

Conflicts Over Conflicts: Challenges in Redrafting the ABA Standards for Criminal Justice on Conflicts of Interest

by LAURIE L. LEVENSON*

Introduction

Over ten years ago, I wrote an article *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*.¹ The irony is that the more I work on the current project—a project dedicated to evaluating and redrafting rules relating to the practice of prosecutors and defense lawyers as set forth in the ABA Standards for Criminal Justice—the more I think of that article. Rules are fine, but they will never take the place of good judgment and a commitment to justice. Therefore, before I get to my comments on the proposed standards, let me share some brief thoughts on what the function of those standards should be in criminal practice.

Robert J. Kutak probably got it right.² It is almost impossible to think of rules without thinking of our aspirational goals. When the “Kutak Code” was drafted in 1983, it included a Model Code of Professional Responsibility that encompassed Disciplinary Rules and Ethical Considerations. While the Rules set the bottom line

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1. Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 *FORDHAM URB. L.J.* 553 (1999).

2. Robert Kutak is remembered as chairing for five years the ABA Commission on Evaluation of Professional Standards (“Kutak Commission”) that drafted the Model Code of Professional Responsibility presented to the American Bar Association House of Delegates in 1981. Mr. Kutak was instrumental in developing the National Advisory Commission on Criminal Justice Standards and Goals.

standards for lawyer conduct, the Ethical Considerations reminded lawyers of the ideals they were trying to achieve. As we embark on the latest revisions of the ABA Standards for Criminal Justice, what are the ideals we are trying to achieve with the redrafting of the conflict of interest rules?

The goal, I propose, is to have lawyers with loyalty. It is to have an adversarial system where each advocate stays on his or her own side of the line. It is to create an environment where parties, witnesses and victims can trust their lawyers. It is to ensure that neither the “client’s” interest nor the public’s interest is compromised by a lawyer who may gain unfair personal or professional advantage by crossing the line into the other side’s camp. And, it is to ensure that a lawyer does not feel compromised by having to do the work of others who should be representing those conflicting interests in any given case. Mainly, the goal is to try to put into writing the instincts we hope all lawyers have when they are confronted with a situation that might compromise their role in the criminal justice system.

Of course, “their role” is another tricky part of the equation. Frankly, defense lawyers have it easy. They have a duty to a client or clients—flesh and blood people who they have to be able to look at and say, “I did my best for you. I put your interests ahead of everyone else’s. I pulled out all the stops and did not compromise your interests for anyone else’s—not for my own interests (financial, professional or personal), not for another client’s interests (past, present, or future), and not for the interests of the witnesses, judge, your family or the public. I was there for you!”

As others have written, whom does the prosecutor talk to in the dead of night? To whom does he or she promise loyalty? To the Constitution? To the defendant, promising that his constitutional rights will be respected? To the victim, but only so long as the victim does not interfere too much with the prosecutor’s exercise of discretion? To the public, but only so much as the prosecutor can divine what the public’s interests really are? With the responsibility to exercise discretion, prosecutors know who gets their undivided loyalty—themselves. It is, to use words rarely found in ethical codes, a matter of conscience. As my article stated so long ago, it is a matter of following the rule, but also doing much more. “Common sense, an understanding of the impact of [one’s] decisions on others, perspective and commitment to a fair trial for both sides of the case

are of the utmost importance.”³ And, these, together with the rules, are the basic tools to ensure that prosecutors act ethically.

With these thoughts in mind, it is time to turn to the conflict of interest rules proposed by the redrafting of the ABA standards. It would be impossible to discuss all of them in depth given the restrictions of this project. The works on these issues fill legal journals and I am grateful to others for this amazing body of work. Rather, after I set forth the prior conflict of interest standards and compare them with the proposed revised standards, I jump into a different type of jurisprudence recently popularized by the current Chief Justice of the United States, John Roberts, as he dissented in *Caperton v. A.T. Massey Coal Co.*, a case that itself focused on the ethical issues.⁴

I would like to ask forty of the toughest questions that arise with regard to conflicts of interest for prosecutors and defense counsel. By asking these questions, we may see whether adopting a code of standards will actually help guide prosecutors and defense lawyers with the everyday conflicts of interest issues they face.⁵ As the Nobel laureate, Isidor I. Rabi, once retold, the secret is in asking the right question.⁶ The answers will flow from that.

I. Prosecution Conflicts of Interest: Asking the Right Questions

The current Standards are divided between prosecution and defense standards.

3. Levenson, *supra* note 1, at 571.

4. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2269–72 (2009) (Roberts, J., dissenting) (addressing what, if any, standards can be established to determine when a judge should recuse himself because of a conflict of interest).

5. One of the major benefits of the roundtables held to discuss the proposed new Standards is that there has been additional discussion of the potential conflicts that arise for prosecutors and defense lawyers. While it is impossible to anticipate all conflicts, open dialogue assists in identifying those situations where lawyers are most likely to consult the Standards for guidance.

6. One of my favorite stories is one retold by Professor Rabi, who was awarded a Nobel Prize for his work in physics. When asked how he became such a great scientist, he answered: “My mother made me a scientist without ever intending it. Every other mother in Brooklyn would ask her child after school: ““So? Did you learn anything today?” But not my mother. She always asked me a different question. ‘Izzy,’ she would say, ‘Did you ask a good question today?’” Donald Sheff, Letter to the Editor, *Izzy, Did You Ask a Good Question Today?*, N.Y. TIMES, Jan. 12, 1988, at A26.

A. Prosecution Conflict of Interest Standards

1. *Current ABA Standard 3-1.3: Conflicts of Interest*

Under the current standards:

(a) A prosecutor should avoid a conflict of interest with respect to his or her official duties.

(b) A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor.

(c) A prosecutor should not, except as law may otherwise expressly permit, participate in a matter in which he or she participated personally and substantially while in private practice or nongovernmental employment unless under applicable law no one is, or by lawful delegation may be, authorized to act in the prosecutor's stead in the matter.

(d) A prosecutor who has formerly represented a client in a matter in private practice should not thereafter use information obtained from the representation to the disadvantage of the former client unless the rules of attorney-client confidentiality do not apply or the information has become generally known.

(e) A prosecutor should not, except as law may otherwise expressly permit, negotiate for private employment with any person who is involved as an accused or as an attorney or agent for an accused in a matter in which the prosecutor is participating personally and substantially.

(f) A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

(g) A prosecutor who is related to another lawyer as parent, child, sibling, or spouse should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. Nor should a prosecutor who has a significant personal or financial relationship with another lawyer participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer, unless the prosecutor's supervisor, if any, is informed and approves or unless there is no other prosecutor authorized to act in the prosecutor's stead.

(h) A prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses unless requested by the accused person or witness to make such a recommendation, and should not make a referral that is likely to create a conflict of interest. Nor should a prosecutor comment upon the reputation or abilities of defense counsel to an accused person or witness who is seeking or may seek such counsel's services unless requested by such person.

2. *Proposed Revised Standards*

The ABA Task Force has proposed the following revised standards. As listed below, the key changes are identified by italics.

(a) A prosecutor should avoid conflicts of interest with respect to his or her official duties, *unless an appropriate waiver is obtained. The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in his or her jurisdiction. A prosecutor should make appropriate disclosures regarding conflicts of interest, to supervisors, courts, or defense counsel, when appropriate. When a conflict is apparent, the prosecutor should recuse or decline to go forward until a non-conflicted prosecutor is in place.*

(b) A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor.

(c) A prosecutor should not, except as law may otherwise expressly permit, participate in a matter in which the prosecutor personally and substantially participated while in private practice or nongovernmental employment, *unless those prior interests were substantially parallel to the current prosecutorial interests and there is no conflict of interest, or unless under applicable law no one is, or by lawful delegation may be, authorized to act in the prosecutor's stead in the matter.*

(d) A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client unless the rules of attorney-client confidentiality do not apply or the information has become generally known.

