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SMU Law Review

Volume 38 | Issue 4 Article 3

January 1984

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Recommended Citation

Walter W. Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 Sw L.J. 965 (1984)
https://scholar.smu.edu/smulr/vol38/iss4/3

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UNETHICAL PROSECUTORS AND INADEQUATE DISCIPLINE

by

Walter W. Steele, Jr. *

THE key role played by the prosecutor in the American criminal justice system is well known and obvious. Beginning with the classic studies of De Long and Baker in the 1930s,[1] extensive literature has described the role and function of the prosecutor,[2] concentrating mainly on the following three prosecutorial functions: (1) the prosecutor's discretionary function (decisions to charge and the associated problem of discretion);[3] (2) the prosecutor's advocate function (conduct at trial);[4] and (3) the prosecutor's processing function (moving court dockets), which has been described both impressionally[5] and statistically.[6]

Of the three areas, this Article examines only the advocate function—conduct at trial. Specifically, the discussion here is limited to an analysis of the ethicality of prosecutors during trial and concludes with an analysis of the adequacy of the disciplinary mechanisms customarily used to deal with prosecutorial misconduct at trial.

To date, most analyses of the prosecutor's office have emphasized how that office relates to other parts of the criminal justice system, or have emphasized the means and techniques of prosecution. Perhaps the time has

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Editor's Note: Unless otherwise indicated, all references to Disciplinary Rules (DR) and Canons are to the Model Code of Professional Responsibility.

1. *See* Baker, *The Prosecutor: Initiation of Prosecution*, 23 J. AM. INST. CRIM. L. & CRIMINOLOGY 770 (1933); Baker & DeLong, *The Prosecuting Attorney Provisions of Law Organizing the Office*, 23 J. AM. INST. CRIM. L. & CRIMINOLOGY 926 (1933).

2. For representative works, see J. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY (1980); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1970); Mills, *The Prosecutor: Charging and "Bargaining,"* 1966 U. ILL. L.F. 511.

3. F. MILLER, *supra* note 2, at 151.

4. *See, e.g.*, Comment, *Prosecutorial Misconduct—Recent Second Circuit Cases*, 2 HOFSTRA L. REV. 385 (1974).

5. *See, e.g.*, THE PROSECUTOR'S DESKBOOK (P. Healy & J. Manak eds. 1971); Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the A.B.A.*, 71 MICH. L. REV. 1145 (1973).

6. *See, e.g.*, Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584. A more complete analytical approach is found in Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976), but its scope is limited to discretion. *See also* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 644 (1972) (extensive discussion of remedies for misconduct by prosecutors and judges).

come in the evolution of things to think less about relationships and techniques and to think, instead, about the prosecutor's ends and purposes. The American Bar Association (ABA) has stated that the "[t]he legal profession must continue to develop an awareness of the importance of a vigorous, fair, and efficient prosecution system and give high priority to the sponsorship and support of those measures necessary to implement this objective."[7]

Can prosecution be vigorous, fair, and efficient without reference to the ABA Code of Professional Responsibility, or to its new analogue, the Model Rules of Professional Conduct? Should a prosecutor meet or exceed the minimal ethical standards announced by the bar through the Code of Professional Responsibility? If the mounting criticism by the bar and by the public about the ethics of the legal profession is justifiable and realistic, then it would seem that more emphasis should be given to the ethicality of the prosecutor's office than to techniques of the act of prosecution, as has been the case heretofore.[8]

At one point the ABA took the position that prosecutors should adopt a higher standard of conduct than lawyers generally. The 1958 ABA report concerning professional responsibility stated that the public prosecutor must not use the standards of an attorney appearing on behalf of an individual client as a guide for the conduct of his office.[9] The report further asserted that if the prosecutor's duties are to be properly discharged, the freedom granted to a partisan advocate must be severely curtailed.[10] Later, however, when the ABA adopted the Standards for the Prosecution Function they defined the term "unprofessional conduct" as "conduct which, in either identical or similar language is or should be made subject to disciplinary sanctions pursuant to the Code of Professional Responsibility in force in each jurisdiction."[11]

Despite these expressions of intent to hold prosecutors to the ethical standards of other lawyers, both scholars and bar grievance committees have paid scant attention to prosecutorial ethicality, and consequently, prosecutors may have developed a sense of insulation from the ethical standards of other lawyers. Flagrant misconduct by prosecutors appears to be increasing.[12] Unfortunately, this trend is not of recent origin. As early

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7. PROSECUTION FUNCTION STANDARDS Standard 3-1.1 commentary (1980).

8. One author commented:

> [T]he general disillusionment with the criminal process, from the outside and from within, is a matter for considerable regret. For, *inter alia*, we do count upon this system, awkward as it may be, to gratify our need to believe that our government is capable of playing a creditable part in the drama of justice.

Uviller, *supra* note 5, at 1167.

9. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958).

10. *Id.*

11. PROSECUTION FUNCTION STANDARDS Standard 3-1.1(e) (1980).

12. Despite time-honored rules regarding the conduct of a criminal trial and the approval of the American Bar Association in 1971 of new standards relating to the prosecution and defense functions, throughout the past decade appeals courts have confronted the issue of misconduct by prosecutors. In their efforts

as fifty years ago, Roscoe Pound observed that the number of incidences of prosecutorial misconduct was substantial and compared the phenomenon to the abuses prominent during the seventeenth century.[13]

In the half-century since Pound's foreboding, court after court has sounded the alarm in unmistakable language, such as: "flagrant abuses of professional standards,"[14] and "[t]his Court has been increasingly faced with meritorious claims of prosecutorial misconduct contrary to clearly expressed precedent."[15] One court, faced with a growing number of prosecutorial misconduct cases, stated that the great number of prosecutorial misconduct cases involving particular prosecutors indicates that the abuses are deliberately calculated and not isolated instances of overzealous trial conduct.[16]

This Article examines the extent and nature of violations of the Code of Professional Responsibility by prosecutors during trial. Finally, it offers some suggestions concerning a new approach to imposing sanctions on prosecutors who violate the Code of Professional Responsibility.

I. DOES THE CODE OF PROFESSIONAL RESPONSIBILITY APPLY TO PROSECUTORS?

To suggest a need to discuss whether the Code of Professional Responsibility applies to prosecutors may appear sophomoric. In its Standards for the Prosecution Function, the ABA applies the Code of Professional Responsibility to prosecutors,[17] and the National District Attorneys Association does the same in its National Prosecution Standards.[18] In addition, several cases have applied the Code of Professional Responsibility to prosecutors with little or no discussion of any underlying doubts,[19] and the

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to deter misconduct courts have reiterated existing guidelines, decried the amount of cases appealed on the grounds of prosecutorial error, and threatened imposition of sanctions if the practice continues.

