs-Merrill 1980).

<sup>36</sup> KY. REV. STAT. ANN. § 69.210(4)(a) (Michie/Bobbs-Merrill 1987).

<sup>37</sup> A 1992 statute allows cities to criminalize violations of city ordinances and assign the prosecution of alternative or parallel civil penalties to city attorneys. 1992 Ky. Acts Ch. 193.

<sup>38</sup> *See infra* part V.A.

## B. Statutory Duties

In addition to his or her prosecutorial duties and general obligation to represent the state and county in civil actions, the commonwealth or county attorney has a surprising number of additional duties that are set forth in a large number of unrelated statutes scattered throughout the books.

Some of these statutory duties are familiar. For example, the county attorney must advise the fiscal court and the several county officers concerning county business;<sup>39</sup> must attend to the prosecution of juvenile cases in the district court;<sup>40</sup> must bring enforcement actions under the Uniform Reciprocal Enforcement of Support Act;<sup>41</sup> and must prosecute paternity actions at the request of complainants.<sup>42</sup> The county attorney must assist the petitioner and represent the interests of the Commonwealth in actions to hospitalize the mentally ill<sup>43</sup> and involuntarily admit the mentally retarded;<sup>44</sup> and the county attorney has an important obligation to assist petitioners in guardianship and conservatorship proceedings involving disabled persons.<sup>45</sup>

Other statutory duties are less familiar to many lawyers. For example, the county attorney is the statutory advisor to the bureau of highways within his county;<sup>46</sup> and the commonwealth and county attorneys may be required to represent the bureau of highways in a condemnation action.<sup>47</sup>

The county attorney plays an important role in the assessment and collection of taxes.<sup>48</sup> The county attorney also institutes proceedings regarding escheats.<sup>49</sup>

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<sup>39</sup> KY. REV. STAT. ANN. § 69.210(3) (Michie/Bobbs-Merrill 1987).

<sup>40</sup> KY. REV. STAT. ANN. § 69.210(2) (Michie/Bobbs-Merrill 1987).

<sup>41</sup> KY. REV. STAT. ANN. §§ 407.190, 407.250(3) (Michie/Bobbs-Merrill 1984).

<sup>42</sup> KY. REV. STAT. ANN. § 406.021(1) (Michie/Bobbs-Merrill 1984).

<sup>43</sup> KY. REV. STAT. ANN. § 202(A).016 (Michie/Bobbs-Merrill 1991).

<sup>44</sup> KY. REV. STAT. ANN. § 202(B).019 (Michie/Bobbs-Merrill 1991).

<sup>45</sup> KY. REV. STAT. ANN. § 387.560(3) (Michie/Bobbs-Merrill 1984).

<sup>46</sup> KY. REV. STAT. ANN. § 176.280 (Michie/Bobbs-Merrill 1989).

<sup>47</sup> KY. REV. STAT. ANN. § 177.082 (Michie/Bobbs-Merrill 1989); *see also* Kentucky Op., *supra* note 4, E-75 (1973), MARU, *supra* note 8, No. 8538 (Supp. 1975); Kentucky Op. E-241 (1981), ABA/BNA Man., *supra* note 8, 801:3903 (dealing with conflicts prohibiting the representation of private parties in condemnation cases).

<sup>48</sup> KY. REV. STAT. ANN. §§ 132.350 (Michie/Bobbs-Merrill 1991) (assessment proceedings); 134.500 (Michie/Bobbs-Merrill 1991) (collection of delinquent taxes); 133.120(7) (Michie/Bobbs-Merrill 1991) (assessment appeals); 69.210(4)(b) (Michie/Bobbs-Merrill 1987) (advise collector in regard to motions against delinquent collecting officers).

<sup>49</sup> KY. REV. STAT. ANN. §§ 393.180 - .200 (Michie/Bobbs-Merrill 1984).

Some statutes are downright obscure. Commonwealth and county attorneys may be called upon to represent the Pharmacy Board in enforcement actions;<sup>50</sup> to prosecute violations of the laws regulating the practice of podiatry;<sup>51</sup> to represent the Health Board;<sup>52</sup> to pursue cases involving air pollution control enforcement;<sup>53</sup> to enforce the fish and game laws;<sup>54</sup> and to enjoin the operation of houses of prostitution.<sup>55</sup>

The county attorney may be tapped to represent the commission heading a sewer construction district,<sup>56</sup> or the board of trustees of a subdivision road district.<sup>57</sup> He or she may cut his or her practice teeth on some project on behalf of the District Water Commission<sup>58</sup> or the District Fire Protection Board.<sup>59</sup> The county attorney and commonwealth's attorney may be asked to provide an opinion to the Crime Victim's Compensation Board regarding the cooperation of the victim with the prosecution and the extent of injuries suffered.<sup>60</sup> He or she may bring an action under the Consumer Protection Act at the request or with the permission of the Attorney General.<sup>61</sup> Or for something a little more exotic, he or she might be called upon to represent the "affiant" in a tuberculosis control enforcement action.<sup>62</sup>

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<sup>50</sup> KY. REV. STAT. ANN. § 315.230(2) (Michie/Bobbs-Merrill 1990).

<sup>51</sup> KY. REV. STAT. ANN. § 311.495(1) (Michie/Bobbs-Merrill 1990). A dirty job, but somebody has got to do it.

<sup>52</sup> KY. REV. STAT. ANN. § 212.270 (Michie/Bobbs-Merrill 1991).

<sup>53</sup> KY. REV. STAT. ANN. § 224.450(5) (Michie/Bobbs-Merrill 1991).

<sup>54</sup> KY. REV. STAT. ANN. § 150.130 (Michie/Bobbs-Merrill 1987).

<sup>55</sup> KY. REV. STAT. ANN. § 233.030 (Michie/Bobbs-Merrill 1991). I am reminded of the observations of Chief Justice Kelyng regarding treason, when he charged the jury: "By levying war is not only meant when a body is gathered together as an army, but if a company of people will go about any public reformation, this is high treason. These people do pretend their design was against brothels; now for men to go about to pull down brothels, with a captain and an ensign, and weapons—if this thing be endured, who is safe?" CROAKE JAMES, *CURIOSITIES OF LAW AND LAWYERS* 73 (1896).

<sup>56</sup> KY. REV. STAT. ANN. § 76.385 (Michie/Bobbs-Merrill 1980).

<sup>57</sup> KY. REV. STAT. ANN. § 179.730 (Michie/Bobbs-Merrill 1989).

<sup>58</sup> KY. REV. STAT. ANN. § 74.030 (Michie/Bobbs-Merrill 1980).

<sup>59</sup> KY. REV. STAT. ANN. § 75.250 (Michie/Bobbs-Merrill 1980). Forest fire abatement proceedings are apparently handled by commonwealth's attorneys, in case you were wondering. *See* KY. REV. STAT. ANN. § 149.410 (Michie/Bobbs-Merrill 1988).

<sup>60</sup> KY. REV. STAT. ANN. § 346.140(2) (Michie/Bobbs-Merrill 1987). In addition, KY. REV. STAT. ANN. § 346.040(4) (Michie/Bobbs-Merrill 1987) provides that the Board may direct the prosecutor to determine whether the victim qualifies.

<sup>61</sup> KY. REV. STAT. ANN. § 367.300 (Michie/Bobbs-Merrill 1987). Pyramid Sales Act violations are within the domain of the commonwealth attorney. *See* KY. REV. STAT. ANN. § 367.990(13) (Michie/Bobbs-Merrill 1990).

<sup>62</sup> KY. REV. STAT. ANN. § 215.580 (Michie/Bobbs-Merrill 1991). Fun for everybody.

### C. *Implications of Part-Time Practice Generally*

In many states, bar committees have attempted to address the potential conflicts of part-time prosecutors in what I call omnibus opinions. Such opinions try to answer all questions once and for all in the hope that the "frequent fliers" will go away. Of course, all such attempts are doomed to failure. Nevertheless, it is useful to examine one of these omnibus or summary opinions at this point. It will give the reader some idea of the complexity of the part-time prosecutor problem, as well as some appreciation of the opportunity cost associated with the acceptance of a part-time prosecutor position.

A few ambitious opinions, like Kentucky Opinion E-275, attempt to set forth general principles applicable to all conceivable situations, while at the same time cataloguing prior opinions in the same jurisdiction:

1. Is the contemplated civil representation related in any way to *possible criminal litigation for which the Attorney for the Commonwealth would be responsible?*

2. Is the contemplated civil representation *related in any way to the statutory duty of said prosecutor to represent the Commonwealth in companion litigation?*

3. Is the contemplated civil representation likely to give the *appearance of impropriety* to the public?

4. If the prosecutor has terminated his employment in the prosecutor's office, and thereafter seeks to represent a client, civilly or criminally, one must question whether the case is one in which the *former prosecutor had substantial responsibility, or performed any act for while employed in the prosecutor's office?*<sup>63</sup>

More often, an effort is made to respond to one or more specific questions, or to collect a set of commonly asked questions.<sup>64</sup> Such

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<sup>63</sup> Kentucky Op., *supra* note 4, E-275 (1983) (emphasis added), ABA/BNA Man., *supra* note 8, 801:3908.

<sup>64</sup> See, e.g., American Bar Ass'n Comm. on Professional Ethics Informal Op. [hereinafter ABA Inf. Op.] 772 (1964); Idaho St. Bar Comm. on Ethics Op. [hereinafter Idaho Op.] 133 (1990), ABA/BNA Man., *supra* note 8, 901:2904; [Unnumbered] Comm. on Ethics of the Maryland State Bar Ass'n Op. [hereinafter Maryland Op.], 7 Md. B.J. 80 (1975), MARU, *supra* note 8, No. 8639 (Supp. 1980); Code of Professional Responsibility Comm., Washington State Bar Ass'n Op. [hereinafter Washington Op.] 74 (1960), MARU No. 4593 (1970); Legal Ethics Comm. of the West Virginia Bar Ass'n Op. [hereinafter West Virginia Op.] 78-1 (1978), MARU No. 13,048 (Supp. 1980). For an interesting federal opinion, issued in connection with the review of a judgment of disbarment imposed by the Standing Committee of Discipline of the United States District Court for the District of Oregon, see



opinions help, because they provide concrete directives, but any such opinion or list is necessarily incomplete.<sup>65</sup>

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*In re Patterson*, 176 F.2d 966 (9th Cir. 1949). In *Patterson*, the Court of Appeals for the Ninth Circuit reversed a "judgment" of disbarment, but reprimanded an assistant United States attorney for: (1) representing a plaintiff in a tort case in which defendant set up the claim that the United States should have been made the party defendant; (2) appearing for a criminal defendant in a state court in violation of an Attorney General's "manual"; (3) offering to represent a seaman seeking funds from the registry of the United States District Court; and (4) recommending an "office associate" to serve as defense counsel for a criminal defendant in a United States court. *Id.*

<sup>65</sup> Compare the following set of guidelines written by the chair of a state bar association ethics committee. The author of these 10 rules or guidelines was attempting to summarize the most common conflicts of interest encountered by prosecutors. In this regard these guidelines are very much like those found in ethics committee "omnibus" opinions.

(1) A prosecuting attorney may engage in private civil practice, but a lawyer who attempts to act in both capacities should not accept any private employment which is in any way inconsistent with or antagonistic to his public employment.

(2) A prosecuting attorney cannot undertake criminal defense in any court.

(3) A prosecutor cannot profit by information gained in the course of performance of his duties as such: he cannot participate in civil actions when an investigation involving the situation in question and alleged criminal offenses was conducted through his office.

(4) The prosecutor cannot ethically use the weight and force of his office to gain an advantage in private employment; for example, when he represents the wife in domestic relations matters and brings nonsupport or criminal charges against the husband. If a crime has been committed, the prosecuting attorney has a duty to prosecute, but he must withdraw from the civil matter. If no crime is involved, he violates the disciplinary rule which provides: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to gain an advantage in a civil matter."

(5) The prosecutor cannot represent a private client against a county commission, even in those counties where there is a separate county attorney.

(6) The prosecutor cannot represent a private client against a county board of education, even in those counties where the board of education has its own counsel.

(7) The prosecutor cannot represent a private client in condemnation proceedings against any state agency, the county, or the board of education.

(8) After he leaves office, the prosecutor cannot represent a defendant whose case originated, was investigated, or was passed upon while he was a prosecutor or a member of the prosecutor's staff.

(9) The foregoing rules apply to any lawyer associated with the prosecutor in private practice. A member of the firm or an associate cannot do that which any other member of the firm cannot do. If a member (or an associate) of a firm is on the prosecutor's staff, no other member of the firm nor an associate thereof may accept any employment which the member of the prosecutor's staff could not accept. Lawyers who only share offices, though not partners, have such a relation to one another as to bring Canon 6 of the Canons of Ethics and Canon 5 of the *Code of Professional Responsibility* into play.

(10) The prosecutor must comply with the disciplinary rule relating to the

We will have occasion to refer back to these "omnibus" opinions, especially Kentucky Opinion E-275, in the discussions that follow. For now it is sufficient to point out that the possibilities for overlap between civil cases and criminal cases for which the prosecutor may be responsible are substantial, and the chance that a case may implicate some obscure statutory duty of the public lawyer must be considered. Even without regard to "appearances,"<sup>66</sup> it seems that the prudent prosecutor<sup>67</sup> would be well advised to take a hard look before leaping into a case at the request of a private party.

### III. THE GOVERNING STANDARDS

In many states most prosecutors, whether elected or serving under contract, will be serving on a part-time basis and will not be precluded from practicing law on behalf of private clients.<sup>68</sup> Ethical difficulties abound in any system dependent on part-time prosecutors,<sup>69</sup> and the authorities have long warned that prosecutors should avoid mixing public and private business.<sup>70</sup> It is unfortunate that the Code and Model Rules are not as helpful as they might be in illuminating such conflicts.

#### A. *The Code and Rules*

Professor Uviller observes that:

[N]ot much of direct bearing can be found in the Code, for these canons are mainly addressed to the private practitioner and speak almost exclusively in terms of duty to "client." . . . [T]here is little to be gleaned from this Code of the particular responsi-

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duties of a public prosecutor and the rule relating to trial publicity.

Kizer, *supra* note 6, at 379-80. The author was the chair of the West Virginia State Bar Committee on Legal Ethics at the time this article was written. Unfortunately, this author suggested that the basis for his guidelines—"the rule which underlies the foregoing (10 rules)"—is that "[a] lawyer should avoid even the appearance of professional impropriety."

<sup>66</sup> See *infra* part III.A.

<sup>67</sup> The conflicts faced by a former prosecutor are discussed *infra* part III.A. See also Kentucky Op., *supra* note 4, E-275 (1983), ABA/BNA Man., *supra* note 8, 801:3908.

<sup>68</sup> See *supra* part II.

<sup>69</sup> Cf. CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standard 3-2.3(b) cmt. (1980) ("At present, there are still prosecutors who devote only a portion of their professional effort to the duties of their office, which causes many problems."); ABA Inf. Op., *supra* note 64, 772 (1964), MARU, *supra* note 8, No. 5380 (1970); WOLFRAM, *supra* note 8, § 8.9.4.

<sup>70</sup> See, e.g., WARVELLE, *supra* note 20, at 143.

bilities of the prosecutor and his particular temptations. The peculiar nature of the prosecutor's ethical constraints stems from the power in his hands, rather than from obligations of fealty to the interests of a client.<sup>71</sup>

As we shall see in Parts IV through VII, this perceived weakness in the Code, and, for that matter, in the successor Rules, can be cured if we are willing to think a bit and draw an analogy between the public and the conventional client.<sup>72</sup> On the other hand, the point is well taken that the framers of our professional standards have favored the "broad and open" (also the "indefinite and difficult to enforce") over the "detailed and specific" (also the "long but rarely complete").<sup>73</sup>

Both the Code and the Rules contain a rule for the former prosecutor that prohibits successive public and private employment in matters in which the prosecutor participated personally and substantially while in the public office.<sup>74</sup> Several cases and ethics committee opinions include this principle.<sup>75</sup> Curiously, no special mention is made of conflicts resulting from concurrent public and

<sup>71</sup> Uviller, *supra* note 6, at 1160.

<sup>72</sup> A prosecuting attorney "is the representative of the public in whom is lodged a discretion . . . , which is not to be controlled by the courts or by an interested individual . . . ." Ganger v. Peyton, 379 F.2d 709, 713 (4th Cir. 1967) (citing *United States v. Brokaw*, 60 F. Supp. 100, 101 (S.D. Ill. 1945)). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 216 cmt. b (Tentative Draft No. 4, 1991) (giving the rationale that the prosecutor's obligation to his or her office, or to the public, is "analogous to an obligation to a client"); MODEL RULES and CODE provisions cited *infra* note 79.

<sup>73</sup> Uviller, *supra* note 6, at 1163; see also *supra* notes 63-65 and accompanying text (discussing alternative approaches to the drafting of ethics opinions).

<sup>74</sup> MODEL CODE, *supra* note 16, DR 9-101(B), (C), EC 9-3; MODEL RULES, *supra* note 3, 1.11(a), (b). Comment 3 to Rule 1.11 states:

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in the public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.

*Cf.* Kizer, *supra* note 6, rule 8.

<sup>75</sup> See, e.g., *United States v. Dorfman*, 542 F. Supp. 402 (N.D. Ill. 1982) (former assistant U.S. attorney may not defend in a matter investigated during his term of office); American Bar Ass'n Comm. on Ethics and Professional Responsibility Op. [hereinafter ABA Op.] 342 (1975), MARU, *supra* note 8, No. 10,294 (Supp. 1980); and Kentucky Op., *supra* note 4, E-275 (1983), ABA/BNA Man., *supra* note 8, 801:3908 (discussed *supra* text accompanying note 63). A recent example is provided in *In re Brodeur*, 479 N.E.2d 57 (Ind. 1985), in which the prosecutor filed informations against two suspects in a shooting

private employment. Instead, the prosecutor will find only the general (and vague) conflicts,<sup>76</sup> confidentiality<sup>77</sup> and advocate-witness rules<sup>78</sup> applicable to any lawyer, plus a few special rules relating to the proper exercise of the charging function.<sup>79</sup>

As a public officer or employee, the prosecutor must also contend with "appearance ethics." That is, it is generally supposed, and frequently stated in judicial opinions,<sup>80</sup> that a prosecutor must avoid "even an appearance of impropriety" or suffer discipline, not to mention political embarrassment.<sup>81</sup>

"Appearance ethics" (that a lawyer must avoid even the appearance of impropriety), which many trace back to the maneuverings, political as well as marital, of Julius Caesar,<sup>82</sup> seem to

incident and participated in some of the discovery and plea negotiations regarding one of the defendants, only to leave the prosecutor's office and enter an appearance as defense counsel for the other defendant, and even file a civil suit on behalf of this second defendant against the first defendant. The former prosecutor received the much-dreaded public reprimand.

MODEL RULES, *supra* note 3, Rule 1.11(c) alludes to concurrent service, but only as regards such matters as negotiating for private employment with a party or an attorney with whom the government lawyer has been dealing in the course of his or her public employment.

<sup>76</sup> MODEL CODE, *supra* note 16, DR 5-101(A) (client's interests in conflict with lawyer's personal or financial interests) and DR 5-105(A)-(C) (interests of multiple clients in conflict); MODEL RULES, *supra* note 3, Rule 1.7(a) (direct conflicts between the interests of multiple clients) and (b) (indirect conflicts between the interests of multiple clients, conflicts between the interests of a client and some third person, and conflicts between client's interests and the lawyer's interests). Regarding imputed disqualification, discussed in part VIII *infra*, see MODEL CODE DR 5-105(D) and MODEL RULES Rules 1.10 (imputed disqualification, general rule) and 1.8(i) (lawyer relatives).

<sup>77</sup> MODEL CODE, *supra* note 16, DR 4-101 and MODEL RULES, *supra* note 3, Rules 1.6, 1.9.

<sup>78</sup> MODEL CODE, *supra* note 16, DRs 5-101(B) and 5-102; MODEL RULES, *supra* note 3, Rule 3.7.

<sup>79</sup> MODEL CODE, *supra* note 16, DR 7-103(A) and ECs 7-13, 7-14; MODEL RULES, *supra* note 3, Rule 3.8; MODEL CODE DR 7-105(A) and EC 7-21. *See also* KY. SUP. CT. R. 3.130, Rule 3.4(f) (Michie/Bobbs-Merrill 1992).

<sup>80</sup> *See, e.g., In re Advisory Opinion of Kentucky Bar Assoc.*, 613 S.W.2d 416 (Ky. 1981); *O'Hara v. Kentucky Bar Assoc.*, 535 S.W.2d 83 (Ky. App. 1975).

<sup>81</sup> *See* Peter Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593 (1992). In this entertaining piece, Professor Peter Morgan makes the case that "appearance ethics" may be downright counterproductive because of the "Blifil Paradoxes." The "Petty Blifil Paradox" (the lesser Blifil) results from the use of the "appearance of impropriety" as a political weapon to attack persons who have, in fact, done no provable evil. The "Grand Blifil Paradox" (or greater Blifil) involves the creation of an appearance of "propriety" to mask actual wrongdoing by the venal player or institution. Blifil was the name of Tom Jones' nemesis in the novel *Tom Jones*, written by barrister Henry Fielding. You thought it was just another "ribald" movie, didn't you?

<sup>82</sup> When asked why he parted with his wife, Caesar replied: "I wished my wife to be not so much as suspected." *See* UNDERWOOD & FORTUNE, *supra* note 8, § 3.2 n.2 (citing PLUTARCH, LIVES (John Dryden trans.)).

have taken hold in American legal ethics by way of the Code of Judicial Conduct,<sup>83</sup> and, in turn, the 1969 Model Code of Professional Responsibility.<sup>84</sup> In the Model Code, that language (“appearance of impropriety”) appears in the introductory canon that precedes the DR 9 series of disciplinary rules<sup>85</sup> and in the heading, but not in the actual “rules” set forth as DRs 9-101(A) - (C). Technically speaking, there *is* no disciplinary rule supporting discipline for lawyers who fail to avoid appearances of impropriety. The “Rule of Caesar’s Wife” may be a good rule to live by, and the most certain approach for avoiding conflicts of interest; but is it, or should it be, the law? The drafters of the ABA Model Rules deliberately dropped the “appearances” lingo,<sup>86</sup> as did the drafters of the Restatement (Third) of the Law Governing Lawyers.<sup>87</sup> On

<sup>83</sup> AMERICAN BAR ASS’N, CODE OF JUDICIAL CONDUCT (1989).

<sup>84</sup> “A Lawyer Should Avoid Even The Appearance Of Professional Impropriety.” MODEL CODE, *supra* note 16, Canon 9. The Model Code’s Ethical Considerations 9-2 provides that “[w]hen explicit guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.” See also CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standard 3-1.2 (“A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties.”); Uviller, *supra* note 6, § X.3, at 1164, reproduced *infra* at note 108.

<sup>85</sup> MODEL CODE, *supra* note 16, Canon 9. See UNDERWOOD & FORTUNE, *supra* note 8, §§ 3.2, 3.6.5; WOLFRAM, *supra* note 8, § 7.1.4.

<sup>86</sup> WOLFRAM, *supra* note 8, § 7.1.4 (quoting Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979)): “[M]any courts regard Canon 9 as ‘simply too slender a reed on which to rest a disqualification order, except in the rarest cases.’ Academic commentators have denounced it. The framers of the 1983 Model Rules plainly meant to abandon it as an independently operating standard.” See MODEL RULES, *supra* note 3, Rule 1.9 cmt. 5 (1989), which is found at Ky. SUP. CT. R. 3.130, Rule 1.10 cmt. 9 (Michie/Bobbs-Merrill 1992). In 1989, the ABA House of Delegates voted to move former Rule 1.10(b) to Rule 1.9(b), and renumber former Rule 1.9(b) as new Rule 1.9(c). A switching and renumbering of the accompanying Comments necessarily followed. This change accounts for the apparent inconsistency between the Model Rules and the Kentucky Rules.

<sup>87</sup> The Restatement rejects the “appearances” rule, and provides the following explanation:

[The appearance-of-impropriety standard] prohibits conflicts that might create improper incentives for a lawyer, as well as situations that might appear to be improper to an uninformed observer but in fact are not. Appearance to the uninformed or casual observer (because of lack of necessary information and perspective), as well as to an interested party (because of bias), should not be accepted as the standard [for determining conflicts of interest]. Indeed, the appearance of impropriety concept suggests a standard so inherently subjective that it could be used to justify prohibiting, without careful examination, any relationship that a reviewing tribunal wished to condemn.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 cmt. (c)(iv) (Tentative Draft No. 4, 1991). Given the reluctance of courts and commentators to disqualify lawyers from representation based on appearances, one would expect courts and bar authorities to be even more reluctant to “discipline” (punish) under such a subjective standard.

the other hand, courts and disciplinary authorities have not been able to kick the habit,<sup>88</sup> in spite of its dangerous side-effects.<sup>89</sup> But this is not my concern at the moment.

My concern is that extensive resort by the courts to the "appearance of impropriety" bromide has invited the argument that all opinions relying on this test or rule were necessarily reversed with the adoption of the Model Rules.<sup>90</sup> This rather disingenuous argument holds that in the absence of a nebulous "standard" that most commentators have roundly condemned, a prosecutor cannot be taken to task for misconduct that everyone recognizes as such. I hope to establish that most of the case law and opinions that seem to be propped up by the "appearances" rationale are still good law because they are, on closer examination, supported by more substantial stuff.

### B. Other Professional Standards

There are other unofficial and supplementary ethics codes for prosecuting counsel, although they, too, are remarkably vague. The National District Attorneys Association (NDAA) alludes to conflicts of interest in what it promotes as a set of "[s]tandards . . . designed for prosecutors *by prosecutors*."<sup>91</sup> Somewhat more concrete are the seventeen "Rules" proposed in Chapter IX [Responsibilities of Government Lawyers] of The American Lawyer's Code of Conduct.<sup>92</sup> However, the latter code has not been adopted in any jurisdiction, and while none of its rules are particularly

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<sup>88</sup> See *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669 (Ark. 1990); *Martindale v. Richmond*, 782 S.W.2d 582 (Ark. 1990). In these cases the court reads the "appearances" standard back into the Model Rules.

<sup>89</sup> See WOLFRAM, *supra* note 8, § 7.1.4 ("Use of the phrase in decisions has both obscured the process by which courts formulate their decisions and, in some instances, has led to seriously erroneous results.")

<sup>90</sup> Cf. *Kentucky Op.*, *supra* note 4, E-350 (1992), KY. BENCH & BAR, Summer 1992, at 33 (refuting "suggestions that the adoption of the Rules . . . somehow overturned past committee opinions and court cases").

<sup>91</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 21, Introduction.

<sup>92</sup> AMERICAN LAWYER'S CODE OF CONDUCT (American Trial Lawyer's Found. 1982) [hereinafter AM. LAW. CODE OF CONDUCT]. Of particular interest are Rules 9.1 (a more defense-favorable version of MODEL CODE, *supra* note 16, DR 7-103(A)) and MODEL RULES, *supra* note 3, Rules 3.8(a)), 9.2 (a prohibition against "invidious discrimination" in the charging function), 9.6 (a provision dealing with release-dismissal agreements, see discussion *infra* part VII.D.), 9.13 (a parallel to MODEL CODE DR 5-101 and MODEL RULES Rule 1.7(b)), 9.14 (a parallel to MODEL CODE DR 9-101(B) and MODEL RULES Rule 1.11), and 9.15 (a parallel to MODEL CODE DR 5-105(D) and MODEL RULES Rules 1.10 and 1.11, but which rejects "screening" of the former government lawyer, see *infra* part VIII).

controversial, the code might very well be viewed as having been drafted by the "enemy" and be given short shrift by prosecutors.

The ABA Standards for Criminal Justice, The Prosecution Function, contain only a few generalizations about conflicts of interest.<sup>93</sup> Professor Uviller is particularly critical of the ABA Standards, and with justification: "[regarding Conflicts of Interest] I find but scant aid in the formulations of the effort. . . . I [am not] confident that the articulated standards confront the real dilemmas."<sup>94</sup>

### C. Statutory Provisions

In some states efforts have been made to supplement the lawyer codes with statutes "laying down the law" to public prosecutors.<sup>95</sup> In Kentucky, disqualification of prosecuting attorneys is addressed in some detail in Kentucky Revised Statutes section 15.733, which provides in pertinent part:

(2) Any prosecuting attorney shall disqualify himself in any proceeding in which he or his spouse, or a member of his im-

<sup>93</sup> The Standards refer to the Model Code and Model Rules for substance: 3-1.2. Conflict of Interest

A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties. In some instances, as defined in codes of professional responsibility, failure to do so will constitute unprofessional conduct.

NATIONAL PROSECUTION STANDARDS, *supra* note 21, Standard 3-1.2.

<sup>94</sup> Uviller, *supra* note 6, at 1167.

<sup>95</sup> For a federal law see 18 U.S.C. § 208(a) (Supp. 1992), which provides: Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, participates personally and substantially as a Government officer or employee, *through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, or request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter* in which, to his knowledge, *he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest*—Shall be [subject to imprisonment of not more than one year or not more than five years for willful misconduct, or to fines as set forth in 18 U.S.C. § 3571 (Supp. 1992)].

*Id.* (emphasis added). See also 18 U.S.C. § 216(a) (detailing penalties); 28 C.F.R. § 45.735-5 (1991) (providing the steps to determining disqualification of a government employee in specific cases). For other statutes, see *infra* part VI.

mediate family either individually or as a fiduciary:

(a) Is a party to the proceeding, or an officer, director, or trustee of a party;

(b) Is acting as a lawyer in the proceeding;

(c) Is known by the prosecuting attorney to have an interest that could be substantially affected by the outcome of the proceeding;

(d) Is to the prosecuting attorney's knowledge likely to be a material witness in the proceeding;

(e) Has served in private practice or government service, other than as a prosecuting attorney, as a lawyer or rendered a legal opinion in the matter in controversy;

(f) Has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

(3) Any prosecuting attorney may be disqualified by the court in which the proceeding is presently pending, upon a showing of actual prejudice.

(4) In the event that a prosecuting attorney is disqualified, he shall certify such fact in writing to the attorney general who may direct another Commonwealth's attorney or county attorney or an assistant attorney general as a special prosecutor to represent the Commonwealth in that proceeding.<sup>96</sup>

This statute certainly provides some useful detail, and we will have occasion to refer to it in the discussion that follows. It acknowledges the power of the trial judge to disqualify the prosecutor in appropriate circumstances, although it is not clear how one is to make a showing of "actual prejudice" before the fact. On the other hand, the statute has one rather serious defect. It only tells the prosecutor what cases he or she may not *prosecute*. It does not direct the prosecutor to decline any civil case offered by a private client. Nor does it direct the prosecutor to withdraw from any such case in the event that a conflict becomes apparent. It places no priority on the performance of the prosecutor's public duty. Indeed, the contrary might be argued. The suggestion is that the civil case may be kept if a special prosecutor can be secured.<sup>97</sup>

#### D. *The Problem of Consent*

Conflicts cannot easily be resolved by consent if one or more of the "clients" is a governmental entity, or, in criminal cases, is

<sup>96</sup> KY. REV. STAT. ANN. § 15.733 (Michie/Bobbs-Merrill 1985).

<sup>97</sup> Ironically, Professor Uviller's proposals, *supra* note 6, seem to suffer from the same defect. See *infra* note 108. The problem of "priority" will be discussed in part IX.



“The People.” While the commentators complain that a “flat rule (against consent by a public officer or public body) threatens more harm than good,”<sup>98</sup> there are dangers of “corruption” or “interest” on the part of the consenting official. At a minimum, some authority superior to the affected individual prosecutor ought to give the consent;<sup>99</sup> some states rule out the possibility of consent altogether.<sup>100</sup>

The Restatement (Third) of the Law Governing Lawyers<sup>101</sup> may prove to be influential in this regard. Comment g(ii) to Restatement section 202 takes the position that “governmental units [should not be] *per se* incapable of consent.”<sup>102</sup> On the other hand, the same comment cites with approval a case in which consent was ineffectual because the prosecutor was using his official position to further the interests of a private client.<sup>103</sup> It would seem to be a safe bet that a court will not look with favor upon the efforts of a prosecuting attorney to sidestep a conflict on the strength of a “public” consent given by the prosecutor himself or a close associate.

#### IV. PROSECUTOR’S PERSONAL INTERESTS

If you were to ask a non-lawyer to describe a hypothetical case involving the influence of prosecutorial self-interest, you would probably receive a description of a scenario involving “vindictiveness.”<sup>104</sup> However, the risk of unacceptable prosecutorial self-in-

\* WOLFRAM, *supra* note 8, § 7.2, at 348.

<sup>98</sup> Cf. MODEL RULES, *supra* note 3, Rule 1.13(e) (requiring consent of an organization’s “appropriate official” if there is a potential conflict of interest where the same attorney represents organization and the individual).

<sup>100</sup> See *id.* Rule 1.11 cmt. 2 (“[S]tatutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule . . . .”); see, e.g., NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 1.7(a)(2) (1984), which provides that “a public entity cannot consent to any such representation”; see also American Bar Ass’n Comm. on Professional Ethics and Grievances, Formal Op. 16 (1929), MARU, *supra* note 8, No. 16 (1970) (“No question of consent can be involved because the public is involved and it cannot consent.”). But see 18 U.S.C. § 208(b) (Supp. 1992) (providing formal mechanisms for obtaining such consent).