(e) A prosecutor should not, except as law may otherwise expressly permit, negotiate for private employment with any

person who is involved as an accused or as an attorney or agent for an accused in a matter in which the prosecutor is participating personally and substantially.

(f) A prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's *personal*,⁷ political, financial, business, property, or other interests or relationships. A prosecutor should disclose to appropriate supervisory personnel any such interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosures to outside persons should be made, and make such disclosures if appropriate.

(g) A prosecutor whose current relationship to another lawyer is parent, child, sibling, spouse or intimate sexual partner should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. A prosecutor who has a significant personal or financial relationship with another lawyer should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer, unless the relationship is disclosed to the prosecutor's supervisor [and the person's defense counsel] and supervisory approval is given, or unless there is no other prosecutor authorized to act in the prosecutor's stead.

(h) A prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses unless requested by the accused person or witness to make such a recommendation, and should not make a referral that is likely to create a conflict of interest. A prosecutor should not comment upon the reputation or abilities of defense counsel to an accused person or witness who is seeking or may seek such counsel's services unless requested by such person.

(i) A prosecutor whose own conduct is the subject of an official investigation of a non-frivolous allegation should ordinarily be recused from acting as prosecutor in the matter in which the challenged conduct originated. However, a mere allegation of misconduct is generally not a sufficient basis for such recusal, absent a judicial or supervisory evaluation that the allegation

7. It should be noted that while "personal" interests are included in the prior ABA standards, the proposed revised set puts them at the top of the list. Yet, there is no further explanation as to what those "personal" interests are, or whether they include emotional, ideological, or psychological concerns.

warrants serious review. Neither should an unfounded allegation of misconduct deter a prosecutor from fair pursuit of any matter. Nevertheless, a prosecutor should report to a supervisor any misconduct allegation made against him or her, in order to obtain a second opinion of its merits.

3. Asking the Right Questions

In evaluating these proposed standards, several key questions jump out at the reader. As listed, these questions arise in a wide variety of prosecutions and highlight why the ABA standards can only be a starting point, not the final answer, to addressing conflicts of interest for prosecutors.

a. Whom does a prosecutor represent?

It is axiomatic that a prosecutor should avoid a conflict of interest, but this can only be accomplished if prosecutors really understand whom they represent.⁸ Although most prosecutors appreciate on some intellectual level that they represent the “People” or “Government” or the community-at-large,⁹ on a day-to-day basis, they answer only to themselves or to a supervisor. Most prosecutors have relatively little contact with the community. Some have affirmatively eschewed the suggestion that they are “social workers” who must interact with community groups. Thus, at any given time, prosecutors tend to define themselves more as the *opponent* against the defendant, rather than in an affirmative position of representing the public. Once this adversarial title is assumed, it is harder for prosecutors to identify when they have a conflict of interest. So long as the interests they have are aligned *against* the defendant, it seems of little interest that the prosecutor’s duties in representing the public at large might be compromised.

8. Some scholars define “conflict of interest” as “some particular incentive which threatens to impair an attorney’s functioning.” See, e.g., Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 831 (1992). However, such a definition skips over the initial question of what is the fundamental role of the prosecutor. Thus, the first inquiries must ask: What is the prosecutor’s role and who is the prosecutor’s client?

9. As now Associate Justice Carol A. Corrigan of the California Supreme Court wrote, “The prosecutor does not represent the victim of a crime, the police, or any individual. Instead the prosecutor represents society as a whole. His goal is truth and the achievement of a just result.” Carol A. Corrigan, *Commentary: On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537 (1986) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Moreover, the reality of our constitutional system is that the prosecutor must, in many ways, also represent the interests of the defendant. The prosecutor has the responsibility of ensuring that a defendant's constitutional rights are honored and even that the defendant's own counsel acts without a conflict of interest. Since prosecutors often see themselves as representing "all" interests (the community, the defendant's, the victim's), the duties can tend to blend into a generic question, "Am I doing the 'right' or 'just' thing in this case?"

Obviously, ethical rules must give more guidance than just telling a lawyer to do the "right" thing. Both the current and proposed ABA standards for conflict of interest tend to highlight some, but not all, of the ethical dilemmas in which prosecutors find themselves. It is left to other provisions of the Standards to explain the role of the prosecutor.¹⁰ Without defining specifically in the conflict rules what a prosecutor's "official duties" are, it is unlikely that prosecutors will have those duties in mind when they encounter all but the most obvious conflict situation.

It is particularly challenging to draft conflict rules for prosecutors because some prosecutors have the responsibility of handling both civil and criminal matters for their jurisdiction. Nothing in the current standards addresses the difficult issues that may arise in such situations. These conflicts may include the handling of discovery obtained for a criminal investigation, but sought in civil enforcement actions, or the use of civil discovery devices to obtain information that could be useful in a criminal investigation.¹¹ We live in an era when prosecutors regularly seek forfeitures by both civil and criminal proceedings. The Standards do not address whether the same District Attorney or Attorney General may lead both investigations and, if so, how those functions must be segregated. The Standards also do not address whether a conflict is created when a prosecutor's office

10. See ABA Prosecution Standard 3-1.2 (Proposed 2009 revision) (discussing that "[t]he prosecutor's client is the public, acting through its duly authorized agents, and not particular government agencies, witnesses or victims"); Rory K. Little, *The ABA's Project to Revise the Prosecution and Defense Function Standards*, 62 *Hastings L.J.* 1113 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Prosecution Function) (2011) [hereinafter Little, App.: Proposed Prosecution Standards].

11. See generally Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 *VAND. L. REV.* 573 (1994); Tammy Jo Berge, *Supreme Court Review: Grand Jury-Disclosure of Grand Jury Materials to Government Attorneys for Civil Use Under Federal Rule of Criminal Procedure 6(e)*, 74 *J. CRIM. L. & CRIMINOLOGY* 1425 (1983).

becomes the beneficiary of seized property. Thus, while it would be convenient to state simply that the prosecutor “represents the public,” the realities of being a prosecutor are more complex.

b. Who can waive a prosecutor’s conflict of interest?

No sooner do the rules state that a prosecutor must avoid conflicts than they tell the prosecutor to obtain an “appropriate waiver” and continue as the prosecutor. Other than stating that the waiver must be made after “appropriate” disclosures, the standards do not attempt to define what constitutes an appropriate disclosure or waiver.

Of course, it may not be possible to anticipate all situations in which a waiver is needed, but more guidance is probably necessary. There are, as the remainder of the standards identify, categories of conflicts for a prosecutor. First, there are conflicts prosecutors might have by prior representation of the defendant. Obviously, in those situations, there must be a waiver from the defendant as well as a representative of the government. These waivers must anticipate whether the prosecutor will be too easy on a former client or, contrary to the ethical rules, use confidential information against a former client.

Similarly, there are the relatively straightforward conflicts when a prosecutor has a close relationship with a witness or lawyer associated with the case. That relationship should be disclosed to all parties before a waiver is obtained.

Third, conflicts arise when the prosecutor has a financial, business, or property interest in a case. While historically a person could confront directly in a criminal court the person who stole his or her property, the current process depersonalizes the criminal trial. Today, any prosecutor financially invested in a case should not be deciding whether a conflict can be waived.

Fourth, and toughest of all, are those situations where a prosecutor may be affected by his or her own “political” or “personal” interests. The problem is that every prosecutor is *always* affected by his or her own personal and political interests. Prosecutors want to win (by the way, so do defense lawyers), and they know that their reputation (as well as any political ambitions they may have) will generally be enhanced by being successful in a particular case. Practically, there must be a way to allow disinterested prosecutors to waive potential conflicts, but the current rules do not set forth standards that can be used to make this determination.

c. How transparent should the prosecutor's work and interests be?