Note, *Prosecutorial Misconduct: The Limitations upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U.L. REV. 1095, 1095-96 (1980) (footnotes omitted).

13. R. POUND, CRIMINAL JUSTICE IN AMERICA 187 (1983).

14. United States v. Falk, 605 F.2d 1005, 1016 (7th Cir. 1979).

15. People v. Biondo, 76 Mich. App. 155, 256 N.W.2d 60, 61 (Mich. 1977).

16. Jackson v. State, 421 So. 2d 15, 16 (Fla. Dist. Ct. App. 1982) (citation omitted).

17. PROSECUTION FUNCTION STANDARDS Standard 3-1.1(d) (1980) states: "It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined in the codes and canons of the legal profession."

18. NATIONAL PROSECUTION STANDARDS Standard 25.1 (National District Attorneys Ass'n 1977) states in part:

> A. To ensure the highest ethical conduct and maintain the integrity of prosecution and the legal system, the prosecutor shall be thoroughly acquainted with and shall adhere at all times to the Code of Professional Responsibility as promulgated by the American Bar Association and as adopted by the various state bar associations.

19. *See, e.g.*, *In re* Wilson, 76 Ariz. 49, 258 P.2d 433 (1953) (district attorney disbarred for accepting payoff from prostitute); *In re* McCowan, 175 Cal. 51, 170 P. 1100 (1917) (prosecutor suspended for 1 year); *In re* Friedman, 76 Ill. 2d 392, 392 N.E.2d 133 (1979) (prosecutor admitted violating Code even though not formally adopted by prosecutor for that jurisdiction); *In re* Burrows, 291 Or. 135, 629 P.2d 820 (1981) (en banc) (district attorney given public reprimand).

United States Supreme Court has made passing reference to the amenability of prosecutors to discipline under the Code of Professional Responsibility.[20] Other courts, however, in what appear to be well-reasoned opinions, have expressed varying degrees of doubt about the applicability of the Code of Professional Responsibility to prosecutors. These cases raise issues about the relationship between sanctions for professional misconduct, such as suspension or disbarment, and the ability of a prosecutor to continue in office. Is disbarment or suspension of a prosecutor's license to practice tantamount to extrajudicial impeachment from office in violation of the separation of powers doctrine? Cases raising this issue may be catalogued into three groups: (1) those that reject the power of the courts to impose any sanction on a prosecutor that may be tantamount to impeachment; (2) those taking the opposite view, holding that the power to impose professional discipline is inherent to the judicial branch and may not be diminished; and (3) those taking a somewhat peculiar middle ground, holding that the bar grievance committee may impose professional discipline on a prosecutor, but that the discipline does not affect the prosecutor's official duties.

A leading case rejecting the power to sanction a prosecutor through conventional grievance mechanisms is *Simpson v. Alabama*.[21] Interpreting Alabama statutes as making impeachment the only mechanism to discipline a prosecutor, *Simpson* held that the bar could not impose professional discipline on a prosecutor, not even a reprimand.[22] In *Snyder's Case*[23] the Supreme Court of Pennsylvania reached the same conclusion, stating that the state bar could not disbar a prosecutor because disbarment is tantamount to removal from office, which can be accomplished only by impeachment through procedure set by statute.[24] These holdings are not without logical appeal. Typically, the prosecutor is elected to hold office for a set period of time, and the customary way to remove any elected office holder is, after all, impeachment. Whenever a disciplinary sanction makes it impossible for a prosecutor to function, that sanction has assumed the role of the impeachment process in a way that may very well be contrary to the will of both the electorate and the legislature. On the other hand, cases holding that professional discipline is an inherent power of the judicial branch conclude that professional discipline, ipso facto, is not impeachment; thus the inherent power of the judicial branch can not be diminished by what may be a happenstance result, that is de facto

20. In Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court held that a prosecutor acting within the scope of his duties was immune from suit for damages under 24 U.S.C. § 1983. As part of the rationale for that holding the Court stated: "Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Id.* at 429 (citing A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13).

21. 311 So. 2d 307 (Ala. 1975); *see also* Watson v. Alabama State Bar, 311 So. 2d 311, 312 (Ala. 1975) (*Simpson* rationale applied to deputy district attorney).

22. 311 So. 2d at 310.

23. 301 Pa. 276, 152 A. 33 (1930).

24. 152 A. at 36-37.

impeachment.[25] *Commonwealth v. Stump*[26] exemplifies this second group of cases. The opinion in *Stump* reviewed other cases at some length and concluded that the office of prosecutor does not shield or protect the incumbent from a failure to obey his oath and consequent duties as an attorney.[27] Like the first group of cases, this second group also has some logical appeal. After all, holding that prosecutors are immune from professional discipline is incongruous at the least and intolerable at the most. One might surmise that the electorate, if asked, would readily accede to the judiciary the power to discipline a prosecutor for ethical misconduct, even though the discipline may result in de facto impeachment.

The third group of cases seemingly lacks logical appeal. These cases take an incongruous approach, holding that the judicial branch has inherent power to discipline a prosecutor, but that such discipline will not diminish the prosecutorial function. In *Melville v. Wettengel*,[28] for example, the court found a lawyer guilty of ethical misconduct serious enough to justify an indefinite suspension, but ordered that the suspension not affect that lawyer's performance of duties as district attorney.[29] A different court reached a similar result in *In re Maestretti*,[30] in which the court suspended a prosecutor for thirty days, but said that the suspension did not apply to his official duties as district attorney.[31] Obviously, if a prosecutor holds a full-time position, these cases make a mockery of the conventional discipline sanction mechanism.

A Texas court has taken an interesting middle ground. In *Phagen v. State*[32] the Texas Court of Civil Appeals held that whenever a prosecutor loses his right to practice law and thus becomes incapacitated to perform his office, an affirmative duty arises on the part of the prosecutor to resign his office, and failure to resign makes that prosecutor a usurper of office.[33] This approach cleverly avoids the tension between the judicial branch, the electorate, and the legislature by making the ultimate act of incapacitation the act of the prosecutor and not the act of the grievance committee.

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25. Clearly, the power to impose professional discipline is an inherent power of the judicial branch, but it is an inherent power that has been compromised somewhat by the judicial branch's showing some deference to the legislative branch. *See* Steele, *Cleaning up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413 (1978).

26. 57 S.W.2d 524 (Ky. 1933).

27. *Id.* at 525; *see also In re* Jones, 70 Vt. 71, 39 A. 1087, 1090-91 (1898), in which the court stated:

> Notwithstanding he [the prosecutor] might be liable to impeachment, or might be rejected by the voters . . . his conduct when acting in his office of attorney . . . was open to investigation by this court; and . . . it is, beyond question, the right and duty of this court to deal with him as justice demands. It may suspend or disbar him.