<sup>101</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202 (Tentative Draft No. 4, 1991). The Comments collect cases dealing with this issue.

<sup>102</sup> *Id.* § 202 cmt. g(ii).

<sup>103</sup> *Id.* (citing *In re La Pinska*, 381 N.E.2d 700 (Ill. 1978)).

<sup>104</sup> Ironically, our hypothetical non-lawyer would probably not cite or even be aware of the classic case of *Shaw v. Garrison*, 467 F.2d 113, 116-18 (5th Cir. 1972), *cert. denied*, 409 U.S. 1024 (1973), in which a distinguished panel of the Fifth Circuit severely criticized the motives and antics of Jim Garrison in connection with his prosecutions of Clay Shaw. So nobody ever said he was a hero, did they? For more mundane discussions of prosecutorial

terest is present in a wide variety of situations that are not characterized by express malice or "bad-faith."

As we have seen, the Model Code and the Model Rules warn that a lawyer must exercise independent professional judgment and not allow the lawyer's personal, family, or financial interests to jeopardize the interests of the client.<sup>105</sup> More explicit guidance would be helpful, even in this area, because "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."<sup>106</sup> Some specific situations are addressed in state statutes,<sup>107</sup> and useful amendments to the professional codes have been proposed from time to time.<sup>108</sup>

"vindictiveness," see *Maple Heights v. Redi Car Wash*, 554 N.E.2d 929, 931-32 (Ohio App. 1988) (involving earlier threats by the prosecutor where the defendant had also filed a grievance against the prosecutor with the local bar association); *May v. Commonwealth*, 285 S.W.2d 160 (Ky. 1955) (stating that another attorney should have tried the defendant because of longstanding antagonism). See also cases collected at Griffin, *supra* note 6; CRIM. JUST., PROSECUTION FUNCTION § 3-3.9(c), *supra* note 19 (providing that "[i]n making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions."); THE AMERICAN LAWYER'S CODE OF CONDUCT:

9.2. In exercising discretion to investigate or to prosecute, a lawyer serving as a public prosecutor shall not show favoritism for, or invidiously discriminate against, one person among others similarly situated.

. . . .

9.13. A lawyer in public service shall not use the powers of public office for personal advantage, favoritism, or retaliation.

AM. LAW. CODE OF CONDUCT, *supra* note 92, §§ 9.2, 9.13.

<sup>105</sup> See *supra* note 76; see also MODEL CODE, *supra* note 16, EC 7-14:

A governmental lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. . . . [H]e should not use his position or the economic power of government to harass parties or to bring about unjust settlements or results.

<sup>106</sup> *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980).

<sup>107</sup> See, e.g., KY. REV. STAT. ANN. § 15.733(2) (Michie/Bobbs-Merrill 1985), discussed *supra* part III C.; 18 U.S.C. § 207 (Supp. 1992).

<sup>108</sup> Uviller, *supra* note 6, at 1164, states:

Art. X: Conflict of Interest

X.1. It is unprofessional conduct for a prosecutor to participate personally in any phase of a criminal investigation or prosecution in which he knows or reasonably anticipates that a member of his immediate family is or will be

- (a) the defendant,
- (b) the victim,
- (c) a witness,
- (d) counsel for the defendant,
- (e) counsel for any witness or interested party, or
- (f) the judge.

### A. *Prosecutor's Relationships with Parties and Witnesses*

In the course of his criticisms of the Proposed ABA Standards for Criminal Justice, The Prosecution Function, Professor Uviller quipped: "I suppose a prosecutor need hardly be told that it is unseemly for him to prosecute his mother or to try the man who raped his daughter."<sup>109</sup> Nevertheless, he included such advice in his guidelines.<sup>110</sup> Cases,<sup>111</sup> statutes,<sup>112</sup> and ethics opinions from across the country suggest that prosecutors do, indeed, need to be told the obvious.

In a surprising number of instances prosecutors have been faulted for prosecuting cases in which one of their relatives or friends<sup>113</sup> was the defendant, or in which the prosecutor felt that it was necessary to ask the advice of an ethics committee regarding

2. It is unprofessional conduct for a prosecutor to participate personally in any phase of a criminal investigation or prosecution unless he reasonably believes that his judgment will be entirely unaffected by

(a) any financial or pecuniary interest held by the prosecutor or by any member of his immediate family in any business or enterprise which he reasonably believes might be involved in or materially affected by the case in question;

(b) any consanguinal, marital, professional, or commercial association, past or present, with any person who is or might reasonably become involved in the case in any capacity; or

(c) any obligation to or association with any person or organization which has had or may have any material influence upon the course of his professional career and which is involved in or materially affected by the case in question.

3. The prosecutor should decline to participate personally in, or if appropriate, should request the appointment of an independent special prosecutor to relieve him of responsibility for the prosecution of

(a) any matter in which he believes that, for any articulable reason, he would be unable to maintain proper professional detachment; or

(b) any matter in which the public is likely to believe that the prosecutor labors under conflicting interests, obligations, or sentiments which would impair his proper professional detachment.

Perhaps as a result of Professor Uviller's criticisms of the ABA Standards for Criminal Justice, a revised ABA Standard 3-1.3(f) has been proposed which would provide:

It is unprofessional conduct for a prosecutor to permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

See FREEDMAN, *supra* note 14, at 224 n.47.

<sup>109</sup> Uviller, *supra* note 6, at 1162.

<sup>110</sup> *Id.*, Art. X.1(a), (b), at 1164.

<sup>111</sup> See *infra* notes 113, 115, 118, 120, 121; see also Griffin, *supra* note 6.

<sup>112</sup> See, e.g., KY. REV. STAT. ANN. § 15.733(2) (a), (d) (Michie/Bobbs-Merrill 1985), set forth *supra* part III.C.

<sup>113</sup> See, e.g., *People v. Nuzzi*, 489 N.Y.S.2d 836, 839-40 (N.Y. Sup. Ct. 1985) (defendant was the first cousin of an assistant district attorney in the city). For a case involving a close personal friendship between the prosecutor and the defendant and the defendant's family, see *State v. Bell*, 370 P.2d 508, 511 (Idaho 1962).

the propriety of his or her participation in such a prosecution.<sup>114</sup> Of equal interest are cases in which a prosecutor was involved in a case against a member of his or her own office.<sup>115</sup> In one bizarre case, a prosecutor was disciplined for manipulating the system by causing charges to be dismissed against another man with whom the prosecutor had a rather unusual relationship, only to file new charges "after the relationship . . . had soured."<sup>116</sup> The prosecutor apparently argued that he could be disqualified only if he were the victim of the offense being prosecuted. The court rejected this rather silly argument, noting that prosecutors should not prosecute close friends and relatives.<sup>117</sup>

Of course, the prosecutor was correct in noting that the prosecutor should not prosecute if he<sup>118</sup> or a close relative were the

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<sup>114</sup> *But see* Advisory Comm. of the Nebraska State Bar Ass'n Op. 90-3 (undated), ABA/BNA Man., *supra* note 8, 901:5505 (county attorney may handle prosecution of his second cousin if he has no business or social contact with the defendant). *Compare* Ky. REV. STAT. ANN. § 15.733 (Michie/Bobbs-Merrill 1985) (prosecutor may not handle cases involving members of his or her "immediate family.").

<sup>115</sup> *In re Davis*, 471 N.E.2d 280, 280-81 (Ind. 1984) (marijuana charges against a deputy prosecutor and his son required a special prosecutor); *Williams v. State*, 123 N.E. 209 (Ind. 1919) (requiring appointment of special prosecutor when the defendant was a deputy prosecutor).

<sup>116</sup> *Nebraska State Bar Assoc. v. Rhodes*, 453 N.W.2d 73, 90-91 (Neb. 1990) (prosecutor withdrew and had another lawyer appointed special prosecutor, but then attempted to appear for the defendant—dressed in a uniform and wearing a gun!), *cert. denied*, 111 S. Ct. 153 (1990).

<sup>117</sup> *Id.* at 89. A lawyer's close business or work relationships can likewise make prosecution difficult. *See, e.g.*, Comm. on Professional Ethics, State Bar of Wisconsin Op. [hereinafter Wisconsin Op.] E-86-14 (1986), ABA/BNA Man., *supra* note 8, 901:9103 (city prosecutor should get special prosecutor to handle case against city employee who regularly works with and testifies for prosecutor in other cases).

<sup>118</sup> *Cf. Brooks v. Fitch*, 534 F. Supp. 129, 132-33 (D.N.J. 1981) (finding no immunity from civil rights charges where defendant was prosecuted outside jurisdiction of prosecutor who sought advantage in civil suit); *see also State v. Knight*, 285 S.E.2d 401, 407 (W. Va. 1981) (An unpleasant case in which the defendant's conviction for indecent exposure was reversed, on the ground that the prosecutor should have been disqualified. The defendant had already been convicted for stealing materials from the prosecutor's houseboat, and had failed to make restitution as ordered. It is worth noting that the only direct witness against the defendant in the indecent exposure case was the prosecutor's secretary.); *State v. Jones*, 268 S.W. 83, 85-86 (Mo. 1924) (disqualifying prosecuting attorney in a case in which the defendant's drunk driving prosecution stemmed from a collision between the cars of the defendant and the prosecuting attorney).

On the question of whether an unrelated civil suit between the defendant and the prosecutor will require disqualification see Wisconsin Op., *supra* note 117, E-86-17 (1986), ABA/BNA Man., *supra* note 8, 901:9104 (not necessarily disqualifying). In *State v. Shevlin*, 195 N.W. 508 (S.D. 1923), the prosecutor deemed himself disqualified in a case because the defendant had a pending civil case against the prosecutor, the nature of which was not disclosed in the opinion.

victim of the crime<sup>119</sup> or a material witness to it.<sup>120</sup> Other close relationships between the prosecutor and the victim may also be disqualifying.<sup>121</sup>

Other, more attenuated relationships between the prosecutor and interested parties or witnesses can also be problematic. A prosecutor's close contacts with the police may make it difficult for the prosecutor to investigate and prosecute particular cases of misconduct.<sup>122</sup> The prosecutor,<sup>123</sup> or his or her partner in private practice,<sup>124</sup> may have represented a prosecution or defense

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<sup>119</sup> *But see* General Counsel and Disciplinary Comm'n of the Alabama State Bar Op. [hereinafter Alabama Op.] 85-61 (1985), ABA/BNA Man., *supra* note 8, 801:1103 (allowing an assistant district attorney to prosecute a case involving the robbery of his brother-in-law's store).

<sup>120</sup> *Cf.* State v. Knight, 285 S.E.2d 401, 407 (W. Va. 1981) (prosecuting attorney's secretary was the only witness); Ky. REV. STAT. ANN. § 15.733(2)(d) (Michie/Bobbs-Merrill 1985); Uviller, *supra* note 6, Art. X.I.(c), at 1164.

<sup>121</sup> People v. Superior Court *ex rel.* Greer, 561 P.2d 1164, 1174 (Cal. 1977) (prosecutor disqualified in murder case because victim's mother was employed in the prosecutor's office; prosecution may also have been in aid of employee's position in custody dispute). For a very interesting ethics opinion see Virginia State Bar Standing Comm. on Legal Ethics Op. [hereinafter Virginia Op.] 731 (1985), ABA/BNA Man., *supra* note 8, 801:8848 (part-time prosecutor who had represented wife in an earlier custody dispute was "not per se disqualified" from prosecuting her husband, who was charged with her murder, but the case should be declined because the public might view this as inappropriate).

<sup>122</sup> WOLFRAM, *supra* note 8, § 8.9.2, at 451, discusses the prosecutor's close contacts with police and the difficulty the prosecutor may have in investigating and prosecuting the police. This close relationship also figures in the rule precluding prosecutors from doing defense work. *See* discussion *infra* part V.A. There is a "flip-side" to this: *See, e.g.*, Tucker v. Kentucky Bar Assoc., 550 S.W.2d 467, 468-69 (1977) (affirming Kentucky Op. E-137 *infra*); Kentucky Op., *supra* note 4, E-230 (1980), ABA/BNA Man., *supra* note 8, 801:3902 (lawyer who represents the Fraternal Order of Police may not do criminal defense work); Kentucky Op. E-137 (1976), MARU, *supra* note 8, No. 11,113 (1980) (lawyer who is police captain and legal adviser to the department may not defend criminal cases, and may be precluded from taking some cases arising out of automobile accidents); Kentucky Op. E-111 (1975), MARU No. 8574 (Supp. 1975) (lawyer/police officer may not take criminal cases or those involving personal injuries from car accidents); *see also* Comm. on Professional Ethics of the New York State Bar Ass'n [hereinafter New York Op.] 615 (1991), ABA/BNA Man. 1001:6101 (law firm that employs police officer as "of counsel" may not do criminal defense work).

<sup>123</sup> *See* MODEL CODE, *supra* note 16, DR 4-101; MODEL RULES, *supra* note 3, Rules 1.6, 1.9; *see also* Kentucky Op., *supra* note 4, E-113 (1975), MARU, *supra* note 8, No. 11,089 (Supp. 1980) (prosecutor cannot be police officer or sheriff); New York Op., *supra* note 122, at 616 (1991), ABA/BNA Man., *supra* note 8, 1001:6101 (police officer may not serve as a part-time district attorney in another county).

<sup>124</sup> *But see* Advisory Comm., Missouri Bar Ass'n Informal Op. [hereinafter Missouri Inf. Op.] 5 (1981), ABA/BNA Man., *supra* note 8, 801:5255 (part-time prosecutor not disqualified from prosecuting defendant although his law partner, also a part-time prosecutor, previously represented a state's witness in the same matter, where the state's witness has new counsel).

witness, or even the defendant<sup>125</sup> in the past. The prosecution may even be complicated, and in some cases jeopardized, by the fact that a part-time prosecutor is suing a prosecution witness in another case in his or her private practice.<sup>126</sup>

### *B. Prosecutor's Relationships with Lawyers, Judges and Court Personnel*

A prosecutor's relationship with a judge or administrative officer of the court is sometimes called into question by opposing counsel or a disappointed litigant. Today, it is not unusual for a prosecutor to be related by blood or marriage to another lawyer who might attempt to represent opposing interests.<sup>127</sup> There is also some risk that a part-time prosecutor might be tempted to sacrifice the public interest in order to accommodate other lawyers with whom he or she must deal in private practice.<sup>128</sup> These relational conflicts will be discussed in this section.

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<sup>125</sup> See *infra* part VI.B.; cf. Professional Ethics Comm. of the Kansas Bar Ass'n Op. [hereinafter Kansas Op.] 85-6 (1985), ABA/BNA Man., *supra* note 8, 801:3821 (county attorney could not prosecute juvenile whose father was a former client and whose sister was formerly employed as the prosecutor's secretary).

<sup>126</sup> See, e.g., Alabama Op., *supra* note 119, at 89-08 (1989), ABA/BNA Man., *supra* note 8, 901:1050 (grounds for withdrawal from the prosecution); see also Alabama Op. 85-40 (1985), ABA/BNA Man. 801:1101 (conflict if prosecutor attempts to rely on prosecution witness in one case while attempting to prosecute that witness in another unrelated case).

<sup>127</sup> See Uviller, *supra* note 6, Art. X.1 (d), (f), at 1164; MODEL RULES, *supra* note 3, Rule 1.8(i).

<sup>128</sup> The commentary to National Prosecution Standard 1.3 provides that:

The attorneys [the prosecutor] deals with as a public officer are the same ones with whom he is expected to maintain a less formal and more accommodating relationship as counsel to private clients. Similar problems may arise in the prosecutor's dealings with his private clients whose activities may come to his official attention. It is undesirable to place a prosecutor in a position in which he must always be conscious of this potential for conflicts and be careful to avoid improprieties or the appearance of conflict.

NATIONAL PROSECUTION STANDARDS, *supra* note 21, at 12-13 (1977). Several state committees have opined that a prosecutor may not also be a domestic relations commissioner or domestic relations mediator. Legal Ethics Comm., Indiana State Bar Ass'n Op. [hereinafter Indiana Op.] 1 (1991), ABA/BNA Man., *supra* note 8, 1001:3301 (part-time deputy prosecutor may not mediate child custody dispute prosecuted by another attorney in firm); Kentucky Op., *supra* note 4, E-214 (1979), ABA/BNA Man. 801:3902; Ethics Comm. of the Ky. Judiciary Op. [hereinafter Kentucky Jud. Op.] JE-79 (1990), KY. BENCH & BAR, Winter 1990, at 39 (stating assistant county attorney may not hold office of domestic relations commissioner). See also O'Hara v. Kentucky Bar Assoc., 535 S.W.2d 83 (Ky. App. 1975) (holding commonwealth's attorney and trial commissioner of juvenile court may not be members of same firm); Kentucky Ops. E-97 (1974), MARU, *supra* note 8, No. 8560 (Supp. 1975), and E-94 (1974), MARU No. 8557 (Supp. 1975) (trial commissioner may not share office space with county or commonwealth attorney).

In most states, the Code of Judicial Conduct disqualifies a judge if the judge, his or her spouse, or any person within the third degree of relationship to the judge (according to the civil law system) is acting as a lawyer in the proceeding.<sup>129</sup> This means, of course, that a prosecutor who is married to or closely related to a judge should not practice before that judge.<sup>130</sup> In theory this problem might be waived.<sup>131</sup> However, it is difficult to see why waiver should be attempted, let alone tolerated, in criminal cases.<sup>132</sup> One might guess that a problematic relationship between a prosecutor and a judge would rarely rear its ugly head. One would be wrong.<sup>133</sup>

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<sup>129</sup> See, e.g., KY. SUP. CT. R. 4.300, CODE OF JUDICIAL CONDUCT, Canon 3.C. (Disqualification) (1)(d)(ii) (Michie/Bobbs-Merrill 1992). A new 1990 version of the ABA Code of Judicial Conduct moves this to Canon 3.E.(1)(d)(ii).

<sup>130</sup> How close is too close? See *supra* note 129 and accompanying text. According to Kentucky Jud. Op., *supra* note 128, JE-48 (1984), KY. BENCH & BAR, Apr. 1984, at 19, a judge need not disqualify herself if the judge's first cousin is acting as a lawyer in the case. Supreme Court of New Jersey Advisory Comm. on Professional Ethics Op. [hereinafter New Jersey Op.] 627 (undated), ABA/BNA Man., *supra* note 8, 901:5810, concedes that a second cousin relationship is too remote to trigger disqualification. Of considerable importance is the fact that most (but not all) of the authorities decline to disqualify all members of a lawyer-relative's firm from appearing before the judge. See, e.g., Kentucky Jud. Op. JE-8 (1979); see also JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 512 (1990) (discussing "Commentary" to Code of Judicial Conduct); E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 67 (1975); Kentucky Jud. Op. JE-82 (1992) (stating that judge need not step down from case just because judge's spouse sometimes represents litigant (as an independent contractor rather than employee) in other litigation cases unless fees paid by the litigant to the spouse represent a substantial part of the judge's family income) (citing DEBORA L. SOLOMON, THE DIGEST OF JUDICIAL ETHICS ADVISORY OPINIONS 359 (1991)).

<sup>131</sup> See Kentucky Jud. Op., *supra* note 128, JE-1 (1979) (providing steps for waiver of judge's disqualification when his son is an attorney appearing before him). Judges are not supposed to twist arms. See ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 3.D. (proposed 1990 Code Canon 3.F.) and Kentucky Jud. Op. JE-15 (1980) (referring to JE-1 as revised to allow waiver in criminal cases). In practice, some judges twist arms.

<sup>132</sup> Most lawyer codes suggest that lawyers should be disciplined if they induce judges to commit such violations of the judicial code, or "knowingly assist" the judge in the commission of an offense. See, e.g., KY. SUP. CT. R. 3.130, Rule 8.3(e) (Michie/Bobbs-Merrill 1992); Kentucky Op., *supra* note 4, E-351 (1992), KY. BENCH & BAR, Summer 1992, at 34.

<sup>133</sup> See Kentucky Jud. Ops., *supra* note 128, JE-1 (1979); 8 (1980), KY. BENCH & BAR, Oct. 1980, at 8; 34 (1982), KY. BENCH & BAR, Apr. 1982, at 30; and 48 (1984), KY. BENCH & BAR, Apr. 1984, at 19. For "foreign" authorities see Ethics Comm. of the Alaska Bar Ass'n Op. 82-2 (undated), ABA/BNA Man., *supra* note 8, 801:1201 (recommending "safeguards" when husband is a trial court judge and wife is an assistant district attorney); Comm. on Professional and Judicial Ethics of the State Bar of Michigan Op. [hereinafter Michigan Op.] CI-703 (1981), ABA/BNA Man. 801:4833 (judge may not hear cases in which his son, an assistant prosecutor, is appearing, but may hear cases in which other members of the prosecutor's office appear); Ethics Comm. of the Cuyahoga County [Ohio] Bar Ass'n Op. 82-1 (1982), ABA/BNA Man. 801:4833 (judge who is son of county

A lawyer who represents a judge should not appear before that judge.<sup>134</sup> This is an unlikely scenario, but not an impossible one, in states where prosecutors may engage in private practice.<sup>135</sup>

A lawyer's relationship with court personnel may also be a source of conflicts, even if the court personnel are not directly involved in the presentation of cases and decision-making.<sup>136</sup> However, there are few cases and opinions on the subject.

The problem of "spousal conflicts" loomed large<sup>137</sup> prior to the appearance of Model Rule 1.8(i), which provides:

A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly

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prosecutor must disqualify himself in all cases in which prosecutor or any of his assistants appears!).

For opinions dealing with a judge who was once in partnership with a commonwealth attorney, see Kentucky Jud. Op. JE-63 (1988), Ky. BENCH & BAR, Winter 1988, at 29 (after assuming office, judge may not preside over any part of criminal proceeding handled while he was in practice, but future matters left to the judge's discretion); ABA Inf. Op., *supra* note 64, 1524 (1987) (prior association with a lawyer in private practice not necessarily disqualifying, but may be—two year rule alluded to). The latter opinion collects cases involving such interesting issues as the disqualification of a judge when the prosecutor is the judge's former law clerk. See, e.g., United States v. Hollister, 746 F.2d 420, 425-26 (8th Cir. 1984) (motion to disqualify denied, but "recusal period" proposed); see also Michigan Op. RI-43 (1990), ABA/BNA Man. 901:4770 (former law clerk may not appear as prosecutor in case on which he or she worked personally and substantially as a clerk, but "screening" may prevent disqualification of other prosecutors in same office).

<sup>134</sup> ABA Inf. Op., *supra* note 64, 1477 (1981) (judge may not preside over case when a party is represented by the judge's lawyer).

<sup>135</sup> Cf. Zuck v. Alabama, 588 F.2d 436, 439-40 (5th Cir. 1979) (reversing decision when defense lawyer also represented prosecutor in unrelated civil case, and defendant did not waive conflict), cert. denied, 444 U.S. 833 (1980); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 210 cmt. d (Tentative Draft No. 4, 1991).

<sup>136</sup> Michigan Op., *supra* note 133, RI-12 (1989), ABA/BNA Man., *supra* note 8, 901:4766 (lawyer running for prosecutor whose wife is the court administrator should be alert to possible conflicts, particularly regarding scheduling and administrative interpretation). Concerning law clerks, see UNDERWOOD & FORTUNE, *supra* note 8, at 149 n.34 (Supp. 1991) (collecting cases); see also MODEL RULES, *supra* note 3, Rules 1.12(b), 1.11(c)(2) (concerning employment negotiations between government attorneys or judicial officials and opposing parties or their representatives); AM. LAW. CODE OF CONDUCT, *supra* note 92, § 9.17 ("While a lawyer in public service is participating personally and substantially in a matter in which a private attorney's client has a material interest, neither lawyer shall comment to the other about the government lawyer's private employment possibilities.").

<sup>137</sup> Kentucky ethics opinions include Kentucky Ops., *supra* note 4, E-305 (1985), ABA/BNA Man., *supra* note 8, 801:3914 (stating that spouse and associates of assistant commonwealth attorney must not accept criminal defense work); E-257 (1982), ABA/BNA Man. 801:3906 (commonwealth's attorney's spouse may not represent client in civil matter if spouse is prosecuting client in criminal proceeding); and E-206 (1979), MARU, *supra* note 8, No. 11,178 (1980) (finding no per se disqualification when attorney represents client and opposing counsel works in same firm as attorney's spouse).



adverse to a person who the lawyer knows is represented by the other lawyer except upon the consent by the client after consultation regarding the relationship.<sup>138</sup>

This new rule treats all family relationships equally,<sup>139</sup> and has the additional advantage of eliminating imputed disqualification in cases in which the related lawyers are not in the same firm or office.<sup>140</sup> The rule makes life simple, because it says, in no uncertain terms, that there is no conflict (and no need for client consent) unless the related lawyers are personally going "head to head."<sup>141</sup> If the related lawyers are going head to head, then client consent may solve the problem, according to the rule.<sup>142</sup> The rule makes no distinction between civil and criminal cases.

But there is the hang-up. We have already seen that some states do not grant government entities the capacity to consent.<sup>143</sup> In

<sup>138</sup> MODEL RULES, *supra* note 3, Rule 1.8(i).

<sup>139</sup> Even relationships by marriage, of course. Professional Ethics Comm'n of the Bd. of Overseers of the Bar Op. [hereinafter Maine Op.] 65 (1985), ABA/BNA Man., *supra* note 8, 801:4212 boldly states that an "in-law" relationship between opposing lawyers does not present the "same degree of intimacy as does a spousal lawyer relationship." This seems like a sensible, if not politically correct, observation.

<sup>140</sup> "Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and not imputed to members of firms with whom the lawyers are associated." MODEL RULES, *supra* note 3, Rule 1.8 cmt. 5; *see also* Virginia St. Bar Standing Comm. on Legal Ethics Informal Op. [hereinafter Virginia Inf. Op.] 317 (1979), MARU, *supra* note 8, No. 12,949 (not improper for a law firm that employs the spouse of a commonwealth's attorney as a paralegal to defend criminal cases in the same jurisdiction).

<sup>141</sup> Further, ABA Op., *supra* note 75, 340 (1975), recommended informing the client whose lawyer was married to a member of an opposing firm of such information so that the client could decide whether to change attorneys. Of course, a lawyer can insist that there is no conflict and cite the Rule till the cows come home, but a client can insist that there is a conflict and to hell with the Rule. The client has the last word on conflicts and can always get another lawyer or firm.

Comm. on Professional Ethics of the Illinois State Bar Ass'n Op. [hereinafter Illinois Op.] 85-8 (1986), ABA/BNA Man., *supra* note 8, 901:3001, is an interesting "Code" decision in that it states that a lawyer may defend criminal cases in the same county in which his son is an assistant state's attorney, so long as the cases are prosecuted by someone other than his son; the lawyer does not have to have his client's consent.

<sup>142</sup> Standing Comm. on Professional Responsibility and Conduct, State Bar of California Op. 1984-83, ABA/BNA Man., *supra* note 8, 801:1701 (requiring consent of both client and district attorney); Ethics Advisory Comm. on the South Carolina Bar Op. [hereinafter South Carolina Op.] 90-15 (1990), ABA/BNA Man. 901:7911 (requiring consent of all parties); South Carolina Op. 90-28 (1990), ABA/BNA Man. 901:7913 (allowing consent in appellate cases); *cf.* Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n Op. 88-12 (1988), ABA/BNA Man. 901:3609 (allowing lawyer whose sister is county attorney to defend criminal cases in county with consent of all parties).

<sup>143</sup> *See supra* part III.D. Comm. on Legal Ethics and Professional Conduct of the

other states, the notion of related lawyers (especially spouses) sitting on opposite sides of the "v." in criminal cases has generally been rejected, consent or no consent, rule or no rule.<sup>144</sup> Further, in a recent Texas case in which a member of the appointed defense counsel's firm was married to the prosecutor, the court not only rejected consent as a solution, but also imputed disqualification to all members of the non-prosecutorial spouse's firm.<sup>145</sup> It is worth noting that the lawyer and the other members of the lawyer's firm were insisting on their own disqualification.

Even unrelated and nonmarried lawyers can be sufficiently close to have conflicts problems.<sup>146</sup> Just a hint of romance can be a complication. Things do not have to be all that "intense."<sup>147</sup> Authority can even be found for the disqualification of close (but "just") friends or roommates.<sup>148</sup>

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Ohio Bar Ass'n Op. [hereinafter Ohio Op.] 87-5 (1987), ABA/BNA Man., *supra* note 8, 901:6826, states that an assistant prosecutor may not appear in a case in which his brother serves as opposing counsel, and that this conflict cannot be waived because the prosecutor is a public employee. This Opinion was followed by Bd. of Comm'rs on Grievances and Discipline of the Ohio Sup. Ct. Op. [hereinafter Ohio Sup. Ct. Op.] 91-22 (1991), ABA/BNA Man. 901:6826 to the same effect. *But see* Comm. on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Ass'n Op. [hereinafter Pennsylvania Op.] 86-2 (1986), ABA/BNA Man. 901:7302 (stating that the district attorney's office may consent); Maine Op., *supra* note 139, 65 (1985), ABA/BNA Man. 801:4201 (alluding to the "attorney general's informed written consent"); *cf.* Maine Op. 42 (1983), ABA/BNA Man. 801:4207 (requiring informed written consent of district attorney or attorney general).

<sup>144</sup> See Committee on Professional Ethics, Connecticut Bar Ass'n Op. [hereinafter Connecticut Op.] 86-15 (1986), ABA/BNA Man., *supra* note 8, 901:2503; Maryland Op., *supra* note 64, 90-3 (1990), ABA/BNA Man. 9012:4328; Ethics Comm. of the Mississippi State Bar Op. [hereinafter Mississippi Op.] 140 (1987), ABA/BNA Man. 901:515, all of which find that the state may not consent. In Pennsylvania Op., *supra* note 143, 86-2 (1986), ABA/BNA Man. 901:7302, the committee cited MODEL RULES, *supra* note 3, Rule 1.8(i), but proceeded to rule that (a) a prosecutor may not go head to head with his or her spouse, even with the defendant's consent, and that (b) the defendant in a criminal case must consent if any member of the defense firm is married to an assistant district attorney. See also Alabama Op., *supra* note 119, 82-574 (1982), ABA/BNA Man. 801:1028. Wisconsin Op., *supra* note 117, E-89-3 (1989), ABA/BNA Man. 901:9109, concedes that Rule 1.8(i) says what it says, but adds that the rule may not reflect "prudent practice." Virginia Op., *supra* note 121, 780 (1986), ABA/BNA Man. 901:8704, comes right out and proclaims that under the Virginia Code, "[s]pousal lawyers are per se disqualified if they represent opposing interests."

<sup>145</sup> *Haley v. Boles*, 824 S.W.2d 796, 797 (Tex. Ct. App. 1992). The court limited the opinion to cases involving the appointment of counsel for indigent defendants who have no alternatives, and really have little choice but to consent.

<sup>146</sup> See Michigan Op., *supra* note 133, CI-1130 (1986), ABA/BNA Man., *supra* note 8, 901:4752 (engaged lawyers).

<sup>147</sup> See, e.g., *People v. Jackson*, 213 Cal. Rptr. 521, 523 (1985) (reversing conviction because of an undisclosed dating relationship between defense lawyer and prosecutor).

<sup>148</sup> Michigan Op., *supra* note 133, CI-607 (1981), ABA/BNA Man., *supra* note 8,

Instances of prosecutorial sycophancy and favoritism must arise with some regularity, since they are acknowledged in the ABA Standards for Criminal Justice, Standards 3-2.8(b) and (d) (Relations with the Courts and Bar), which provide:

(b) A prosecutor's duties necessarily involve frequent and regular official contacts with the judge or judges of the prosecutor's jurisdiction. In such contacts the prosecutor should carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions and canons require between advocates and judges.

. . . .

(d) In the prosecutor's necessarily frequent contacts with other members of the bar, the prosecutor should strive to avoid the appearance as well as the reality of any relationship which would tend to cast doubt on the independence and integrity of the office.<sup>149</sup>

Lawyers, including prosecutors, should not provide loans or gifts to judges before whom the lawyer practices.<sup>150</sup> A lawyer may extend "ordinary social hospitality" to a judge before whom he or she practices, but this concept must be "tempered by the circumstances."<sup>151</sup> As a matter of judicial ethics, judicial candidates, including incumbents, may accept campaign contributions from lawyers, so long as such contributions are made through a campaign committee.<sup>152</sup> According to the commentary to the Model Code of Judicial Conduct, the names of contributors should not

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801:4818 (holding that roommates who are close friends may not be on opposite sides of the "v.," and requiring consent from the defendant even if another prosecutor in disqualified attorney's office handles the matter!).

<sup>149</sup> CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standards 3-2.8(b), (d) (1980).

<sup>150</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 4.D.(5) (1990).

<sup>151</sup> SHAMAN, *supra* note 130, at 202-03 (1990).