The Ethical Standards require prosecutors to disclose their conflicts of interests. In fact, many prosecution offices—including U.S. Attorney's Offices throughout the country—now have prosecutors complete a conflict of interest form when beginning a case.¹² This rule inherently recognizes the value in transparency in the prosecutor's work. Yet, like others in the legal profession, prosecutors can bridle against such rules. How much of one's personal, financial, business, and community activities should be subject to public scrutiny? Our criminal justice system is a bit schizophrenic. We tell prosecutors that it is not really about "them." They are, for lack of a more glorified term, "processors" who present evidence to the court. Yet, rules about conflicts of interest suggest the contrary. How evidence is processed depends very much on the personal interests and drive of prosecutors.

Transparency is good for a criminal justice system, but it is not always comfortable. It is particularly uncomfortable when there are no firm lines as to how much transparency is required.

d. Why should prosecutors get a head start by continuing to work in government on matters they worked on privately?

The proposed rules would permit a prosecutor to participate in a matter in which the prosecutor personally and substantially participated while in private practice, so long as those prior interests were substantially parallel to the current prosecutorial interests and "there is no conflict of interest." Putting aside the oblique nature of the phrase "there is no conflict of interest,"¹³ the fundamental question is whether a prosecutor will be able to be objective in evaluating and pursuing a case if he had an interest in its outcome before becoming a prosecutor.

This question highlights an important reality in considering the issue of conflicts of interest for prosecutors. No prosecutor starts the job with a blank slate. All prosecutors bring to the job, and to the

12. See DEP'T OF JUSTICE FORM GCO-1 (requiring prosecutor to comply with 18 U.S.C. § 208 that prohibits a prosecutor from participating personally and substantially in an official capacity in a particular matter in which the prosecutor has a financial interest either directly or indirectly through family members or close associates). While this form is helpful, it focuses on financial interests and barely mentions other types of personal interests that may cause a conflict.

13. The terminology does not specify what kind of interest. While one might assume that the primary concern is over financial interests, there are also the ongoing emotional and personal ties that attorneys maintain with former clients and cases.

decisions they must make, their prior life experience and the judgments they have developed from it. Sometimes we praise an individual's history as "valuable experience" that he brings to the job. However, other aspects of it may compromise the prosecutor's ability to remain unbiased in a case. The key is to figure out what makes a prior interest "substantially parallel" to current prosecutorial interests and who should be making that determination.

- e. Why is the standard regarding conflicts with prior clients based on the duty of confidentiality and not the duty of loyalty?

Conflict of interest rules typically focus on ensuring that a lawyer respects two related but separate duties: (1) the duty of loyalty to a client; and (2) the duty of confidentiality. The duty of loyalty is based upon a client's expectations that his or her lawyer will put the client's interests ahead of others. The duty of confidentiality is tied specifically to maintaining a client's secrets, even beyond those that were learned in privileged communications.

The current ethical standard, ABA Standard 3-1.4(d), is tailored toward maintaining the duty of confidentiality, but not the duty of loyalty. There are regularly cases in which a defense lawyer becomes a prosecutor and the prosecutor's office will have a matter regarding the prior client. While a prosecutor can be fenced off from revealing confidential information regarding that client, the mere position of the lawyer in the office may still violate a lawyer's duty of loyalty.

Here, one particular case comes to mind. Michael Morales, an inmate on California's death row, made headlines because he challenged California's execution protocol. While the media focused on the means of execution, another issue lurked in the case. Morales was prosecuted by a District Attorney's office whose second in command just happened to be a lawyer who had previously served as a public defender. In fact, twenty-five years before Morales's clemency proceedings, this particular prosecutor had actually represented Morales in the very murder case that landed him on death row. The court held that the lawyer's new prosecutorial office did not need to be recused.¹⁴ So long as the lawyer did not work on the case, the court did not believe that there was a recusable conflict. While this case also calls into question the proper recusal standards for prosecutorial offices,¹⁵ it raises a more direct issue: Even if the

14. *People v. Morales*, 770 P.2d 244 (Cal. 1989).

15. See *infra* Question P: "Which jurisdiction's law should govern conflict of interest issues and should there be different rules for part-time prosecutors?"

lawyer's confidences from his client are preserved, is it a conflict of interest if a lawyer presides over an office that is seeking to execute his prior client?

From the client's perspective, it is not simply whether a lawyer is violating his duty by disclosing confidential information. The real question is one of credibility. When that lawyer represented to the client that he would be the client's zealous advocate, were his fingers crossed? Was there an exception where the lawyer, now off to be a prosecutor, would not directly attack a client, but would nonetheless abandon his role as the client's zealous advocate? In order to ensure that both the duty of loyalty and the duty of confidentiality are respected, there may need to be a broader rule prohibiting a prosecutor, or his office, from pursuing a matter against a former client.

f. Isn't being a prosecutor one big job interview?

For a brief moment, think of all of the successful lawyers and political figures you know who are touted from their first moment of introduction as a "former federal prosecutor." Think also of whether prosecutors develop different types of working relationships with former prosecutors who are now representing clients. The current and proposed standards properly state that a prosecutor should not negotiate for private employment with the accused or anyone representing him. After all, we do not want the prosecutor selling the farm to line up his next job. But, an arguably greater concern has to do with prosecutors trading favors with individuals other than attorneys. Prosecutors want to advance their careers and it is often those outside of the office that can help them do so. For example, in the Jesse James Hollywood case¹⁶ a prosecutor provided confidential information to a film producer seeking to make a movie about the prosecutor and the case.¹⁷ Doesn't this compromise a prosecutor's objectivity as well?

g. Do the Standards do enough to prevent prosecutors from exploiting their positions of public trust?

The proposed Standards make minor changes to prior ethical Standards, but still nibble at one of the biggest concerns when it

16. *Hollywood v. Super. Ct.*, 182 P.3d 590 (Cal. 2008).

17. See Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 *FORDHAM L. REV.* 1809 (1995).

comes to prosecutorial conflicts of interest. What limitations should be put on prosecutors, especially those identified with high-visibility cases, who seek to exploit their prosecution experience for personal gain? For example, consider the prosecutor in the *Haraguchi*¹⁸ case who wrote and promoted a novel that included details from a case she was prosecuting. The California Supreme Court was unwilling to recuse the prosecutor on the record in that case, but noted that if there was an actual likelihood of unfair treatment, it would rule differently. The court considered it insufficient that the lower appeals court had found the prosecutor's actions "unseemly" enough to undermine the public's confidence in the integrity of the prosecution.

If we are serious about prosecutors not taking such steps, stricter standards are needed so courts will not so readily disregard such conflicts. If prosecutors know there are opportunities down the road to exploit their experiences, it is quite possible that they will tailor their prosecutorial decisions to enrich those opportunities.

- h. Why do we think that disclosure to "appropriate supervisory personnel" is enough to prevent prosecutors from being affected by conflicts of interests?

In many situations, disclosure to supervisors may be exactly what is needed to prevent prosecutors from being affected by conflicts of interest. To the extent that supervisors have more experience, have developed more judgment, and are more detached from a particular case, their wisdom may very well help guide the junior prosecutor.¹⁹ Yet, there are at least a couple of problems in relying on supervisors to remedy conflict situations. First, the junior prosecutor must realize that he or she has a problem that needs advice. Second, it is not always true that the more senior prosecutors are more responsive to ethical issues. Sometimes, young prosecutors will be more troubled by ethical issues than their superiors. In order to ensure that a supervisor takes seriously a conflict of interest concern, it is important that any ethical standards also expressly hold the supervisor responsible for any ethical violation. Too often supervisors interpret ethical dilemmas by junior prosecutors as a lack of guts or an unwillingness to pursue a prosecution at full throttle. Thus, it is important that the role of supervisor is well defined. Not every supervisor who is good at teaching a newer prosecutor how to try a

18. *Haraguchi v. Super. Ct.*, 182 P.3d 579 (Cal. 2008).