28. 57 P.2d 699 (Colo. 1936) (en banc).

29. *Id.* at 701.

30. 30 Nev. 187, 93 P. 1004 (1908).

31. 93 P. at 1005.

32. 510 S.W.2d 655 (Tex. Civ. App.—Fort Worth 1974, *writ ref'd n.r.e.*).

33. *Id.* at 661-62.

II. PROSECUTORS' COURTROOM MISCONDUCT TYPIFIED

In the course of thousands of prosecutions occurring annually in American courtrooms, some ethical misconduct by prosecutors is inevitable. Simply listing examples of such occurrences provides little insight, because the list does no more than confirm the truism—those things happen.[34] Categorizing the types of misconduct by prosecutors during trial, however, might be of some benefit. Another useful insight, if it can be gleaned from the cases, is the frequency of misconduct—is it as pervasive as some of the writers indicate?[35] Unfortunately, no practical way has yet been found to measure the frequency of prosecutorial misconduct, except to rely upon impressions gained from the volume of appellate opinions and the language contained therein as to the frequency of such misconduct.

A survey of appellate cases dealing with all types of prosecutorial misconduct reveals a significant number, perhaps a majority, related to the nonadvocate functions of the prosecutor's office.[36] These cases fit rather easily into categories. For example, instances of unethical conduct can be found dealing with a prosecutor's responsibility to enforce penal laws,[37] to screen cases,[38] to account for state funds,[39] and to plea bargain.[40]

Another sizeable category of cases concern DR 7-105(A).[41] Apparently, these relatively numerous instances of prosecutorial misconduct centering around DR 7-105 arise from allowing prosecutors to carry on private practices.[42] For example, in *In re Truder*[43] a prosecutor received a severe reprimand for representing victims in a civil case and the state in a criminal case against the same defendant for the same offense.[44] *MacDonald v.*

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34. For such lists, see Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1034-41 (1967); *cf.* Braun, *Ethics in Criminal Cases: A Response*, 55 GEO. L.J. 1048 (1967) (contending that the conduct of prosecutors is sufficiently policed given the fact they are subject to close scrutiny at the trial and appellate level, as well as by defense counsel).

35. One author observed: "The academic commentators who have examined the problem of prosecutorial misconduct have almost universally bemoaned its frequency." Alschuler, *supra* note 6, at 631; *see supra* notes 17-20 and accompanying text.

36. For a useful list, see Annot., 10 A.L.R. 4 TH 605 (1981).

37. *In re* Graves, 146 S.W.2d 555 (Mo. 1941) (en banc) (prosecuting attorney ousted in quo warranto proceeding and reprimanded in grievance proceeding for failing to enforce gambling, prostitution, and liquor laws).

38. *See* F. MILLER, *supra* note 2, at 151.

39. *In re* Jelliff, 271 N.W.2d 588 (N.D. 1978) (prosecuting attorney suspended for embezzlement; held a violation of DR 1-102(A)(5), (6); also held guilty of comingling state's funds with his own).

40. In the case of *In re* Rook, 556 P.2d 1351, 1357 (Or. 1976) (en banc), the court held that DRs apply to prosecutors and that the prosecutor's conduct in this case, harrassing another by refusing to plea bargain with defendants until they discharge their retained counsel, clearly fell "within the plain language and intent of DR 7-102(A)(1)." *Id.* The district attorney received a public reprimand. *Id.*

41. DR 7-105(A) provides: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

42. *See* Kizer, *Legal Ethics and the Prosecuting Attorney*, 79 W. VA. L. REV. 367 (1976-1977) for a discussion of the inevitable conflicts of interest that arise whenever a prosecutor engages in part-time private practice.

43. 17 P.2d 951 (N.M. 1932).

44. *Id.* at 952.

Musick[45] involved similar conflict of interest issues, and the United States Court of Appeals for the Ninth Circuit found that a prosecutor violated DR 7-105 by offering to dismiss a criminal prosecution if the defendant would stipulate to probable cause for the arrest.[46] Deputies from the district attorney's office stipulated that the prosecutor made the offer to protect the police from a possible civil rights suit for false arrest. The court stated that a prosecutor's use of a criminal prosecution to prevent a civil proceeding by the defendant against policemen is improper, even when the civil case originates from the events that are the basis for the criminal charge.[47] No more will be said about the significant number of cases alluded to above since the focus of this paper is on misconduct that occurs during trial.

Earlier commentators have noted the broad scope of unethical trial conduct by prosecutors.[48] One excellent example of such writing[49] presents a plenary analysis of prosecutorial misconduct including, inter alia, making statements of personal belief in violation of DR 7-106(C)(4);[50] making disparaging remarks about the defendant in violation of DR 7-106(C)(2);[51] and making references to matters not in evidence in violation of DR 7-106(C)(1).[52] For example, in *Attorney Grievance Commission v. Green*[53] the court disbarred a prosecutor for attempted subordination of perjury, and in *Turner v. Ward*[54] the court reversed a conviction because the prosecutor knowingly used false testimony. In *State v. Socolofsky*[55] the court cen-

45. 425 F.2d 373 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970).
46. 425 F.2d at 375.
47. *Id.*
48. *See* Freedman, *supra* note 34.
49. Note, *supra* note 12.
50. DR 7-106(C)(4) provides:
> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
> . . . .
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

51. DR 7-106(C)(2) provides:
> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
> . . . .
> (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

52. DR 7-106(C)(1) provides:
> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

53. 365 A.2d 39, 41 (Md. 1976).
54. 321 F.2d 918 (10th Cir. 1963).
55. 666 P.2d 725, 725-26 (Kan. 1983).

sured a district attorney for violating DR 7-108(D)[56] when he improperly communicated with discharged jurors with the intent to harass, embarrass, or influence their actions in the future, a practice that may be all too common.

Some unethical conduct by prosecutors remains in the shadows, seldom addressed by commentators or by appellate opinions. The position of prosecutor often facilitates the occurrence of violations of either DR 7-110(B)[57] or DR 7-104(A).[58] Frequently, the assignment of a prosecutor to one particular judge can lead to a team-member kind of rapport between a judge and "his" prosecutor, a fact that facilitates violations of DR 7-110. While DR 7-110 makes its statement to lawyers, Canon 3A(4) of the Code of Judicial Conduct[59] makes the judge's obligation to avoid ex parte contacts equally obvious.[60]

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56. DR 7-108(D) (Communication with or Investigation of Jurors) provides:
After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

57. DR 7-110(B) states:
In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
(1) In the course of official proceedings in the cause.
(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

58. DR 7-104(A) states:
(A) During the course of his representation of a client a lawyer shall not:
(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

59. CODE OF JUDICIAL CONDUCT Canon 3A(4) (1972) provides:
A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

60. *In re* Dekle, 308 So. 2d 5 (Fla. 1975), a disciplinary proceeding instituted against a Florida Supreme Court Justice because of his use of an ex parte memorandum in the preparation of his judicial opinion, resulted in a finding that his actions constituted impropriety and laxness. The judge was publicly reprimanded for violating canon 3A(4). *Id.* at 12.