<sup>152</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5.C.(2) (1990); Kentucky Op., *supra* note 4, E-277 (1984), KY. BENCH & BAR, Jan. 1984, at 49. *But see* KY. REV. STAT. ANN. §§ 121.045, 121.990(4) (Michie/Bobbs-Merrill 1990) (prohibiting direct or indirect contribution to official required by law to perform duties peculiar to the contributor or to supervise, regulate, or control the contributor's affairs). For an omnibus opinion regarding the proper relationship between lawyers and judges see Kentucky Op. E-351 (1992), KY. BENCH & BAR, Summer 1992, at 33. Comm. on Professional Ethics of the Bar Ass'n of Nassau County [NY] Op. [hereinafter Nassau County Op.] 87-22 (1987), ABA/BNA Man., *supra* note 8, 901:6258 states that a lawyer who prosecutes in the judge's court on a daily basis should not serve on the judge's re-election committee.

be revealed to the candidate unless the candidate is required by law to file a list of his or her campaign contributors.<sup>153</sup>

Fortunately, most part-time prosecutors try to maintain an aura of impartiality in their dealings with other lawyers.<sup>154</sup> Nevertheless, there will be occasions when a part-time prosecutor's relationship with another lawyer will present rather glaring conflicts of interest involving the lawyer's personal<sup>155</sup> or financial interests.<sup>156</sup> Such financial or business dealings with lawyers, clients, and others are addressed in the next section.

### C. *Prosecutor's Financial and Other Interests*

The lawyer codes,<sup>157</sup> statutes,<sup>158</sup> and common sense all inform the prosecutor that he or she should not allow political or financial interests to interfere with the execution of his or her duties as a public officer.

There are a number of interesting cases and opinions dealing with the prosecutor's political and financial interests. Some involve fairly venal conduct, or at least conduct that seems likely to, if not calculated to, raise judicial and disciplinary eyebrows. For example, it seems fairly obvious that a prosecutor should not

<sup>153</sup> The object is "to insulate candidates from personal contact with contributors which may lead to allegations of bias." SHAMAN, *supra* note 130, § 11.13, at 341-42; THODE, *supra* note 130, at 99. I have received reports suggesting that some Kentucky judges are oblivious to the need for such insulation.

<sup>154</sup> *But see In re Complaint of Rook*, 556 P.2d 1351, 1356-57 (Or. 1976) (prosecutor would not plea bargain with the clients of a lawyer against whom he held a grudge).

<sup>155</sup> Virginia Op., *supra* note 121, 1203 (1989), ABA/BNA Man., *supra* note 8, 901:8752 (dealing with conflicts created by contract with other lawyers to do collections); Virginia Op. 786 (1986), ABA/BNA Man. 901:8705 (stating that prosecutor may not prosecute unrelated cases against clients of an attorney representing the prosecutor in a real estate matter).

<sup>156</sup> *Cf.* Illinois Op., *supra* note 141, 89-2 (1989), ABA/BNA Man., *supra* note 8, 901:3011 (stating that prosecutor should not accept referral fee from lawyer for wrongful death case sent to that lawyer if prosecutor had initial discretion regarding prosecution of an offense arising out of the matter). *But see* Missouri Inf. Op., *supra* note 124, 1 (1982), ABA/BNA Man. 801:5258 (part-time assistant prosecutor and part-time special assistant public defender may act as co-counsel for plaintiff in personal injury case although defender is representing a convicted defendant on an appeal).

<sup>157</sup> CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standard 3-3.9 (ABA 1980). Discretion in the Charging Decision: "(c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved . . . ."

<sup>158</sup> *See, e.g.*, KY. REV. STAT. ANN. § 61.240 (Michie/Bobbs-Merrill 1986) (county attorney may have no interest in any claim or contract with county); KY. REV. STAT. ANN. § 61.210 (Michie/Bobbs-Merrill 1986) (or in a road contract or public improvement).

prosecute solely to gain fame or fortune,<sup>159</sup> or dismiss charges in order to forestall inquiry into his or her own conduct.<sup>160</sup> Should a prosecutor have to be told that it might look bad if he or she were to take large campaign contributions from a defendant or a defendant's family?<sup>161</sup>

Book contracts and media rights seem to have been almost as much of a problem for prosecutors as for defense counsel, but at least they are addressed in the codes.<sup>162</sup> In other respects, some commentators criticize the codes for failing to stress the importance of avoiding conflicts arising from the prosecutor's pecuniary stake in an outcome:

[T]he prosecutor may be expected to shun financial interests which might be affected by matters within his office. Perhaps, little of the local prosecutor's work alters the financial condition of any enterprise in which he is likely to own a share. Yet, it is surely well to advise prosecutors to avoid investment (for example) in taverns or construction and maintenance firms contracting with the local government, for we would not want his investigative or prosecutorial ardor cooled by the prospect of financial loss.<sup>163</sup>

Of course, the financial interests of relatives<sup>164</sup> and business associates<sup>165</sup> must also be factored into the equation.<sup>166</sup>

<sup>159</sup> See *Shaw v. Garrison*, 467 F.2d 113, 116-18 (5th Cir. 1972); CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standard § 3-3.9(c); see also *supra* note 104 and accompanying text.

<sup>160</sup> See *In re Johnson*, 477 N.W.2d 54, 55 (Wis. 1991). The mere fact that the defendant files a civil suit against the prosecutor should not lead to automatic disqualification. The question is whether the prosecutor's ability to exercise independent professional judgment will be inhibited. See, e.g., *Alabama Op.*, *supra* note 119, 89-22 (1989), ABA/BNA Man., *supra* note 8, 901:1052; see also *supra* note 118 (citing cases in which prosecutor's professional judgment might be inhibited).

<sup>161</sup> Small donations from a relative of an accused will not be disqualifying. See *Michigan Op.*, *supra* note 133, RI-23 (1989), ABA/BNA Man., *supra* note 8, 901:4767.

<sup>162</sup> See *Shaw*, 467 F.2d at 118-19. A prosecutor may sell media rights concerning his or her role in a matter after representation has ended. *New York Op.*, *supra* note 122, 606 (1990), ABA/BNA Man., *supra* note 8, 901:6108 (alluding to MODEL RULES, *supra* note 3, Rule 1.8(d), but warning lawyer about problems of confidentiality). Cf. *Penguin Books U.S.A., Inc. v. Walsh*, 756 F. Supp. 770, 781-83 (S.D.N.Y. 1991) (allowing Iran-Contra prosecutor to publish book on the affair), *vacated as moot*, 929 F.2d 69 (2d Cir. 1991).

<sup>163</sup> *Uviller*, *supra* note 6, at 1161. Presumably it is unwise for a prosecutor to own any interest in a warehouse. See *supra* note 55 and accompanying text.

<sup>164</sup> See KY. REV. STAT. ANN. § 15.733(2)(c) (Michie/Bobbs-Merrill 1985), cited *supra* text accompanying note 96.

<sup>165</sup> See *Uviller*, *supra* note 6, at 1162, citing Standard 1.2(b)(ii) of the Tentative Draft of the ABA Standards, which identified a "debilitating conflict" when "a business partner or associate or a relative has any interest in a criminal case, either as a complaining witness,

The prosecutor should also consider the implications of business relationships with other lawyers, particularly defense counsel.<sup>167</sup> Even landlord-tenant relationships can lead to inconvenience, if not conflict.<sup>168</sup>

#### D. *A Note on the Prosecutor as Witness*

Many prosecutors regularly stub their toes on the advocate-witness rule, which requires an attorney to withdraw from a case if he or she anticipates that he or she or a member of his or her firm will be called as a witness in that case.<sup>169</sup> However, the rule is not really a "conflicts" rule at all, but is instead a rule designed to separate advocacy (argument) from evidence.<sup>170</sup> For that reason, I have decided to skip any extended discussion of the cases and opinions concerning the advocate-witness rule in this article.

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a party or as counsel"; see also Griffin, *supra* note 6, at 982-83; cf. Alabama Op., *supra* note 119, RO 90-91 (prosecutor who is prosecuting worthless check cases for business owned by city commissioner may not prosecute ethics case against commissioner); discussion of prosecuting present clients *infra* part VI.A. In Kentucky, some rural prosecutors represent coal companies and other local employers whose operations may be heavily regulated by the state. This can lead to disqualification squabbles. See *infra* part V.C.

<sup>166</sup> According to some opinions, the prosecutor's service on the board of a non-profit agency or corporation can also be a source of conflicts if the prosecutor may be called upon to prosecute individuals serviced by the agency or corporation. See South Carolina Op., *supra* note 142, 86-12 (undated), ABA/BNA Man., *supra* note 8, 901:7903. Others see no conflict so long as the prosecutor has no knowledge of confidential information that would be involved in the defense. See Pennsylvania Op., *supra* note 143, 88-264 (undated), ABA/BNA Man. 901:7317. But see MODEL RULES, *supra* note 3, Rule 6.3 (prescribing safeguards for participants in legal service organizations).

<sup>167</sup> See, e.g., Indiana Op., *supra* note 128, 2 (1982), ABA/BNA Man., *supra* note 8, 801:3304 (addressing "nonlegal business deals" between part-time prosecutors and defense attorneys); Ethics Comm. of State Bar of South Dakota Op. [hereinafter South Dakota Op.] 90-1 (1990), ABA/BNA Man. 901:8002.

<sup>168</sup> According to ABA Inf. Op., *supra* note 64, 1419 (1978), a part-time public defender may rent office space in building owned by a prosecutor. Accord New York Op., *supra* note 122, 583 (1987), ABA/BNA Man., *supra* note 8, 901:6103. Kentucky Op., *supra* note 4, E-322 (1987), ABA/BNA Man. 901:3903, states that it may be permissible for a lawyer who defends criminal cases to rent fully separate office space in a building that is also occupied by a full- or part-time commonwealth or county attorney, but that it may be necessary to meet witnesses and others elsewhere to avoid disclosure of information. Cf. South Carolina Op., *supra* note 142, 85-17 (1985), ABA/BNA Man. 801:7919 (regarding attorney sharing office with prosecutor's spouse). Office-sharing is another matter entirely, and will be discussed in part VIII.C.

<sup>169</sup> As a disciplinary rule, this rule can be found in MODEL CODE, *supra* note 16, DRs 5-101(B), 5-102, and MODEL RULES, *supra* note 3, Rule 3.7. For an extensive collection of cases involving violations of the rule by prosecutors see UNDERWOOD & FORTUNE, *supra* note 8, §§ 4.1 - 4.14 (1988).

<sup>170</sup> UNDERWOOD & FORTUNE, *supra* note 8, § 4.1.

For my purposes it is sufficient to alert the reader to the fact that the rule may support a motion to disqualify the prosecutor or provide the grounds for an attack on a conviction.<sup>171</sup> The reader may refer to the extensive literature on the subject for further guidance.<sup>172</sup>

## V. REPRESENTATION IN OPPOSITION TO THE STATE, COUNTY, OR CITY

### A. *Criminal Defense*

In virtually every state there are ethics opinions stating that a part-time prosecutor may not defend in criminal cases—not just in the prosecutor's own county<sup>173</sup> but anywhere else in his or her state.<sup>174</sup> In some states the prohibition has been enacted into stat-

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<sup>171</sup> See, e.g., *People v. Paperno*, 429 N.E.2d 797, 801 (N.Y. 1981) (stating defendant's pretrial showing that prosecutor's investigative or prosecutorial conduct will be a material issue may justify disqualification under advocate witness rule, but conviction will not be reversed absent showing of substantial likelihood of prejudice); see also KY. REV. STAT. ANN. § 15.733(2)(d) (Michie/Bobbs-Merrill 1985) (requiring disqualification where attorney or member of immediate family is likely to be material witness).

<sup>172</sup> See generally Barbre, *supra* note 6.

<sup>173</sup> See, e.g., Kentucky Op., *supra* note 4, E-160, MARU, *supra* note 8, No. 11,126 (1980); cf. Kentucky Op. E-102 (1974), MARU No. 8565 (1975) (statutory partner of county attorney may not handle criminal defense cases in other counties); see also New Jersey Op., *supra* note 130, 478 (1981), ABA/BNA Man., *supra* note 8, 801:5804 (finding that associate of county attorney may not represent defendant convicted in same county on appeal).

<sup>174</sup> See Kentucky Ops., *supra* note 4, E-291 (1985), ABA/BNA Man., *supra* note 8, 801:3911; E-211 (1980), ABA/BNA Man. 801:3901; E-193 (1978), MARU, *supra* note 8, No. 11,165 (1980); E-160 (1977), MARU No. 11,126 (1980); E-102 (1974), MARU No. 8565 (1975); E-61 (1972), ABA/BNA Man. 801:3911; E-31 (1967), MARU No. 8493 (1975); Michigan Op., *supra* note 133, CI-887 (1983), ABA/BNA Man. 801:4859; Ethics Comm. of the State Bar of Montana Op. [hereinafter Montana Op.] 12 (1980), ABA/BNA Man. 801:5401; Pennsylvania Op., *supra* note 143, 88-2 (undated), ABA/BNA Man. 801:4859. *But see* Kansas Ops., *supra* note 125, 82-35 (1982), ABA/BNA Man. 801:3811 and 81-2 (1981), ABA/BNA Man. 801:3805 (allowing defense in other counties). In Bjorkman, *supra* note 6, the author criticizes the South Dakota view that prosecutors may represent criminal defendants in other counties of the state. Claims may be made that representation of a defendant by a lawyer who was a prosecutor in a neighboring county amounted to ineffective assistance of counsel. See, e.g., *Goodson v. Peyton*, 351 F.2d 905, 906 (4th Cir. 1965); *State ex rel. Starnes v. Erickson*, 186 N.W.2d 502, 506-07 (S.D. 1971) (discussed extensively in Bjorkman's Comment), *cert. denied*, 404 U.S. 845 (1971). *But cf.* *O'Melia v. State*, 339 S.E.2d 586, 588 (Ga. 1986) (finding county solicitor's defense of accused felon in solicitor's own county created actual conflict of interest that should have required disqualification, but conviction affirmed in absence of showing of prejudice). For a disciplinary case see *Maginnis' Case*, 112 A. 555 (Pa. 1921) (suspension for acting as assistant defense counsel

utory law.<sup>175</sup> The ban sometimes extends to prohibit defense practice in federal court.<sup>176</sup> It has even been ruled that a prosecutor may not defend in another state.<sup>177</sup> Typically, the partners and associates of prosecutors are also prohibited from doing defense work on just as broad a basis.<sup>178</sup>

in another county).

It has been suggested that if a lawyer is appointed district attorney *pro tempore* as opposed to being appointed special prosecutor for a single case, then neither he nor his partners or associates may do defense work. See Wisconsin Ops., *supra* note 117, E-83-191 (1983), ABA/BNA Man. 801:9110, and E-81-19 (1981), ABA/BNA Man. 801:9105. This may make it difficult to recruit experienced temporary prosecutors in rural areas where there are few lawyers.

<sup>175</sup> See, e.g., KY. REV. STAT. ANN. § 15.740 (Michie/Bobbs-Merrill 1985) (Commonwealth's attorney and county attorney not to represent accused): "The commonwealth's attorney and county attorney shall not act as defense counsel in any criminal prosecution in any state or federal court *in this Commonwealth*, except in cases in which he is a party." (emphasis added).

CAL. BUS. & PROF. CODE § 6131. [Aiding defense where partner or self has acted as public prosecutor; misdemeanor and disbarment] provides:

Every attorney is guilty of a misdemeanor and, in addition to the punishment prescribed therefor, shall be disbarred:

(a) Who directly or indirectly advises in relation to, or aids, or promotes the defense of any action or proceeding in any court the prosecution of which is carried on, aided or promoted by any person as district attorney or other public prosecutor with whom such person is directly or indirectly connected as a partner.

(b) Who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as district attorney or other public prosecutor, afterwards, directly or indirectly, advises in relation to or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action upon any understanding or agreement whatever having relation to the defense thereof.

Kizer, *supra* note 6, at 374, cites a West Virginia Trial Court Rule (IV(c)) that prohibits the representation of criminal defendants by prosecutors and their associates.

<sup>176</sup> KY. REV. STAT. ANN. § 15.740 (Michie/Bobbs-Merrill 1985); see also ABA Op., *supra* note 75, 262 (1944) (finding that even absent state law prohibiting the representation, state prosecutor may not defend in criminal case in federal court, but may represent persons before federal boards and bureaus in matters involving federal law only); South Carolina Op., *supra* note 142, 2-77 (undated), MARU, *supra* note 8, No. 12,711 (Supp. 1980) (refusing to allow full-time solicitor to handle criminal defense in federal courts or matters before federal agencies).

<sup>177</sup> ABA Op., *supra* note 75, 30 (1931); Kentucky Op., *supra* note 4, E-102 (1974), MARU, *supra* note 8, No. 8565. I must admit that I gave out the "wrong" answer once, when I was "winging it." Sometimes I get things right, too. My critics explain this by quoting Governor Combs, who once said, when he was criticized for conceding a point to a political opponent, "Even a blind pig can find an acorn now and then."

<sup>178</sup> ABA Inf. Op., *supra* note 64, 922 (1966), MARU, *supra* note 8, No. 5516 (Supp. 1970) (forbidding criminal defense by a prosecutor or a member of the prosecutor's staff); ABA Op., *supra* note 75, 142 (1935), MARU No. 142 (1970) (stating that prosecutor and



The explanation for these rules is somewhat vague, although the rules may be salutary.<sup>179</sup> It seems fairly obvious that the pros-

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partner may not defend criminal cases); Alabama Op., *supra* note 119, 86-35 (1986), ABA/BNA Man., *supra* note 8, 901:1005 (disqualifying members of city attorney's firm from criminal defense); Illinois Op., *supra* note 141, 791 (1982), ABA/BNA Man. 801:3012 (disqualifying assistant attorney general's partners from criminal defense work); Kansas Ops., *supra* note 125, 83-37 (1983), ABABNA Man. 801:3817 (forbidding participation by partners and associates of county attorney in cases where state is plaintiff), 81-30 (1981), ABA/BNA Man. 801:3809 (disqualifying county attorney's partner from representing criminal defendants in other counties); Standing Comm. on Ethics and Professional Responsibility of the State Bar of Nevada Op. [hereinafter Nevada Op.] 1 (1987), ABA/BNA Man. 901:5601 (disqualifying deputy district attorney and partner where charge is violation of city ordinance). *But see* Wisconsin Op., *supra* note 117, E-86-7 (1986), ABA/BNA Man. 901:9102 (allowing partner of city attorney to represent criminal defendants if specific criteria met); *cf.* Kentucky Op., *supra* note 4, E-322 (1987), ABA/BNA Man. 901:3903 (permitting a criminal defense lawyer to share office space with another lawyer who has contracted to prosecute only URESA and TAPP cases for county attorney, although office sharer may not defend URESA and TAPP cases); Virginia Op., *supra* note 121, 684 (1985), ABA/BNA Man. 801:8841 (suggesting that if prosecutor only handles welfare fraud and child support cases, partners and associates might handle other types of defense cases). It seems pretty obvious that a lawyer should not defend a case if his partner is or has been the prosecutor in the case. *See* ABA Op. 16 (1929) (disallowing representation of a defendant who is being prosecuted by another member of the same firm); Kentucky Op. E-18 (1963) (stating that partner of city attorney who serves as police court prosecutor may not defend in that court). But a surprising number of statutes on the books relate to this "obvious" issue. *See, e.g.*, CAL. BUS. & PROF. CODE § 6131 (West 1990); NEW YORK JUD. LAW § 493 (McKinney 1983). The 1980 Discussion Draft of (then) Model Rule 3.10 provided that:

A lawyer for the accused in a criminal case, shall not:

(b) act in a case in which the lawyer's partner or other professional associate is or has been the prosecutor; . . . .

MODEL RULES, *supra* note 3, Rule 3.10 (Discussion Draft 1980), *reprinted in* STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS' STATUTES AND STANDARDS 125 (1989).

In some states, ethics opinions suggest that the partners and associates of a part-time prosecutor may defend in jurisdictions other than that in which the prosecutor is employed. *See* Michigan Op., *supra* note 133, CI-612 (1981), ABA/BNA Man. 801:4818; Ethics Comm. of the State Bar Ass'n of North Dakota 37 (1980), ABA/BNA Man. 801:6701; Pennsylvania Op., *supra* note 143, 88-18 (undated), ABA/BNA Man. 901:7310 (suggesting that this is allowed if all parties to the litigation consent); Virginia Op. 674 (1985), ABA/BNA Man. 801:8840. The Virginia Committee has opined that if a prosecutor has only limited assignments (using welfare fraud and child support enforcement as examples) then other members of his firm may defend in the same jurisdiction. Virginia Op. 684 (1985), ABA/BNA Man. 801:8841; *see also* Alabama Op. 454 (1981), ABA/BNA Man. 801:1013 (allowing assistant attorney general who prosecutes only child support and paternity cases to represent criminal defendants). *But see* New Jersey Op., *supra* note 130, 168 (1970), MARU, *supra* note 8, No. 6868 (Supp. 1970) (lawyer for county planning board may not represent criminal defendants in the county). In Kentucky Op. E-248 (1981), ABA/BNA Man. 801:3905, the Kentucky committee stated that even an assistant county attorney who did only Title IV-D (AFDC) cases could not defend in-state criminal cases.

<sup>179</sup> WOLFRAM, *supra* note 8, § 8.9.4, at 455 (1986) ("Such strict conflict rules are evidently designed to purchase public contentment with the unquestionable integrity of

ecutor should not defend in his or her own county. Presumably, a statewide ban could flow from the fact that the particular prosecutorial system is unified,<sup>180</sup> or be based on the theory that a prosecutor must not be disloyal to the state.<sup>181</sup> It is not intuitively obvious why a part-time state prosecutor may not defend in federal court<sup>182</sup> or in a foreign jurisdiction.<sup>183</sup> These rules are usually justified in terms of "appearances," or on the ground that a defense role might interfere with the ability or willingness of other police

prosecutions. . . . They may do so, but at a very high price.").

Elsewhere, Professor Wolfram has raised the suggestion that concern about appearances may be too costly a public relations exercise. See *supra* note 86. The private bar has never been particularly sensitive to public appearances. For example, James tells of an eminent counsel who fixed on his coat of arms the motto "*Si Nummis Immunis*," which James translates as "Down with the money and I'll get you off." James was taken by the fact that this motto is a palindrome. JAMES, *supra* note 55, at 591. My own motto would be "I'll have to look into that."

<sup>180</sup> Cf. Bjorkman, *supra* note 6, at 38-39.

<sup>181</sup> See Kansas Op., *supra* note 125, 80-48 (1981), ABA/BNA Man., *supra* note 8, 801:3805; Kentucky Op., *supra* note 4, E-291 (1985), ABA/BNA Man. 801:3911; Comm. on Professional Responsibility, Vermont Bar Ass'n Op. 88-9 (undated), ABA/BNA Man. 901:8607; cf. ABA Op., *supra* note 75, 118 (1934), MARU, *supra* note 8, No. 118 (1970) (refusing to allow county attorney to work to obtain parole for person convicted in another county); Ethics Comm., North Carolina State Bar Ass'n Op. [hereinafter North Carolina Op.] 425 (1963), MARU No. 3450 (1970) (prosecutor may not advise prisoner).

<sup>182</sup> See Missouri Inf. Op., *supra* note 124, 16 (1981), ABA/BNA Man., *supra* note 8, 801:5258 (county prosecutor may represent potential federal defendant on federal charge on which there could be no action by the county prosecutor); see also Alabama Op., *supra* note 119, 84-14 (1984), ABA/BNA Man. 801:1071 (allowing associate of prosecutor to defend in federal criminal cases so long as no facet of federal case will be subject matter of state court proceedings and defendant will not be subject to state charges); Alabama Op. 81-547 (1981), ABA/BNA Man. 801:1024 (allowing associate of prosecutor to accept court appointment to represent defendant in federal case); cf. statutes cited in note 175, *supra*. One assumes that there would usually be a possibility of parallel state charges being filed.

<sup>183</sup> ALA. CODE §§ 12-17-195 and -196 provide:

Any assistant district attorney who acts as attorney for, represents or defends any defendant charged with a criminal offense of any kind or character in any court, state, municipal or federal, *in this state*, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than \$100.00 nor more than \$1,000.00.

Any partner or partners of any district attorney or assistant district attorney of this state who defend criminal cases of any character, kind or description in *any court in this state* in which said district attorney or assistant district attorney is the prosecuting officer shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500.00.

*Id.* (emphasis added) (citations omitted).

Compare the language of KY. REV. STAT. ANN. § 15.740 (Michie/Bobbs-Merrill 1985) (no criminal penalty). For state opinions involving similar statutes see Maryland Op., *supra* note 64, 86-76 (1986), ABA/BNA Man., *supra* note 8, 901:4304; Nevada Op., *supra* note 178, 1 (1987), ABA/BNA Man. 901:5601 (citing statute forbidding part-time county prosecutor's law partner from representing criminal defendant in any state court).

forces and prosecutors to cooperate with the switch-hitter in other cases.<sup>184</sup>

In the introductory portions of this Article I alluded to the fact that, at least in Kentucky, the work of the city attorney is often "contracted out" to private firms.<sup>185</sup> At one time, the city attorney was assigned prosecutorial duties.<sup>186</sup> Furthermore, the city attorney had, and in many areas still has, the duty of advising the city police.<sup>187</sup> The conventional wisdom in most states runs to the proposition that a city prosecutor may defend outside of his jurisdiction,<sup>188</sup> but may not become involved in the defense of cases that arise in his territorial jurisdiction, that would involve the violation of city ordinances of his jurisdiction,<sup>189</sup> or that would

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<sup>184</sup> ABA Op., *supra* note 75, 262 (1944), MARU, *supra* note 8, No. 262 (1970) (cooperation might be disrupted); ABA Op. 118 (1934), MARU No. 118 (1970) (might "undo the work of another [prosecutor]" and cause a decline in public confidence). Cf. Michigan Op., *supra* note 133, CI-887 (1983), ABA/BNA Man., *supra* note 8, 801:4859; Montana Op., *supra* note 174, 25 (1981), ABA/BNA Man. 801:5405. No special rule is needed to prevent the part-time prosecutor from alluding to his public office. His public office is irrelevant when he is representing a private party, and the prosecutor should not be permitted to allude to it in an effort to enhance his or her position or to bolster the credibility of his or her client. Cf. MODEL CODE, *supra* note 16, DRs 7-106(C)(1), (4) 8-101(2); MODEL RULES, *supra* note 3, Rule 3.4(e).

May a prosecutor represent a person in an action to recover tangible items of stolen property in the possession of the police or the court? If this is a major moral lapse then it is not very obvious. Idaho Op., *supra* note 64, 16 (1959), MARU, *supra* note 8, No. 840 (1959), allows a prosecutor or deputy prosecutor to represent a plaintiff in a civil action to recover stolen goods in another county, but not if the prosecutor's office was involved in the related criminal action.

I do not recommend that a prosecutor attempt to represent a suspect or convicted or acquitted defendant in such an action, nor do I think it is appropriate for state prosecutors to appear opposite the federal government in "forfeiture" proceedings.

<sup>185</sup> See *supra* notes 37-38 and accompanying text.

<sup>186</sup> See Kentucky Op., *supra* note 4, E-196 (1978), MARU, *supra* note 8, No. 11,168 (1980) (noting that city attorney now handles only administrative affairs). However, a new statute, KY. REV. STAT. ANN. § 82.000 (Banks-Baldwin 1992), allows cities to criminalize violations of city ordinances at the misdemeanor level and assign such cases to the county attorney. The duty to prosecute parallel or alternative civil penalties is assigned to the city attorney. These quasi-prosecutorial duties will exacerbate the conflicts problems. See Virginia Inf. Op., *supra* note 140, 152 (undated), MARU No. 10,082 (1975) (declining to sanction city attorney's defense of city ordinance violations even if such cases are prosecuted by commonwealth's attorney rather than city attorney).

<sup>187</sup> Kentucky Op., *supra* note 4, E-196 (1978), MARU, *supra* note 8, No. 11,168 (1980).

<sup>188</sup> See, e.g., Alabama Op., *supra* note 119, 82-648 (undated), ABA/BNA Man., *supra* note 8, 801:1038; Illinois Op., *supra* note 141, 852 (1983), ABA/BNA Man. 801:3018; cf. Wisconsin Op., *supra* note 117, E-81-6 (1981), ABA/BNA Man. 801:9104 (allowing prosecutor to defend cases involving violations of the ordinances of other municipalities).

<sup>189</sup> See Kentucky Op., *supra* note 4, E-196 (1978), MARU, *supra* note 8, No. 11,168 (1980); see also Alabama Ops., *supra* note 119, 90-42 (1990), ABA/BNA Man., *supra* note

involve the testimony of the police officers of his city.<sup>190</sup> It is not as obvious why a city attorney who has no prosecutorial duties and who has no formal duty to advise the police should be prohibited from doing defense work in the city.<sup>191</sup> In my experience, a number of small towns and their lawyers have proposed special contractual arrangements and "waivers" so that the partners and associates of the city attorney might continue to maintain a defense practice. However, in a recent ethics opinion the Kentucky Committee and Board of Governors declined to approve of these special arrangements, opting instead to maintain a conventional bright-line rule.<sup>192</sup> This opinion is sure to be controversial.

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8, 901:1068 (concerning defendants charged with violations of city or municipal ordinances), 82-648 (undated), ABA/BNA Man. 801:1038; Illinois Op., *supra* note 141, 823 (1983), ABA/BNA Man. 801:3015; New Hampshire Bar Ass'n Ethics Comm. Op. [hereinafter New Hampshire Op.] 1987-8/13 (1988), ABA/BNA Man. 901:5704; Ohio Sup. Ct. Op., *supra* note 143, 88-8 (1988), ABA/BNA Man. 901:6856; Virginia Inf. Op., *supra* note 140, 152 (undated), MARU No. 10,082 (1985) (finding it improper to defend violation of city ordinance even if such cases are prosecuted by commonwealth's attorney rather than city attorney); Wisconsin Op., *supra* note 117, E-81-3 (1982), ABA/BNA Man. 801:9104. For a disciplinary case see *State ex rel. Nebraska State Bar Ass'n v. Hollstein*, 274 N.W.2d 508, 517 (Neb. 1979). In this case, the Supreme Court of Nebraska reduced a city attorney's penalty from suspension from the bar to censure when his appearance was based in part on the grounds that the ethics opinion on which his suspension was based was unknown to him.

<sup>190</sup> See Ethics Comm. of the Board of Professional Responsibility of the Supreme Court of Tennessee Op. [hereinafter Tennessee Op.] 81-F-23 (1981), ABA/BNA Man., *supra* note 8, 801:8105; New York Op., *supra* note 122, 544 (1982), ABA/BNA Man. 801:6107. In Kentucky Op., *supra* note 4, 225 (1980), KY. BENCH & BAR, Apr. 1980, at 55, the committee opined that the partner or associate of a city attorney may defend criminal cases outside the city in which the city attorney is employed, but may not defend in any case if the offense occurred in that city or if the city police investigated the criminal case. In *People v. Washington*, 444 N.E.2d 753, 757 (Ill. App. Ct. 1982), the Illinois Court of Appeals ruled that a part-time city attorney could not effectively cross-examine a city police officer about the grounds for his client's arrest, and that his client, a murder defendant, received ineffective assistance of counsel.

<sup>191</sup> See, e.g., South Carolina Op., *supra* note 142, 84-21 (undated), ABA/BNA Man., *supra* note 8, 801:7915 (permitting county lawyer who represents county officials in civil matters to represent criminal defendants charged in the county employing the lawyer so long as the lawyer does not advise the sheriff's department regarding criminal matters). *But see* ABA Op., *supra* note 75, 186 (1938), MARU, *supra* note 8, No. 186 (1970) (refusing to allow county attorney who handles civil cases for the county to defend in cases prosecuted by the county district attorney).

Can we distinguish someone holding the position of "city attorney" from a lawyer in private practice who accepts some civil cases or other non-criminal contract work from the city? In a "big-city" context, one assumes that much work will be contracted out. Should such contract lawyers and their firms be prohibited from doing criminal defense work involving the city police? If a firm does contract work in civil matters for a particular state agency, should that firm be precluded from doing criminal cases? Such restrictions seem terribly formal.

<sup>192</sup> The committee reasoned:

In a few states, a case<sup>193</sup> or an ethics opinion<sup>194</sup> has approved a plan or program allowing a local firm to "loan" one or more associates or junior partners to the prosecutor's office without the loan resulting in disqualification of other firm members from defending in other criminal cases. The theory seems to be that the public will get something for nothing<sup>195</sup> and that the firm members will get some trial experience.<sup>196</sup> Presumably, the prosecutor gets something to crow about in the local newspaper, and in some cases at least, a chance to cozy up to one or more large law firms. On balance, these programs strike me as a bad idea.

In other states, there are opinions that permit prosecutors to defend when they are appointed by the court.<sup>197</sup> Appointing pro-

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It has been pointed out by advocates of the current and restrictive rule [KBA E-196] that there are still conflicts of interest or risks of abuse in this context, in spite of these special contractual provisions. For example, the city may be a potential target of a 1983 action arising from the same facts of the case that the lawyer is attempting to defend in his private capacity. In other circumstances the lawyer may be perceived as "advising" or otherwise steering the police, who may be inclined to listen to the lawyer because of his or her role as city attorney.

Kentucky Op., *supra* note 4, E-349 (1992), KY. BENCH & BAR, Spring 1992, at 46, *discretionary review granted sub nom. In re Redding*, No. 92-SC-647 (1992).

<sup>193</sup> See, e.g., *Seth v. State*, 592 A.2d 436, 438 (Del. 1991) ("Lend-A-Prosecutor" program).