19. *Levenson*, *supra* note 1, at 568.

case also has the background and sensibilities to guide a prosecutor on ethical issues.

- i. If a prosecutor has a duty to ensure that a defendant receives a fair trial,²⁰ why is it a cardinal sin for a prosecutor to warn a defendant when defense counsel is compromising the defendant's interests?

It is axiomatic that a prosecutor should not interfere with defense counsel's ability to zealously represent the client. Defense lawyers have a tough enough job without a prosecutor badmouthing or second-guessing that representation. Defendants, wary of the power that prosecutors yield, are likely to defer to the prosecutor's wishes if prosecutors are allowed to interfere with defense representation.

Yet, there are cases where the prosecutor may actually be acting in the defendant's best interest by commenting on the actions and abilities of defense counsel. The current rule reflects a "don't ask, don't tell" policy. If the defendant does not ask about his lawyer's abilities or reputation, the prosecutor is not allowed to comment.

In at least two situations, prosecutors may need the leeway to comment on defense counsel's actions. First, in the plea bargaining situation, there are defense lawyers who, for ideological or other reasons, refuse to negotiate with the prosecutor. Since some jurisdictions, including the federal courts, forbid the court from participating in plea bargaining, the absolute prohibition on contact with a defendant may work contrary to the defendant's interest. It is the ethical duty of defense counsel to convey a plea offer to a defendant. But what consequences does defense counsel face when he refuses to communicate the offer because of his own or another client's interest in taking the case to trial? Moreover, what about the situation where a prosecutor does not want to make a plea offer for cooperation because the prosecutor does not trust the current defense counsel? The current ethical rules have decided that it is better for a defendant to forego that offer than to hear negative information from the prosecutor about his lawyer.

Second, in the early investigative stages of a case, a prosecutor may be open to designating a person as a witness, rather than target, if that witness is represented in preindictment discussions by defense counsel with whom the prosecutor has a working relationship. Yet, the rules prohibit a prosecutor from even suggesting a list of defense lawyers the witness should contact. While the rule is designed to

20. ABA Standard, Prosecution Function 3-1.2(b); Little, App.: Proposed Prosecution Standards, *supra* note 10.

protect a prosecutor from overreaching, it also can work to a defendant's detriment. One might ask, "Why not allow the prosecutor to make the referral, but only on the condition that the defense counsel exercise his or her judgment independently of the prosecutor?"

- j. Can we ever prevent a motion to recuse from being used as a strategic attack on the prosecutor?

The proposed Standards have added a separate requirement that a prosecutor whose conduct is the subject of an official investigation recuse himself, provided the accusations are non-frivolous. The biggest problem with this proposed rule is that no one can know whether an allegation is unfounded until the investigation is completed. It is, therefore, a chicken-and-egg problem. Unfounded allegations can be (and frequently are) leveled at a prosecutor, but whether these accusations have any basis will generally not be determined by the time the prosecutor must decide whether to recuse himself. It is easy to state that unfounded allegations of misconduct should not deter a prosecutor from the fair pursuit of any matter, but prosecutors are fully aware that the best defense is a good offense and they have become the target of the defense's strategic offensive efforts.

There is also the interesting question of what "recusal" really means if the allegations are made once trial has begun. Recently, in the prosecution of Broadcom CFO Bill Ruehle and co-founders Henry Samueli and Henry Nicholas, the district judge "recused" the lead prosecutor in the middle of trial.²¹ However, all that initially meant was that the prosecutor could not ask questions during the proceedings. Later, when the full extent of the prosecutor's misconduct was revealed, the judge ordered the prosecutor not to appear in the courtroom and barred the prosecutor from helping the relief prosecutor prepare for examinations of witnesses, including the cross-examination of key witnesses in the case. Yet, even those efforts could not sanitize the case of the offending prosecutor's actions. Of course, all of the reports, exhibits and pleadings that the relief prosecutor used were infused with the knowledge and perceptions of the recused prosecutor. If recusal happens during trial, it is simply too late to unring the bell.

21. See Rachanee Srisavasdi, *Jurors Told of Broadcom Prosecutor's Misconduct*, O.C. REGISTER, Dec. 3, 2009, <http://www.ocregister.com/articles/dull-222343-broadcom-stolper.html>.

These first ten questions reflect some of the key challenges of redrafting the ethical standards for prosecutors. However, they are certainly not the only questions that can be asked. In fact, there at least ten other questions precipitated by what is *not* covered by the proposed standards:

- k. Should prosecutors have a duty to ensure that defense lawyers do not face their own conflicts of interests?

Consider the following situation: A particular prosecution office has brought two drug cases. Defense counsel Robby Little represents Client A in Case #1 and Client B in Case #2. As far as anyone knows, the cases are unrelated. In Case #2, prosecutors make an offer to Client B to cooperate. During the debriefing, Client B reveals that another defendant in Case #1 bragged about his drug transactions with Client A. The prosecutor wants to use Client B's testimony in Case #1, but this will put Robby Little in an impossible situation. In order to defend Client A, Little would have to zealously attack Client B. If Little engages in such an attack, Client B may lose the benefit of his cooperation. Neither Client A nor Client B want to relinquish Little as counsel (because he is known as the best in the world), but the prosecutor is worried that there will be a later Sixth Amendment claim. Little suggests that Client B be sentenced before he is cross-examined in Client A's trial. Whose interests prevail?

Consider also the situation where a defense lawyer has interviewed for and accepted a job with the prosecutor's office during the pendency of a case. If defense counsel does not disclose this conflict, does the prosecutor have the responsibility to do so?²²

There are endless permutations of conflicts of interest and often it is the prosecution's actions that put defense lawyers in a precarious situation. Should prosecutors be concerned when their actions create a knotty conflict of interest issue for defense counsel? Generally, the rules caution prosecutors from commenting on defense counsel's abilities, unless such comments are directed to the court. Motions to recuse defense counsel are often viewed as strategic moves to gain an advantage over the defense. The current and proposed rules are designed to prevent prosecution interference with defense counsel representation, but they offer no direction as to what a prosecutor's role should be when there is an apparent conflict or failure in defense

22. See Anne Bowen Poulin, *Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?*, 47 AM. CRIM. L. REV. 1135 (2010).

counsel representation.²³ From the prosecutor's perspective, some effort must be made to preserve a defendant's Sixth Amendment rights and prevent a post-conviction challenge based upon conflict of counsel. On the other hand, if defense counsel's arguable conflict of interest is so remote, a hearing may needlessly undermine the defendant's confidence in defense counsel.

One benefit to having an ethical standard that dictates when prosecutors should raise a potential conflict by defense counsel is that it may prevent gamesmanship in the use of motions to recuse. Of course, the challenge in drafting such a standard is that it is often not until after a case when it can be determined whether a conflict of interest actually affected the counsel's representation.

1. Does a prosecutor create a conflict of interest by speaking to the media?

As currently drafted, the ABA Standards cover prosecution extrajudicial statements in a separate ethical standard. Standard 3-1.4 prohibits prosecutors from making extrajudicial statements that the prosecutor knows or reasonably should know will have a substantial likelihood of prejudicing a criminal proceeding. Standard 3-2.11 prohibits a prosecutor from entering into a literary agreement or agreement for media rights prior to the conclusion of all aspects of a case.²⁴

Both of these rules reflect aspects of the conflict of interest rule. The reason a prosecutor should not make extrajudicial statements is not simply because it may prejudice the defendant, but also because public statements can lock a prosecutor into a position that does not fairly and objectively evaluate the defendant's case. Mike Nifgong's conduct in the Duke Lacrosse investigation is a primary example of just such a phenomenon.²⁵

The prohibition of agreements to sell literary or media rights is also designed to make sure prosecutors evaluate a case from the perspective of what best serves the public's interest and not the

23. For more discussion on this issue and some helpful proposals, see Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 Am J. Crim. L. 323 (1989); Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put that Lawyer's Client in Jail?*, 69 Fordham L. Rev. 997 (2000).