In *In re* Del Rio, 400 Mich. 665, 256 N.W.2d 727 (1977), a judge had engaged in ex parte communications with a complaining witness just before a bench trial and attempted to transfer cases, in which the judge had some interest, to his court. As a result of this and other conduct, the court held that the judge had violated the ethical principles of avoidance of

Two leading cases typify a prosecutor's violation of DR 7-110(B): *Tamminen v. State*,[61] from Texas, and *In re Conduct of Burrows*,[62] from Oregon. These two cases present an interesting contrast because the court in *Tamminen* dealt with the violation as a due process matter and not as a grievance matter,[63] while the court in *Burrows* dealt with the violation as a grievance matter, with the district attorney receiving a public reprimand.[64] In *Tamminen* the prosecuting attorney, ex parte, provided the judge with a dossier of the defendant's past associations with convicted felons. The appeals court characterized that act as "reprehensible prosecutorial misconduct."[65] In *Burrows* the district attorney's ex parte communication with the judge related to bail. On appeal the finding of the district court pointed out the obvious danger of ex parte communications that the judge may be improperly influenced and inaccurately informed.[66]

Violations of DR 7-110(B) are not unique to prosecutors or to criminal cases,[67] but the affinity between judge and lawyer that might lead to ex parte communications may be greater in criminal cases than in civil cases. Violations of DR 7-110 are a gross affront to the delicate balances required to maintain the equilibrium of the adversary system, and one would hope that such violations would never occur in any type of case. One can hope that the paucity of reported cases means that relatively few violations of DR 7-110 exist, but a more realistic surmise might be that, of the many violations of DR 7-110, virtually all are undetected because the violation takes place in camera.

Contrasted to the relatively few cases discussing DR 7-110, cases discussing violations by prosecutors of DR 7-104(A) are somewhat numerous. Prosecutors have some equities when considering violations of DR 7-104. This DR has two parts: one part deals with the ethics of a lawyer (the prosecutor) communicating with an adverse party (the defendant) known to be represented; the second part deals with the ethics of a lawyer (the prosecutor) giving legal advice to an unrepresented adverse party (the defendant).

Whenever a prosecutor becomes involved in the investigative stage of a proceeding he is in a position to be tempted, if not actually required, to communicate with a defendant who may or may not be represented. In court a prosecutor will most certainly encounter unrepresented defendants who come seeking legal advice about the entry of a guilty plea. The inevitability of these situations together with the ambiguity of a prosecutor's

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impropriety and partiality, as proscribed by canons 4, 5, and 13 of the Canons of Judicial Conduct (applicable prior to October 1, 1974). 256 N.W.2d at 743 n.13. The judge was suspended from office for five years without pay. *Id.* at 753.

61. 653 S.W.2d 799 (Tex. Crim. App. 1983).
62. 291 Or. 135, 629 P.2d 820 (1981) (per curiam).
63. 653 S.W.2d at 802.
64. 629 P.2d at 826.
65. 653 S.W.2d at 802.
66. 629 P.2d at 826.
67. See cases collected in Annot., 22 A.L.R.4TH 917 (1983).

role when placed in these situations give rise to the equities present whenever violations of DR 7-104 are at issue.

Curiously, the appellate courts have dealt primarily with the relationship of DR 7-104 to the investigative-interrogation aspects of investigation, while largely ignoring the legal-advice giving—plea-bargaining aspects of prosecution and their relationship to DR 7-104. In *United States v. Killian*[68] agents of the FBI and the Drug Enforcement Agency (DEA) on orders of the United States Attorney interviewed a represented codefendant who was in custody without advising that defendant's attorney. Characterizing this order by the United States Attorney as highly improper and unethical,[69] the court went on to state that the FBI's and DEA's conduct was truly reprehensible and tarnished the dignity of the offices of the U.S. Attorney, the FBI, and the DEA.[70] Seldom are the facts about the prosecutor's responsibility for interrogation of a represented defendant so clear. More often, the defendant himself seeks to confer with the prosecutor, as in *People v. Green*.[71] Nevertheless, the court in *Green* was very critical of the district attorney for what it considered a violation of DR 7-104 in responding to the defendant's request for an audience.[72]

In *In re Conduct of Burrows*[73] a district attorney was charged with a violation of DR 7-104 for talking with a represented defendant who expressly asked to speak with the district attorney about making a deal that would allow leniency on pending charges in return for undercover work in the future. This particular prosecutor took the precaution of specifying that the conversation about undercover work would not include conversation about the pending case for which the defendant was represented. Nevertheless, the Supreme Court of Oregon held that the district attorney violated DR 7-104 and issued a public reprimand.[74] Similar opinions exist and are neatly summarized in the following statement from *United States v. Thomas*:[75]

> [O]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview which produced the statement and was given a reasonable opportu-

68. 639 F.2d 206 (5th Cir. 1981), *cert. denied*, 451 U.S. 1021 (1980).

69. 639 F.2d at 210.

70. *Id.* Despite the court's highly critical comments, the conviction was not reversed because the prosecutor did not use the evidence obtained in violation of DR 7-104 against the offended co-defendant. *Id.*

71. 405 Mich. 273, 274 N.W.2d 448 (1979).

72. 274 N.W.2d at 453. The court stated:

> We hold that while this defendant's initiative and willingness to speak and the lack of overreaching by the assistant prosecuting attorney are factors to be considered in mitigation, they do not excuse compliance with the standard of professional conduct prescribed by DR 7-104(A)(1).

Id.

73. 291 Or. 135, 629 P.2d 820 (1981) (per curiam).

74. 629 P.2d at 826.