<sup>194</sup> See, e.g., Ethics Comm. of the Massachusetts State Bar Op. [hereinafter Massachusetts Op.] 91-2 (1991), ABA/BNA Man., *supra* note 8, 1001:4601 (discussing volunteer program for work at both trial and appellate levels, and appropriate safeguards); see also Michigan Op., *supra* note 133, CI 760 (1982), ABA/BNA Man. 801:4841 (allowing lawyer who serves as special prosecutor for city who prosecutes ordinance violations on a pro bono basis to defend criminal cases).

<sup>195</sup> The public appetite for services that don't cost the public anything and the desire of politicians to stay in the kitchen no doubt have something to do with the part-time prosecutor problem, the pro bono debate, and so on. The list grows.

<sup>196</sup> In the old days, law firms were willing to train associates and absorb the cost of training. Those days are long gone.

<sup>197</sup> See Professional Ethics Comm. of the Florida Bar Op. [hereinafter Florida Op.] 72-48 (1973), MARU, *supra* note 8, No. 8187 (Supp. 1975) (approving federal judge's appointment of state prosecutors to defend in federal court upon determination that "hardship conditions" exist in a particular county); Idaho Op., *supra* note 64, [unnumbered], MARU No. 8277 (Supp. 1975) (allowing lawyers in same firm to appear on opposite sides after disclosure if court-appointed); Ethics Comm. of the Utah State Bar Op. [unnumbered] (1972), MARU No. 9910 (Supp. 1975) (concerning city prosecutor defending in own jurisdiction pursuant to court appointment). Mississippi Op., *supra* note 144, 75 (1982), ABA/BNA Man., *supra* note 8, 801:5103, suggests that conflicts considerations "weigh more heavily on the attorney who acts as a private defense counsel as compared to one who represents the indigent through court-appointment." See also ABA Inf. Op., *supra* note 64, 1285 (1974), MARU No. 7439 (Supp. 1975) (the final in a series of confusing opinions from the ABA Committee on defense practice by city attorneys). On the other hand, in *Haley v.*

secutors to defend seems to me to be the least desirable way to provide legal services to the indigent, and presumably cannot be allowed where statutes ban prosecutorial defense practice.<sup>198</sup> Of course, "the law is what the court says it is," and prosecutors should not be disciplined for following court orders.<sup>199</sup>

The rule that bars prosecutors from defending criminal cases can cause some confusion when a defense lawyer runs for the prosecutor's office. One assumes that a candidate may continue to defend until such time as he is elected.<sup>200</sup> May the lawyer continue to defend in pending ("open file") cases after his or her election but before he or she takes office? Some opinions can be found allowing the lawyer to complete the defense of pending cases before being sworn in, but warn that new cases should not be accepted if they are likely to be incomplete when the lawyer assumes office.<sup>201</sup> Upon assuming office, the prosecutor and his staff will face new problems in proceeding against the prosecutor's former client which are addressed in Part VI.B. of this Article.

### B. Suits Against the State

It is commonly assumed that a prosecutor may not represent a private party whose interests are adverse to the state or county,<sup>202</sup>

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Bowles, 824 S.W.2d 796 (Tex. Ct. App. 1992), discussed *supra* at note 145, the court concluded that spousal conflicts presented non-consentable conflicts in cases involving court-appointed criminal defense attorneys, because the indigent defendant has no real alternatives.

<sup>198</sup> See, e.g., KY. REV. STAT. ANN. § 15.740 (Michie/Bobbs-Merrill 1985), cited *supra* at note 175.

<sup>199</sup> See MODEL RULES, *supra* note 3, Rule 1.16(c).

<sup>200</sup> In Comm. on Rules of Professional Conduct of the State Bar of Arizona Op. [hereinafter Arizona Op.] 88-3 (1988), ABA/BNA Man., *supra* note 8, 901:140, the committee stated that a lawyer who had been appointed to defend in a murder case may continue to defend even after announcing his intention to run for county attorney, but that he must seek permission to withdraw from the case if the client does not consent to the representation.

<sup>201</sup> See Virginia Op., *supra* note 121, 1319 (1990), ABA/BNA Man., *supra* note 8, 901:8767; Ky. Op. Att'y Gen. 85-80 (1985) (the prohibition against defending criminal cases in KY. REV. STAT. ANN. § 15.740 does not apply until the person appointed to fill the vacancy in the commonwealth attorney's office assumes that office and takes the oath); cf. South Carolina Op., *supra* note 142, 2-77 (undated), MARU, *supra* note 8, No. 12,711 (Supp. 1980) (cautioning appointed prosecutor to avoid cases that might relate to his forthcoming prosecutorial duties); Nassau County Op., *supra* note 152, 88-1 (1988), ABA/BNA Man. 901:6261 (dealing with defense attorney who has accepted job as prosecutor for state prosecuting agency that is not prosecuting his client; he may continue to represent that client with full disclosure and client's consent). But see ABA Op., *supra* note 75, 136 (1935), MARU No. 136 (1970) (lawyer who represents a convict before parole board must discontinue this representation upon his election to office of county attorney).

<sup>202</sup> See Bjorkman, *supra* note 6, at 40. Bjorkman cites Kizer, *supra* note 6, at 376-80,

and this assumption appears to be central to our discussions in sections B and C of this Part. There are some opinions on the books that allude to this proposition,<sup>203</sup> and as government agencies proliferate one assumes that more and more cases will be declared "off limits" for the part-time prosecutor's private practice. Is there a compelling rationale for this generalization?

The rationale seems to be based on the argument that "an attorney-client relationship exists between the state, together with its political subdivision, the county, and the state's attorney."<sup>204</sup> It

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as support for the generalization that "[t]he ethics committees of most state bar associations have unequivocally opposed the representation, by state's attorneys, of parties in opposition to the interests of the county or of the state." However, Kizer does not make such a sweeping statement. Rather, he notes that most bar associations find that prosecutors should never represent private clients whose cases relate in any way to official prosecutorial duties. Kizer, *supra* note 6, at 378.

<sup>203</sup> In *Missouri Inf. Op.*, *supra* note 124, 9 (1979), *MARU*, *supra* note 8, No. 11,934 (Supp. 1980), the committee recommended that an attorney ask permission to withdraw from a civil rights suit against a prison warden, various guards, and the state of Missouri when he became the prosecutor in an adjoining county. However, if his motion to withdraw were denied, the committee would allow him to continue. *Cf. MODEL RULES*, *supra* note 3, Rule 1.16(c) (noting that even a lawyer with a good reason to withdraw must obey a court order to continue representation). In *Indiana Op.*, *supra* note 128, 1 (1977), *MARU* No. 11,058 (Supp. 1980), the committee observed that deputy prosecuting attorneys are appointed officials of the state, and found that such prosecutors may not represent criminal defendants or clients with claims against the state in their private practices. In an unnumbered 1974 Idaho opinion, *MARU* No. 8271 (Supp. 1975), the committee opined that "[a] part-time prosecutor may not represent a private plaintiff attacking the constitutionality of a state statute, even though the prosecutor's office is not involved with the proposed suit. Such an attorney is a public employee and may not represent an adversary to the state." In *Arizona Op.*, *supra* note 200, 242 (1968), *MARU* No. 5996 (Supp. 1970), the committee stated that a county attorney may not represent a private client in a wrongful death action in which the state, through its highway department, might be a defendant. I assume that some county attorneys in Kentucky would take issue with this opinion, at least insofar as it would purport to apply to cases arising outside of their county.

In *Kentucky Op.*, *supra* note 4, E-272 (1983), *ABA/BNA Man.* 801:3908, the committee ruled that a tenured law professor could not represent a plaintiff against his or her own university over the university's objection. This seems odd, since a tenured professor has no attorney-client relationship with the university. There may be a *MODEL CODE*, *supra* note 16, DR 5-101(A) or *MODEL RULES*, *supra* note 3, Rule 1.7(b) conflict, but it seems to me that the client (plaintiff) might rationally "consent" in appropriate circumstances. *Compare* *Illinois Op.*, *supra* note 141, 89-18 (1990), *ABA/BNA Man.*, *supra* note 8, 901:3013 (allowing part-time university instructor to represent, in a criminal proceeding, a former university employee, so long as the client consents after full disclosure and the lawyer is able to exercise his or her independent professional judgment). I also wonder why the university would object; having a tenured law professor on the other side might very well increase one's chances for winning.

<sup>204</sup> Bjorkman, *supra* note 6, at 40 n.124. Who is the government lawyer's client? The ethics codes answer the question with confusion. *See, e.g.*, *MODEL RULES*, *supra* note 3, Rule 1.13 cmt. 7; Federal Bar Ass'n Committee on Professional Ethics, *Ethical Consider-*

seems to be taken as a given that a part-time prosecutor is a lawyer for or servant of the state at all times, and for all purposes. If the state is the prosecutor's present client, then the prosecutor should not sue his or her private client, or represent adverse interests, even in an unrelated matter or matters.<sup>205</sup> Another argument, which often helps resolve individual cases, would be that a prosecutor should not represent private litigants in matters in which he or she might be called upon to perform his or her official duty.<sup>206</sup> However, it can be seen that this is a much narrower proposition, and it cannot account for all of the opinions prohibiting representation against the state or state agencies.

If a part-time prosecutor must at all times be loyal to the state, then it would seem to follow that a part-time prosecutor may not put on his or her private practice hat and sue the state. Commentators usually support this proposition by citing cases and opinions relating to condemnation matters,<sup>207</sup> or the occasional case in which a prosecutor wishes to represent a private client in a suit in the state court or board of claims.<sup>208</sup>

Kentucky Opinion E-241<sup>209</sup> is typical of the condemnation opinions. The issue was whether a commonwealth attorney or a county attorney could represent a party other than the state in a condemnation proceeding brought by the Kentucky Department of

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ations For Federal Lawyers, F.E.C.-5.1, reprinted in STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS (1989); WOLFRAM, *supra* note 8, §§ 8.9.2, 13.9.1.

<sup>205</sup> See MODEL RULES, *supra* note 3, Rule 1.7 cmts. 3 and 8; see also ABA Inf. Op., *supra* note 64, 1495 (1982), ABA/BNA Man., *supra* note 8, 801:340-1 (both the Model Code and the Model Rules clearly prohibit a lawyer from representing one client in litigation against another client the lawyer simultaneously represents in another case, even though the matters are unrelated). If the "People" that the prosecutor is representing in a criminal case is the same client (the state) that the prosecutor is suing when he or she is pursuing a claim against the state, and is the same client that the prosecutor is opposing when he or she represents a private client against the Department of Natural Resources, then this makes some sort of sense. *But see* KY. SUP. CR. R. 3.130, Rule 1.7 cmt. 14 (Michie/Bobbs-Merrill 1992) (noting that court will usually inquire into conflicts when attorney represents multiple criminal defendants). Of course, this provides all the more support for the rule prohibiting prosecutors from representing criminal defendants.

<sup>206</sup> See Kentucky Op., *supra* note 4, E-275 (1983) ("Is the contemplated civil representation related in any way to the statutory duty of said prosecutor to represent the Commonwealth in companion litigation?"); Kizer, *supra* note 6, at 378; see also *infra* parts V.C. and D.

<sup>207</sup> See Kizer, *supra* note 6, at 377, 380.

<sup>208</sup> *Id.* at 377. I have provided informal opinions to part-time commonwealth attorneys that they should not represent private parties with tort claims against the state (Board of Claims cases).

<sup>209</sup> Kentucky Op., *supra* note 4, E-241 (1981), KY. BENCH & BAR, July 1981, 28, 29.



Highways. In answering this question, the committee appeared to draw several distinctions between the commonwealth attorney and the county attorney, which, it seems to me, are frequently overlooked.

The committee seemed to take the position that a commonwealth attorney, a "Constitutional Officer," is a servant of the state. The committee opined:

The Commonwealth Attorney should not represent a private interest in condemnation proceedings since he is an officer of the State, derives his authority from the state, is paid by the State, and is an employee of the State. It is axiomatic that a lawyer who is an employee will not take any action against the employer. Since the Commonwealth is a party to a condemnation action, the Commonwealth Attorney would have a conflict of interest in representing the other side . . . .<sup>210</sup>

As far as the committee is concerned, the state is the commonwealth attorney's master. Elsewhere the committee alludes to the biblical injunction that "no man can serve two masters." To put it another way, the committee viewed this as a situation in which the prosecutor was about to rob Peter to pay Paul.

Regarding the county attorney, the committee observed that he or she is a "County Officer," as well as a "Constitutional Officer," to whom the legislature might assign duties pertaining to state functions as well as county functions.<sup>211</sup> The committee concluded from this exercise in state and local government law<sup>212</sup> that there may be some situations in which a county attorney may handle a condemnation case, and some situations in which he or she may not. At this point in the opinion, the committee noted that the county attorney has the statutory duty to represent the Department of Highways<sup>213</sup> regarding matters in his or her own county. This would suggest that the county attorney should be precluded from representing private parties in condemnation cases in his or her own county, but not necessarily in other counties.

So far so good. However, the committee continued:

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> This is a good example of how "ethics questions" cannot be answered until questions of law are resolved. For examples of the difficulties faced by ethics committees in this regard see Underwood, *supra* note 2, at 152-54.

<sup>213</sup> See sources cited *supra* notes 46-47.

The County Attorney is in somewhat a different situation [than the Commonwealth Attorney]. He is elected by the people of his county to serve the county in that office. The County Attorney is paid by the county for performing the functions before the Fiscal Court. The County Attorney also receives remuneration from the state for prosecutorial functions in the district court.<sup>214</sup>

Unfortunately, even if we accept these propositions, the committee did not tell us what follows. It did not say what it was driving at. Is the point that the county attorney is not the state's lawyer except when he or she is actually engaged in the performance of some specific "state duty?" Apparently not, as further analysis demonstrates.

The committee observed that in the normal condemnation case, the county in which the property is located is a necessary party to the litigation since there needs to be a determination as to the taxes due on the property. The committee did not discuss this point further. Perhaps the point was made to support the view that the county attorney should not take a condemnation case in his own county. However, this extremely formal point (the taxes may not be disputed) adds little to the analysis that went before. Finally, the committee concluded that "[i]t is our feeling that the County Attorney like the Commonwealth Attorney may not represent a private individual in a condemnation proceeding."<sup>215</sup> This is a proposition that is contradicted elsewhere in the opinion by the suggestion that cases in other counties might be taken.

I have not undertaken a detailed review of this opinion just to be hyper-critical. My point is that there seems to be some confusion as to what the rules are and should be, or at least what the reasons for the rules are. If I had to describe what I think is the position of the committee and the board, based on the ethics opinions discussed so far, it would be that part-time commonwealth attorneys may not sue the state, and that part-time county attorneys probably can't either (then again maybe they can in some circumstances). This is not very helpful.<sup>216</sup> As we shall see in the next

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<sup>214</sup> Kentucky Op., *supra* note 4, E-241 (1981), KY. BENCH & BAR, July 1981, 28, 29.

<sup>215</sup> *Id.*

<sup>216</sup> Again, we might ask who the client is. If a county attorney can be called upon to represent the Department of Highways, or is in fact representing that agency in a pending matter, does that mean that the county attorney is representing the same client (that abstract "State") that a private client may want him to sue in the Board of Claims or in federal court under § 1983? This seems a bit extravagant. On the other hand, if we accept the view

section, there is at least one other Kentucky ethics opinion on point. But it is clear that some simple and iron-clad rules would be helpful, even if the theory behind the rules were lacking in elegance.

### C. *Opposing State and Local Governments*

The defense of a citizen in a criminal case, or the representation of a "John Q. Public" in a civil damage action against the state, is only part of the story. These are the most obvious instances of "direct" conflict.<sup>217</sup> But the question is broader: Is a lawyer who can fairly be said to be representing a governmental entity also representing interests adverse to the that governmental entity? The

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that a county attorney is deemed a lawyer for the Commonwealth and all of its instrumentalities because he or she regularly accepts a paycheck from the state treasury, perhaps we need not engage in such close analysis.

In any event, prosecutors who call me about this type of conflict invariably cite Kentucky Ops., *supra* note 4, E-210 (1979), ABA/BNA Man., *supra* note 8, 801:3901 and E-66 (1974), MARU, *supra* note 8, No. 8529 (Supp. 1975) (the latter "written" by the Court of Appeals in response to an appeal of an ethics opinion). Those opinions state that commonwealth and county attorneys may accept workers' compensation cases. However, those opinions seem to be based on the premise that an action on behalf of a private client for workers' compensation benefits is not an action against the Workmen's Compensation Board (the State). Alluding to the statutory duties of commonwealth and county attorneys, the committee observed:

The statute creates the possibility that any of three people may be called upon to represent the Board in actions against it if it so desires. Above all else, [KY. REV. STAT. ANN. § 342.425 (Michie/Bobbs-Merrill 1990)] is designed to afford a source of legal representation for the Board when the Board itself is the real party in interest. It does not contemplate or encompass the normal situation where counsel for a private party goes before the Board to seek an award for a work-related injury or disease. . . .

Since the Board acts in a neutral capacity in adjudicating claims before it, surely the Board would not favor a county attorney's client simply because of the remote possibility that the county attorney might some day be called upon to represent the Board.

Kentucky Op. E-66, *supra*. See also West Virginia Op., *supra* note 64, 77-9 (1978), MARU No. 13,046 (Supp. 1980) (in most instances workers' compensation cases do not involve the state and its interests, but if claimant were an employee of the state or of any of its agencies or subdivisions, the public employer would be a real party in interest and the representation would be improper). A nit-picker would point out that the old Kentucky opinions do not take into account the existence of the Special Fund, which may be represented by an assistant attorney general. See Illinois Op., *supra* note 141, 278 (1966), discussed *infra* note 224. Does it make a difference if the fund is a real party in interest? See the next section. It makes my head hurt to think about all of this, and I do not find Kentucky Ops. E-66 and E-210 very helpful. I suspect that these opinions will continue to serve as a sort of "Holy Grail" for prosecutors who want to take cases against the Commonwealth and its boards and agencies.

<sup>217</sup> See MODEL RULES, *supra* note 3, Rule 1.7(a).

conflict—the opposition—may be “indirect.”<sup>218</sup> This is where things can get rarefied indeed.

I have already alluded to the fact that conflicts can arise because the particular prosecutor has a statutory duty to represent an entity, or a specific board or agency, in a particular type of case.<sup>219</sup> Such conflicts will be catalogued in the next section. We must also concede the general rule that a lawyer may not represent interests adverse to a client with whom there exists an ongoing attorney-client relationship.<sup>220</sup> That conflicts rule is familiar to all lawyers in private practice. But if a private citizen wants to bring a case that will put that citizen at odds with a state or county entity or agency, and if the prosecutor has no “open files”—pending cases—in which he or she is representing the particular entity or agency, and if it is highly unlikely that the specific prosecutor or anyone in the prosecutor’s office<sup>221</sup> will actually be called upon to represent the entity or agency in the matter at hand, is acceptance of the representation improper? What is the basis for an across-the-board rule against the representation, by part-time prosecutors, “of parties in opposition to the interests of the county or the state?”<sup>222</sup>

When we are asked to acknowledge such a conflicts rule (at least in its most extreme formulations or applications), it seems to me that we are asked to assume that in accepting the office, and in taking the periodic public paycheck (such as it is), the part-time prosecutor is also accepting the proposition that he or she is a lawyer for the check-paying entity and all of its agencies, commissions, and boards at all times and for all purposes. The lawyer is on a sort of public retainer, and has a present client relationship with the retaining government and any and all of its departments and subdivisions.

We may be able to agree on such a rule, and many prosecutors seem to have already adopted it in practice.<sup>223</sup> In fact, such a rule

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<sup>218</sup> See *id.* Rule 1.7(b).

<sup>219</sup> See discussion of condemnation cases, *supra* notes 209-15 and accompanying text.

<sup>220</sup> See *infra* part VI.A.

<sup>221</sup> See *infra* part VIII.

<sup>222</sup> See Bjorkman, *supra* note 6, at 40.

<sup>223</sup> Note that I am acting as something of a devil’s advocate here. I am perfectly happy to follow a restrictive rule if it is fairly announced. A lawyer on retainer for a corporation, or a lawyer who regularly does work for a corporation, would not expect to be able to sue or otherwise oppose that corporation or its subsidiaries. Do prosecutors protest too much about restrictive rules that limit opportunity?

played center stage in one Kentucky Bar Association ethics opinion.<sup>224</sup> In that opinion, the committee stated that neither commonwealth or county attorneys nor their associates in private practice could represent licensees in disciplinary actions before state licensing boards or commissions, nor could they represent any such licensee against any state board or commission in any district, circuit, or appellate court. The Committee reasoned that "Commonwealth attorneys are compensated by the state and therefore are employees of the state."<sup>225</sup> The committee extended the net of this logic to county attorneys with the observation that "they receive remuneration from the state for prosecutorial functions in the district courts . . . . Therefore it is the opinion of this Committee that County Attorneys and their assistants are prohibited from representing licensees in such disciplinary actions."<sup>226</sup>

This is a sweeping and seemingly definitive ruling that is fully consistent with the notion that no commonwealth or county attorney may ever oppose any state agency or board. To the extent that ethics committee advisory or interpretive opinions are persuasive, this may be said to be the rule in Kentucky. But have we really thought about the implications of such a rule?<sup>227</sup> Do we want to rethink it? If, after thinking about it, we still want such an across-the-board rule, should we not spell it out clearly in a statute or court rule? I pose these questions because, in my experience, most lawyers do not read ethics opinions. When they do read them, they do not always believe what they read.

The case of the county attorney might be distinguished from that of the commonwealth or state's attorney. One Kentucky statute states: "[I]n no case shall the county attorney take a fee or act as counsel in any case in opposition to the interest of the county."<sup>228</sup>

Although this sentence is well hidden, it is written (for the most part) in words of one syllable, and does not leave much room

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<sup>224</sup> Kentucky Op., *supra* note 4, E-263 (1982), KY. BENCH & BAR, July 1982, 44, 45. Cf. Illinois Op., *supra* note 141, 278 (1966), MARU, *supra* note 8, No. 6620 (Supp. 1970) (requiring a newly elected state's attorney to withdraw from the representation of a client whom he has been representing in an appeal from the denial of a license from a state agency when the appeal is opposed by the attorney general of the state).

<sup>225</sup> Kentucky Op. E-263 (1982), *supra* note 224.

<sup>226</sup> *Id.*

<sup>227</sup> See Kentucky Op., *supra* note 4, E-275 (1983), KY. BENCH & BAR, Oct. 1983, 52, 55a ("By becoming a candidate for Commonwealth or County Attorney, or accepting employment as an assistant in either of these prosecutorial offices, the lawyer must consider the number and types of cases that will be precluded in the private law practice . . .").

<sup>228</sup> KY. REV. STAT. ANN. § 69.210(4)(b) (Michie/Bobbs-Merrill Supp. 1990).

for misunderstanding. It rules out (in the absence of consent<sup>229</sup>) representation of any party in any case in which the county or a county board or agency has any adverse interest.<sup>230</sup> This rule would not necessarily prevent the lawyer from taking cases adverse to other counties or the boards or agencies of other counties<sup>231</sup> unless, of course, positional or issues conflicts are to be taken seriously.<sup>232</sup> However, the statute says nothing about the status of the county attorney as a lawyer for the state when he or she is not performing the limited prosecutorial duties assigned to him or her by the state.

The fact that the county attorney prosecutes cases on behalf of the state in the district court of his or her county,<sup>233</sup> and the theoretical possibility that the prosecutor might be assigned to a

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<sup>229</sup> See discussion *supra* part III.D.

<sup>230</sup> See Kentucky Ops., *supra* note 4, E-167 (1977), MARU, *supra* note 8, No. 11,143 (Supp. 1980) (lawyer who shares office space with part-time assistant county attorney may not represent private parties in cases concerning the same matter handled by the county attorney in the county attorney's court), E-159 (1977), MARU No. 11,135 (Supp. 1980) (lawyer who shares office space with county attorney may not accept employment adverse to county), and E-141 (1976), MARU No. 11,117 (Supp. 1980) (county attorney may not represent county residents in dispute concerning legality of a garbage collection contract between the county and a private business).

May a commonwealth attorney bring a case against the county? Compare New York Op., *supra* note 122, 430 (1976), MARU No. 12,195 (Supp. 1980) (refusing to allow part-time county prosecutor who handles only criminal cases to represent client in civil damage action against county, even though county has advice of a county attorney and case will be defended by insurance defense counsel) and Virginia Inf. Ops., *supra* note 140, 253 (undated), MARU No. 12,885 (Supp. 1980) (stating that county's commonwealth's attorney may not represent private parties in civil cases against that county) and 153 (undated), MARU No. 10,083 (Supp. 1975) (finding it improper for commonwealth's attorney to represent private clients in cases against county even though county attorney has been appointed) with Alabama Op., *supra* note 119, 83-109 (1983), ABA/BNA Man., *supra* note 8, 801:1059 (permitting part-time deputy district attorney hired by county commission to handle criminal cases in county, but considered employee of the state, to represent deputy sheriffs in civil suit against county commission on theory that case was not directly related to and would not effect lawyer's payment by county commission—an odd opinion?), Indiana Op., *supra* note 128, 4 (1983), ABA/BNA Man. 801:3306 (allowing part-time state prosecutor paid by county to represent private clients against county if there is no probability of criminal charges, no use of "inside information," no official duty to be performed by county prosecutor, and consent by all parties) and Virginia Inf. Op. 315 (undated), MARU No. 12,947 (Supp. 1980) (noting that commonwealth attorney may not sue county, but part-time county attorney who handles only civil cases may defend criminal cases in his or her county as long as defendant is not charged with violations of county ordinances!).

<sup>231</sup> May a county attorney represent a client in another county in a request for a zone change? Yes. See Kentucky Op., *supra* note 4, E-193 (1978), MARU, *supra* note 8, No. 11,165 (Supp. 1980).

<sup>232</sup> But see MODEL RULES, *supra* note 3, Rule 1.7 cmt. 8 (noting that government lawyers may sometimes represent government employees against government agencies).

<sup>233</sup> See *supra* note 27 and accompanying text.

prosecution in another forum in a particular case,<sup>234</sup> may justify a ban on defense practice, and even a rule against representation in damage suits against the state.<sup>235</sup> But unless it is probable that the prosecutor will actually be called upon to become involved in the matter at hand or a closely related matter in his or her official capacity, or be called upon to prosecute his or her client, does it follow that the county attorney may not represent private citizens against, say, the Department of Natural Resources?<sup>236</sup>

I admit that such conflicts are much more likely to be spotted and argued when a commonwealth's attorney takes a case, since the commonwealth's attorney is more easily identified with the state (they call them commonwealth's attorneys, don't they?). But the same questions might be raised. Is there a real and substantial conflicts issue when a commonwealth's attorney represents a coal operator who has been cited for violation of some administrative regulation by the Department of Natural Resources? The department will have its own lawyers. Must there be a substantial likelihood that, in the particular case, the prosecutor will be called upon to bring a charge or claim against the coal operator, or is the representation improper simply because a state agency is the opposing party?<sup>237</sup>

These are not merely academic questions. Prosecutors are taking cases like this every day, and state agencies, like the Department

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<sup>234</sup> See *supra* note 30 and accompanying text.

<sup>235</sup> For example, damage suits against prison authorities.

<sup>236</sup> The answer must be "yes" if we are to follow Kentucky Op. E-263 (1982), *supra* note 224. See also Professional Ethics Comm., State Bar of Texas Op. [hereinafter Texas Op.] 323 (1966), MARU, *supra* note 8, No. 7247 (Supp. 1970), which informs us that county attorneys and their partners may not represent clients in suits adverse to the state.

Of course, in the real world disputes over the application of ethics rules may sometimes be affected by attitudes brought about by the distribution of power in a particular locale. These influences may not be appreciated by outsiders. Consider the lyrics of Malvina Reynolds' tune "Mrs. Clara Sullivan's Letter," which goes, with my additions [ ] and deletions \_\_\_\_: "[Prosecutor \_\_\_\_] he has it fine, he runs the law and owns a mine, in \_\_\_\_ County." [© Schroder Music Co. (BMI)]. Many critics feel that local prosecutors "run the counties." They draw many conclusions from this major premise that are hostile to and restrictive of the prosecutor. Arguments like this are hard to work into ethics opinions. Nevertheless, I must concede that the positioning of a local public figure, especially one associated with the law, on the side of a local citizen or local company in a dispute with "outsiders" (especially "those people from Capitol City") will attract attention. Perhaps this is what that "appearance of impropriety" language is all about.

<sup>237</sup> See cases collected *infra* parts VI and VII; see also *Sanders v. Mississippi State Bar Ass'n*, 466 So. 2d 891 (Miss. 1985). In this case, a prosecutor tried to represent allegedly corrupt school board members at a removal hearing. Because there were reasonable grounds to believe that criminal charges were warranted, the attorney was reprimanded for violating his obligation to aid uncompromisingly in the prosecution of persons for unlawful conduct.

of Natural Resources, are responding with motions to disqualify.<sup>238</sup> Cases are becoming bogged down because of these collateral disputes.<sup>239</sup> Unfortunately, there does not seem to be a consensus regarding the answer to the conflicts question, regardless of what the ethics committee may have said in an unread and, for that matter, "unavailable" opinion.<sup>240</sup> While the easy answer would be to declare such cases off limits after subjecting them to the "small test," this lacks a certain intellectual elegance, and might be difficult to justify under the language of the Model Rules.<sup>241</sup> This is the sort of question that might profitably be addressed in a supplementary code or in a statute.<sup>242</sup>

It is worth noting that on one occasion the Kentucky ethics committee opined that a private lawyer representing a state agency on a personal service contract could not represent a private client against that same agency in a different, unrelated matter, but that the same lawyer could represent a private client against a different state agency with consent of all parties after full disclosure.<sup>243</sup> This opinion makes sense if the agency *qua* agency is the client, and not the "state" and any and all of its subdivisions, agencies, boards and commissions.<sup>244</sup> If only the particular agency is the client, then the lawyer may not sue the present client,<sup>245</sup> but may sue a related "non-client" with consent after full disclosure.<sup>246</sup> However, it seems to me that private lawyers on contract to handle a specific category<sup>247</sup> of administrative cases may fairly be governed by a less rigorous

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<sup>238</sup> These motions are then passed on to the ethics committee by the courts. Judges do not understand that ethics committees are not fact-finding bodies, and that such committees properly defer to the courts when "ethics matters" are in litigation. See Maryland Op., *supra* note 64, 92-26 (1991), ABA/BNA Man., *supra* note 8, 1001:4305.

<sup>239</sup> See Underwood, *supra* note 2, at 164-67.

<sup>240</sup> See *supra* note 6 (discussing need for state bar handbooks).

<sup>241</sup> See *supra* note 86 and accompanying text (regarding the deletion of the "appearance of impropriety" from the Model Rules). And so the cry goes out: "They (or insert for "they" the Ethics Committee Chairman, or better still, the Chief Justice: pick your "they") are trying to take our private practices away from us!"

<sup>242</sup> See proposals *infra* part IX.

<sup>243</sup> Kentucky Op., *supra* note 4, E-281 (1984), ABA/BNA Man., *supra* note 8, 801:3909.

<sup>244</sup> See *supra* note 223 and accompanying text.

<sup>245</sup> See *supra* notes 236-42 and accompanying text.

<sup>246</sup> Cf. MODEL RULES, *supra* note 3, Rule 1.7(b) and accompanying comments.

<sup>247</sup> See, e.g., ABA Op., *supra* note 75, 262 (1944); ABA Inf. Op., *supra* note 64, 798 (1964), MARU, *supra* note 8, No. 5403 (Supp. 1970); Ethics Comm. of the Los Angeles County Bar Ass'n Op. [hereinafter Los Angeles County Op.] 77 (1936), MARU No. 6143 (Supp. 1970).



conflicts rule than full-time state employees<sup>248</sup> or part-time prosecutors.<sup>249</sup>

As one might expect, the cases and opinions relating to city attorneys are analogous to those dealing with commonwealth and county attorneys. Neither a city attorney nor a lawyer who is on retainer or contract for a city in a specific area should sue the city, even in an unrelated matter,<sup>250</sup> or represent adverse interests.<sup>251</sup> The

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<sup>248</sup> Cf. Maryland Op., *supra* note 64, 92-8 (1991), ABA/BNA Man., *supra* note 8, 1001:4304 (refusing to allow a full-time assistant general counsel for a state agency to represent a private client in a civil rights suit against another state agency). In Kentucky Op., *supra* note 4, E-200 (1979), MARU, *supra* note 8, No. 11,172 (1980), the committee opined that a lawyer employed full-time by a government agency could not represent a client before another governmental agency in a matter unrelated to his employment. The same opinion stated that the full-time government lawyer could not represent another employee of a different department in a disciplinary hearing, and could not represent a client charged with a crime in a circuit court.

<sup>249</sup> See Missouri Inf. Op., *supra* note 124, 25 (1979), MARU, *supra* note 8, No. 11,950 (Supp. 1980) (allowing "specially hired assistant prosecuting attorneys" to accept court appointments to represent criminal defendants and to represent clients in civil or administrative cases before or involving state agencies, as well as to oppose other prosecuting attorneys in civil litigation with the informed consent of all parties).