24. A prosecutor's duty of confidentiality may also be at issue in these situations. See Glavin, *supra* note 17.

25. See Laurie L. Levenson, *Prosecutorial Sound Bites: When Do They Cross the Line?*, 44 GA. L. REV. 1021, 1040 (2010).

prosecutor's self-interest. In essence, both of these stem from the prohibition against a prosecutor putting 'his personal interests first. The location of a rule, not just what it says, may influence on how effective it is in directing the prosecutor's conduct.

- m. Why should a prosecutor be prohibited from trying a case against a spouse, close family member or intimate partner?

Perhaps it may be for Spencer Tracy and Katherine Hepburn movies,²⁶ but I am generally against rules that assume that family members are incapable of abiding by their professional responsibilities because their opponent is another family member. If one of the goals of the ethical rules is to depersonalize a prosecutor's role, then the proposed Standards that make irrebuttable presumptions that a prosecutor will be driven (or perceived to be driven) by personal interests, is inconsistent with this goal. In fact, perhaps the need for civility among family members will actually lead to more professional conduct by counsel. A rule that requires disclosure and consent is both practical and appropriate in these situations.²⁷

- n. Will conflict of interest rules be effective unless they are accompanied by certification requirements in each case?

The ethical standards guide behavior, but more concrete action may be needed to ensure that counsel take seriously their ethical obligations. Therefore, just as lawyers must certify for amicus briefs and other such pleadings the personal interest they may have in a case, it is worthwhile to contemplate what additional procedural rules could be adopted to ensure that prosecutors have seriously considered their ethical obligations. Might it increase public confidence in a case if a prosecutor had to certify at the time of the filing of charges that neither the prosecutor nor the investigating agents have a personal interest in the case? While some prosecutorial offices require prosecutors to complete a conflict sheet when handling a case, a requirement that prosecutors certify with the court that there is no conflict is likely to cause prosecutors to take the issue more seriously.

26. See *ADAM'S RIB* (MGM 1949), in which Spencer Tracy plays the prosecutor in a case defended by his wife, Katherine Hepburn. See also Plot Summary, *Adam's Rib*, IMDB, <http://www.imdb.com/title/tt0041090/plotsummary>, (last visited Dec. 15, 2010).

27. See Stacey DeBroff, Note, *Lawyers as Lovers: How Far Should Ethical Restrictions on Dating or Married Attorneys Extend?*, 1 GEO. J. LEGAL ETHICS 433 (1987).

One function of ethical standards can be to encourage open conversations about conflicts so that they can be evaluated by someone other than the lawyers most directly affected by them. Certification requirements compel a lawyer to focus on the possibility of a conflict of interest and make ethical behavior a priority in handling cases.

- o. Should prosecutors be responsible for conflicts of interest among law enforcement personnel?

The motives and interests of law enforcement officials can have a more dramatic effect on a case than even those of the prosecutors. Yet, few prosecutors pause to ask what investment a particular officer has in a particular case. Knowing and revealing the conflicts of law enforcement officers may be critical to ensuring a proper case evaluation and the fair trial of a defendant.²⁸

I learned this lesson while working on an Innocence Project case. The case had been investigated by a homicide detective who was out to prove herself during the investigation of the defendant.²⁹ It was her first homicide case, she was being tailed by a newspaper reporter, and she was the first black woman assigned to such a detail. Her motives for being a hero and solving the case are clear in retrospect, but there is nothing in the record to reveal that the prosecutor noticed how the information he was receiving was slanted by an investigator with so much personal interest in the case.

In order for ethical standards to be comprehensive, it may be important to assign to prosecutors the responsibility of determining what conflicts of interest members of the investigation team have.

And, for good measure, consider the following questions:

- p. Which jurisdiction's law should govern conflict of interest issues and should there be different rules for part-time prosecutors?

The world of prosecution often crosses state and international borders. When a case involves crimes that take place in a multitude of venues, should the prosecutor be able to pick and choose where to try the case so as to affect which ethical standards will guide his or her

28. Cf. *People v. Merritt*, 19 Cal. App. 4th 1573 (1993) (investigator whose credibility is at issue should be removed so as to not affect integrity of prosecution).

29. The case is described in detail in the first chapter of Miles Corwin, *THE KILLING SEASON* 18 (1998). See *People v. Anthony*, Los Angeles County Superior Court Case No. BA097736 (1995).

conduct? Efforts to have federal ethical standards govern nationwide have not generally been received well, even for federal prosecutions. Thus, while the ABA Standards may propose some general standards, we can predict that states will want to modify these standards. Model standards are helpful, but prosecutors may still be placed in a situation where local courts are resistant to the proposed standards.

Additionally, some of the most difficult conflict issues that arise are generated by part-time prosecutors. Part-time prosecutors must be exceptionally vigilant to avoid conflicts between their criminal cases and those of their private clients.³⁰ Maintaining an aura of impartiality may be particularly difficult when the prosecutor who is prosecuting fraud cases also represents businesses. While a client may not be a victim in a particular case, the prosecutor still knows that his or her client may want the prosecutor to take a particularly strong stance in a case in order to deter other potential violators.

In some jurisdictions, part-time prosecutors are “loaned” out by law firms to the government to prosecute occasional cases. While prosecutors are supposed to put the public interest first, there is no denying that their primary allegiance often remains with the firm that provides their primary employment. The work of a part-time prosecutor is full of landmines, from the fear of prosecuting current or former clients, to the concern that supervisors in the private employment will second-guess their work as a prosecutor. Given the range of conflict issues that arise for part-time prosecutors, it may be important to have a separate standard addressing their situations.³¹

q. How should we deal with the “wobble” words?

Because ethical issues involve judgment calls, there is practically no way to draft ethical standards without using words that provide for flexibility in the standards. Thus, the proposed standards, as with their predecessors, are loaded with phrases such as: “appropriate” waiver, “substantially” participated, “appropriate” disclosure, “significant” personal or financial relationship, “fair pursuit,” “likely” to create a conflict, and more. These words reflect that at the heart of conflict of interest rules, as with other ethical standards, lies the need

30. See generally Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415 (1993).

31. See generally Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1 (1993).

to rely on prosecutors' good judgment. The rules are guideposts, but it takes a conscientious prosecutor to be guided.

- r. How can the prosecutor's role and conflict rules be reconciled with the victim's expectations?

Try as you may to explain that a prosecutor's job is to do "justice," victims still believe that their rights should be vindicated. As the flesh and blood of the prosecution's interests, it is difficult for prosecutors not to conflate a victim's interests with those of the prosecution. Without specifying in the rules what duties a prosecutor owes to a victim, do the rules provide sufficient guidance to both the prosecutor and to the victim as to how decisions in a case will be made? The recent passage of "victim's rights" legislation makes it imperative that the Standards give as much guidance as possible to the prosecutor's proper role with the defendant.³² As one author suggested, there must be a clear delineation between the victim's lawyer and the government's lawyer.³³ In fact, it may be necessary to provide specific notes and commentary that identify appropriate behavior by a prosecutor, depending on what type of conflict with the victim arises.³⁴

- s. Should conflict of interest rules focus on prosecutorial duties or prosecutorial loyalties?

The Ethical Standards broadly state that a prosecutor "is an administrator of justice, an advocate, and an officer of the court."³⁵ As such, the prosecutor has the duty "to seek justice, not merely to convict."³⁶ How prosecutorial loyalties affect prosecutorial duties often depends on the type of duty being performed. The current standards seek to set forth general policies regarding conflicts of

32. This legislation has led some commentators to propose that a prosecutor can be viewed as the "victim's lawyer" with some of the hallmarks of a traditional attorney/client relationship. See, e.g., Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Conflict of DeFacto/Client Attorney Relationships*, 48 S. TEX. L. REV. 695, 719–24 (2007).