75. 474 F.2d 110 (10th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973).

nity to be present. To hold otherwise, we think, would be to overlook conduct which violated both the letter and the spirit of the canons of ethics.[76]

As the previous cases illustrate, appellate court opinions are somewhat vociferous about a prosecutor's violation of DR 7-104(A)(1), which deals with communication with a represented defendant.[77] By contrast, opinions dealing with a prosecutor's violation of DR 7-104(A)(2), which involves giving advice to an unrepresented defendant, do not exist. These facts seem incongruous, indeed. Seemingly, prosecutors are forced to deal with unrepresented defendants seeking to negotiate their own guilty pleas much more often than with the problems of investigative interrogations of a represented defendant. A defendant seeking to negotiate a guilty plea with a prosecutor is in need of legal advice. That the prosecutor and the defendant are in a direct adversary relationship is self-evident. EC 7-18 states: "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel."[78] Is a prosecutor's offer of a negotiated sentence to an unrepresented defendant the giving of "advice" that is expressly forbidden by DR 7-104(A)(2)? Consider that the defendant is a layman and probably a novice to the courtroom. Consider that the prosecutor holds an authoritative position, even in the eyes of seasoned criminal attorneys. Can there be any doubt that the offer by a prosecutor to negotiate with an unrepresented defendant is precisely the type of event that DR 7-104(A)(2) seeks to avoid? If so, why the silence from the appellate courts about this particular violation of ethical standards? Could it be that no one has thought to raise the issue? Is a more likely answer that all associated with the issue avoid it because survival of the American criminal justice system depends on moving cases, and significant lubricant in that effort is afforded by the self-representing defendant, who is somewhat contrite?

In conclusion, instances of prosecutorial misconduct are numerous indeed. Furthermore, a great deal of that misconduct in the courtroom goes unreported, either because it occurs in secret or in seclusion or because the various observers of the misconduct do not complain. In fact, one might argue that some forms of unethical conduct by prosecutors have become normative to the system.

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76. 474 F.2d at 112. *Compare* United States v. Lemonakis, 485 F.2d 941, 956 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974) (informer who recorded conversation with represented defendant on instructions of prosecutor was not the "alter ego" of the prosecutor), *with* McCubbin v. State, 675 P.2d 461, 465-66 (Okla. Crim. App. 1984) (district attorney's use of information at trial obtained by an informant placed in jail cell with accused murderer was a violation of sixth amendment and resulted in a reversal of conviction).

77. *But cf.* Pannell v. State, 666 S.W.2d 96, 98 (Tex. Crim. App. 1984), in which the court held that a violation of DR 7-104(A)(1) by a district attorney did not amount to a violation of state law. Despite the recognition of the state bar as an administrative agency, the court rejected the proposition that disciplinary rules are "laws" of the state that fall within the reach of TEX. CODE CRIM. PROC. ANN. art. 38.23 (1979), which excludes evidence obtained in violation of the laws of Texas. *Id.*

78. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1980).

III. REVERSAL OF CONVICTIONS

If unethical conduct by prosecutors in court occurs frequently, numerous disciplinary proceedings against prosecutors should be found, but such is not the case. Apparently, instead of being dealt with by conventional grievance processes, prosecutors' unethical conduct often becomes a part of the law of the case if the defendant appeals the conviction. Thus, we have a somewhat anomalous phenomenon; unethical conduct at trial by defense lawyers is dealt with as a grievance, involving administrative fact-finding and imposing of sanctions that is usually carried out in private, and only rarely reaches the appellate level.[79] On the other hand, unethical trial conduct by prosecutors is often briefed and argued by both sides in an appellate court as a part of the errors on appeal. Thus, the appellate court's opinion becomes a kind of summary judgment as to the propriety of the prosecutor's conduct in that case. Although this phenomenon might appear harsh from the standpoint of a prosecutor, it seems to have little deterrent effect on prosecutors and, as will be demonstrated, is largely dysfunctional from the standpoint of the administration of criminal justice.[80]

Since appellate courts reverse convictions due to prosecutorial misconduct at trial,[81] one must ask whether reversing a conviction is an appropriate or useful way to adjudicate prosecutorial misconduct and impose sanctions.[82] On the face of things, reversing a conviction is not a deterrent to the prosecutor, but rather a benefit to the defendant.[83] Other reasons cause the validity of reversal of convictions as a sanction for prosecutorial misconduct to be suspect. The question on appeal is validity of the conviction, not validity of the prosecutor's conduct per se. If a conviction lacks

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79. For a thorough overview of the conventional grievance process, see Nordby, *The Burdened Privilege: Defending Lawyers in Disciplinary Proceedings*, 30 S.C.L. REV. 363, 394-402 (1979).

80. Some commentators have recognized that the role played by appellate review of prosecutorial misconduct is dysfunctional yet central to the evaluation and imposition of sanctions for such misconduct. One commentator stated:

> Academic commentators have generally despaired of appellate reversal as an effective means of controlling prosecutorial misconduct. They have referred to reversal as a "quasi-sanction" and have said, "Appellate justices time and time again have condemned . . . poor conduct and warned prosecutors to keep within the bounds of propriety. Later opinions reflect the result—frustrating failure." These academic observers have found it imperative that "two distinct problems—justice and discipline—be kept separate."

Alschuler, *supra* note 6, at 645 (footnotes omitted).

81. *E.g.*, Berger v. United States, 295 U.S. 78, 88-89 (1935), in which the Court reversed a criminal conviction because of the cumulative effect of the prosecutor's improper suggestions, insinuations, and assertions of personal knowledge before the jury. This is one of the earliest and most frequently cited cases dealing with the impact of a prosecutor's unethical trial conduct on the validity of a conviction.

82. *Cf.* DeFoor, *Prosecutorial Misconduct in Closing Argument*, 7 NOVA L.J. 443 (1983) (suggesting that reversal of a case may prejudice society more than the prosecutor).

83. In Jackson v. State, 421 So. 2d 15, 16 (Fla. Dist. Ct. App. 1982), the court stated that repeated reversals for prosecutorial impropriety did not have their desired effect of preventing acts of prejudicial misconduct. The court went on to speculate that some prosecutors believe that time spent by a defendant in jail during the lengthy appellate process is enough to cause the prosecutor to feel that the case was effectively won. *Id.* n.4.

due process because of the overwhelming taint of a prosecutor's misconduct, reversal is inevitable, but the purpose of reversal is and should be fairness to the defendant, not the imposition of sanctions on a prosecutor.[84] Indeed, many instances of harmless error occur when an appellate court finds trial misconduct by the prosecutor but does not reverse the conviction.[85] In such cases the only apparent sanction for unethical conduct is that the conduct is described in the opinion, perhaps in opprobrious terms.[86]

The dysfunction of reversal as a sanction is evident in those instances in which a disparity arises between the standards established in the Code of Professional Responsibility and the requirements of the law. These instances create another set of cases in which an express finding of unethical trial conduct does not result in any sanction. For example, the standards set forth in DR 7-103 require the prosecutor to disclose any exculpatory evidence that "tends to . . . mitigate the degree of the offense, or reduce the punishment."[87] The law set forth in the cases of *Brady v. Maryland*[88] and *United States v. Agurs*,[89] however, requires a reversal of a conviction only if the defendent made a specific request for such evidence.[90] If the defendant served only a general request for exculpatory information on a prosecutor, the court will reverse the conviction if the evidence withheld creates a reasonable doubt that previously did not exist.[91] Thus, conduct by a prosecutor could clearly violate the standard set by DR 7-103, while clearly not violating the standard set by the law, and thus an appellate court would not reverse the conviction, nor impose a sanction on the prosecutor.