<sup>250</sup> See Kentucky Op., *supra* note 4, E-190 (1978), MARU, *supra* note 8, No. 11,162 (Supp. 1980); Professional Ethics Comm. of the Bar Ass'n of Greater Cleveland Ops. 1-A and 1-A Supp. (1950-51), MARU Nos. 3555 and 3556 (1970) (lawyers who are police court prosecutors, city council members, or police officers may not represent clients in matters in which city has an adverse interest, even if limited to appearances before municipal administrative agencies and board of zoning appeals). Of course, if a lawyer has done work for the city (e.g., bond work), the lawyer may not subsequently attack the validity of the bonds on behalf of either a taxpayer or new city authorities. ABA Op., *supra* note 75, 71 (1932), MARU No. 71 (1970). However, a city attorney may represent a private client charged by other cities or villages with violations of their codes and ordinances. Illinois Op., *supra* note 141, 543 (1976), MARU No. 10,935 (Supp. 1980); New Jersey Op., *supra* note 130, 314 (1975), MARU No. 8916 (Supp. 1975) (driver's license revocation for offenses in another county).

In Los Angeles County Op., *supra* note 247, 77 (1934), MARU No. 6143 (Supp. 1970), the committee opined that a special attorney who represented the city in commercial litigation may represent a municipal fireman in a salary dispute with the city. So there is an opinion for all occasions: cf. authorities *supra* note 248. On the basis of my experience, I would say that this is a problem that deserves some consideration. Many lawyers would like to have some kind of contract employment with a city while retaining the right to sue the city and its agencies in unrelated cases, or do criminal defense work. See *supra* note 191 and accompanying text. This problem may be exacerbated by the spreading around of city work (dare I say, for political reasons?).

<sup>251</sup> See ABA Inf. Op., *supra* note 64, 691 (1963), MARU, *supra* note 8, No. 5309 (Supp. 1970) (dealing with the city attorney and conflicts of interest; good "omnibus opinion"); ABA Inf. Op. 1003 (1967), MARU No. 5590 (Supp. 1970) (city lawyer and members of firm may not represent a client with an application for a liquor license before city council); see also *In re A & B*, 209 A.2d 101, 103 (Nov. 1965) (lawyer may not represent municipality and at same time act as attorney for developers); accord, New Jersey Op., *supra* note 130, 161 (1969), MARU No. 6861 (Supp. 1970) (office associate of municipal attorney may not

rule against representation adverse to the city applies in appellate matters as well as cases at the trial level.<sup>252</sup> In one state, the bar committee opined that an attorney who has been appointed as a municipal prosecutor and whose duties are limited to handling traffic violations and criminal matters in municipal court may not represent applicants before municipal boards or clients before the board of adjustment, planning board, or municipal council of his or her municipality, or employees of the municipality in workmen's compensation cases in which the municipality appears as the respondent.<sup>253</sup>

Other part-time prosecutors should also think twice before suing cities in their jurisdiction.<sup>254</sup> For example, it has been suggested that a county prosecutor may not represent the plaintiff in a suit against a municipality in the county and its police department alleging false arrest, violation of civil rights, and the like.<sup>255</sup>

The lawyer for an entity such as a county or city represents the entity and not the individual officers or constituents of the

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represent developer who is planning to build homes in the municipality).

In New Jersey Op. 140 (1968), MARU No. 6840 (Supp. 1970), the committee opined that a municipal prosecutor could not defend a police officer charged with assault and battery in the commission of an arrest; see also New Jersey Op. 104 (1967), MARU No. 6804 (Supp. 1970); cf. Maryland Inf. Op., *supra* note 64, 78-40 (1978), MARU No. 11,370 (Supp. 1980) (assistant state's attorney may not represent police officers before disciplinary board); cf. ABA Inf. Op. 798 (1964), MARU No. 5403 (Supp. 1970) (attorney may represent client before city council acting as zoning board while he represents city's urban renewal authority in circuit court appeal, where urban renewal authority is autonomous body separate from city and attorney will not be required to support city in rezoning that which it is his duty to oppose for authority or vice versa).

<sup>252</sup> But see New York Op., *supra* note 122, 218 (1971), MARU, *supra* note 8, No. 8978 (Supp. 1975) (allowing part-time prosecutor who is not officer of city to appear against the city on appeal).

<sup>253</sup> New Jersey Op., *supra* note 130, 19 (undated), MARU, *supra* note 8, No. 1505 (1970). See New Jersey Op. 5 (undated), MARU No. 1491 (1970).

<sup>254</sup> But see Virginia Op., *supra* note 121, 6 (1944), MARU, *supra* note 8, No. 4373 (1970) (allowing commonwealth's attorney to represent client against city although salary paid in part by city).

<sup>255</sup> See New Jersey Op., *supra* note 130, 162 (1969), MARU, *supra* note 8, No. 6862 (Supp. 1970); see also Indiana Op., *supra* note 128, 5 (1979), MARU No. 11,077 (Supp. 1980) (full-time county prosecutor may not represent plaintiff against police officers of city in which prosecutor works, even if venue has been shifted to adjacent county, since he works closely with police while discharging his official duties; there is also an "impression of impropriety"); cf. ABA Inf. Op., *supra* note 64, 1282 (1973), MARU No. 7436 (1975) (refusing to allow city corporation counsel who "sought the confidences of the police officers" in an action against city for police misconduct to represent either or both sides in suit seeking indemnity from the officers; the officers had been warned that their statements might be used against them, but a "statute in the jurisdiction" required corporation counsel to represent police officers in civil cases).

entity.<sup>256</sup> Accordingly, there is not necessarily any prohibited conflict of interest when a county attorney investigates official misconduct of county officials.<sup>257</sup> On the other hand, it may very well be wise for independent counsel to be hired.

#### D. Statutory Duties

“[T]he statutory duties of the position must be considered to determine whether a prior legislative obligation to perform the task prohibits the task from becoming a part of [the prosecutor’s] private practice.”<sup>258</sup> The cases and opinions are legion.

We have already seen how the statutory duty to prosecute criminal cases may require the prosecutor to decline civil cases.<sup>259</sup> Other governmental and administrative duties can also lead to conflicts. The Kentucky Ethics Committee has stated that a county attorney may not represent a resident of a nursing home in a suit against the facility if, by virtue of his or her office, the attorney is designated the president of a holding corporation that issued bonds for the facility’s construction, although the relationship between the holding corporation and the facility was minimal.<sup>260</sup>

Since the assistant county attorney has a statutory duty to assist in the collection of dependency support payments,<sup>261</sup> a part-time

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<sup>256</sup> See MODEL RULES, *supra* note 3, Rule 1.13(a); Michigan Inf. Op., *supra* note 133, RI-112 (1991), ABA/BNA Man., *supra* note 8, 1001:4760 (county, not county commissioner, is client of county attorney, so county attorney may bring an action against commissioner under “incompatible offices” statute); West Virginia Op., *supra* note 64, 90-1 (undated), ABA/BNA Man. 901:9003. *But cf.* Maryland Inf. Op., *supra* note 64, 78-35 (1978), MARU, *supra* note 8, No. 11,364 (Supp. 1980) (in which it appears that the county attorney had allowed an attorney-client relationship in fact, whether proper or not, to develop with the county executive).

<sup>257</sup> Missouri Inf. Op., *supra* note 124, 12 (1978), MARU, *supra* note 8, No. 11,870 (Supp. 1980). See also Indiana Op., *supra* note 128, 5 (1979), MARU No. 11,077 (Supp. 1980).

<sup>258</sup> Kentucky Op., *supra* note 4, E-275 (1983), KY. BENCH & BAR, Oct. 1983, 52, 56 (alterations in original). The condemnation opinions involve conflicts arising from statutory duties as well as from obligations of loyalty to the relevant public entity. See Kentucky Ops. E-241 (1981), ABA/BNA Man., *supra* note 8, 801:3903, E-80 (1974), MARU, *supra* note 8, No. 8543 (1975), and E-75 (1973), MARU No. 8538 (1975).

<sup>259</sup> See *Sanders v. Miss. State Bar Ass’n*, 466 So. 2d 891 (Miss. 1985) (reprimanding county attorney who represented school board members privately in civil case that could have led to criminal prosecution for which he could have had substantial responsibility); *supra* notes 223-36 and accompanying text.

<sup>260</sup> Kentucky Op., *supra* note 4, E-56 (1971), KY. BENCH & BAR, Apr. 1972, at 52. *But cf.* Kentucky Op. E-71 (1973), MARU, *supra* note 8, No. 8534 (1975) (commonwealth attorney may represent public utility companies).

<sup>261</sup> KY. REV. STAT. ANN. §§ 407.190 and 407.250(2) (Michie/Bobbs-Merrill 1984). The

assistant county attorney may not represent the defendant in a civil action to collect dependency support payments.<sup>262</sup>

Furthermore, an assistant county attorney in his or her private practice may not seek dependency support payments for a fee. Such a fee could be viewed as excessive as well as illegal,<sup>263</sup> since "[i]t seems inconceivable that a client would knowingly pay to receive a service which an attorney is by law required to perform and for which he has already received compensation by virtue of his [or her] office."<sup>264</sup> Sometimes the question is much closer. For example, may a prosecuting attorney charge a fee for helping the victim of a crime recover compensation from the Crime Victim's Compensation Board?<sup>265</sup> May a commonwealth attorney or county attorney be appointed to serve as a guardian ad litem? This may

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county attorney also has a potential public duty to prosecute nonsupport cases. See Kentucky Op., *supra* note 4, E-215 (1979), KY. BENCH & BAR, July 1979, at 48. *But see* Kentucky Op. E-257 (1982), KY. BENCH & BAR, July 1982, at 44, suggesting that an attorney for the commonwealth may "represent a wife in a civil action attempting to collect back child support against a husband after the termination of a nonsupport action in favor of the husband prosecuted by the attorney for the Commonwealth."

<sup>262</sup> See Indiana Op., *supra* note 128, U3 (1984), ABA/BNA Man., *supra* note 8, 801:3309; Indiana Op. 7 (1981), ABA/BNA Man. 801:3303; Kentucky Op. E-215, *supra* note 261. In Legal Ethics Comm. of the Oregon State Bar Op. [hereinafter Oregon Op.] 527 (1989), ABA/BNA Man. 901:7106, the committee opined that a district attorney providing support enforcement services to a wife does not have an attorney-client relationship with her, and may prosecute the wife for contempt, for support enforcement if a change of custody occurs, and for a violation of the criminal law after the support enforcement services have been provided.

<sup>263</sup> See MODEL RULES, *supra* note 3, Rule 1.5(a); MODEL CODE, *supra* note 16, DR 2-106(A).

<sup>264</sup> Kentucky Op., *supra* note 4, E-76 (undated), KY. BAR J., April 1974, at 12, 14 (alterations in original); Kentucky Op. E-275 (1983), ABA/BNA Man., *supra* note 8, 801:3908. See ABA Op., *supra* note 75, 261 (1944), MARU, *supra* note 8, No. 261 (1970) (when statutes impose official duties on a prosecuting attorney in divorce actions, neither he nor his deputies may ethically represent a private party thereto); see also ABA Inf. Op., *supra* note 64, 922 (1966), MARU No. 5516 (Supp. 1970) (district attorney and staff may not represent wife or husband privately in domestic relations court or in preliminary conference concerning agreed support order with member of probation staff where member of district attorney's staff required by law to represent prosecutrix in support action).

<sup>265</sup> I was asked this question once, and I did not think that this representation was really adverse to the state or otherwise prohibited. On the other hand, I was not aware of KY. REV. STAT. ANN. §§ 346.140 - 346.110 (Michie/Bobbs-Merrill 1983). See *supra* note 60 and accompanying text. Do these statutes make a difference? Incidentally, my "hotline" letter opinion to the inquiring lawyer was dated and mailed Feb. 14th, but not postmarked until Feb. 17th, and not delivered until Mar. 30th, 1992. This is not too "hot." The victim could have died of starvation waiting for the U.S. Mail.

Of course, the lawyer who represented the criminal defendant should not represent the victim before the Compensation Board. Kentucky Op., *supra* note 4, E-271 (1983), ABA/BNA Man., *supra* note 8, 801:3908.

be a problem in light of the numerous assignments given to these public lawyers.<sup>266</sup> But the other side of the coin is that there may be a scarcity of lawyers in some rural areas, and lawyers feel some obligation to accept appointments.<sup>267</sup>

## VI. PROSECUTING CLIENTS

### A. Prosecuting Present Clients

In 1985, the Ethics Committee of the Kentucky Bar Association observed that an assistant county attorney, though permitted to engage in the private practice of law in Kentucky, should not be permitted to handle civil cases on behalf of persons being prosecuted by his or her office on criminal charges, even when the criminal case is unrelated to the civil matter.<sup>268</sup> This would involve litigation against a present client, and would result in a division of loyalty even though the matters are not substantially related.<sup>269</sup>

The notion that a lawyer may not pursue litigation against a present client is not simply mainstream: it is the rule in every American jurisdiction. It has been the ABA view under both the Code and the Model Rules.<sup>270</sup> It is clearly stated in comment 8 to Model Rule 1.7, which declares that: "Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated."<sup>271</sup>

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<sup>266</sup> See, e.g., North Carolina Op., *supra* note 181, CPR-171 (1978), MARU, *supra* note 8, No. 12,423 (Supp. 1980) (suggesting that there is a conflict if the part-time county attorney has past, present, or possible future involvement in the matter on behalf of county department of social services); Washington Op., *supra* note 64, 74 (1960), MARU No. 4592 (Supp. 1970) (stating prosecutor of a sixth class city may not represent guardian or estate of incompetent person); see also Arizona Op., *supra* note 200, 74-13, MARU No. 7615 (Supp. 1975).

<sup>267</sup> See MODEL RULES, *supra* note 3, Rule 6.2 (lawyer must show good cause to avoid appointment as personal representative).

<sup>268</sup> Kentucky Op., *supra* note 4, E-291 (1985), ABA/BNA Man., *supra* note 8, 801:3911.

<sup>269</sup> See Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976); MODEL CODE, *supra* note 16, DR 5-105.

<sup>270</sup> ABA Inf. Op., *supra* note 64, 1495 (1982), ABA/BNA Man., *supra* note 8, 801:340. See also Perfect v. State, 141 N.E. 52 (Ind. 1923) (concerning prosecutor who sought his own disqualification and requested appointment of special prosecutor where defendant was his long-time client); cf. ABA Op., *supra* note 75, 77 (1932), MARU, *supra* note 8, No. 77 (1970) (stating that lawyer prosecuting criminal charge against defendant may not represent defendant in personal injury suit while indictment is pending).

<sup>271</sup> MODEL RULES, *supra* note 3, Rule 1.7 cmt. 8. See discussion *infra* part VII.A.2. There have been cases in which the prosecutor has accepted employment from the very

Under the rules of imputed disqualification, the partners and associates of the prosecutor are similarly constrained.<sup>272</sup> The committee stated:

[F]or one associated with an assistant county attorney to represent a person who is being prosecuted by that county attorney's office even on an unrelated matter would result in a division of loyalty. In addition, the public would no doubt question the zealously of such a prosecution against a private client.<sup>273</sup>

On the other hand, the committee recognized that there is no compelling reason for such a disqualification to be extended statewide, even in a "unified" prosecutorial system.<sup>274</sup> The committee declared that "an assistant county attorney or his partner or associate should not be disqualified from representing clients in civil matters simply because the client is being prosecuted somewhere else in the Commonwealth, or is taking a position adverse to the Commonwealth in some other forum."<sup>275</sup>

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defendant he was prosecuting. See L.C. DiStasi, Jr., Annotation, *What Constitutes Representation Of Conflicting Interests Subjecting Attorney To Disciplinary Action*, 17 A.L.R. 3d 835, 851 (1968).

Some Kentucky case law and gloss seem to suggest that a lawyer might sue a present client because "[r]epresentation of a client in one matter does not in and of itself create a lawyer client relationship with respect to other, unrelated matters." Kentucky Op., *supra* note 4, E-148 (1976), KY. BENCH & BAR, Oct. 1976, at 30. See *In re Advisory Opinion of Ky. State Bar Ass'n*, 361 S.W.2d 111 (Ky. 1962); Kentucky Op. E-281 (1984), KY. BENCH & BAR, Apr. 1984, at 45, 46 (citing Kentucky Op. E-148 (1976)). The quoted proposition may be true enough in the proper context, *cf.* *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. App. 1979), but it does not follow that a lawyer may sue a present client. If that is what the Kentucky authority means to say, then the Kentucky authority is simply wrong.

<sup>272</sup> See WOLFRAM, *supra* note 8, § 8.9.4, at 456 (prosecutor may not obtain indictment of party who is represented in related civil case by prosecutor's private law partner). Imputed disqualification is discussed *infra* part VIII.

<sup>273</sup> Kentucky Op., *supra* note 4, E-291 (1985), KY. BENCH & BAR, Jan. 1985, at 50, 55.

<sup>274</sup> See discussion *supra* part II.A.; see also *State v. Klattenhoff*, 801 P.2d 548 (Haw. 1990) (separate office of Attorney General not disqualified from prosecuting sheriff for theft from Police Relief Association even though another office of Attorney General was defending sheriff in unrelated civil case brought by a prisoner against sheriff for mistreatment).

<sup>275</sup> Kentucky Op., *supra* note 4, E-291 (1975), ABA/BNA Man., *supra* note 8, 801:3911. I have already noted that Kentucky prosecutors may not defend criminal cases. See discussion *supra* part V.A. For a bizarre case of overreaching, see *In re Lake*, 737 P.2d 40 (Kan. 1987) (involving prosecutor who prosecuted client in one county while representing her on criminal charges in another county, represented her former business associates in civil cases that were adverse to her interests, and engaged in inappropriate business transactions with her—and received only the dreaded "public censure"!).

The reaction to this ruling was predictable. A group of "adversely affected" prosecutors appealed the opinion to the Kentucky Supreme Court. The appeal focused on the "unfairness" of a rule that might require a prosecutor to withdraw from a "good [civil] case," if, for example, his or her private client were "picked up for a [DUI]" or the like. The appellants argued that the court should announce a rule that there is no conflict unless there is a substantial relationship between the private matter and the public matter (the prosecution).<sup>276</sup>

Is there anything unfair in requiring prosecutors to abide by the same conflicts rules that apply to private lawyers? If not, then there is no reason to give prosecutors the benefit of a substantial relationship test that would not otherwise be applied in the context of a "present client v. present client" conflict.<sup>277</sup> Even if there were any unfairness or hardship associated with applying the ordinary conflicts rules to prosecutors with private practices, it would be preferable if we could ameliorate it in some way other than by developing special ethics rules for prosecutors.<sup>278</sup> Ideally, we might consider moving to a system using full-time prosecutors.<sup>279</sup>

For present purposes it is useful to think of three categories of cases in which the prosecutor's private client might be charged with a crime.<sup>280</sup> In some cases, when the matters are unrelated, a pros-

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<sup>276</sup> *In re Ky. Bar Ass'n Amended Advisory Op. E-291*, 710 S.W.2d 852 (Ky. 1986). KY. SUP. CT. R. 3.530(5) provides that:

Any person or entity aggrieved or affected by a formal opinion of the Board [an ethics opinion approved by the Board of Governors and published in the state bar journal] may file with the Clerk within thirty (30) days after the end of the month of publication of the KENTUCKY BENCH & BAR in which the full opinion or a synopsis thereof is published, a copy of the opinion, and, upon motion and reasonable notice in writing to the Director, obtain a review of the Board's opinion by the Court."

See generally Underwood, *supra* note 2, at 136.

<sup>277</sup> See *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976); see also Kentucky Op., *supra* note 4, E-257 (1982), ABA/BNA Man., *supra* note 8, 801:3906 (in a pre-Rule 1.8(i) opinion the committee opined that the spouse (in a separate law office) of a prosecutor could not represent a client in a civil matter if the prosecutor was prosecuting this client in a criminal matter).

<sup>278</sup> I am opposed to the development of special ethics rules for different segments of the bar. It is frequently argued that the conflicts rules are too difficult to apply, too hard on, or too inconvenient for big firms, little firms, urban firms, rural firms, etc. I fear that special pleading has taken a toll on lawyers' ethics and exacerbated the problem of interest group self-glorification, intramural bickering, and the fragmentation of the bar generally.

<sup>279</sup> See *supra* text accompanying note 21; *infra* note 459 and accompanying text.

<sup>280</sup> We are, of course, dealing with a continuum: the categories are artificial.

ecutor will have no way of anticipating such a conflict.<sup>281</sup> In a greater (but perhaps still small) number of cases, there may be a remote possibility—perhaps only a theoretical possibility—of criminal charges being lodged against the client. Yet, in other cases—the domestic relations case is the paradigm—the probability that such charges will be brought is very high.

For an example from the second category, consider a case in which the prosecutor is representing a home improvements contractor and there are facts that suggest the possibility of fraud on the part of the client. If there is a possibility of a charge being filed against the client, and if the prosecutor's office would be responsible for pursuing that charge during or even after the close of the civil representation,<sup>282</sup> then it would be best if the prosecutor declined the case or withdrew from the representation.<sup>283</sup> As another example, assume that the part-time prosecutor is representing a homeowner who claims that his insurer is denying a substantial fire loss in bad faith.<sup>284</sup> If the insurance company were to raise an arson defense, and if the prosecutor's office were responsible for investigating or pursuing cases of arson, then the prosecutor might be faced with the unpleasant tasks of withdrawing from the civil case and requesting a special prosecutor.<sup>285</sup> These are cases in which the prudent prosecutor might apply, as a personal guide (even if it is not a rule of discipline), the Rule of Caesar's Wife.<sup>286</sup> In the language of Kentucky Ethics Opinion E-275,<sup>287</sup> the prosecutor may be alert enough to see that these cases relate to "possible criminal litigation for which the attorney for the Commonwealth would be

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<sup>281</sup> Cf. *In re Kentucky Bar Ass'n*, 710 S.W.2d at 853-54 (Leibson, J., concurring) (stating that lawyer should only be disciplined if Bar Association can prove intentional misconduct).

<sup>282</sup> See *infra* part VII.B.

<sup>283</sup> See Maryland Op., *supra* note 64, 87-28 (1987), ABA/BNA Man., *supra* note 8, 901:4308; cf. Virginia Op., *supra* note 121, 1271 (1989), ABA/BNA Man. 901:8762 (prosecutor must withdraw as defense counsel for two clients in a suit filed against them by the beneficiaries of a will where it appears that the clients may have committed fraud); Maryland Op. 81-64 (1981), ABA/BNA Man. 801:4311 (an assistant state's attorney may represent a civil client who attempts to recover from a tortfeasor for property damage even though a traffic citation had issued against his client, so long as the prosecutor's office is not involved in the investigation or prosecution of the traffic charge).

<sup>284</sup> In Kentucky, a "bad faith" claim may result in an award of extracontractual compensatory and punitive damages, even in the first party context. In other words, these can be "good" cases by anyone's standards. See, e.g., *Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176, 178 (Ky. 1989).

<sup>285</sup> Missouri Op., *supra* note 8, 10 (1981), ABA/BNA Man., *supra* note 8, 801:5257.

<sup>286</sup> See *supra* note 82.

<sup>287</sup> See *supra* note 63 and accompanying text.



responsible," and in which the contemplated civil representation is likely to give rise to an "appearance of impropriety."<sup>288</sup>

Unfortunately, few prosecutors see these conflicts coming. Others will take these cases even when they recognize the potential conflict. But must all "good cases" be rejected on the theory that there is a possibility of related criminal action? An insurance company that will commit bad faith will also assert a frivolous defense for tactical reasons. Must the prosecutor in our not so hypothetical insurance case withdraw at the demand of the opposing party?<sup>289</sup> Are we going to have a prophylactic rule that prosecutors may not take first-party fire insurance cases?

The difficulty in applying rules based on possibilities, and the risk of tactical use of such rules, can also be discerned in the third category of cases. In most states, part-time prosecutors are permitted to take domestic relations cases, even if they involve custody issues.<sup>290</sup> Logically, there is always a possibility that one of the divorcing parties will file criminal charges against the other. Nevertheless, the Kentucky committee and Kentucky's Board of Governors have opined that an assistant commonwealth's attorney or that attorney's associates may participate in divorce cases even when children are involved:

An assistant Commonwealth attorney or his associates should be very reluctant to take a civil case where there is a possibility of further criminal action. However, if there is only a remote possibility of subsequent criminal proceedings the assistant Commonwealth attorney may take the case, since the attorney could later excuse himself if the remote possibility develops into a reality.<sup>291</sup>

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<sup>288</sup> Kentucky Op., *supra* note 4, E-275 (1983), ABA/BNA Man., *supra* note 8, 801:3908.

<sup>289</sup> See *infra* notes 446-47 and accompanying text.

<sup>290</sup> Virginia Op., *supra* note 121, 594 (1984), ABA/BNA Man., *supra* note 8, 801:8828 (a part-time or assistant commonwealth's attorney may handle civil domestic relations proceedings for private clients if the opposing party is not facing or expected to face the attorney in any criminal proceedings); Virginia Op. 675 (1985), ABA/BNA Man. 801:8840 (custody cases). *But see* Illinois Op., *supra* note 141, 503 (1975), MARU, *supra* note 8, No. 10,912 (Supp. 1975) (state's attorney may not represent a party in divorce or custody matters).

<sup>291</sup> Kentucky Op., *supra* note 4, E-210 (1979), ABA/BNA Man., *supra* note 8, 801:3901. In Virginia, a commonwealth's attorney may represent a private party in a domestic relations, child custody or child support proceeding if the following conditions are met: 1) no criminal proceedings are pending or being considered against any party or witness; 2) no opposing party or witness is the subject of any criminal investigation; 3) as a public employee, the commonwealth's attorney has no substantial responsibility for the matter;

Since E-275 specifically cited and approved this language, and even extended it to county attorneys,<sup>292</sup> it is apparent that there are "possibilities," and then again there are "remote possibilities." So long as part-time prosecutors are permitted to practice divorce cases, there will be a need for some flexibility. Any time the part-time prosecutor is representing a person in a civil action, there is a theoretical possibility that one or the other of the parties will file a criminal charge against the opponent.<sup>293</sup> As the Kentucky Committee observed in yet another opinion:

This situation generally arises in a pending divorce case where one spouse takes out a criminal complaint against the other spouse.

If the criminal complaint is taken out by the spouse who is represented by the Attorney for the Commonwealth, the Attorney for the Commonwealth may prosecute the criminal action against the other spouse. However, the Attorney for the Commonwealth must withdraw as soon as practical from the civil action.<sup>294</sup>

If the criminal complaint is taken out against a client whom the Attorney for the Commonwealth represents in the civil case, the Attorney for the Commonwealth must disqualify himself from the prosecution of the criminal action and must withdraw from

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and 4) there is no implication that the prosecutor's public office will enable him or her to improperly influence the court's decision. See Virginia Op., *supra* note 121, 594 (1984), ABA/BNA Man. 801:8828; Virginia Op. 600 (1984), ABA/BNA Man. 801:8829; Virginia Op. 613 (1984), ABA/BNA Man. 801:8836; see also discussion *infra* part VII. In contrast, an Oregon opinion suggests that domestic relations cases should be shunned unless there are no children in the marriage and no custody issues. Oregon Op., *supra* note 262, 380 (1978), MARU, *supra* note 8, No. 12,646 (Supp. 1980).

<sup>292</sup> Kentucky Op., *supra* note 4, E-275 (1983), KY. BENCH & BAR, Oct. 1983, at 54, 56 ("These opinions [Kentucky Ops. E-210 and E-66] would also be applicable to the county attorney.").

<sup>293</sup> In rural states like Kentucky, it seems that "taking out warrants" against other folks is a popular sport. Even the availability of cable TV has not made a dent in the popularity of this activity. If A and B file cross-complaints against each other for assault, and each consults with the prosecutor, does the prosecutor have a conflict? Missouri Inf. Op., *supra* note 124, 10 (1978), MARU, *supra* note 8, No. 11,810 (Supp. 1980), suggests that such a scenario is fraught with conflicts, and that separate prosecutors may be required. *But see* West Virginia Op., *supra* note 64, 90-2 (undated), ABA/BNA Man., *supra* note 8, 901:9004, which points out that the complaining witness is not the prosecutor's client (the state is) and that consolidation promotes judicial economy. *Accord* Virginia Op., *supra* note 121, 1415 (1991), ABA/BNA Man. 1001:8704 (prosecutor may prosecute all four parties to a dispute and alleged fight even though three are subjects of cross-warrants).

<sup>294</sup> This suggestion, as well as other suggestions in this opinion, will be reconsidered in part VII, which involves the criminal prosecution of persons with whom the prosecutor's private client is embroiled in civil litigation.

the civil action as soon as practical without taking further action on behalf of the client in the civil action.<sup>295</sup>

Clearly, an opponent may be tempted to file a criminal charge to set up the part-time prosecutor for disqualification. It is not apparent why we should invariably deny a part-time prosecutor an opportunity to resist disqualification in good faith if he or she reasonably believes that the motion and related criminal charges against the client are frivolous and made solely to gain some tactical advantage in the civil litigation. On the other hand, it is also difficult to have very much sympathy for prosecutors who take divorce cases in the face of a rather strong likelihood that substantial conflicts will arise.<sup>296</sup>

Before moving on I want to allude to yet another perplexing wrinkle. How do we analyze a case in which a part-time prosecutor is assigned a duty to represent a citizen under one statute, and is then assigned a conflicting obligation. Given the legislature's (the People's) propensity to assign new duties to county and commonwealth's attorneys, this sort of thing is worrisome. The best example I can think of arises from the county attorney's duty to prosecute misdemeanors and his or her duty under Title IV-D of the Social Security Act<sup>297</sup> to assist parents in the collection of child support. Suppose that the prosecutor has undertaken the child support collection case for a mother, and then is called upon to

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<sup>295</sup> Kentucky Op., *supra* note 4, E-257 (1982), KY. BENCH & BAR, July 1982, at 44; see also Virginia Op., *supra* note 121, 696 (undated), ABA/BNA Man., *supra* note 8, 801:8843 (providing guidelines for determining when a part-time prosecutor must decline or withdraw from a civil case).

<sup>296</sup> See Kentucky Op., *supra* note 4, E-294 (1984), ABA/BNA Man., *supra* note 8, 801:3912 (giving a "qualified yes" answer to the question of whether it is ethical for a commonwealth's attorney to continue representation of a party in a contested custody matter although the opposing party, on the advice of counsel, had sought and been refused a criminal complaint from the county attorney relative to the custody issue). In this particular scenario, the judge before whom the case was pending denied a motion to disqualify. All too often judges refuse to act on such motions, suggesting that the ethics committee decide such issues. Of course, ethics committees are not elected or appointed to decide disqualification motions. See Underwood, *supra* note 2, at 128-31.

I gather from discussion of the Kentucky Board of Governors that it may revisit this area and consider a ban on defense practice by commonwealth's and county attorneys. Meanwhile, other states are grappling with the same problem. For example, the West Virginia Supreme Court recently announced that a county prosecutor cannot represent a private client in domestic relations matters if the client could potentially be a party to a proceeding including the prosecutor's office, such as an action brought under the state's Prevention of Domestic Violence Act. State *ex rel.* Bailey v. Facemire, 413 S.E.2d 190 (W. Va. 1991).

<sup>297</sup> 42 U.S.C. §§ 651-69 (1988 & Supp. 1992).

try a misdemeanor case against her. Or suppose that the complainant in a criminal case is the party from whom the prosecutor is attempting to collect child support.<sup>298</sup> Some would distinguish these cases on the ground that in neither scenario is the prosecutor representing a private client voluntarily, for a fee. And there may be more fundamental differences between these cases and the cases discussed previously. In the first scenario, some state bar opinions assert that there is no attorney-client relationship between the government attorney and the recipient of the child support.<sup>299</sup> In the second scenario, I would think that the complainant is clearly not the prosecutor's client. However, it is also clear that it would be preferable if someone else prosecuted the criminal case.<sup>300</sup>

### B. Prosecuting Former Clients

Surely prosecutors should be aware of the difficulties inherent in prosecuting former clients. The familiar substantial relationship test<sup>301</sup> and the general obligation not to use protected client information<sup>302</sup> against the present or former client apply to prosecutors in the same way that they apply to any other lawyer. When

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<sup>298</sup> The problem of leveraging and "over-prosecution" is discussed in part VII. In Kentucky Op. E-257, *supra* note 295, the committee opined that a part-time assistant county attorney could not prosecute a criminal nonsupport case and a civil back child support case against the same person "at the same time," but could pursue the civil case once the criminal case had "terminated." KY. BENCH & BAR, July 1982, at 44.

<sup>299</sup> Indiana Op., *supra* note 128, 3 (1981), ABA/BNA Man., *supra* note 8, 801:3303 (prosecutor representing petitioner under Title IV-D (42 U.S.C. §§ 651-69 (1988 & Supp. 1992)) may simultaneously prosecute petitioner on criminal charges, since the relationship is mandated by Title IV-D as that of assignor-assignee rather than attorney-client); Oregon Op., *supra* note 262, 527 (1989), ABA/BNA Man. 901:7106; *cf.* Missouri Inf. Op., *supra* note 124, 18 (1979), MARU, *supra* note 8, No. 11,924 (Supp. 1980) (dealing with AFDC funds).

<sup>300</sup> See *supra* part IV.A.