33. Walker A. Matthews, Note, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998).

34. Fortunately, some of the best ethicists in the country have proposed such solutions. See, e.g., Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559 (2005) (identifying and analyzing four possible conflicts with victims, including: (1) The Prosecutor as the Victim's Surrogate; (2) The Prosecutor as the Victim's Avenger; (3) The Victim as an Intervenor on Plea Decisions; and (4) The Unwilling Victim).

35. ABA Standard, Prosecution Function 3-1.2(b).

36. ABA Standard, Prosecution Function 3-1.2(c).

interest and their effect on prosecutor conduct. Yet, there are certain areas where prosecution conflicts of interest pose a particular problem. For example, charging decisions, plea decisions and sentencing are particularly problematic. Linking the conflict of interest rules to other ethical standards that address these issues might at least remind prosecutors of how their own interests, or those of someone close to them, affect their other ethical duties.

For example, Proposed ABA Standard 3-5.1 will address decisions to charge, arrest, and search. Within that Standard, in addition to the separate conflict of interest standard, it may be helpful to remind prosecutors that their charging decisions should not be based upon any personal interests. It is not unusual for prosecutors, especially in high-visibility cases, to be motivated by personal and political interests in seeking charges.³⁷ Cases can even become personal vendettas against a defendant. It is too easy for a prosecutor to disassociate specific functions, such as charging decisions, from the conflict of interests of rules that should be guiding all of their actions.

t. Is a conflict of interest the same as misconduct?

The tension over ethical rules is often created by an accusation that a prosecutor has committed “misconduct.” Yet, there is a range of conduct that is labeled as misconduct—from deliberately hiding exculpatory information to misgauging how personally a prosecutor is involved in a case.³⁸ Many of the political battles over conflict of interest provisions might be avoided if the word “misconduct” did not become a surrogate for the straightforward accusation that there was a conflict of interest that influenced the case.

u. What kind of conflicts should lead to the recusal of an entire prosecutorial agency?

Many of the decisions regarding prosecutorial conflicts of interest currently focus on the difficult issue of when a prosecutor’s conflict should recuse an entire office. Traditionally, more flexibility has been

37. See Laurie L. Levenson, *Celebrity Prosecutions: High-Profile Prosecutors & High-Profile Conflicts*, 39 LOY. L.A. L. REV. 1237, 1243–44 (2006) (describing District Attorney Tom Sneddon’s repeated efforts to prosecute Michael Jackson).

38. See, e.g., Brad Heath & Kevin McCoy, *Prosecutors’ Conduct Can Tip Justice Scales*, USA TODAY, Sept. 23, 2010, http://www.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm?POE=click-refer (in-depth series on prosecutorial misconduct); Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, CENTER FOR PUBLIC INTEGRITY, June 26, 2003, <http://www.publicintegrity.org/pm/default.aspx?act=main>.

given to government offices because there are fewer alternatives in replacing them in a case. Yet, if the conflict were on the other side, the entire defense firm would be recused. Can the difference in imputed disqualification rules be justified?

As discussed *supra*,³⁹ courts are extremely reluctant to recuse prosecutorial offices because of the burden on prosecutorial agencies and the belief that ethical walls can be erected between the tainted prosecutor and the remaining staff. Yet, there is no empirical data to support this assumption and if ethical walls are disfavored for private practitioners, it is at least odd that they are so often accepted when the stakes are much higher in a criminal case.

- v. How do funding issues of prosecutorial offices affect conflict of interest rules?

Because of budgetary difficulties, prosecutorial agencies are increasingly looking to private donations to create units that can prosecute specialized crimes. For example, a workers' compensation unit or insurance fraud unit might be the beneficiary of donations by companies affected by those prosecutions. Should all such donations be prohibited? Does it depend on whether the investment is in relation to a particular case or just generally in establishing an office? How does one characterize this as a personal or financial interest of the individual prosecutor?

For the last twenty years, courts have been struggling with how to evaluate the conflicts for prosecutorial offices that serve a specific business interest.⁴⁰ Yet the proposed rules do not take a specific position on this issue, which is likely to occur more frequently as prosecution offices face increasing budgetary pressures.

II. Defense Conflicts of Interest: Asking the Right Questions

A. Defense Conflict of Interest Standard

1. *Current Standard 4-3.5 Conflicts of Interest*

- (a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

39. See discussion of Morales, *supra* note 14 and accompanying text.

40. See, e.g., *People v. Eubanks*, 927 P.2d 310 (Cal. 1996).

(b) Defense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.

(c) Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that:

(i) the several defendants give an informed consent to such multiple representation; and

(ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounter in defending multiple clients.

(d) Defense counsel who has formerly represented a defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

(e) In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he

or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

- (i) the accused consents after disclosure;
 - (ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and
 - (iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality.
- (f) Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.
- (g) Defense counsel should not defend a criminal case in which counsel's partner or other professional associate is or has been the prosecutor in the same case.
- (h) Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor.
- (i) Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter. Defense counsel who was formerly a prosecutor should not use confidential information about a person acquired when defense counsel was a prosecutor in the representation of a client whose interests are adverse to that person in a matter.
- (j) Defense counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such a prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter where defense counsel knows the government is

represented in the matter by such prosecutor, except upon consent by the client after consultation regarding the relationship.

(k) Defense counsel should not act as surety on a bond either for the accused represented by counsel or for any other accused in the same or a related case.

(l) Except as law may otherwise expressly permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney or employee of the government in a matter in which defense counsel is participating personally and substantially.

2. *Proposed Defense Conflict of Interest Standards*

The proposed ABA standards for conflict of interest are still a work in progress and have not yet been finalized by the Standards Committee. Accordingly, they will not be quoted in this article. Moreover, given my background as a former prosecutor, I recognize that some may say that I have my own “conflict of interest” in critiquing the ethical obligations of defense counsel. Yet, after thirty years of teaching professional responsibility, there are some key questions I would ask of any proposal for changes. These questions identify how challenging the effort is to draft conflict of interest standards for defense lawyers, as well as prosecutors.

3. *Asking the Right Questions*

a. To whom does a defense lawyer owe a duty of loyalty?

Traditionally, the answer to this basic question is that a defense attorney has a duty of loyalty only to the defendant. This, it is said, is the backbone of not only the ethical rule, but also the Sixth Amendment. A client is defined as the person who is the party in the action, not someone paying his or her bills. Yet, the rules are not absolute because an attorney also has a duty of loyalty to the “court” or the justice system. Thus, defense counsel must act within the bounds of the law. The question, therefore, is both to whom does a defense lawyer owe a duty of loyalty and what does that duty cover? It is the struggle to answer this question that can create the biggest conflict issues for defense lawyers, especially given that their perspective may be very different from that of the judge, whose primary interest is to enforce the court’s rules.

- b. To what extent can a defense lawyer's duty be affected by former clients?

Defense lawyers are not consiglieres.⁴¹ Thus, the traditional admonition that defense counsel should not let his or her personal judgment be affected by loyalties to a former client can be somewhat puzzling. Certainly, absent some exceptions, a lawyer retains forever the duty of confidentiality and attorney-client privilege.⁴² Yet, once a client's case is concluded, is there a reason the lawyer should never represent a witness or other party in a case against that client? Is it because a client will be upset that his lawyer has betrayed him? Or, because without such a promise, it will be nearly impossible for the lawyer to create the trusting relationship he needs to represent the client? To the extent defense counsel do have a duty of loyalty to former clients, it would be helpful to have rules that detail the extent of that duty.

- c. Should the conflict of interest rules be the same for retained counsel as they are for appointed counsel?

The conflict of interest rules seek to provide protection for a client by requiring disclosure of actual or potential conflicts of interest and requiring written, informed consent. Yet, the voluntariness of that consent may differ dramatically for defendants depending on whether they have retained or appointed counsel. Defendants who can afford retained counsel have the ability to seek out counsel without conflicts of interest. Defendants with appointed counsel have more limited choice. While they may receive new counsel, they will undoubtedly worry about whether they are being given "leftovers" by seeking another lawyer without a conflict. Moreover, they may misperceive that a lawyer who has a connection to other parties in a case actually may have more inside information than an impartial lawyer who may be appointed.