The most obvious reason for the dysfunction of reversal as a sanction is the fact that many defendants do not appeal their convictions, or if they do appeal, they may have failed to properly preserve the error arising from ethical misconduct.[92] Since reversing cases is such a dysfunctional way to

84. Recently, in United States v. Hasting, 103 S. Ct. 1974, 1978, 76 L. Ed. 2d 96, 104 (1983), the Supreme Court had occasion to discuss this point and held that an appellate court's supervisory power to reverse a conviction because of prosecutorial misconduct could not be used to reverse when the misconduct amounted to no more than harmless error.

85. *E.g.*, United States v. Okenfuss, 632 F.2d 483, 485-86 (5th Cir. 1980).

86. *See* United States v. Hasting, 103 S. Ct. 1974, 1979 n. 5, 76 L. Ed. 2d 96, 104 n.5 (1983).

87. DR 7-103(B).

88. 373 U.S. 83 (1963).

89. 427 U.S. 97 (1976).

90. 373 U.S. at 87.

91. 427 U.S. at 112-13.

92. One early commentator appropriately summarized the matter in the following statement:

> Because prosecutors are obligated to pursue every legitimate means to bring about a just conviction, they must refrain from using improper methods calculated to produce wrongful convictions. . . . Resort to such conduct is seldom grounds for a new trial, however, especially in the absence of a contemporaneous objection, unless the resulting unfairness "permeates the entire atmosphere of the trial" or prejudices the substantial rights of the defendant. Furthermore, prosecutorial conduct deemed improper generally will not result in reversal if the trial court issued curative instructions, the evidence against

impose sanctions for unethical conduct, one cannot help but wonder why appellate courts, with their inherent power over discipline, have not structured more formidable and sanction-specific remedies. When from the record, the briefs, and the arguments on appeal, the appellate court has found a prosecutor's conduct to be unethical, why is the court content simply to decide whether or not to reverse the conviction? Why do the appellate courts avoid imposing sanctions against an offending lawyer directly? In fact, a few appellate courts have addressed that issue, but in most cases they have suggested that the trial court should do something about imposing sanctions, and for the most part these appellate opinions are lacking in any suggestion that the appellate court, itself, may impose sanctions against those whom it has judged to be violators of the Code of Professional Responsibility.

A typical example of this apellate court hesitancy is *Rodriguez v. State*,[93] in which the appellate court found that "this case approaches the limit to which a prosecutor may strain the patience of justice . . . ."[94] The court affirmed the conviction for lack of reversible error and then made this somewhat insipid remark:

> Further, judicial acquiescence in such misconduct only marks it with a silent seal of approval, making it the acceptable norm for all other prosecutors. In the face of this kind of impropriety, trial judges must not fear to move decisively in using their admonishment and contempt powers to assure that the proper ends of justice and the integrity of our legal system are preserved.[95]

Another example of a typically modest approach occurred in *United States v. Singleterry*.[96] In what was the fourth consecutive opinion by that appellate court to criticize the same named prosecutor for the same kind of improper conduct, the court went no further than a final warning that to appear as counsel in federal court is a forfeitable privilege.[97] The Second Circuit Court of Appeals gave more thorough consideration to the problem in *United States v. Modica*.[98] The court listed the following three strategies that an appellate court could adopt to deal with improper courtroom conduct: (1) a reprimand of the offending prosecutor by name in a publicized opinion; (2) a direction to the trial court to initiate appropriate disciplinary action; and (3) the imposition of sanctions such as suspension from all courts in the circuit.[99] Not uncharacteristically, however, the court in *Modica* placed most of its reliance on the trial courts to deal with

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> the defendant is otherwise overwhelming, or the conduct itself can be construed as a response invited by the defendant.

Project: Tenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1979-1980, 69 GEO. L.J. 211, 467-68 (1980) (footnotes omitted).

93. 644 S.W.2d 200 (Tex. App.—San Antonio 1982, no pet.).
94. *Id.* at 202.
95. *Id.* at 209.
96. 646 F.2d 1014 (5th Cir. 1981), *cert. denied*, 459 U.S. 1021 (1982).
97. 646 F.2d at 1020.
98. 663 F.2d 1173 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).
99. 663 F.2d at 1185.

the problem.[100]

One appellate court, the Florida District Court of Appeals, has declared an *intention* to take direct action whenever it finds an instance of professional misconduct. In *Jackson v. State*[101] the Florida court stated that whenever the appellate court adjudicates an instance of prosecutorial misconduct in the future, it will also determine the appropriateness of initiating a disciplinary investigation.[102] This approach, while apparently unique, seems both manifest and just; one wonders why it is so rare.

IV. ANALYSIS OF THE PROBLEM

Prosecutors' unethical trial conduct is too common and too destructive to ignore. Any amount of misconduct by a prosecutor is intolerable because of the unique and powerful position he plays in the criminal justice system.[103] Frequent misconduct by prosecutors is subversive to the perception that the American legal profession is capable of self-policing professional standards. Spread on the public record of our national case reporter system is conduct such as a prosecutor's directing an undercover informant to attend and to record surreptitiously a private conference between defendants and their defense counsel,[104] and a prosecutor's making an ex parte tender of evidence to a judge in chamber.[105] Realizing that such cases provoke little or no outrage among the legal profession and very rarely result in any disciplinary investigation or sanction causes one to wonder how the appearance of fairness and professionalism in the American legal system has survived.

Before suggesting improvements, perhaps it would be useful to review some reasons for the failure of our present institutions to stop trial misconduct by prosecutors. A fuller appreciation of some of the current dysfunctions will enhance the ability to evaluate the workability of any given set of suggestions for change.

As a functional matter, the witnesses to trial misconduct are often lim-

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100. The court stated that "[w]e deem it sufficient to express our concerns and to alert the district courts to their range of remedies, with confidence that the proper discharge of their responsibilities will prove to be a sufficient deterrent." *Id.* at 1185-86.

101. 421 So. 2d 15 (Fla. Dist. Ct. App. 1982).

102. *Id.* at 17.

103. The ABA has appropriately stated:

> The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other hand, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and in the very idea, of justice itself.

Professional Responsibility: Report of the Joint Conference, supra note 9, at 1218.

104. *E.g.*, Brewer v. State, 649 S.W.2d 628, 629 (Tex. Crim. App. 1983).