<sup>301</sup> See generally MODEL RULES, *supra* note 3, Rule 1.9; UNDERWOOD & FORTUNE, *supra* note 8, § 14.3.4 (Supp. 1992). There are many state bar ethics opinions on this subject. See, e.g., Arizona Op., *supra* note 200, 81-29 (1981), ABA/BNA Man., *supra* note 8, 801:1310; Virginia Op., *supra* note 121, 726 (1985), ABA/BNA Man. 801:8847. If the cases are unrelated and there will be no use (or misuse) of protected client information, then there may not be any prohibited conflict or grounds for disqualification. See West Virginia Op., *supra* note 64, 84-1 (1984), ABA/BNA Man. 801:9004; Griffin, *supra* note 6, at 958 (1970); see also *Havens v. Indiana*, 793 F.2d 143, 144-45 (7th Cir. 1986), *cert. denied*, 479 U.S. 935 (1986). *Havens* is a particularly useful case regarding what is and what is not protected information of the former client, as it alludes to matters of "public record" and other information that "anyone prosecuting the defendant would have had access to." *Id.*

<sup>302</sup> MODEL CODE, *supra* note 16, DR 4-101(B)(2) and (3) (1981); MODEL RULES, *supra* note 3, Rules 1.6, 1.8(b), and 1.9.

the prosecutor attempts to prosecute a former client, the filing of a motion to disqualify is foreseeable,<sup>303</sup> and the trial judge should err in favor of disqualification.<sup>304</sup>

Prosecutors are sometimes caught napping and are disqualified as a result of past interviews of potential clients whose cases were not taken.<sup>305</sup> This is so because "a duty to maintain the confidentiality of information relating to the prospective representation may arise under [the Model Code or Rules] even though the lawyer performs no legal services for the would-be client and declines the representation."<sup>306</sup> One assumes that this must be a particular risk for a part-time prosecutor, since he or she may consult with a great number of potential defendants in his or her private practice.

A prosecutor may also be disqualified from prosecuting a defendant if the prosecutor previously represented the defendant's co-conspirator or co-defendant.<sup>307</sup> The rules of vicarious disqualification, which allow the conflict of one partner or associate to be

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<sup>303</sup> See Griffin, *supra* note 6.

<sup>304</sup> See Reaves v. State, 574 So. 2d 105 (Fla. 1991); Sharplin v. State, 330 So. 2d 591 (Miss. 1976). For a case of "switching sides," see State v. Chambers, 524 P.2d 999, 1004 (N.M. Ct. App. 1974). At least one case has found a violation of due process in this context. United States v. Schell, 775 F.2d 559, 566 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986).

<sup>305</sup> Satterwhite v. State, 359 So. 2d 816, 818 (Ala. Crim. App. 1977); see also State v. Fitzpatrick, 464 So. 2d 1185, 1188 (Fla. 1985) (concerning disqualification of entire office); Gray v. State, 469 So. 2d 1252, 1254 (Miss. 1985) (concerning prosecutor who had consulted with defendant for 45 minutes at the jailhouse while in private practice); Mattress v. State, 564 S.W.2d 678, 680 (Tenn. Crim. App. 1977) (concerning prosecutor who had represented defendants on unrelated criminal charges before assuming office).

<sup>306</sup> ABA Op., *supra* note 75, 90-358 (1990), ABA/BNA Man., *supra* note 8, 901:132. This valuable and practical opinion provides guidance on how the lawyer might avoid disqualification by limiting information imparted by the would-be client at the initial interview. It also provides specific examples of instances in which disqualification should be granted or denied (for example, when the aggrieved party did not interview in good faith, but with a view to setting up the lawyer for disqualification). Cf. Alabama Op., *supra* note 119, 82-586 (1982), ABA/BNA Man. 801:1029 (social conversation with the alleged defendant not disqualifying where no attorney-client relationship formed and lawyer received nothing that could be used against the defendant and favorably for the state); Kentucky Ops., *supra* note 4, E-316 (1987), ABA/BNA Man. 901:3902 (limiting disqualification to circumstances in which lawyer has established client relationship or had obtained confidential information from prospective client) and E-58 (1972), MARU, *supra* note 8, No. 8521 (Supp. 1975) (allowing lawyer who conferred with plaintiff to defend insurer-defendant where no confidential relationship was formed with plaintiff).

<sup>307</sup> See, e.g., Banton v. State, 475 N.E.2d 1160 (Ind. App. 1985); Arizona Op., *supra* note 200, 85-6 (1985), ABA/BNA Man., *supra* note 8, 801:1324. *But see* Martin v. Commonwealth, 361 S.W.2d 654 (Ky. 1962) (declining to disqualify attorney who represented one jointly indicted but separately tried co-defendant when attorney joined prosecutor's office and helped prosecute non-represented defendant).

imputed to another, are a factor that can lead to further complication and possible embarrassment.<sup>308</sup> Vicarious or imputed disqualification will be addressed in some detail in Part VIII of this article.

Sometimes a problem of "subsequent representation" will surface when the prosecutor's office hires a lawyer who has been practicing on the defense side of the "v.," and the new prosecutor's former client moves to disqualify all members of the prosecutor's staff.<sup>309</sup> It may also arise when a prosecutor is seeking enhanced punishment based on prior offenses if the prosecutor himself served as defense counsel in the earlier case.<sup>310</sup> In the first scenario, some courts are reluctant to disqualify an entire prosecutor's office for fear of discouraging competent practitioners from engaging in public service.<sup>311</sup> Other courts are more doctrinaire and treat the prosecutor's office as a law "firm" for purposes of imputed disqualification, even to the extent of disallowing "screening" or "walling off."<sup>312</sup>

The same split of authority can be found in the responses to the second scenario (enhanced punishment). In *In re Ockrassa*,<sup>313</sup> a former public defender turned prosecutor sought enhanced punishment for a DUI defendant on the basis of prior convictions in cases in which the prosecutor had served as the defendant's counsel. The Arizona high court suggested that "even minimal research" would have informed the lawyer that the situation presented a

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<sup>308</sup> These scenarios can get fairly convoluted. For example, a defendant (D1) might object to being prosecuted by a prosecutor (P1) who is the partner of another prosecutor (P2) who previously prosecuted the defendant's co-defendant (D2). Virginia Op., *supra* note 121, 562 (1984), ABA/BNA Man., *supra* note 8, 801:8823.

The fact that a prosecutor used to work for a firm that represented the defendant may not be disqualifying if the prosecutor had no personal involvement in the earlier representation. Virginia Op. 1043 (1988), ABA/BNA Man. 901:8737; Wisconsin Op., *supra* note 117, E-88-2 (1988), ABA/BNA Man. 901:9107; *see also* MODEL RULES, *supra* note 3, Rules 1.9(b), 1.10(b).

<sup>309</sup> *See, e.g.*, State v. Chambers, 524 P.2d 999 (N.M. Ct. App.), *cert. denied*, 524 P.2d 988 (N.M. 1974); State v. Cooper, 409 N.E.2d 1070 (Ohio C.P. 1980); *cf.* People v. Doyle, 406 N.W.2d 893 (Mich. Ct. App. 1987) (disqualifying prosecutor and entire staff due to personal relationship between prosecutor and defendant).

<sup>310</sup> *See In re Ockrassa*, 799 P.2d 1350 (Ariz. 1990); Cole v. Commonwealth, 553 S.W.2d 468 (Ky. 1977).

<sup>311</sup> *Cf.* Summit v. Mudd, 679 S.W.2d 225 (Ky. 1984).

<sup>312</sup> *See* cases cited *supra* note 41. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 203 cmts. d(iii) (regarding prosecutors' offices) and d(iv) (regarding public defenders' offices) (Tentative Draft No. 4, 1991) impute disqualification if the lawyers have access to each other's files.

<sup>313</sup> 799 P.2d 1350 (Ariz. 1990) (the validity of prior DUI cases was at issue).

hopeless conflict.<sup>314</sup> On the other hand, the Kentucky Supreme Court held in *Cole v. Commonwealth*<sup>315</sup> that since prior convictions are a matter of public record (provable by way of a certified copy of a judgment of conviction or the testimony of a court clerk), there should be no prohibitive conflict absent a good faith dispute as to the validity of the earlier conviction or some other circumstance suggesting a lawyer-witness issue or a problem of confidentiality.<sup>316</sup>

## VII. CIVIL LITIGATION AGAINST PERSONS WHO ARE SUBJECT TO CRIMINAL PROSECUTION

Nothing in the Model Code's Disciplinary Rule 7-105 or Kentucky Rule 3.4(f)<sup>317</sup> exempts prosecutors from the prohibition against threatening criminal prosecution solely for the purpose of gaining an advantage in a civil matter. Nevertheless, I get reports of part-time prosecutors engaging in such conduct on a regular basis. Indeed, such conduct has been encouraged. It is good politics<sup>318</sup> to keep the merchants happy and the rest of us scared witless. In Kentucky, it was long the practice of at least some county attorneys to serve as collection agents for local merchants. The business community, and in turn the legislature, thought this was a splendid development. Accordingly, the statutory definition of theft by deception was amended to bless what otherwise might be viewed as a questionable practice.<sup>319</sup> Specifically, Kentucky Revised Statute section 514.040 provides in pertinent part that:

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<sup>314</sup> *Id.* at 1353.

<sup>315</sup> 553 S.W.2d 468 (Ky. 1977).

<sup>316</sup> *Id.* at 472; *cf.* *Havens v. Indiana*, 793 F.2d 143 (7th Cir.) (noting that information used by prosecutor at trial of former client was not confidential because it was a matter of public record), *cert. denied*, 479 U.S. 935 (1986).

<sup>317</sup> KY. SUP. CT. R. 3.130, Rule 3.4(f) (Michie/Bobbs-Merrill 1992) provides: "A lawyer shall not . . . [p]resent, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter."

<sup>318</sup> Some might say good economics, too. Lord Mansfield and Adam Smith might have been gratified.

<sup>319</sup> See KY. REV. STAT. ANN. § 514.040 (Michie/Bobbs-Merrill 1990); see generally WOLFRAM, *supra* note 8, § 13.5-6 (discussing prosecutors who threaten prosecution). In Idaho Op., *supra* note 64, 132 (1989), ABA/BNA Man., *supra* note 8, 901:2902, the committee indicated that a prosecutor may send a letter to a person who has written an NSF check, and may threaten prosecution if the person does not make restitution. The committee stated that because the prosecutor is not representing the victim as a private client, the disciplinary rule does not apply. On the other hand, the committee suggested that the prosecutor assumes the status of the victim's private counsel if he includes a demand for payment or seeks collection, and that he may not allude to criminal prosecution in his

(1) A person is guilty of theft by deception when he obtains property or services of another by deception with intent to deprive him thereof. A person deceives when he intentionally:

• • • •

(4) For purposes of subsection (1) of this section, an issuer of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid if:

• • • •

(b) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after issue, and the issuer failed to make good within ten (10) days after receiving notice of that refusal. An issuer makes good on a check or similar sight order for the payment of money by paying to the holder the face amount of the instrument, together with any fee to be imposed pursuant to subsection 4(c) of this section; or

(c) If a county attorney issues notice to an issuer that a drawee has refused to honor an instrument due to a lack of funds as described in subsection (4)(b) of this section, the county attorney may charge a fee to the holder of five dollars (\$5), if said instrument is paid.<sup>320</sup>

Whatever the merits of this statute, I can only say that it is very difficult to get prosecutors to take the anti-extortion provisions of the ethics codes seriously in the face of such precedent.<sup>321</sup> Furthermore, if government lawyers are "doing it," it is hard to get other lawyers not to "do it."<sup>322</sup>

or her letter. The distinctions made by the committee seem very fine indeed. Cases involving debt collection by threat and leveraging are collected in Eclavea, *supra* note 6, at § 15. For a case of relatively recent vintage, see *In re Lantz*, 420 N.E.2d 1236 (Ind. 1981) (prosecuting attorney may not file bad check cases in his private capacity as this gives appearance of using pressure of public office to collect civil debts for private party).

<sup>320</sup> KY. REV. STAT. ANN. § 514.040 (Michie/Bobbs-Merrill 1990).

<sup>321</sup> Reasoning by false analogy, some prosecutors figure that merchants are always right, and consumers must, therefore, always be subject to arrest—pending resolution of any petty dispute in favor of the merchant. *But see* *Armorie v. Delamarie*, 93 Eng. Rep. 664 (K.B. 1722).

<sup>322</sup> The "but everybody's doing it" approach to professional responsibility. "But the county attorney is doing it" is even harder to contend with.

Enthusiasts of the "everybody's doing it" school of jurisprudence will appreciate Committee on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d 720 (W. Va. 1992). In this rather unconvincing opinion, Justice Neely theorized that MODEL CODE, *supra* note 16, DR 7-105(A) had not been incorporated into the new Rules of Professional Conduct because it was either "redundant [of what, we might ask?] or overbroad or both [isn't this redundant?]." He then sidestepped or struck down (it is hard to tell which) W. VA. CODE § 61-5-19 by applying the "doctrine of desuetude." That statute prohibits offering not to



Having looked at extortionate threats of prosecution, we are ready to look at actual prosecutions of persons who are opponents of the part-time prosecutor's clients in private civil litigation.<sup>323</sup>

### A. *Simultaneously Pending Cases*

In his book *Ethical Issues In Prosecution*, John Jay Douglass makes the observation that "it is axiomatic [that] a prosecutor should never try a defendant with whom he is embroiled in civil litigation."<sup>324</sup> At first glance, this seems to sweep broadly. Perhaps we should test it, as if it were a hypothesis.

#### 1. *Same Opponent—Related Criminal and Civil Cases*

In 1973, the Ethics Committee of the Kentucky Bar Association was asked whether "an associate of a commonwealth's attorney . . . [may] represent a plaintiff in a civil action against defendants who have been charged with crimes arising out of the same subject matter, and which [crimes] the commonwealth's attorney has a duty to prosecute?"<sup>325</sup> The committee answered the question in the

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prosecute a crime in exchange for restitution. To the author's surprise, the ABA Committee subsequently issued Formal Opinion 92-363 (1992), which cites this West Virginia opinion for the proposition that the Model Rules permit a lawyer to threaten criminal charges in aid of a related civil claim. The committee's view of the propriety of threats should be contrasted with the views of the leading commentators. *See, e.g.,* WOLFRAM, *supra* note 8, at 718 (deletion of an explicit rule was a "clear, and unfortunate, diminution of the protections afforded by the Code"); FREEDMAN, *supra* note 14, at 227 ("[U]nfortunately, there is no parallel to DR 7-105 in either the Model Rules or in the ABA Prosecution Function Standards.").

<sup>323</sup> The possibility of such a relationship is alluded to in Kizer, *supra* note 6, at 379:

The prosecutor cannot ethically use the weight and force of his office to gain an advantage in private employment; for example, when he represents the wife in domestic relations matters and brings nonsupport or criminal charges against the husband. If a crime has been committed, the prosecuting attorney has a duty to prosecute, but he must withdraw from the civil matter. If no crime is involved, he violates the disciplinary rule which provides: A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

*See also In re Williams*, 50 P.2d 729, 732 (Okla. 1935), discussed *infra* note 351.

<sup>324</sup> DOUGLASS, *supra* note 6, at 130 (citing *Blanton v. Barrick*, 258 N.W.2d 306, 311 (Iowa 1977)); *see also* ABA Op., *supra* note 75, 30 (1931), MARU, *supra* note 8, No. 30 (1970).

<sup>325</sup> Kentucky Op., *supra* note 4, E-64 (1973), KY. BAR J., July 1973, at 10. The scenario was a bit unusual in that the lawyer wanted to know if he could take a civil case against the operators of overweight coal trucks, when, at the same time, there were criminal charges pending against the same operators, which the lawyer's associate was under a duty to prosecute as commonwealth attorney.

negative, pointing out the "temptation to 'over-prosecute' in criminal actions wherein the prosecuting attorney has a vested interest in the outcome, because of his being retained to represent the plaintiffs in a civil action involving the same subject matter."<sup>326</sup> The committee also alluded to DR 9-101(B), which states that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."<sup>327</sup> Perhaps the thought was that if successive employment in a substantially related matter would be problematic, then it necessarily follows that simultaneous employment would also be problematic. Of course, the committee also made the obligatory reference to an "appearance of professional impropriety."<sup>328</sup>

While this opinion was in the mainstream,<sup>329</sup> it was more than a little vague. As Professor Wolfram notes:

It is clear in [such a] situation that the prosecutor is acting consistently and not adversely to the interests of any present or past client. But the serious objection remains that the prosecution might be in aid of the part-time prosecutor's private client and not because of an unencumbered exercise of prosecutorial discre-

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<sup>326</sup> *Id.* The committee alluded to an unspecified opinion in which it "frowned upon a Commonwealth's attorney handling a civil action for past-due child support payments, because he has a powerful lever at his command to force those payments by the threat of criminal prosecution." *Id.* at 11. Note that the issue of imputed disqualification is not of immediate concern. We will return to imputed or vicarious disqualification in part VIII. For a recent and very interesting ethics opinion see Pennsylvania Op., *supra* note 143, 91-79 (1991), ABA/BNA Man., *supra* note 8, 1001:7306, in which it was stated that a member of a law firm should not take a civil case concerning an employment contract when the matter was also the subject of a current criminal investigation and another member of the firm was also a member of the prosecutor's office. One assumes that such a scenario could lead to the appearance that the opponent might be "leveraged," or that charges against the firm's client were not explored. Of course, the prosecution of a present client might also result. *Cf.* North Carolina Op., *supra* note 181, 502 (1966), MARU, *supra* note 8, No. 9252 (Supp. 1975) (city solicitor may not represent B, C, and D in an intracorporate dispute with A over suspected mismanagement of corporate funds where municipal court before which solicitor practices has both civil and criminal jurisdiction over the matters).

<sup>327</sup> MODEL CODE, *supra* note 16, DR 9-101(B); *see also* MODEL RULES, *supra* note 3, Rules 1.11(a), (c)(2); AM. LAW. CODE OF CONDUCT, *supra* note 92, § 9.14 (Revised Draft 1982):

A lawyer shall not accept private employment relating to any matter in which the lawyer participated personally and substantially while in public service.

<sup>328</sup> Kentucky Op., *supra* note 4, E-64 (1973), KY. BAR J., July 1973, at 10, 11 (citing MODEL CODE, *supra* note 16, Canon 9 (1981)).

<sup>329</sup> *See In re Truder*, 17 P.2d 951 (N.M. 1932), *infra* notes 347-50 and accompanying text, also discussed in DiStasi, *supra* note 271, at 852; *see also* Kentucky Op., *supra* note 4, E-350 (1992), KY. BENCH & BAR, Summer 1992, at 33 (following *Lovelace*, *Truder*, and other cases).

tion. The prosecutor's duties as a public officer and his or her loyalties as a private practitioner conflict.<sup>330</sup>

In other words, the conflict has something to do with abuse of office as well as abuse of the defendant.<sup>331</sup> For example, in *Ganger v. Peyton*,<sup>332</sup> the Court of Appeals for the Fourth Circuit observed that a prosecution by an interested prosecutor can collide with the concept of fundamental fairness assured by the Due Process Clause:

Because of the prosecuting attorney's own self-interest in the civil litigation . . . he was not in a position to exercise fairminded judgment with respect to (1) whether to decline to prosecute, (2) whether to reduce the charge to a lesser degree . . . , or (3) whether to recommend a suspended sentence or other clemency.<sup>333</sup>

Justice Brennan expressed similar views in *Young v. United States ex rel. Vuitton et Fils S.A.*<sup>334</sup> when he observed that prosecution by such an interested prosecutor

would violate the ABA ethical provisions, since the attorney could not discharge the obligation of undivided loyalty to both clients [the private client and the "People"] where both have a direct interest. The Government's interest is in a dispassionate assessment of the propriety of criminal charges. . . . A prosecutor may

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<sup>330</sup> WOLFRAM, *supra* note 8, § 8.9.4, at 455 (citations omitted).

<sup>331</sup> See MODEL RULES, *supra* note 3, Rule 1.11 cmt. 2:

A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. . . . Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.

See also AM. LAW. CODE OF CONDUCT, *supra* note 92, § 9.13 (1982): "A lawyer in public service shall not use the powers of public office for personal advantage, favoritism, or retaliation."

<sup>332</sup> 379 F.2d 709 (4th Cir. 1967). That is not to say that an ethical violation of this genre will necessarily result in the reversal of a conviction on the complaint of an aggrieved defendant. See, e.g., *Dick v. Scroggy*, 882 F.2d 192, 196-97 (6th Cir. 1989).

*Ganger v. Peyton* involved a classic scenario: The prosecutor was representing the wife in a divorce while prosecuting the husband for assault of the wife. For like cases and ethics opinions see *In re Thrush*, 448 N.E.2d 1088 (Ind. 1983) (concerning prosecutor who represented husband in dissolution proceedings while prosecuting husband for battery of wife and was disciplined for refusing to disqualify himself); *In re Schull*, 127 N.W. 541 (S.D. 1910) (prosecutor represented husband in divorce and prosecuted wife for adultery); see also *South Dakota Op.*, *supra* note 167, 90-5 (1990), ABA/BNA Man., *supra* note 8, 901:8002 (lawyer may not represent husband in divorce if his associate is a part-time prosecutor who granted immunity to husband during investigation of wife for drug offenses).

<sup>333</sup> *Ganger*, 379 F.2d at 713.

<sup>334</sup> 481 U.S. 787, 803-05 (1987).

be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. . . . Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.<sup>335</sup>

This sort of conflict is also acknowledged in the Restatement (Third) of the Law Governing Lawyers<sup>336</sup> section 216, which provides:

[A] lawyer may not represent a client in any matter with respect to which the lawyer has a fiduciary or other legal obligation to another person if there is a substantial risk that the obligation would materially and adversely affect the lawyer's representation of the client.

According to the Restatement "Rationale," the prosecutor's fiduciary obligation to his or her office or to the public should be treated as "analogous to an obligation to a client."<sup>337</sup> The Reporter's Note<sup>338</sup> links this notion (which parallels Justice Brennan's analysis in *Young*) to Canon 5 of the Model Code (EC 5-1) and Rule 1.7 of the Model Rules. Comment f(ii) to section 216 relates its general blackletter terms to the prosecution function:

(ii). *Service as a prosecutor.* A prosecutor exercises wide discretion over the decision whether to prosecute, what charges to file, and what criminal sanctions to seek. Prosecutors determine who will have to incur the expense, loss of liberty, and damage to reputation flowing from those decisions. Where responsibilities to a client other than the public might distort the exercise of the prosecutor's discretion, it is improper for the prosecutor to act.<sup>339</sup>

The Restatement's "Illustration" of this comment describes a case in which the prosecutor's private practice client was the victim of

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<sup>335</sup> *Id.* at 805. Justice Brennan also noted that a federal prosecutor might be charged with committing a felony under 18 U.S.C. § 208(a). See text of § 208(a), *supra* note 95.

<sup>336</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 216 (Tentative Draft No. 4, 1991).

<sup>337</sup> *Id.* § 216 cmt. b.

<sup>338</sup> *Id.* § 216, at Reporter's Note.

<sup>339</sup> *Id.* § 216 cmt. f(ii); cf. Kentucky Op., *supra* note 4, E-171 (1977), MARU, *supra* note 8, No. 11,147 (Supp. 1980) (stating that Office of Attorney General may not participate in criminal case against individuals who were co-defendants with the commonwealth in civil actions arising from the same incident in which Attorney General's office was representing the commonwealth).

an assault by a juvenile. The prosecutor is said to violate section 216 by exercising discretion to charge the juvenile as an adult, the argument being that "a lawyer with no prior relationship to the victim must decide whether to charge the juvenile as an adult."<sup>340</sup> While it seems to me that this is not the most illustrative of "Illustrations," the Reporter's Note cites cases of both the "abuse of office" and "leveraging" variety in support of the comment.<sup>341</sup>

This brings us to the case of *Kentucky Bar Association v. Lovelace*.<sup>342</sup> The prosecutor was charged with misconduct arising in connection with three separate scenarios:

(1) A child was killed in a bus accident. The prosecutor filed a civil suit on behalf of the child's parents, which was "primarily handled by his law partner," while his assistant obtained an indictment in a parallel criminal action.

(2) Following another accident, the prosecutor obtained permission from a "neighboring" commonwealth attorney to present the matter to the grand jury. He identified himself as being the representative of the family and commonwealth attorney in another district. Later, he actually participated in negotiations in the parallel civil case and "attempted to use the promise of probation in [the] criminal case as leverage to get money . . . in the civil action."

(3) In yet another accident case for which he had investigatory responsibility, the prosecutor was hired to bring a wrongful death action on behalf of the passenger. The driver was thereafter indicted on felony charges, which were amended down to a misdemeanor charge and a one-year suspended sentence of pro-

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<sup>340</sup> RESTATEMENT § 216 cmt. f.

<sup>341</sup> *Id.* § 216, at Reporter's Note (citing *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); see *supra* notes 334-35 and accompanying text; *In re LaPinska*, 381 N.E.2d 700 (Ill. 1978) (concerning situation where prosecutor's private client, as purchaser of house, claimed fraud on part of seller, and prosecutor filed case charging a zoning violation by seller to aid client's case); *In re Lantz*, 420 N.E.2d 1236 (Ind. 1981) (prosecutor filing bad check charges in aid of debt collection cases brought on behalf of private clients; see discussion *supra* notes 318-23 and accompanying text)). Cf. WOLFRAM, *supra* note 8, § 8.9.4 (citing *In re Fisher*, 400 N.E.2d 1127 (Ind. 1980) (prosecutor represented the mother in a child custody dispute against the father who was being prosecuted by the same prosecutor's office). For more child custody cases see discussion *supra* notes 261-62. Professor Wolfram also cross-references his discussion of the "tactical value of threats to invoke the criminal process." WOLFRAM, *supra*, § 13.5.5, at 717 n.72 (citing *In re Joyce*, 234 N.W. 9 (Minn. 1930) (concerning county attorney disciplined for obtaining the indictment of defendants in claims asserted by his private clients)). Many "leveraging" cases are collected in *Eclavea*, *supra* note 6.

<sup>342</sup> 36 KY. L. SUMMARY at 7, 7-9 (June 29, 1989), *withdrawn*, Kentucky Bar Ass'n v. Lovelace, 778 S.W.2d 651, 654 (Ky. 1989).

bation. The civil case settled for the policy limits plus a personal contribution from the driver.<sup>343</sup>

The court concluded that DR 9-101(B)<sup>344</sup> applies to concurrent as well as successive representation of conflicting public and private interests, and imposed a temporary suspension.<sup>345</sup>

In subsequent proceedings the court backed off a bit, observing that in all but the last case the prosecutor did not intend to gain an advantage, and reduced the punishment accordingly. Nevertheless, the court opined that:

A prosecutor must decline employment in any civil action when there is any reasonable probability that criminal prosecution might arise from the circumstances of the case. If after accepting employment in a civil matter, a criminal prosecution arises from the circumstances of the case the prosecuting attorney must withdraw from the civil proceeding and disqualify himself from handling the prosecution.<sup>346</sup>

Although this decision seems perfectly consistent with a host of available precedent, there was a considerable outcry. One would have thought that the court had plucked a pernicious new doctrine out of thin air for the purpose of destroying private practices. But the case might profitably be compared to *In re Truder*,<sup>347</sup> a classic case discussed in Professor Douglass's handbook for prosecutors.<sup>348</sup> In this case, a part-time prosecutor and his assistant brought a voluntary manslaughter action against a defendant as a result of an automobile accident. The prosecutors then accepted a civil case for damages against the defendant on behalf of the personal representative of a victim of the same accident, and offered to dismiss the criminal charges as part of a settlement. The New Mexico Supreme Court reacted with indignation:

It appears from statements by all counsel in the case that it is not unusual practice in this state for district attorneys to engage, as respondents admittedly did here, to prosecute a civil action upon the same facts constituting a criminal action which they are

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<sup>343</sup> 36 KY. L. SUMMARY at 7.

<sup>344</sup> MODEL CODE, *supra* note 16, DR 9-101(B).

<sup>345</sup> *Lovelace*, 36 KY. L. SUMMARY at 9.

<sup>346</sup> *Lovelace*, 778 S.W.2d at 653-54.

<sup>347</sup> 17 P.2d 951 (N.M. 1932).

<sup>348</sup> DOUGLASS, *supra* note 6, at 127-29. Similar disciplinary cases are collected in *Eclavea*, *supra* note 6.

then prosecuting, or may be called upon to prosecute; that no statute prohibits this practice; that, as generally viewed, such double employment, standing alone, while not entirely approved, has not been deemed misconduct as could lead to disciplinary measures; that, to make a case for disciplinary action, some actual conduct must be shown in addition, violative of the public or private duty of the attorney. We cannot accede to this view, and, if the practice is so widespread as stated, we feel it our imperative duty to condemn it at this first opportunity.

The incompatibility of public duty and private interest and employment is too plainly illustrated in this case to require discussion. It scarcely aggravates the case to show that one of the respondents actually uttered the suggestion which is implied in the situation itself, that a payment of damages would moderate the vigor or good faith, if not entirely end, the prosecution.<sup>349</sup>

*Lovelace* and *Truder* are virtually identical, and both are consistent with the Kentucky Bar ethics opinion with which we opened our discussion. Nevertheless, these opinions go unheeded.<sup>350</sup>

A final point should be made with regard to the problem of leveraging in "same opponent—related civil and criminal" cases. The leveraging may also be done by a prosecutor who is representing the defendant in a civil case. Perhaps the classic illustration of this point is provided by *In re Williams*,<sup>351</sup> a venerable Oklahoma case.

In this case *Williams* had represented one *Radney* in a criminal matter. Some time later (after *Radney* had served his term in the

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<sup>349</sup> DOUGLASS, *supra* note 6, at 127-29 (quoting *In re Truder*, 17 P.2d at 951-52).

<sup>350</sup> See *Kentucky Bar Ass'n v. Marcum*, 830 S.W.2d 389 (Ky. 1992). In this case, a malpractice action against a doctor was accepted by the prosecutor's private firm, while at the same time the prosecutor was pursuing an indictment against the doctor for "trafficking in controlled substances by dispensing controlled substances without a good medical reason." The criminal offense allegedly arose from the same facts as the civil case. The offending lawyers received public reprimands. One assumes that the penalty was not more severe because there was no proof of "pressure" or "leverage." This is not a Kentucky phenomenon by any means. See, e.g., *Commonwealth v. Eskridge*, 604 A.2d 700 (Pa. 1992) (finding that district attorney should have recused himself from prosecution of defendant when his private law partners represented the victims of the crime). For a curious contrast compare *Cantrell v. Commonwealth*, 329 S.E.2d 22, 26-27 (Va. 1985) (reversing conviction where private attorney hired by victim's family to pursue civil action arising from events underlying prosecution also handled the prosecution, due to violation of due process) with *Kentucky Op.*, *supra* note 4, E-151 (1976), *MARU*, *supra* note 8, No. 11,127 (Supp. 1980) (stating that lawyer in private practice who represents the personal representative of a murder victim in a wrongful death action against the alleged murderer may assist the commonwealth's attorney in the murder trial, so long as the commonwealth's attorney has no interest in the civil case and controls the murder trial).

<sup>351</sup> *In re Williams*, 50 P.2d 729 (Okla. 1935).

state penitentiary), Williams was elected county attorney. Williams appointed Sasseen his assistant county attorney. At this point we hear from the Campbells, who made the mistake of loaning money to Radney and taking a mortgage in return. The promissory note and mortgage associated with this transaction were sold to the Speeds.<sup>352</sup>

In due course Radney failed to pay, and the Speeds sued. Radney consulted with Williams, who at this point was still serving as county attorney, and Williams fixed Radney up with his minion, Sasseen. Sasseen entered an appearance and filed an answer for Radney, and moved to join the Campbells as parties, alleging wrongdoing on their part as well as asserting the invalidity of the note and mortgage. In aid of this contrived pleading and defense, Williams then filed a criminal complaint charging the Campbells with grand larceny and embezzlement growing out of the same facts and circumstances that were pled by Radney as a defense in the civil case. As an additional touch, Sasseen endorsed the criminal information that resulted in the "bindover" of the defendants, although he later testified that he made no investigation of the facts!<sup>353</sup>

Finally, Williams resigned as county attorney, but then accepted employment by Radney in the civil case. After the smoke cleared, both lawyers had been disciplined (again, the dreaded "public reprimand").<sup>354</sup> Williams clearly violated what was then Canon 38 of the Oklahoma professional rules and what is now either DR 9-101(B) or Rule 1.11(a).<sup>355</sup> But the important holding of the court was its scathing observation that "the powers of the office of county attorney were thrown into the scale of a civil lawsuit in

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<sup>352</sup> *Id.*, at 730.

<sup>353</sup> *Id.* at 730-31.

<sup>354</sup> *Id.* at 732.