- d. Do the ethical rules really matter given that the judge has the ultimate say as to whether a conflict of interest can be waived?

In *Wheat v. United States*,⁴³ the Supreme Court held that even if a defendant is willing to waive a conflict of interest, the court still has the power and responsibility to appoint new counsel if it is concerned

41. "Consigliere" is a close advisor or counsel, although the term is often used to refer to a lawyer for the Mafia, as popularized by Mario Puzo's 1969 novel, "*The Godfather*."

42. See *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998).

43. *Wheat v. United States*, 486 U.S. 153, 159 (1988).

about defense counsel's conflict of interest. The remaining question is whether *Wheat* creates an incentive or disincentive for defense counsel to identify conflicts of interest. Some might argue that the Court created an incentive for defense counsel to be extra vigilant about conflicts because of the need to be accountable to the court. On the other hand, some defense counsel may proceed in a conflict situation because if the court does not interfere, it would seem not to violate the Standards.

An important related question is whether more specific rules should be drafted to control waiver of concurrent representation by multiple clients.⁴⁴ At the time that clients must decide whether to waive independent counsel, they may not appreciate the impact of such a waiver unless very specific warnings are provided. What kind of warnings these should be may vary by the type of case. A generic rule that allows for waiver in multiple defendant cases may be insufficient to ensure a knowing and intelligent waiver by the client.⁴⁵

- e. Does incompetence create a conflict of interest? What about representation by defense counsel who themselves face criminal prosecution or professional discipline?

A perennial problem for defendants seeking relief for ineffective assistance of counsel is the conflict between the defendant's interest in securing a new trial and defense counsel's interest in maintaining his reputation and justifying their actions and inactions in defending the defendant. This problem is minimized by the appointment of separate counsel for claims of ineffective assistance of counsel, but there is still an incentive for defense counsel, even in trial, to blame the client for bad strategic decisions. The traditional conflict of interest rule does not address this problem in anything but the most general prohibition against conflicts with a lawyer's "personal interests."

Sadly, there is also a growing problem of defense lawyers handling cases while they themselves face prosecution or professional discipline.⁴⁶ Defense lawyers in those situations face a unique type of

44. See Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407 (1998).

45. See Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 78 (2009) (suggesting that conflicts of interest are not easily remedied by providing decision-makers with information and that defendants will necessarily discount such information).

46. For an excellent work on this issue, see generally Anne Bowen Poulin, *Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?*, 47 AM. CRIM. L. REV. 1135 (2010).

conflict. While their clients expect them to argue zealously in favor of the client's case, the lawyers themselves must be careful not to antagonize the prosecutors who may hold their own fate in their hands.⁴⁷ Again, one would hope that a defense lawyer would recognize this as a "personal interest" in conflict with a client, but the problem may be egregious enough that a specific standard should be drafted to deal with this issue. Current law makes it extremely difficult for a defendant to seek relief even if he or she is represented by a lawyer with this conflict.⁴⁸ Thus, prophylactic ethical rules are needed.

- f. Does defense counsel who is seeking employment with a prosecution office at the time of representation also have a conflict of interest?

Currently, the ABA defense standards prohibit defense counsel from representing a criminal defendant in a jurisdiction in which he or she is also a prosecutor.⁴⁹ However, this prohibition does not go far enough. In some cases, defense counsel may be interviewing with the prosecutor's office or may have gone so far as to accept employment with that office.⁵⁰ Even at these early stages, defense counsel has an interest in ingratiating himself or herself with the prosecutor's office. At minimum, defense counsel should have a duty to advise the client of the lawyer's activities so that the client can gauge and monitor whether the lawyer is compromising the client's interests in an effort to seek a position in the prosecutor's office. Thus far, courts have not found that a defense lawyer seeking employment in a prosecution office creates a disqualifying conflict of interest.⁵¹ Thus, it is important that the Ethical Standards be

47. See, e.g., *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) (If an attorney is under criminal investigation, he may "pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer.").

48. See *Poulin*, *supra* note 46, at 1172-73 (noting that early intervention in the conflict is important because "not all courts are receptive [to post-conviction challenges] and the defendant faces a daunting obstacle regardless of whether the court applies the [Supreme Court's precedent under] the *Sullivan* rule or the *Strickland* test").

49. ABA Standard, Defense Function 4-3.5(g).

50. See, e.g., *Plumlee v. Masto*, 512 F.3d 1204 (9th Cir. 2008).

51. See, e.g., *Commonwealth v. Agbanyo*, 872 N.E.2d 758 (Mass. App. Ct. 2007) (no conflict of interest even though defense counsel had accepted a position at county prosecutor's office); *Garcia v. Bunnell*, 33 F.3d 1193, 1198-99 (9th Cir. 1994) (no conflict even though defense counsel was scheduled to be employed in prosecutor's office); *People v. Martinez*, 98 Cal.Rptr. 127 (Cal. Ct. App. 2000) (no conflict despite counsel's acceptance of employment offer from prosecutor's office).

amended to make that conflict clear.⁵² The proposed Standards thoughtfully suggest such a new rule.⁵³

- g. Are there sufficient disclosures to remedy a conflict of interest and should independent counsel advise a defendant regarding potential conflict issues?

The ABA Standards are probably overly optimistic in believing that a defendant can knowingly and voluntarily waive a conflict of interest. This is because it is often impossible for defense counsel to review sufficient information and defense strategy to get a knowing defense waiver. When a conflict arises, defense counsel typically seeks immediate recusal with only the minimum information disclosed to the court. Given the limitations on defense counsel in regards to what information may be revealed, the ethical provision that provides for waiver may create an unrealistic expectation as to how conflicts can be resolved.

Moreover, it is questionable whether a defendant can make an intelligent waiver of conflict without advice from independent counsel. If the Ethical Standards are really designed to serve the defendant's interests, independent counsel should be available to provide such advice. While there will be additional costs involved, the decision of which counsel to use is among the most important decisions a defendant must make.

- h. How should joint defense agreements be treated?

There are concrete conflict of interest issues that regularly arise in criminal cases, but are not answered directly by the Ethical Standards. Rather, practicing defense lawyers are left to divine or interpret contradictory case law as to the effectiveness of joint defense agreements. The redrafting of the Ethical Standards offers an opportunity to settle how these agreements should be viewed.⁵⁴

52. See generally Poulin, *supra* note 46.

53. See Proposed ABA Defense Function 4-1.4(i) (May 21, 2009 Task Force Proposal); Rory K. Little, *The Role of Reporter for a Law Project*, 38 *Hastings Const. L.Q.* 747 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Defense Function) (2011) [hereinafter Little, App.: Proposed Defense Standards].

54. See generally Lisa A. Mathewson & Catherine M. Recker, *Joint Defense Agreements in the Corporate Context: No Guarantees*, 29 *Champ.* 20 (Sept./Oct. 2005).

- i. Should conflict of interest rules be stricter or more lenient for pre-indictment representation?

The current Standards do not address specifically the ethical issues that arise in representation of defendants in grand jury matters and pre-indictment negotiations. Yet, independent representation may be critical at this stage. While the general standards prohibiting one's loyalties from being affected by other or potential clients provides some guidance, the rules could be more precise. Is it proper for a lawyer to represent two witnesses before the grand jury if they both agree after full disclosure? Is it proper to do so if the lawyer knows that the grand jury proceeding is essentially an audition as to who will be immunized for trial and who will not?

The most difficult types of conflicts arise when clients decide to cooperate with an investigation. This can happen at any stage of the proceedings. Not only can there be a direct conflict between multiple clients, but the prospect that a client will become a government informant means that clients can continue to create conflicts of interest, as they are mined for information regarding other possible criminal activities and associates.