105. *E.g.*, Tamminen v. State, 653 S.W.2d 799, 800 (Tex. Crim. App. 1983).

ited to the defendant, defense counsel, and the judge. If a defendant appeals his conviction, the judges of the appellate court can be added to the list of "witnesses." To expect the defendant, personally, to report misconduct by a prosecutor is unrealistic. Even if a defendant had the capacity to recognize unethical trial conduct, reporting the prosecutor to a grievance committee does not serve the defendant's self-interests.[106]

Defense counsel is the most logical source of reporting. Not only will defense counsel recognize unethical conduct when it occurs, DR 1-103(A) places an affirmative duty on every lawyer to report instances of violation of the Code of Professional Responsibility to the appropriate grievance committee.[107] Only one reported case has been found, however, in which defense counsel reported a prosecutor to a bar grievance committee.[108] A review of some of the annual reports of the United States Department of Justice Office of Professional Responsibility and reports of the Prosecutor Council for the State of Texas revealed very few instances of reports originating from defense counsel.[109] Undoubtedly, defense counsel has the same disincentives to reporting the prosecutor as does the defendant, for defense counsel is committed to the cause of the defendant. Furthermore, if defense counsel prejudices himself with the prosecutor by making a complaint to the grievance committee, he faces the prospect of the impact on cases of future clients.

If the defendant and the defendant's lawyer cannot realistically be expected to report unethical trial conduct by a prosecutor, attention must be focused on the judges. As the Code of Professional Responsibility directs the conduct of practicing lawyers, so does the Code of Judicial Conduct command judges to report instances of unethical conduct to the grievance committee.[110] Traditionally, American courts have been wary of treading upon the prerogatives of other departments of government lest they disturb

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106. One court has stated:

> It flies in the face of reason to expect a defendant to risk a prosecutor's actual or imagined displeasure by instituting proceedings that cannot directly benefit him. The defendant may not unreasonably believe such action will adversely affect his case in subsequent proceedings at the trial, on appeal or at a retrial following an appeal, or his later chances for parole.

People v. Green, 405 Mich. 273, 274 N.W.2d 448, 464 (1979).

107. DR 1-103(A) provides:

> "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violations."

108. *In re* Burrows, 291 Or. 135, 629 P.2d 820 (1981) (per curiam) (defense counsel reported two prosecutors and each received public reprimand for violating DR 7-104(a)(1), communicating with represented defendant without defense counsel's consent, and DR 7-110(B), discussing merits of case with judge without knowledge of defense counsel).

109. From the reports for 1981, 1982, and 1983 of the Prosecutor Council for the State of Texas, only one instance of a report originating from defense counsel was found: TEX. PROSECUTOR COUNCIL ANN. REP. No. 51-83-31, at 23 (1983). From the reports for 1980 and 1981 of the United States Department of Justice Office of Professional Responsibility, a total of 56 complaints from defense counsel were found: 26 complaints in 1981 and 30 complaints in 1980.

110. CODE OF JUDICIAL CONDUCT Canon 3(B)(3) (1972); *see also* Steele, *supra* note 25 (reviewing summary power of courts to discipline attorneys).

the delicate balance of power between the judiciary and the other branches of government, a fact that appears to have contributed greatly to the success of the American system and to the strength of the judicial branch. Accordingly, trial courts are very reluctant to institute sanctions against prosecutors, seen as functionaries from another branch of government with distinct roles of their own to play for the system to stay in equilibrium.[111] Curiously, however, attitudes seem to have shifted insofar as appellate court judges are concerned. In *United States v. Modica*[112] the United States Court of Appeals for the Second Circuit remarked on the futility of the present system that relies primarily on the reversal of convictions as the only retort to unethical conduct by prosecutors and suggested that appellate courts should begin to play a larger role.[113] Earlier, in *People v. Green*,[114] an opinion by the Supreme Court of Michigan, three of the concurring justices suggested that the solution to unethical trial conduct was for the appellate court to order the clerk to refer the matter to grievance authorities for appropriate action.[115] Similarly, in *Jackson v. State*,[116] a Florida appellate court served notice that henceforth it would report instances of attorney misconduct to the appropriate state bar agency. Despite such assertions by isolated courts, there is no evidence to date that appellate courts will become a driving force in the enforcement of ethical standards beyond the act of reversing convictions when appropriate.[117]

Even if there was reason for optimism about the prospect of defendants, trial counsel, trial judges, or appellate judges becoming more aggressive in reporting unethical misconduct, the adequacy of a typical state bar grievance organization to deal with any but the most egregious examples of prosecutor misconduct is in doubt. These committees derive their power from the judiciary and hence share in the reluctance to exert coercive influence on the office of the prosecutor, especially when a sanction may be tantamount to removal from office, or at the least, to a serious intervention between the prosecutor's office and the voters. Furthermore, most lawyers

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111. *See* DeFoor, *supra* note 82, at 475.

112. 663 F.2d 1173 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

113. The court stated:

> We share the frustration voiced by commentators at the inability of some federal prosecutors to abide by well-established rules limiting the types of comments permissible in summation. But we disagree that the solution lies in reversing valid convictions. . . . A reprimand in a published opinion that names the prosecutor is not without deterrent effect. A Court of Appeals, exercising its supervisory power over the administration of criminal justice, may well have authority to direct the initiation of appropriate action in the District Court or, alternatively, to take action of a disciplinary nature with respect to practice before the federal courts of the Circuit, including possible temporary suspensions. We need not probe the full extent of such authority at this time.

663 F.2d at 1185 (footnotes omitted).

114. 405 Mich. 273, 274 N.W.2d 448 (1979).

115. 274 N.W.2d at 455.

116. 421 So. 2d 15, 17 (Fla. Dist. Ct. App. 1982).

117. Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95, 97 (1982) (suggesting that appellate courts should set forth serious ethical questions that the record brings to their attention and should refer same to the appropriate agency for investigation).

who serve on grievance bodies practice primarily in the civil branch of the justice system, a fact that may make them reluctant to pass judgment on prosecutors, at least in those instances calling for some insight into the criminal justice system. Certainly, the prosecution of a criminal case is arcane from the standpoint of most lawyers. Differences between criminal practice and civil practice abound. The prosecutor is burdened with a responsibility, if not a duty, to the victim and to the body politic, as well as a responsibility to the court and to the defendant. Cast into this schizophrenic muck are such additional complicating factors as the fourth, fifth, and fourteenth amendments of the United States Constitution; ambivalent pretrial discovery mechanisms; and keen interest from the news media. These and other differences between the norms of criminal practice and the norms of civil practice obviously influence the standards of conduct expected of lawyers, thus making the judging of those standards an act requiring considerable expertise.