<sup>355</sup> *Id.* at 731, citing the equivalent of Canon 36 of the 1946 Kentucky Canons, which provided:

A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

See KY. CT. APP. R. 3.170 (1946) (adopting ABA Canons of Professional Ethics). Canon 36 and the successor DR 9-101(B) were construed in Kentucky Op., *supra* note 4, E-212 (1979), ABA/BNA Man., *supra* note 8, 801:3901 (former government lawyer may not accept private employment in a matter pending in an agency if he gained substantial knowledge but did not perform any official act and was not counsel of record with respect to the matter, or if he performed any act with respect to the matter on behalf of the agency).



favor of the defense when the county attorney's office by law and by all ethics was required to be and remain neutral."<sup>356</sup>

## 2. *Same Opponent—Unrelated Criminal and Civil Cases*

We have established that a part-time prosecutor who is representing clients in a civil matter should not simultaneously investigate or prosecute the same or related matters as a prosecuting attorney.<sup>357</sup> Is there a similar risk of "leveraging" and abuse of office when the criminal charge is unrelated to the private civil representation?

On the one hand, the relatedness of the cases may make it possible for the prosecutor to exploit the fact-finding resources of the criminal process in aid of the private client.<sup>358</sup> But from the standpoint of leveraging and interference with the prosecutor's exercise of independent professional judgment on behalf of the *public* interest, it does not seem to me that the relatedness of the criminal charges and civil claims is necessarily critical.<sup>359</sup> An unrelated charge, substantiated or contrived, might be threatened or otherwise exploited in the same fashion. That is, "the weight and force of [the prosecutor's] office [might be used] to gain an advantage in private employment"<sup>360</sup> whether or not there is any relationship between the private client's civil case and the criminal charge against the private client's opponent. Virtually all of the scenarios addressed in reported appellate opinions and ethics opinions involve "same facts" or related cases, and little attention has been paid to the formulation of a more general principle.

### *B. Civil Case When Criminal Case Not Yet Initiated, or When Criminal Case Already Completed*

So far we have considered only those instances in which there are simultaneously pending civil and criminal cases. However, al-

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<sup>356</sup> *Williams*, 50 P.2d at 732.

<sup>357</sup> *Lyman v. Grievance Comm. of 8th Judicial Dist.*, 552 N.Y.S.2d 721 (A.D. 1990).

<sup>358</sup> See MODEL CODE, *supra* note 16, DR 9-101(A), (B); MODEL RULES, *supra* note 3, Rule 1.11(a); *cf.* Kizer, *supra* note 6, at 379: "A prosecutor cannot profit from information gained in the course of performance of his duties as such: he cannot participate in civil actions when an investigation involving the situation in question and alleged criminal offenses was conducted through his office."

<sup>359</sup> *But see Missouri Inf. Op.*, *supra* note 124, 5 (1983), ABA/BNA Man., *supra* note 8, 801:5261, which suggests the contrary.

<sup>360</sup> Kizer, *supra* note 6, at 379 guideline (4).

legations of abuse of office may be substantiated in cases in which criminal action has not yet been instituted, or in cases in which a parallel criminal action has been completed by the time that the civil action is commenced.

Perhaps the most widely cited opinion suggesting that a prosecutor should not take on private civil representation in a matter that he or she investigated in his or her official capacity is an ancient ABA opinion that states that a prosecutor who investigated an automobile accident and decided against criminal prosecution could not represent one of the parties to the accident in a subsequent civil suit.<sup>361</sup> There are a number of possible reasons for such a rule. The least obvious is that the possibility of civil employment might influence the performance of the prosecutor's investigation. There is also the possibility that once the prosecutor sides with one of the parties in the civil case, he or she will be unwilling to reconsider pressing criminal charges. In that regard it might be felt that such cases should be declined routinely to head off public doubts or any "appearance of impropriety." However, the opinion seems to focus on the notion that a public officer or employee should not appear to be generating business from the public office, a proposition that harkens back to a more innocent age.<sup>362</sup>

This opinion is by no means unique. Another ABA opinion stated that a prosecutor who investigated a fire for evidence of arson but did not gather enough evidence to support a criminal prosecution could not represent the owner in an action against the owner's insurer.<sup>363</sup> And in yet another opinion, the ABA committee

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<sup>361</sup> ABA Op., *supra* note 75, 135 (1935), MARU, *supra* note 8, No. 135 (1970).

<sup>362</sup> In Illinois Op., *supra* note 141, 89-2 (1989), ABA/BNA Man., *supra* note 8, 901:3011, the committee stated that a prosecutor could not accept a referral fee associated with the referral of a wrongful death case involving a local ordinance because the prosecutor had the initial discretion to prosecute or not prosecute. *Accord*, Professional Guidance Comm. of the Philadelphia Bar Ass'n Op. 91-24 (1991), ABA/BNA Man. 1001:7503; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 214 cmt. d. (Tentative Draft No. 4, 1991). In Pennsylvania Op., *supra* note 143, 88-167 (undated), ABA/BNA Man. 901:7315, the committee opined that a part-time prosecutor may not represent the wife in a domestic relations case if the prosecutor may have to prosecute the husband for spousal abuse. The committee also observed that in such a situation there is a risk that the prosecutor might obtain and use information in the course of the criminal investigation that might advance the wife's civil case. *Cf.* Alabama Op., *supra* note 119, 87-123 (1987), ABA/BNA Man. 901:1032 (stating that assistant district attorney may not participate in prosecution of husband for sexual abuse of daughter where the wife previously consulted the district attorney's law partner about obtaining a divorce).

<sup>363</sup> ABA Op., *supra* note 75, 39 (1931), MARU, *supra* note 8, No. 39 (1970); *cf.* Massachusetts Op., *supra* note 194, 91-7 (1991), ABA/BNA Man., *supra* note 8, 1001:4602

stated that a former assistant attorney general could not represent a class of plaintiffs in a matter that the lawyer investigated while holding the public office, even though the attorney general had made a determination not to proceed, the suit would not have been adverse to the former government employer (the suit would have been against the same private party that had been the subject of the public investigation), and the attorney general had no objection to the lawyer's acceptance of the employment.<sup>364</sup>

In the above scenarios, the prosecutor made an initial determination not to prosecute. Many state bar opinions deal with the situation in which such a determination has not been made, and in which it is likely that such charges will be filed. Virtually all of these state that the prosecutor may not take the related civil case because it would interfere with the prosecutor's "paramount duty to the public."<sup>365</sup>

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(stating that former district attorney who investigated but did not prosecute husband for criminal battery of wife may not later represent wife, as private client against husband, in a civil claim for battery). *But cf.* Virginia Inf. Op., *supra* note 140, 150 (undated), MARU No. 10,080 (Supp. 1975) (allowing commonwealth's attorney to qualify as administrator of deceased's estate although he had previously determined not to prosecute another party to the accident in which the deceased died); *see supra* notes 284-89 and accompanying text.

<sup>364</sup> ABA Inf. Op., *supra* note 64, 1462 (1980), ABA/BNA Man., *supra* note 8, 801:307. In other words, the strict language of MODEL CODE, *supra* note 16, DR 9-101(B) (now MODEL RULES, *supra* note 3, Rule 1.11) was applied to bar the representation even though the subsequent private representation was not adverse to the government and the government was willing to "consent." Professor Wolfram states that Model Rule 1.11(b) also compels this result and alludes to the facts of *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974). WOLFRAM, *supra* note 8, § 7.6.4. *But cf.* Pennsylvania Op., *supra* note 143, 91-190 (1991), ABA/BNA Man. 1001:7312 (stating that part-time prosecutor may not represent private clients in civil cases if those clients have previously been prosecuted through his or her office, unless the appropriate government agency can and will give consent!).

<sup>365</sup> Michigan Op., *supra* note 133, CI-1170 (1987), ABA/BNA Man., *supra* note 8, 901:4758. Some opinions, like this Michigan opinion, limit this prohibition to cases in which the particular prosecutor was involved. *See, e.g.,* Alabama Op., *supra* note 119, 90-39 (1990), ABA/BNA Man. 901:1067 (permitting assistant district attorney whose office prosecuted husband for manslaughter of wife to represent victim's mother in custody action and handle estate of decedent if prosecutor did not have "substantial involvement" in the prosecution and gained no confidential information that could be used against the husband); *cf.* Virginia Op., *supra* note 121, 942 (1987), ABA/BNA Man. 901:8722 (allowing former prosecutor and/or the prosecutor's spouse or firm to represent the victim of a crime in a subsequent civil action provided that the prosecutor did not participate in the prosecution of the opposing party); Illinois Op., *supra* note 141, 84-5 (1984), ABA/BNA Man. 801:3021 (allowing prosecutor's firm to take the case if prosecutor was not personally involved). *But see* South Carolina Op., *supra* note 142, 84-19 (undated), ABA/BNA Man. 801:7915 (stating that an assistant solicitor, even one not assigned to the related criminal case, may not accept the related civil case).

Florida Op., *supra* note 197, 59-2 (1959), MARU, *supra* note 8, No. 6227 (Supp. 1970),

When it comes to civil representation after the completion of criminal proceedings, the authorities are divided. Some state bar committees appear to approve of the practice.<sup>366</sup> For example, in Kentucky, the ethics committee opined that at no time "may an Attorney for the Commonwealth have at the same time pending a criminal case of non-support and a civil case attempting to collect back child support," but saw no problem with the prosecutor's pursuit of a civil collection case "once the criminal action has terminated."<sup>367</sup> But at least as many, if not the majority, of these opinions prohibit the prosecutor from taking a related civil case even after the dust has settled on the prosecution.<sup>368</sup> The cases are also split, and a few examples will suffice to tell the tale of confusion.

In *State v. Basham*,<sup>369</sup> a South Dakota statute provided:

The state's attorney *shall not receive any fee or reward from or on behalf of any prosecutor or other individual for services in*

is curious. It states that a county prosecutor may not represent a party in a civil action arising out of an automobile accident (1) while he or some other officer is investigating to determine whether criminal charges should be filed, (2) while a criminal action is pending, (3) when his or her contact with the client arose from his or her work on the accident, or (4) if the defendant in the action "may receive the impression that criminal charges may be filed unless he settles the civil action." However, the opinion goes on to suggest that the prosecutor may take the civil case if (a) the investigation is over, and no charges will be filed (subject to rules (3) and (4) above?), (b) "only simple negligence is involved and prosecution will take place in another court," or (c) the prosecution has been terminated.

<sup>366</sup> On the other hand, the drafters of state bar opinions do not necessarily have the benefit of pertinent arguments and authorities. See Underwood, *supra* note 2, at 144-47.

<sup>367</sup> Kentucky Op., *supra* note 4, E-257 (1982), KY. BENCH & BAR, July 1982, at 44. In contrast see Kentucky Op. E-153 (1976), MARU, *supra* note 8, No. 11,129 (Supp. 1980) (stating prosecutor who has represented a party in a divorce may not subsequently prosecute the adverse party for nonsupport); see also Florida Op., *supra* note 197, 59-2 (1959), MARU No. 6227 (Supp. 1970). But see Virginia Op., *supra* note 121, 420 (1983), ABA/BNA Man., *supra* note 8, 801:8806 (allowing part-time commonwealth's attorney to represent a client in a custody case while at the same time pursuing the father of the client's child for support payments as a public attorney).

<sup>368</sup> See, e.g., Illinois Op., *supra* note 141, 85-10 (1986), ABA/BNA Man., *supra* note 8, 901:3001; Ethics Advisory Panel of the Rhode Island Sup. Ct. Op. 90-17 (1990), ABA/BNA Man. 901:7809 (refusing to allow prosecutor who prosecuted defendant for "dangerous driving" to represent the victim's father in a later wrongful death action); Virginia Op., *supra* note 121, 1114 (1988), ABA/BNA Man. 901:8743 (stating that after unsuccessful criminal prosecution for reckless driving, prosecutor may not take wrongful death case against the same defendant).

<sup>369</sup> 170 N.W.2d 238 (S.D. 1969). This case has been read as supporting the broad propositions that, in South Dakota at least, a state's attorney may not accept a related civil case "even though the criminal proceeding concluded before the private employment was accepted," and that "the state's attorney must refuse private employment in all matters dealt with in his or her official capacity." See Bjorkman, *supra* note 6, at 35.

any prosecution or business to which it shall be his official duty to attend, nor be concerned as attorney or counselor for either party, other than for the state or county, in any civil action depending on the same state of facts upon which any criminal prosecution commenced, but undetermined, shall depend; nor shall any state's attorney while in office be eligible to hold any judicial office whatever.<sup>370</sup>

The facts of the case trace a common pattern. The defendant was involved in a two-car collision in which the daughter of the driver of the other car was killed. The defendant's blood alcohol level was 0.15, and he was charged and convicted of DUI and manslaughter. Alleging a violation of due process of law, the defendant challenged his conviction on the ground that a member of the prosecutor's office was employed by the family of the victim on a contingent fee basis to represent the family in civil damage suits against him.<sup>371</sup> According to the opinion, the criminal prosecution was initiated by way of an information filed by a Deputy State's Attorney Weisensee. Another deputy state's attorney, Sechser, participated with Weisensee at the criminal trial.<sup>372</sup> At a hearing on the defendant's motion for a new trial, Sechser admitted that during the pendency of the criminal case he was already retained by the victim's family, and had informed Weisensee of this fact. However, he also claimed that he had not discussed the merits of the civil claims with his private clients. Furthermore, he informed them that *no suit would be commenced before the termination of the criminal proceeding*.<sup>373</sup> It was urged by the state that the conviction should stand because the state statute "contemplates a present interest in a civil action and since civil and criminal proceedings were not pending simultaneously the statute was not violated."<sup>374</sup> The Supreme Court of South Dakota rejected the state's argument.<sup>375</sup> Citing a similar Illinois precedent,<sup>376</sup> the court reasoned that it was

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<sup>370</sup> *Basham*, 170 N.W.2d at 240 (emphasis added). The court noted that the statute had existed in South Dakota as far back as the 1880s. Similar statutes are discussed in Moldoff, *supra* note 6.

<sup>371</sup> *Basham*, 170 N.W.2d at 239.

<sup>372</sup> *Id.* at 241.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *People ex rel. Hutchinson v. Hickman*, 128 N.E. 484 (Ill. 1920). See Moldoff, *supra* note 6, at 782-83 (collecting cases).

the purpose of the legislature to prevent any influence upon the discharge of the duties of a state's attorney by reason of personal interest on his part and that if it be held that a state's attorney might be retained in a civil suit to be commenced after the conclusion of the criminal prosecution, the holding would invite evasion of the spirit of the law which prohibits his being interested in a civil matter based on the facts of a criminal action.<sup>377</sup>

This case should be compared with *Maddox v. Lord*, a recent decision of the Court of Appeals for the Second Circuit.<sup>378</sup> In that case, a convicted murderess and habeas corpus petitioner alleged that the supervising prosecuting attorney had a prohibited interest in her conviction for the killing of her husband. The state conceded that nine months after the petitioner's sentencing, the prosecutor joined a firm that had had a contract with the sons of the victim that provided an incentive to procure the disqualification of the petitioner from sharing in the proceeds of her husband's estate.<sup>379</sup>

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<sup>377</sup> *Basham*, 170 N.W.2d at 241. See Virginia Op., *supra* note 121, 942 (1987), ABA/BNA Man., *supra* note 8, 901:8722 (allowing prosecutor to take civil case related to prior criminal proceeding only if he or she did not participate in the prosecution); Virginia Op. 606 (1984), ABA/BNA Man. 801:8830 (suggesting that a prosecutor may not represent a plaintiff in a personal injury claim against a defendant he or she prosecuted, but also stating that the prosecutor's spouse may take such a case); Michigan Op., *supra* note 133, CI-1136 (1986), ABA/BNA Man. 901:4753 (stating that prosecutor may not take subsequent related civil case, but an uninvolved assistant prosecutor may). Older Virginia opinions permitted the prosecutor to take related civil cases once the prosecution had reached a "final disposition." See Virginia Op. 1 (1942), MARU, *supra* note 8, No. 4368 (1970) (stating that prosecutor should not accept or negotiate for employment in a civil action arising out of an automobile accident "until the final disposition of any criminal charge arising out of the same accident which he has prosecuted," and in no event may the prosecutor appear on behalf of the defendant in the civil case if that is the party he prosecuted); Virginia Op. 32 (1951), MARU No. 4400 (1970). Virginia Inf. Op., *supra* note 140, 146 (undated), MARU No. 10,076 (Supp. 1975), clearly states that once the lawyer's prosecution of a host driver has fully terminated, then the prosecutor may represent the estate of the deceased guest passenger. *But see* Virginia Inf. Op. 290 (1978), MARU No. 12,922 (Supp. 1980), which states that a commonwealth's attorney who participated in a preliminary hearing at which a charge of involuntary manslaughter against the potential defendant was dismissed may not represent the estate of the victim in a wrongful death action.

Of course, a prosecutor may not defend a wrongful death case for the same defendant he or she prosecuted, nor may a member of his or her firm conduct such a defense. See, e.g., Virginia Op. 604 (1984), ABA/BNA Man. 801:8829 (citing MODEL CODE, *supra* note 16, DRs 9-101(B), 5-105(D)(E)); cf. ABA Inf. Op., *supra* note 64, 1104 (1969), MARU No. 5672 (Supp. 1970) (special prosecutor in jury-tampering case could not thereafter represent defendant's counsel in disbarment proceedings). On the civil side, see Arizona Op., *supra* note 200, 91-21 (1991), ABA/BNA Man. 1001:1404 (prosecutor who secured child support order may not later attempt to have it reduced).

<sup>378</sup> 818 F.2d 1058 (2d Cir. 1987).

<sup>379</sup> *Id.* at 1063.

The court of appeals returned the petitioner's case to the district court for an evidentiary hearing to determine if the agreement for representation had been initiated before or during her criminal trial.<sup>380</sup> It seemed very important to the court that no suggestion be taken from the remand that the prosecutor had done anything wrong.<sup>381</sup> It also seems significant that in *Basham* there had been dealings between the private client and the prosecutor prior to the completion of the criminal case, so the cases might be reconciled. In any event, the cases addressing this issue are relatively few.

Once the criminal case has been completed, there seems to be little risk of "leveraging." Such cases might be governed by a different rule. On the other hand, in a small town, a formal agreement prior to the completion of the criminal case between a private client and a local prosecutor may not be needed to raise, or even to substantiate, a suspicion concerning the existence of "expectations" or tacit agreement.

Finally, I would point out that the language of Model Rule 1.11 is not identical to that of the Model Code's DR 9-101. Model Rule 1.11(a) seems to address only subsequent representation that is adverse to the government.<sup>382</sup> But Model Rule 1.11(b) can be read, at least in some cases, as also prohibiting subsequent representation of a private client which is adverse to a party that he or she prosecuted while in government service.<sup>383</sup> And Model Rule 1.11(c)(2) suggests that a prosecutor ("a lawyer serving as a public officer or employee") may not negotiate for employment with anyone involved in a "matter" while the prosecutor "is participating personally and substantially" in the same "matter."<sup>384</sup> This language would apply to the *Basham* scenario, but would not fit the situation in which there had been no contact or "deal" prior to the termination of the criminal case. In some cases, then, the rulemaker may be left with vague, secondary arguments alluding to appearances, concerns about "business-getting," the use of the

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<sup>380</sup> *Id.*

<sup>381</sup> *Id.* I do not know what the arguments of counsel were or whether cases like *Basham* were briefed.

<sup>382</sup> See *supra* note 364 and accompanying text. *But see* AM. LAW. CODE OF CONDUCT, *supra* note 92, § 9.14, cited *supra* note 327.

<sup>383</sup> MODEL RULE, *supra* note 3, Rule 1.11(b); see *supra* notes 358, 362, and 365; WOLFRAM, *supra* note 8, § 7.6.4.

<sup>384</sup> MODEL RULES Rule 1.11(c)(2).

information-generating capacity of public office for private gain,<sup>385</sup> and so on.

### C. *Parallel Cases on Behalf of the Government*

In *Young v. United States ex rel. Vuitton et Fils S.A.*,<sup>386</sup> the United States Supreme Court held that the lawyer for an interested private party should not serve as special prosecutor in a contempt case.<sup>387</sup> The rationale of the case has been applied to criminal contempt prosecutions based on alleged violations of injunctions obtained by government agencies, although the "interested" prosecutor works for the government rather than for a private party. In *United States ex rel. SEC v. Carter*,<sup>388</sup> the Court of Appeals for the Fifth Circuit found it objectionable that SEC attorneys who had been involved in the underlying civil case, rather than the U.S. Attorney, had control of the contempt prosecution.<sup>389</sup> Furthermore, the court suggested that certain conduct, or rather misconduct, on the part of the SEC lawyers in the case raised serious doubts about their ability to perform disinterestedly as prosecutors. The court also alluded to language in *Young* that warned of the possibility that a prosecutor's interest "theoretically could . . . create[] temp-

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<sup>385</sup> The notion seems to be that a prosecutor may get the benefit of an inside track. See MODEL RULES, *supra* note 3, Rule 1.11(b), (e); New Jersey Op., *supra* note 130, 634 (1989), ABA/BNA Man., *supra* note 8, 801:5811 (stating that lawyer who prosecuted defendant for fraud and theft and who had "confidential information" regarding the matter may not represent fraud victim in later civil case arising from the same facts); Texas Op., *supra* note 236, 332 (1967), MARU, *supra* note 8, No. 7256 (Supp. 1970), states that a prosecutor may not take a civil case arising out of a matter that is the subject of a criminal investigation or prosecution within the prosecutor's district, but exceptions may be made if the prosecutor "has fully performed and terminated his duty" and has gained "no confidential information."

<sup>386</sup> 481 U.S. 787 (1987) (finding contempt for an alleged violation of an injunction obtained in a trademark case). See *supra* notes 334-41 and accompanying text; see also *In re Sasson Jeans Inc.*, 104 B.R. 600, 608-09 (S.D.N.Y. 1989) (lawyer for trustee in bankruptcy should not be appointed to prosecute contempt actions in bankruptcy proceedings). *But see* Person v. Miller, 854 F.2d 656, 663 (4th Cir. 1988) (allowing counsel for private, interested party to assist so long as government retains actual control of prosecutorial decisions), *cert. denied*, 489 U.S. 1011 (1989); Commonwealth v. Hubbard, 777 S.W.2d. 882, 883-84 (Ky. 1989) (holding that victim's lawyer may serve as private prosecutor because *Young* invoked only the "supervisory authority" of the Supreme Court over the federal courts, and because private prosecutor may not become involved in any civil matter related to the prosecution).

<sup>387</sup> *Young*, 481 U.S. at 790.

<sup>388</sup> 907 F.2d 484 (5th Cir. 1990).

<sup>389</sup> *Carter*, 907 F.2d at 488.



tation to use the criminal investigation to gather information of use in . . . [a parallel civil] suit[. . . ]"<sup>390</sup>

Similar questions of misuse of power have been raised from time to time in cases in which a staff lawyer for a government agency has appeared in criminal proceedings (for example, before a grand jury) as a prosecutor in order to present evidence relating to a matter or matters investigated for his or her agency. Some cases have suggested that such "double hatting" may involve a conflict of interest or "over-prosecution," or may give rise to an appearance of impropriety.<sup>391</sup> The majority of cases have refused to disqualify agency counsel in the absence of an actual conflict or investigatory misconduct.<sup>392</sup> To date, conflicts or abuses of this nature have not attracted much attention at the state level.

#### D. Release-Dismissal Agreements

A release-dismissal agreement is an agreement offered by a prosecutor conditioning a *nolle prosequi* or dismissal of charges on a release of civil claims against the arresting officers or the governmental entity employing them. To the extent that interests other than those of the public are being served by such agreements, it would seem that they involve a rather obvious potential for conflict.<sup>393</sup> Furthermore, if the charges to be dismissed are insub-

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<sup>390</sup> *Id.* at 486 (citation omitted); *cf.* *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 312-13 (1978). *But see* *FTC v. American Nat'l Cellular*, 868 F.2d 315, 320 (9th Cir. 1989) (refusing disqualification where participation of the FTC lawyers who handled the civil suit was not substantial).

<sup>391</sup> *In re Grand Jury Subpoenas (GM Corp.)*, 573 F.2d 936 (6th Cir. 1978), *on rehearing*, 584 F.2d 1366 (6th Cir. 1978), *cert. denied*, *GM Corp. v. United States*, 440 U.S. 934 (1979). *Cf.* *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 419 (1983) (refusing to allow attorneys for the Civil Division of the Justice Department to obtain automatic [FED. R. CRIM. P. 6(e)(3)(A)(i)] disclosure of grand jury materials for use in a civil suit); *see also* *United States v. Bernhardt*, 831 F.2d 181 (9th Cir. 1987), which raises questions about possible abuses of the "cross-designation" of federal and state prosecutors by way of temporary assignments and joint investigations.

<sup>392</sup> *In re Paul Perlin*, 589 F.2d 260 (7th Cir. 1978); *United States v. Dondich*, 460 F. Supp. 849 (N.D. Cal. 1978), *aff'd*, *United States v. Mays*, 646 F.2d 369 (9th Cir.), *cert. denied*, *Dondich v. United States*, 454 U.S. 1127 (1981). GERSHMAN, *supra* note 6, § 2-53, places these among the "better reasoned" cases, but collects other cases in which specific misconduct justified disqualification or other intervention, such as dismissal of indictments.

<sup>393</sup> *In Town of Newton v. Rumery*, 480 U.S. 386 (1987), Justice O'Connor criticized deals in which "public criminal justice interests are explicitly traded against the private financial interest of the individuals involved in the arrest and prosecution." *Id.* at 400 (O'Connor, J., concurring in part and concurring in judgment). On the other hand, a lawyer employed by a city is not automatically disqualified from representing both the city and individual officers and employees who are co-defendants in a § 1983 suit. *See* *Petition for Review of Opinion 552*, 507 A.2d 233 (N.J. 1986). Proof of an actual conflict may be required before a court will disqualify counsel.

stantial, "leveraging" the person charged in an effort to force him or her to surrender substantial rights is hard to square with either DR 7-103(A) or DR 7-105<sup>394</sup> or Model Rule 3.8(a).<sup>395</sup> Although such an agreement may be voidable on grounds of duress, it may be upheld in specific circumstances. In *Town of Newton v. Rumery*,<sup>396</sup> the United States Supreme Court held that a dismissal agreement releasing claims under section 1983 is not per se invalid.<sup>397</sup> This decision was immediately condemned by the commentators,<sup>398</sup> and attempts have been made to "reverse" it by way of amendments to the ethics codes. The American Lawyer's Code of Conduct provides:

A lawyer serving as a public prosecutor shall not condition a dismissal, nolle prosequi, or similar action on an accused's relinquishment of constitutional rights, or of rights against the government, a public official, or any other person, other than

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<sup>394</sup> MODEL CODE, *supra* note 16, DRs 7-103(A), 7-105. The latter position forbids "a lawyer" (no exception for prosecutors) from presenting or threatening to present criminal charges solely to obtain an advantage in a civil manner. Kentucky's Rule of Professional Conduct 3.4(f) retains this rule, although the ABA Model Rules do not (at least not explicitly). Model Code EC 7-21 (1981) elaborates at some length:

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

A good illustration of these rules can be found in *Stark County Bar Ass'n v. Russell*, 495 N.E.2d 430 (Ohio 1986). In this case the part-time prosecutor represented the plaintiff in a slander suit. In the course of taking a deposition in the case, and presumably in aid of it, he threatened the deponent, suggesting that if he "got smart" he "[wouldn't] get out of [] town." After the deposition, the deponent responded by remarking that he "would nail [the lawyer's] posterior to the wall," additional threats were exchanged, and the prosecutor brought criminal charges for "aggravated menacing." The threats during the deposition were found to have violated MODEL CODE DR 7-105 (threatening to present criminal charges solely to gain an advantage in a civil matter), and the subsequent charges violated MODEL CODE DR 7-103(A) (instituting criminal charges with knowledge that the charge is not supported by probable cause). *Russell*, 495 N.E.2d at 431-32.

<sup>395</sup> MODEL RULES, *supra* note 3, Rule 3.8(a).

<sup>396</sup> 480 U.S. 386 (1987).

<sup>397</sup> *Id.* at 397-99.

<sup>398</sup> See, e.g., discussion in FREEDMAN, *supra* note 14, at 225-27; cf. ALAN DERSHOWITZ, *THE BEST DEFENSE* 279-88 (1982) (comparing release-dismissal agreements with wrongful psychiatric commitment).

relinquishment of those rights inherent in pleading not guilty and proceeding to trial.<sup>399</sup>

The critics may protest too much. A plurality of justices seemed to place the burden of proof on the issue of a release-dismissal agreement's validity on the prosecutor,<sup>400</sup> and the court did not purport to say anything definitive on the matter of legal ethics.<sup>401</sup> Indeed, several justices alluded to the fact that there might be ethical implications in individual cases.<sup>402</sup>

In fact, release-dismissal agreements have been ruled unethical by some state bar committees and courts both before<sup>403</sup> and after<sup>404</sup> *Town of Newton v. Rumery*. Furthermore, it seems that the public interest may be served by a release-dismissal agreement in a specific case.<sup>405</sup>

### VIII. IMPUTED DISQUALIFICATION

Throughout this Article, ethics opinions and cases have been cited which have involved the disqualification of not only individual prosecutors, but other lawyers associated with the prosecutor in his or her public office or private law firm.<sup>406</sup> Such imputed or vicarious disqualification has become a hot issue as lawyers and

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<sup>399</sup> AM. LAW. CODE OF CONDUCT, *supra* note 92, Rule 9.6. According to Professor Freedman, an amendment to the Model Rules similar to Rule 9.6 was rejected in the District of Columbia. FREEDMAN, *supra* note 14, at 227 n.70.

<sup>400</sup> *Rumery*, 480 U.S. at 399-400 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>401</sup> Such matters have been left to state law, have they not?

<sup>402</sup> *Rumery*, 480 U.S. at 394-96, 413-14 (Stevens, J., dissenting).

<sup>403</sup> See Colorado Bar Ass'n Ethics Comm. Op. 62 (1982), ABA/BNA Man., *supra* note 8, 801:1903; Oregon Op., *supra* note 262, 483 (1983), ABA/BNA Man. 801:7111; Virginia Op., *supra* note 121, 131 (1963), MARU, *supra* note 8, No. 4499 (1970). Cases include *Boyd v. Adams*, 513 F.2d 83 (7th Cir. 1975); *McDonald v. Musick*, 425 F.2d 373 (9th Cir. 1970); *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968); *Hoines v. Barney's Club, Inc.*, 620 P.2d 628 (Cal. 1980) (release upheld).

<sup>404</sup> See *New Jersey Op.*, *supra* note 130, 661 (1991) (improper per se for prosecutor to condition acceptance of a guilty plea on a waiver of civil rights claims); Oregon Op., *supra* note 262, 516 (1988), ABA/BNA Man., *supra* note 8, 901:7104 (holding that such agreements may be unethical, but also holding that they are not unethical per se because there may be probable cause, charges are not "threatened" because they are already pending, and the defendant's rights are not violated if his or her consent is fully informed and voluntary).

<sup>405</sup> While the prosecutor does not represent the individual police officer or other official subject to a potential civil claim, it does not necessarily follow that he represents or ought to represent the interests of the claimant, or that the claimant's interests are congruent with the public interest. Cf. MODEL RULES, *supra* note 3, Rule 1.13.

<sup>406</sup> See *supra* notes 272-79 and accompanying text.

courts have become more aware of prosecutors' conflicts of interest.

### A. *The Prosecutor's Office as a Firm*

Lawyers in private practice are familiar with imputed disqualification of a lawyer's partners, associates, or affiliates.<sup>407</sup> It is presumed that lawyers within a firm share information about their cases and experiences, or at least have access to such information. A common economic interest will bolster a common interest in winning particular cases, and this will in turn increase the incentive to share information.<sup>408</sup> For present purposes the theoretical question is whether these same opportunities and incentives are present in the prosecutor's office. Should we treat it as a law firm for purposes of the conflicts rules?

The ABA Code was silent on this issue. The Model Rules were not silent, but they were not particularly bold. Professor Wolfram points out that "interoffice imputed disqualification is not imposed under Model Rule 1.11 for governmental law offices."<sup>409</sup> Furthermore, neither the definition of "Firm" in the "Terminology" section of the Rules nor the comments to Rule 1.10 (Imputed Disqualification) mention the prosecutor's office directly.<sup>410</sup> This has left the courts and ethics committees to reason by analogy, and the courts and ethics committees have, for the most part, leaned in the direction of flexibility.

In marked contrast to the Rules, the Restatement refers specifically to prosecutors' offices in comments to section 203<sup>411</sup> that

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<sup>407</sup> "Affiliates" is a term that was added to the Model Code DR 5-105(D) (1981) to sweep up new forms of association. Cf. ABA Op., *supra* note 75, 84-351 (1984), ABA/BNA Man., *supra* note 8, 801:121; Kentucky Op., *supra* note 4, E-311 (1986), ABA/BNA Man. 901:3901 (3-part test for existence of affiliation).

<sup>408</sup> See MODEL RULES, *supra* note 3, Rule 1.10 cmts. (discussing lawyer's loyalty to the firm).

<sup>409</sup> WOLFRAM, *supra* note 6, § 7.6.5 (citing MODEL RULES, *supra* note 3, Rule 1.11(c) cmt. 9: "Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated").

<sup>410</sup> Reference is made to "legal department[s] of . . . corporation[s] or other organizations" and to "legal services organization[s]." MODEL RULES, *supra* note 3, Rule 1.10.