- j. To what extent does the duty of candor to the court interfere or redefine the duty of loyalty?

A lawyer may not knowingly present false information in court.⁵⁵ While the Standards incorporate this rule, they do not address the conflict of interest created for defense counsel when a client wants to testify falsely. In describing conflicts of interest, it may be helpful for this specific type of conflict to be identified and a specific prescription for dealing with the issue offered.

- k. "No good deed goes unpunished": When does helping a client create a conflict of interest?

Although the Standards prohibit a lawyer from acting as a surety for a client, they do not prohibit other actions that may begin by serving the client's interest but ultimately create a conflict. For example, may a lawyer propose to the court that the defendant live with the lawyer so that the client can be released on a personal recognizance bond? Is it a conflict for the lawyer to use his own reputation and prestige to help a client? If the goal of the Standards is to maintain a purely professional relationship between lawyer and

55. ABA Standard, Defense Function 4-7.5(b) (May 2009).

client, the little things that lawyers do to help their clients everyday may pose more of a risk to that relationship than the posting of a bond.

- l. Should the Standards set forth specific warnings that must be given to prevent conflicts of interest?

Judges have been very concerned lately about lawyers failing to advise persons during internal investigations related to criminal cases that the lawyer represents the entity and not the individual. These are commonly referred to as *Upjohn* warnings.⁵⁶ Given the frequency with which this issue arises, a remodeling of the Standards might include specific warnings that are designed to prevent, not just remedy, conflicts of interest.

- m. Why doesn't defense counsel's belief that a client is guilty create a conflict of interest?

One can anticipate that the answer to this question is because the defense lawyer has a duty to represent a client regardless of whether the client is guilty or innocent. Many a noble word has been said about this topic. However, it is undeniable that a lawyer's belief in the innocence or guilt of a client can, in at least subtle ways, affect the lawyer's decision making in a case. The reason the lawyer's beliefs do not create a conflict of interest is because lawyers are not supposed to be influenced by those beliefs. Yet, human nature is a bit more complicated than the rules might presume.

- n. Does a defense lawyer have a conflict of interest if the defendant moves to replace counsel but is unsuccessful in doing so?

The prescription for many potential conflicts of interest for defense lawyers is "not to take personally" actions or words of a client that might otherwise influence the lawyer. In fact, a client's words and actions may cause a lawyer to withdraw for a conflict. One can only take so much abuse. However, many lawyers, devoted to the ideal of representing a person charged by the state, tend to deny the personal impact such actions and words may have on the client. The

56. See Timothy M. Middleton, "Watered-Down Warnings": *The Legal and Ethical Requirements of Corporate Attorneys in Providing Employees with "Upjohn Warnings" in Internal Investigations*, 21 GEO. J. LEGAL ETHICS 951 (2008). See also Jeffrey Eglash, Gordon A. Greenberg & Laurie L. Levenson, *Avoiding the Perils and Pitfalls of Internal Corporate Investigations: Proper Use of Upjohn Warnings*, Conference Paper, ABA Section of Litigation Corporate Counsel CLE Seminar, Feb. 11-14, 2010.

Ethical Standards envision a defense lawyer with infinite patience and the thickest of skins.

There are similar tensions when a lawyer is appointed to represent a defendant as a standby counsel. To what extent do conflict of interest issues arise in these scenarios and what should be the working relationship between counsel and the pro se defendant when the defendant has made it clear that he or she does not welcome counsel's input?⁵⁷

III. Final Questions

The roundtable discussions held on these issues have produced many more issues that should be addressed in revising the ABA Standards on Conflicts, both for the prosecution and the defense. It is evident that the conflict issues that arise in white collar cases are often very different from those in cases involving street crimes. Likewise, the conflict issues for prosecutors in large offices differ significantly from those of prosecutors in smaller counties who handle both criminal and civil matters. It is a Herculean challenge to draft rules that provide enough specificity to provide guidance, yet cover the myriad of unique conflict situations that regularly arise.

Ultimately, solving the challenge of drafting a code that adequately addresses conflicts of interest requires that the drafters be prescient enough to anticipate situations and questions not yet addressed. It also involves asking the most basic questions about ethical standards. These constitute the last four of the forty questions I propose:

Are the standards for the client's (or public's) sake or ours (the lawyers)?

Do we have the resources to set the standards we would like to set?

Will the court undermine these standards by creating constitutional standards that do not require enforcement of these standards?

Will lawyers be honest enough in evaluating their situations to properly apply the standards?

The redrafting of ethical standards offers the opportunity to ask the right questions, even if we do not have the perfect answers. We learn from the discourse and anticipate the very issues that the

57. See Meghan H. Morgan, *Standby Me: Self-Representation and Standby Counsel in a Capital Case*, 16 CAP. DEF. J. 367 (2004).

shareholders in the criminal justice system must face daily. While this essay addresses forty of the most important issues, there are certainly more than can be asked. Ethical Standards do not stand independently of each other. Conflicts issues are raised throughout the Standards.⁵⁸

In this paper, I offer a range of questions we can debate as we critically examine the wide range of conflicts of interest issues in criminal cases. Hopefully, if we ask (and answer) these questions now, the answers will not have to come during habeas corpus actions or bar proceedings against counsel. These questions are far from academic. They make up the day-to-day challenges of being a prosecutor or defense lawyer in America's criminal justice system. Thus, the bonus question we now must ask: Are we willing to learn from our past mistakes?

IV. Postscript: "So many questions, so little time"

As could be predicted, the issue of conflicts of interest for prosecutors and defense lawyers raises far more than the forty questions addressed in the early draft of this paper used for the ABA Roundtable discussions. Some of the additional questions have been integrated into other sections of the article. However, there are two additional questions that must be considered: (1) If we are to take the issue of conflicts seriously, should the advice of independent counsel be required to waive a conflict of interest?; and (2) What enforcement mechanisms will ensure that prosecutors and defense lawyers abide by the rules against conflicts of interest?

As for the right to independent advice regarding conflicts, in the best of all worlds, all clients would have the right to consult with independent counsel before waiving a conflict of interest. The problem is that we live in a world with limited resources. Thus, neither the current nor proposed Standards require that a client receive independent advice before waiving a conflict of interest. Without this requirement, there is a greater burden on the courts to ensure that the client is making a knowing and intelligent waiver.

With regard to enforcement mechanisms, there are a variety of models that may be considered, including: (1) the use of professional

58. For example, Proposed ABA Standard for Criminal Justice, Defense Standard 4-3.5 prohibits literary or media rights agreements. Presumably this is because of conflict that such agreements raise. See Ria A. Tabacco, *Defensible Ethics: A Proposal to Revise the ABA Model Rules for Criminal Defense Lawyer-Authors*, 83 N.Y.U. L. REV. 568 (2008).

responsibility or “ethics czars” to provide guidance in prosecution and defense offices; (2) court ombudsmen to resolve ethical issues; (3) ethical walls that screen lawyers from conflicts; (4) certification requirements; (5) reporting requirements when conflicts of interest are observed; (6) mandatory education requirements; and (7) office policy manuals.

However, while all of these are important approaches to consider, prosecutors and defense lawyers must have internal guidance mechanisms as well. They must be alert to potential ethical problems and understand how they might affect the lawyer’s ability to perform a crucial role in the criminal justice system.

In the end, the ultimate responsibility for ensuring that these conflicts do not undermine the fairness of a criminal proceeding resides with both the court and counsel. While lawyers must be guided by both moral compasses and ethical standards, conflict rules are not just a matter of ethics; they are a key aspect of the right to due process and have a profound impact on the public’s sense of confidence in the criminal justice system. “[C]ourts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.”⁵⁹ The goal of refining the ethical standards is no less than ensuring that the criminal justice system provides a venue for a fair trial for the defendant and the People.

59. *Wheat*, 486 U.S. at 159.

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