<sup>411</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 203 (Tentative Draft No. 4, 1991) provides:

Unless all affected clients consent to the representation under the limitations and conditions provided in § 202 or unless imputation hereunder is removed as provided in § 204, the restrictions upon a lawyer imposed by §§ 207-214 also restrict other lawyers who:

take the position that "if prosecutors commonly discuss cases with each other and have physical access to each other's files," then disqualification is imputed.<sup>412</sup> However, if there is no such access, then the question is whether the lawyers work for the same "organization".<sup>413</sup>

If prosecutors' offices are organized by county . . . the county ordinarily should be regarded as the common organizational employer; if an assistant prosecutor in the county is prohibited from acting, all other prosecutors in that county should be prohibited as well. If, instead, prosecutors . . . were coordinated from a central statewide office, even the fact that members of the office were physically assigned across the state in geographically separate offices might not eliminate the imputation because of the incentive and opportunity to advance the interests of the prosecuting agency.<sup>414</sup>

The Restatement methodology is softened and flexibility is provided by the availability of "screening" ("procedures for removal of imputation") in section 204,<sup>415</sup> which "can help minimize

(1) Are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association;

(2) Are employed with that lawyer by an organization to render legal services either to that organization or to others to advance the interests of the organization; or

(3) Share office space under circumstances that fail to assure that confidential client information will not be available to other lawyers in the shared office.

<sup>412</sup> *Id.* § 203 cmt.

<sup>413</sup> *Id.* § 203(2).

<sup>414</sup> *Id.* § 203 cmt. (d)(iii).

<sup>415</sup> Section 204 provides, with regard to "removing imputation":

The restrictions upon an affiliated lawyer specified in § 203 do not restrict that lawyer when:

(1) The affiliation between the lawyer and the personally-prohibited lawyer that created the imputed prohibition has been terminated and no confidential information of the client, material to the matter, has been communicated to the lawyer or any other lawyer who remains affiliated with the lawyer;

(2) The restriction is of representation adverse to a former client as provided in § 213 and there is no reasonable prospect that confidential information of the former client will be used with material adverse effect on the former client because:

(a) The confidential client information communicated to the personally-prohibited lawyer is not likely to be significant in the later case;

(b) Adequate screening measures are in effect to eliminate involvement by the personally-prohibited lawyer in the representation; and

(c) Timely and adequate notice of the screening has been provided to all affected clients; or

otherwise serious practical problems for the operation of a prosecutor's office."<sup>416</sup>

The most common scenario raising the issue of imputed disqualification in the prosecutor's office involves the hiring of a new prosecutor who has been representing a criminal defendant or has represented a defendant in the past, and who is now personally disqualified from prosecuting the former client.<sup>417</sup> Professor Wolfram identifies three possible solutions: (1) strict imputed disqualification to all members of the prosecutor's office, (2) disqualification of only those prosecutors in the same office who are subordinate to the disqualified prosecutor, and (3) no imputed disqualification if adequate screening is implemented.<sup>418</sup> The Restatement opts for

(3) The restriction is of a representation prohibited as provided in § 214 and:

(a) Adequate screening measures are in effect to eliminate involvement by the personally-prohibited lawyer in the representation; and

(b) Timely and adequate notice of the screening has been provided to the appropriate government agency.

<sup>416</sup> *Id.* § 204. The Restatement allows private firms considerable leeway to screen. So have the courts. See *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222 (6th Cir. 1988); see also *UNDERWOOD & FORTUNE*, *supra* note 8, § 3.8.4. In this regard prosecutors are not really getting the benefit of special rules or special treatment.

<sup>417</sup> See *supra* notes 268-316 and accompanying text.

<sup>418</sup> *WOLFRAM*, *supra* note 8, § 7.6.5. Recent cases include *People v. Hernandez*, 286 Cal. Rptr. 652 (Cal. App. 1991) (no disqualification of entire 900-person office when some members prosecuted defendant who was state's witness in another case); *People v. Spreitzer*, 525 N.E.2d 30, 38 (Ill. 1988) (no per se conflict that would justify reversal of conviction), *cert. denied*, 112 S. Ct. 594 (1991); *State v. McKibben*, 722 P.2d 518, 525-26 (Kan. 1986) (noting that no per se office disqualification has been required in majority of states); *Aldridge v. State*, 583 So. 2d 203, 205 (Miss. 1991) (failure to screen a newcomer led to disqualification of the entire office); *State v. Camacho*, 406 S.E.2d 868, 873-75 (N.C. 1991) (disqualification should only be extended to lawyers who have been exposed to protected (former client) information); *State v. Stenger*, 760 P.2d 357, 360-61 (Wash. 1988) (when the disqualified lawyer is chief prosecutor and makes no effort to screen, entire office should be disqualified); *Banton v. State*, 475 N.E.2d 1160, 1163-64 (Ind. Ct. App. 1985) (disqualifying entire prosecutor's staff when the prosecutor had defended co-defendant while serving as public defender). Other cases involving the disqualification of entire offices include *People v. Doyle*, 406 N.W.2d 893 (Mich. 1987); *State v. Chambers*, 524 P.2d 999 (N.M. App. 1974), *cert. denied*, 524 P.2d 988 (N.M. 1974); *State v. Cooper*, 409 N.E.2d 1070 (Ohio C.P. 1980); *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 5 (Tex. Crim. App. 1990) (disqualification of entire office was error).

Recent ethics opinions on the issue include *Illinois Op.*, *supra* note 141, 88-2 (1988), *ABA/BNA Man.*, *supra* note 8, 901:3008 (discussing the details of "effective" screening); *West Virginia Op.*, *supra* note 64, 85-2 (1985), *ABA/BNA Man.* 801:9005 (rejecting imputed disqualification in the context of government lawyers—"a prosecutor's office is not a 'law firm' within the meaning of the Code"—but with caveats); *Wisconsin Op.*, *supra* note 117, E-86-15 (1986), *ABA/BNA Man.* 901:9103 (good discussion of the "mechanics" of making the move and screening); *Wisconsin Op.* E-86-18 (1986), *ABA/BNA Man.* 901:9104 (neither newly elected district attorney nor member of his staff may prosecute cases of which the

the screening solution, without regard to the size of the particular office. Illustration 8 to section 203 provides:

Assistant Prosecutor A, who has recently joined a county prosecutor's office, represented Defendant at a preliminary hearing in a pending case while in private practice. Assistant prosecutor B, a member of the same county prosecutor's office, has been assigned to prosecute Defendant in the same matter. Unless imputation is removed pursuant to § 204, B is disqualified from doing so because A would be prohibited from prosecuting Defendant. A prosecutor in an adjoining but jurisdictionally distinct county ordinarily would, however, be permitted to act.<sup>419</sup>

In my opinion, this solution is reasonable for large counties, but may be overly liberal for small rural counties with as few as two prosecutors per office. The leading Kentucky case, *Summit v. Mudd*,<sup>420</sup> which adopted a liberal screening solution, involved the large prosecutor's office in Jefferson County (Louisville). However, prosecutors and members of the Attorney General's staff have, in my experience, contended that *Summit v. Mudd* established a rule that applies in all circumstances, regardless of the level of authority of the prosecutor having the conflict, and regardless of the size of the prosecutor's office.<sup>421</sup>

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district attorney had actual knowledge prior to resigning his public defender position!).

A committee may not look as favorably on screening when a prosecutor takes a conflict to a defense firm or to a public defender's office. See Alabama Op., *supra* note 119, 89-84 (1989), ABA/BNA Man. 901:1058 (stating that when prosecutor goes to private firm, firm may not handle appeal of defendant prosecuted by newcomer, and screening disallowed in this context); Alabama Op. 87-106 (1987), ABA/BNA Man. 901:1030 (allowing prosecutor who goes with firm to complete files as "special assistant prosecutor," but not allowing firm to do any criminal work). But see Arizona Op., *supra* note 200, 80-19 (1980), ABA/BNA Man. 901:8102 (allowing screening when former prosecutor hired by public defender's office).

<sup>419</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 203 illus. 8 (Tentative Draft No. 4, 1991).

<sup>420</sup> 679 S.W.2d 225, 226 (Ky. 1984). In this case, the prosecutor's office hired a public defender, and the new prosecutor's former client moved to disqualify the entire prosecutor's office. The court declined the invitation, probably out of fear of discouraging the hiring of competent and experienced practitioners for public service. *Summit v. Mudd* at least partially overrules Kentucky Op., *supra* note 4, E-124 (1975), MARU, *supra* note 8, No. 11,100 (Supp. 1980), which opted for the "traditional" rule of across-the-board imputed disqualification.

For a federal case in the Sixth Circuit, see *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981), *cert. denied*, 454 U.S. 1149 (1982).

<sup>421</sup> If screening (no matter how ineffective and empty a ritual) solves the problem, then no special prosecutor need be supplied. For cases and opinions rejecting screening in the small office see *Turbin v. Arizona Sup. Ct.*, 797 P.2d 734 (Ariz. App. 1990) and Wisconsin

### B. *The Prosecutor's Private Firm*

In spite of tolerant court opinions allowing screening when the disqualification of an entire prosecutor's office is the issue<sup>422</sup> and recent cases encouraging lawyers in private firms to serve as "voluntary" prosecutors,<sup>423</sup> there are still some limits to the confusion of public and private roles. At least that is so according to the case of *State v. Ross*.<sup>424</sup> In that case, the client hired a private law firm to defend him in a civil action based on an alleged assault. Unfortunately, the client was also being prosecuted in criminal court for the same conduct. The client was not aware of the fact that his lawyer was also a part-time prosecutor, and that another member of the same firm had filed the criminal complaint against him.<sup>425</sup> Citing Rules 1.7, 1.10, and 1.11, the Supreme Court of Missouri not only reversed the client's conviction, but also ordered that the entire prosecutor's office be disqualified from participating in any retrial of the case.<sup>426</sup>

In short, courts and ethics committees are probably not going to create exceptions or exhibit flexibility when the question relates to the disqualification of members of the prosecutor's private firm. In a recent Kentucky opinion, the committee stated:

A prosecutor's conflicts are imputed to his or her partners and associates in private practice. See Rule 1.10. See also DR 5-105(D) and KBA E-64 [(1973)]. It is no "solution" that the prosecutor has passed the civil representation off to another member of his [or her] private firm. *Summit v. Mudd* [679 S.W.2d 225 (Ky. 1984)] is not to the contrary. That case held that a former defense lawyer who moved to an urban prosecutor's office and was personally disqualified from prosecuting his former client, did not pass the taint of disqualification onto other members of the

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Op., *supra* note 117, E-86-8 (1986), ABA/BNA Man., *supra* note 8, 901:9102. In Tennessee Op., *supra* note 190, 87-F-111 (1987), ABA/BNA Man. 901:8102, the committee stated that "office" disqualification would have to be considered on a "case-by-case" basis.

<sup>422</sup> See cases cited *supra* notes 418-20.

<sup>423</sup> See cases cited *supra* notes 193-94.

<sup>424</sup> 829 S.W.2d 948 (Mo. 1992).

<sup>425</sup> *Id.* at 949.

<sup>426</sup> *Id.* at 951-52 (citing MODEL RULES, *supra* note 3, Rules 1.7, 1.10, 1.11). For disqualification from a different direction see *State v. Detroit Motors*, 163 A.2d 227 (N.J. 1960), in which someone else in the prosecutor's private firm had represented the defendant in a related civil matter, and the court disqualified the prosecutor from the criminal case. This case is collected with others in Griffin, *supra* note 6. See also Virginia Op., *supra* note 121, 562 (1984), ABA/BNA Man., *supra* note 8, 801:8823 (extending bar on prosecution by commonwealth's attorney to attorney's close associate).



prosecutor's office. That case does not authorize "hand-offs" in the context of a prosecutor's private law firm, nor does it authorize "screening" generally.<sup>427</sup>

Efforts by elected prosecutors to manipulate appearances or structure their relationships with private firms in order to avoid conflicts or rules against private practice are almost certain to fail, and to cause embarrassment.<sup>428</sup> Lawyers have successfully eliminated conflicts by dissolving a partnership, but that seems a very heavy price to pay to keep a case.<sup>429</sup>

### C. Office Sharing

In Kentucky,<sup>430</sup> as in many states, office sharers are affected by imputed or vicarious disqualification in the same way as partners and associates. The basic documents,<sup>431</sup> like the ABA Rules and the Restatement, may be more liberal. Both of these authorities

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<sup>427</sup> Kentucky Op., *supra* note 4, E-350 (1992), KY. BENCH & BAR, Summer 1992, at 33. See also Kentucky Bar Ass'n v. Marcum, 830 S.W.2d 389 (Ky. 1992), discussed *supra* notes 342-50; Kentucky Bar Ass'n v. Lovelace, 778 S.W.2d 651 (Ky. 1989); AM. LAW. CODE OF CONDUCT, *supra* note 92, § 9.15: "When a lawyer is disqualified from representing a client under Rule 9.14, no partner or associate of the lawyer, and no one with an of counsel relationship to the lawyer, shall represent the client."

<sup>428</sup> See, e.g., Michigan Op., *supra* note 133, CI-521 (1981), ABA/BNA Man., *supra* note 8, 801:4804 (describing disapproved scenarios suggested by a full-time elected prosecutor who hoped to maintain an interest in a private law firm without actually practicing law in the firm).

<sup>429</sup> See the discussion of this possibility in Alabama Op., *supra* note 119, 89-107 (1989), ABA/BNA Man., *supra* note 8, 901:1061. This opinion seems "lawyer favorable" in that it allows the lawyers to maintain an office-sharing arrangement so long as they preserve client confidentiality and do not practice cases together. But see discussion *infra* subpart C.

<sup>430</sup> Kentucky opinions on office-sharing and imputed disqualification include: Kentucky Op., *supra* note 4, E-322 (1987), ABA/BNA Man., *supra* note 8, 901:3903 (defense lawyer may not share with full-time or part-time prosecutor, but may share with prosecutor whose duties are specially limited, and may be tenant in building owned by full-time or part-time prosecutor, with some caveats); Kentucky Op. E-243 (1981), KY. BENCH & BAR, July 1981, at 30 (office sharer with county attorney may not defend criminal cases and may not oppose county); Kentucky Op. E-238 (1981), KY. BENCH & BAR, July 1981, at 28 (office sharer with county attorney may not represent juvenile offenders); Kentucky Op. E-194 (1978), MARU, *supra* note 8, No. 11,166 (Supp. 1980) (office sharer with commonwealth attorney may not defend criminal cases); Kentucky Op. E-187 (1978), MARU No. 11,159 (Supp. 1980) (lawyer may not share office space with judge before whom lawyer appears); Kentucky Op. E-129 (1975), MARU No. 11,105 (Supp. 1980) (county attorney may share office space with a city attorney, with caveats); Kentucky Op. E-128 (1975), MARU No. 11,104 (Supp. 1980) (county attorney may not share office space with police court judge); Kentucky Op. E-44 (1971), MARU No. 8507 (Supp. 1975) (defense lawyer may not share office space with commonwealth attorney).

<sup>431</sup> The most up-to-date version of Model Code DR 5-105(D) (1981) extends imputed disqualification to "any other lawyer affiliated with him or his firm."

appear to recommend a case-by-case or fact-sensitive approach to imputed disqualification in the context of office sharing.<sup>432</sup>

The Rules address office sharing in the definition of what is and is not a "firm" for purposes of imputed disqualification.

Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. . . . [T]wo practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. . . . [I]t is relevant in doubtful cases to consider the underlying purposes of the rule that is involved. A group of lawyers could be considered as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.<sup>433</sup>

The Restatement has this to say about office sharing:

When lawyers share office space, they typically share some common costs such as rent, library, and office salaries, but the lawyers do not often work on common cases and do not share fee income. Section 203(3) governs imputation of conflicts in such arrangements. The key inquiry is whether the physical organization and actual operation of the office is such that the confidential client information of each lawyer is secure from the others. Where such security is provided and where no other plausible risks to confidentiality and loyalty are presented, the conflicts of the lawyers [are] not imputed to each other by reason of their office-sharing arrangement. On the other hand, lawyers who in fact associate in a matter, share fee income, or hold themselves out as partners or members of a professional corporation (even if that is not a fact) are held to the stricter rule applicable to members of a firm.<sup>434</sup>

This "facts and circumstances" approach focusing on access to confidential material is reflected in the ethics opinions of a

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<sup>432</sup> See UNDERWOOD & FORTUNE, *supra* note 8, § 3.8.2.

<sup>433</sup> MODEL RULES, *supra* note 3, Rule 1.10 cmt. 1.

<sup>434</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 203 cmt. e (Tentative Draft No. 4, 1991).

number of states,<sup>435</sup> and some opinions seem quite permissive.<sup>436</sup>

Lawyers may be in the same building without being office sharers. Many committees that are otherwise very conservative on the issue of office sharing concede this point.<sup>437</sup> The Kentucky committee has opined that an attorney who defends criminal cases is not absolutely prohibited from renting office space in a building that is also occupied by a full-time or part-time commonwealth or county attorney if the offices are sufficiently separate.<sup>438</sup> On the other hand, the committee added that the trial strategies or work product of one attorney could be compromised by the knowledge of his or her adversary as to who visits the other's office for appointments. For example, in a particular case, it may be necessary for the defense attorney to consider meeting witnesses undisclosed to the prosecution somewhere other than at the defense lawyer's office.<sup>439</sup>

## IX. PROPOSALS

### A. *Unresolved Questions*

#### 1. *Particular Questions*

At various points in this article, I have questioned the conventional wisdom or pointed out the lack of consensus regarding a particular issue in the law of conflicts of interest. I have not done this because I have any axe to grind. Instead, as a neutral party,

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<sup>435</sup> See, e.g., Ohio Op., *supra* note 143, 83-1 (1983), ABA/BNA Man., *supra* note 8, 801:6828 (finding they are not "associates" within meaning of Ohio version of DR 5-105(D)). *But see* Illinois Op., *supra* note 141, 783 (1982), ABA/BNA Man. 801:3102 (requiring per se disqualification because office-sharing is a DR 5-105(D) "affiliation"); Michigan Op., *supra* note 133, CI-706 (1981), ABA/BNA Man. 801:4833.

<sup>436</sup> See, e.g., Alabama Op., *supra* note 119, 81-543 (1981), ABA/BNA Man., *supra* note 8, 801:1024 (allowing lawyer to accept criminal appointments although he shares facilities such as library with a part-time prosecutor, if they have no access to one another's files). Virginia Op., *supra* note 121, 1416 (1991), ABA/BNA Man. 1001:8705, is in sharp contrast to this Alabama opinion.

<sup>437</sup> See, e.g., Virginia Op., *supra* note 121, 1416 (1991), ABA/BNA Man., *supra* note 8, 8705.

<sup>438</sup> Kentucky Op., *supra* note 4, E-322 (1987), KY. BENCH & BAR, Summer 1987, at 33 question 3.

<sup>439</sup> *Id.*, citing South Carolina Op., *supra* note 142, 85-17 (1985), ABA/BNA Man., *supra* note 8, 801:7919. Some would argue that a landlord-tenant relationship may raise a Model Code DR 5-101 or Model Rule 1.7(b) issue. See *supra* part IV.B.

I would urge that lawyers in each jurisdiction attempt to reach some consensus and then state the rules unequivocally. Based on my experience as a bar association ethics committee chairman, it is my opinion that some issues need to be revisited so that realistic, acceptable answers can be provided to the following questions:

(1) When, if ever, may a part-time prosecutor oppose the state, or a state agency that the prosecutor is not actively representing?

(2) What rules should be applied to municipal attorneys regarding a) criminal defense work and b) representation in opposition to municipal agencies that the prosecutor is not actively representing?

(3) Should part-time prosecutors be precluded from doing domestic relations work?

(4) To what extent should conflicts rules be couched in terms of possibilities and appearances, as opposed to substantial probabilities? What are the roles of good faith and judgment?

(5) Should prosecutors be precluded from taking civil cases against persons that they have prosecuted, when the civil case arises out of the facts underlying the prosecution, but the prosecution has terminated?

(6) Can a general rule or rules be formulated regarding prosecutors and imputed disqualification?

(7) Under what circumstances is "double disqualification" required, and what is the rationale for it?<sup>440</sup>

Perhaps there is less confusion regarding these issues than I suspect. In any event, it would not hurt to have answers in the form of a readily available supplement to the Rules of Professional Conduct.

## 2. *Provision of Special Prosecutors: The Question of Double Disqualification*

Both the ABA Standards<sup>441</sup> and the (NDAA) National Prosecution Standards<sup>442</sup> allude to the desirability of having some mech-

<sup>440</sup> See *infra* notes 441-55 and accompanying text.

<sup>441</sup> CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standards 3-2.2(e) and 3-2.10(b).

<sup>442</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 21, Standard 3.2 provides:

(A) Determination of Need

The prosecuting attorney shall have the discretion to petition the court to assign a special prosecutor in cases where recognizable or potential conflicts of interest exist in the prosecuting attorney's opinion.

anism in place for the appointment of special prosecutors to take over prosecutions when local prosecutors face conflicts. Kentucky law<sup>443</sup> provides that a local prosecutor may request that the attorney general direct<sup>444</sup> another commonwealth or county attorney or an assistant attorney general to take over a prosecution if the local prosecutor is "conflicted out." However, none of these standards explicitly directs the prosecutor to decline or withdraw from any private work because of a conflict.<sup>445</sup> Many prosecutors seem to believe that the best approach to conflicts is to take the private case and shirk the public duty. The argument seems to be that the case on behalf of the private client may be kept if a special prosecutor can be secured. If there is any doubt as to whether a case should be taken or declined, the case will be taken, and a request for an advisory opinion will go to the ethics committee.<sup>446</sup> The corollaries seem to be that the ethics committee must make the decision and order the prosecutor to drop the private work,<sup>447</sup> or better yet, that the attorney general must provide a special prosecutor so that the local prosecutor may attend to his or her private practice.

This does not seem like a very good way to run a railroad. It would be much more desirable if prosecutors placed the priority on their public work. The commentary to National Prosecution Standard 1.3(A) sums up the problem:

(B) Utilization

The special prosecutor shall have the authority to deal only with the case assigned by the prosecuting attorney.

<sup>443</sup> KY. REV. STAT. ANN. § 15.733(4) (Michie/Bobbs-Merrill 1991).

<sup>444</sup> KY. REV. STAT. ANN. § 15.730 (Michie/Bobbs-Merrill 1991) ("Commonwealth's attorneys and county attorneys as special prosecutors") makes each regular commonwealth's attorney and county attorney an ex officio special prosecutor of the commonwealth who may be assigned outside of his or her judicial circuit or district. However, the Attorney General has taken the position that upon noticing a conflict the local prosecutor should make an attempt to arrange with another county attorney or commonwealth attorney to serve as special prosecutor before making the statutory written certification requesting assignment of a special prosecutor by the Attorney General. Ky. Op. Att'y Gen. 83-206 (1983).

<sup>445</sup> See *supra* note 97 and accompanying text; see also Missouri Inf. Op., *supra* note 8, 5 (1977), MARU, *supra* note 8, No. 11,778 (Supp. 1980) (setting sympathetic guidelines for a wide variety of hypothetical (but very common) situations that allow prosecutors to "conflict out" of criminal prosecutions and still keep their civil cases).

<sup>446</sup> See *supra* note 4 and accompanying text.

<sup>447</sup> A "stop me before I kill again!" approach to professional responsibility. Cf. Ky. SUP. CT. R. 3.130, Rule 1.7 cmt. 14 (Michie/Bobbs-Merrill 1992): "Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation."

[T]here is a great risk that the part-time prosecutor will not give sufficient energy and attention to his official duties. Since his salary is a fixed amount, and his total earnings depend on what he can derive from his private practice, *there is continuing temptation to give priority to private clients.*<sup>448</sup>

One might rely on the voters to throw out elected prosecutors who don't perform their public duties, and who seem to rely too heavily on special prosecutors. But voters often don't understand what is going on or don't care. Some critics report seeing prosecutors in rural Kentucky counties who view defendants and victims as not only potential voters but potential clients, who should be catered to. Some go further and claim that there is a systemic conflict of interest in any system that relies so heavily on part-time prosecutors, since a prosecutor's actions are all too often driven by a desire to please everyone—to “work things out”—rather than take a hard line when it is needed. In some parts of the state, rumors, presumably unfounded, abound about prosecutors. Does the need to get along jeopardize appropriate prosecutorial zeal?<sup>449</sup>

It must also be admitted that tactical disqualification motions can be a problem. But sometimes disqualification is invited. It has been reported that some part-time prosecutors are generous in their definition of “present client,” and that many a DUI repeat offender has played the game of always having some kind of legal matter entrusted to the county attorney. After all, it is not always easy to get a special prosecutor to venture into the big woods. While everyone waits, cases are consigned to limbo.

The Kentucky Supreme Court seemed to be addressing the problem of priority in *Kentucky Bar Ass'n v. Lovelace*.<sup>450</sup> In a passage that most prosecutors seem bent on ignoring, the court opined that “[i]n the future, whenever a public prosecutor deems it necessary to [obtain a special prosecutor because of an apparent conflict], he should also withdraw from any other case, civil or criminal, arising out of the same transaction or occurrence.”<sup>451</sup> Elsewhere, the court returned to this theme:

A prosecutor must decline employment in any civil action when there is a reasonable probability that any criminal prosecution

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<sup>448</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 21, Standard 1.3(A) (emphasis added).

<sup>449</sup> See CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standard 3-2.8(d), cited in text accompanying note 150 *supra*.

<sup>450</sup> 778 S.W.2d 651 (Ky. 1989).

<sup>451</sup> *Id.* at 653.

might arise from the circumstances of the case. If after accepting employment in a civil matter, a criminal prosecution arises from the circumstances of the case the prosecuting attorney must withdraw from the civil proceeding and disqualify himself from handling the prosecution.<sup>452</sup>

This double disqualification is not explicitly required by the Rules of Professional Conduct<sup>453</sup> or by Kentucky Revised Statute section 15.733.<sup>454</sup> Furthermore, it is not clear whether the Court intends to apply the same rule in all conflicts scenarios.<sup>455</sup> Indeed, the Court did not spell out any rationale for double disqualification. My guess is that the Court wants to remove the incentive for prosecutors to drop public work (by passing it off to special prosecutors) in order to pursue private work, and wants to dispel the perception that prosecutors are using the office for personal advantage. Certainly, one way to do that is to make the prosecutor drop any related civil case when he or she opts out or is forced out of a criminal case. Can we fashion a more flexible solution? If we did, would it not simply invite abuse and evasion?

## *B. New Guidelines for the Prosecutor*

### *1. Standards*

Professor Uviller put his finger on the legislative problem when he observed that: "Concededly, a hard choice must be made in framing ethical standards. The formulation must be either broad and open, in which case it is indefinite and difficult to enforce, or it must be detailed and specific, in which case it is long but rarely complete."<sup>456</sup>

In my experience, prosecutors need something more detailed. Furthermore, they need (and they will only follow) something more

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<sup>452</sup> *Id.* at 653-54.

<sup>453</sup> Logically, one might argue that the prosecutor could keep the civil case and refrain from prosecuting, or (assuming that the prosecution is not against the prosecutor's client, in which case Rules 1.6 and 1.9 would come into play) prosecute and withdraw from the civil case. *But see* Kentucky Op., *supra* note 4, E-257 (Question 1) (1982), KY. BENCH & BAR, July 1982, at 44 (requiring double disqualification in some circumstances).

<sup>454</sup> *See supra* note 443 and accompanying text.

<sup>455</sup> The opinion refers to "same transaction or occurrence" scenarios. Kentucky Bar Ass'n v. Lovelace, 778 S.W.2d at 653. What should happen if the conflict arises in the context of unrelated cases?

<sup>456</sup> Uviller, *supra* note 6, at 1163.

available and more authoritative than an ethics opinion. They need a supplementary code drafted by a representative body. The ABA Standards for Criminal Justice (The Prosecution Function) Standard 3-1.1(d) seems to invite state bar associations or advisory councils to formulate such guidelines: "The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.4."<sup>457</sup>

As an academic lawyer who teaches "legal ethics," and as a member of a state bar ethics committee, I would urge the high court of every state that relies on part-time prosecutors to consider appointing a special committee to formulate such guidelines. I hope that the codes, cases, proposals and materials in this Article will provide some useful background material. I would also hope that any special standards will conform as closely as possible to the rules that apply to all other lawyers.<sup>458</sup> It would be far better to switch to a system of full-time prosecutors than to accommodate part-time prosecutors by watering down sound rules to facilitate the seizing of perceived practice opportunities.<sup>459</sup>

## 2. *Special Ethics Committee*

As a "part-time" chairman of a state bar ethics committee, and as an academic lawyer who has handled few criminal matters (none as a prosecutor), I am also keenly aware of the limitations of advisory opinions and hotlines.<sup>460</sup> One question that occurs to me is whether it might not make more sense for prosecutors to have their own advisory ethics committee. The drafters of the ABA Standards for Criminal Justice proposed that each state establish "a state council of prosecutors" within each state,<sup>461</sup> and also

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<sup>457</sup> CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standard 3-1.1(d); *see also id.* Standard 3-2.5: "Prosecutor's Handbook; Policy Guidelines and Procedures" (each office should develop policy and procedure handbook).

<sup>458</sup> *See infra* notes 464-66 and accompanying text.

<sup>459</sup> Many times have I been stopped at a Bar Association meeting and chastised by a young lawyer for denying him or her "opportunities" by inventing these peculiar rules. It is simply no use trying to explain that I neither legislate nor enforce. *Cf. Lawlines v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992) (finding that ethics rules violate neither antitrust statutes nor civil rights). Nor have I had any luck convincing the children of the 80s that there is more to life than market forces. It's hard to be an Ethics Chairman. *See Underwood, supra* note 2, at 125. "Blow, blow, thou winter wind, thou art not so unkind as Man's [or Woman's] ingratitude." WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 7.

<sup>460</sup> Underwood, *supra* note 2, at 169-76.

<sup>461</sup> CRIM. JUST., PROSECUTION FUNCTION, *supra* note 19, Standard 3-2.2(c) [Interrelationship of Prosecution Offices Within a State]: "A state council of prosecutors should be established in each state."



recommended that each state have an "advisory council on professional conduct":

(a) In every jurisdiction an advisory body of lawyers selected for their experience, integrity, and standing at the trial bar should be established as an advisory council on problems of professional conduct in criminal cases. This council should provide prompt and confidential guidance and advice to lawyers seeking assistance in the application of standards of professional conduct in criminal cases.

(b) Communications between a lawyer and such an advisory council should have the same privilege for protection of the client's confidences as exists between lawyer and client. The council should be bound by statute or rule of court in the same manner as a lawyer is bound not to reveal any disclosure of the client except

(i) if the client challenges the effectiveness of the lawyer's conduct of the case and the lawyer relies on the guidance received from the council, and

(ii) if the lawyer's conduct is called into question in an authoritative disciplinary inquiry or proceeding.<sup>462</sup>

Kentucky has a "Prosecutors' Advisory Council," which is responsible both for "the preparation of the budget of the unified prosecutorial system" and for prosecutors' continuing legal education.<sup>463</sup> One assumes that this body corresponds, in some measure, to the "state council of prosecutors" alluded to in the ABA Standards. Kentucky has no special "advisory council on professional conduct in criminal cases."<sup>464</sup>

I think that it might be helpful to have such a special ethics committee in my state. It would cut the workload heaped on the ethics committee and hotline volunteers, and the members of such a special committee would have a better understanding of the work assigned to part-time prosecutors. Of course, there is a down side to all of this. There is much to be said for consistency, and it is not desirable to have separate committees running amok, issuing bizarre new interpretations of the Rules. Ethics committees representing specialists have been known to become a bit partisan, even

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<sup>462</sup> *Id.* at Standard 4-1.4 ("Advisory Councils on Professional Conduct").

<sup>463</sup> KY. REV. STAT. ANN. § 15.705 (Michie/Bobbs-Merrill 1991). The council may delegate most of these functions to the attorney general pursuant to KY. REV. STAT. ANN. § 15.710 (Michie/Bobbs-Merrill 1991).

<sup>464</sup> The ABA Standards seem to contemplate a joint committee for both prosecutors and defense lawyers. *See supra* note 461 and accompanying text.

to the point of functioning like lobbyists pushing for (if not drafting) interest group- or client-favorable rules and legislation.<sup>465</sup> However, these temptations are resistible. Certainly, before the opinions of such an "advisory council on professional conduct" could be given official status and full protective effect, some kind of review or oversight by the ethics committee or the state bar association's board of governors could be required.<sup>466</sup>

## X. CONCLUSION

For many jurisdictions, the need for part-time prosecutors is a reality that will continue into the foreseeable future. The daunting task of balancing a private practice with prosecutorial duties is made all the more difficult by the lack of a coherent set of guidelines for minimizing the impact of conflicts of interest. What is needed is a set of guidelines flexible enough to permit attorneys to balance the part-time prosecutor's dual practice yet concrete enough to protect the system and its participants from conflicts of interest. Of prime importance in establishing any such system is the need for a clear statement of the boundaries. We need to confront these issues more directly, and debate the problems of part-time prosecutors more openly.

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<sup>465</sup> See Underwood, *supra* note 2, at 145-46.

<sup>466</sup> In Kentucky, such a committee would have to be accounted for in Ky. SUP. CT. R. 3.530 (Michie/Bobbs-Merrill 1992), which authorizes the ethics committee and "hotline" to issue advisory opinions that will insulate lawyers from discipline (if they follow the committee recommendations).