In the same vein, but at a different leval of abstraction, is the fact that the concept of the prosecutor's office is multifaceted, requiring many different professional faces, some of which are more visible than others. The prosecutor as a trial lawyer, as one who charges persons with crime, and as one who seeks justice through vindication are fairly well-known characteristics, but the prosecutor as a politician with a constituency that includes such diverse groups as police, judges, news media, and citizen groups is not so obvious. For all of these reasons conventional grievance mechanisms appear inappropriate for prosecutors, and it may be that the great reluctance to discipline prosecutors derives from that sense of inappropriateness.

V. A PROPOSAL FOR POLICING AND IMPOSING SANCTIONS ON PROSECUTORS

What follows is a proposed statute and commentary based in part on an adaptation of a Texas statute that created the Prosecutor Council of Texas.[118] This statute creates a new mechanism and procedure to detect instances of unethical trial conduct by a prosecutor and to impose appropriate sanctions for the conduct.

An Act Creating the Prosecutors' Grievance Council

Section 1. Jurisdiction of the Prosecutors' Grievance Council.

There is created the Prosecutors' Grievance Council, hereinafter referred to as Council, as an administrative agency of the judicial branch of government to perform the inherent powers of the judiciary to investi-

118. TEX. REV. CIV. STAT. ANN. art. 332d (Vernon Supp. 1984). The Prosecutor Council of Texas was created by the Texas Legislature in 1977 to deliver technical assistance, educational services, and professional development training to Texas prosecutors. Although the council is allowed to accept complaints about prosecutors, the Texas statute does not expressly make violation of the Code of Professional Responsibility misconduct. *Id.*, § 10(b)(2).

gate instances of unethical conduct committed by prosecutors and to impose sanctions for such conduct.

Commentary

The Texas legislature created a Prosecutor Council with multiple purposes, only one of which is to investigate complaints against prosecutors.[119] The jurisdiction of the Prosecutors' Grievance Council suggested here is limited to ethical matters only, because it seems incompatible to cast service functions, such as technical assistance to prosecutors, upon the same agency that must police and impose sanctions on prosecutors.

Section 2. Membership of the Prosecutors' Grievance Council.

The Council shall be composed of the following members: (1) three citizens of the state who are not licensed to practice law and who are not members of law enforcement agencies shall be appointed by the governor; (2) three incumbent prosecuting attorneys to be elected by the prosecuting attorneys of the state; (3) one judge of a court of appeal; one judge of a trial court with criminal jurisdiction each of whom shall be appointed by the Supreme Court; and (4) one attorney practicing criminal defense appointed by the State Bar.

Section 3. Expenses, Terms and Vacancies.

Members of the Council shall receive no compensation for their service but are entitled to actual expenses in the performance of their duties. Members shall serve overlapping three-year terms. In the event a member who is a prosecuting attorney or a judge or a defense counsel ceases to hold such office, or resigns from the Council, a vacancy on the Council arises. Vacancies are filled in the same manner as the original appointment; such appointments being for the unexpired term of the vacated position. A member of the Council may be reappointed for two additional terms.

Section 4. Employment of Employees.

From the funds available to it, the Council may employ such employees as it deems necessary for the performance of its duties, and may arrange for and compensate such expert witnesses as the Council may from time to time seek to consult, and may pay any and all other expenses pertinent and necessary to effectuating the purpose for which the Council is created.

Commentary

Sections 3 and 4 deal with self-evident administrative matters. The composition of the Council, covered in section 2, presents multiple issues that are both political and substantive in nature. The attempt here is to present a balanced membership. Obviously, this section could be changed to skew the membership to reflect one perspective or another.

119. *Id.* An informal survey of other states produced no evidence of a centralized agency to serve prosecutors comparable to the Texas agency.

Section 5. Standards of Ethics for Prosecutors.

At all times prosecutors for this State shall adhere to the following Standards of Ethics:

Standard 1: To ensure the highest ethical conduct and to maintain the integrity of the prosecution function in the criminal justice system, the prosecutor shall be thoroughly acquainted with and shall adhere at all times to the Code of Professional Responsibility as promulgated for this State.

Standard 2: A prosecutor shall not commit any felony or misdemeanor involving moral turpitude.

Standard 3: A prosecutor shall not willfully engage in conduct inconsistent with his professional duties.

Standard 4: A prosecutor shall not knowingly deny or impede any person in the exercise of any right, privilege, or immunity guaranteed to such person by the Constitution of the United States or by the Constitution or laws of this State, said prosecutor knowing at the time that his conduct is unlawful.

Commentary

This list was purposely limited to emphasize the kinds of conduct that falls within the realm of the advocate role of the prosecutor. Other jurisdictions may wish to expand the list of standards to include situations such as mental or physical illness, failure to maintain qualifications required by law for election to office, or neglect of duty. The argument here is that such problems should be handled with statutes related to impeachment or recall procedures and should not be dealt with by a council concerned mainly with matters of ethics.

Standard 4 is, perhaps, unique. Prosecutorial immunity from suit, a doctrine of long-standing, was reaffirmed by the United States Supreme Court in *Imbler v. Pachtman*.[120] In voicing its support of immunity, however, the *Imbler* court pointed out that a prosecutor is amenable to professional discipline by an association of his peers.[121] Standard 4 is merely an attempt to ensure the fruition of the Supreme Court's assumption that a prosecutor who knowingly and purposely violates a citizen's civil rights will, indeed, be amenable to professional discipline by an association of his peers.

Section 6. Receipt of Complaint.

A "complaint" is a written communication signed by a complainant and directed to the Council setting forth allegations that would lead a reasonable person to believe that a prosecutor has violated a Standard of

120. 424 U.S. 409 (1976).

121. *Id.* at 429. The *Imbler* Court stated:

> [A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

Id. (footnote omitted).

Ethics for Prosecutors. All complaints shall be recorded by the Council and the respondent-prosecutor shall immediately be furnished with a copy of said complaint. In the discretion of the chairperson of the Council, the identity of the complainant may be held confidential.

Section 7. Preliminary Investigation of Complaints.

Without holding any hearing the Council shall investigate each complaint to determine if probable cause exists to institute formal proceedings by Writ of Inquiry. If no probable cause is found, the respondent-prosecuting attorney and the complainant shall be notified in writing. At least twice each year the Council shall convene for this purpose on dates determined by the chairperson of the Council, such chairperson being elected by members of the Council for one-year terms.

Section 8. Appellate Court Opinions Tantamount to Probable Cause.

Whenever any opinion by an appellate court in this State contains a finding, implicit or explicit, that a prosecutor has violated a Standard of Ethics for Prosecutors, that opinion shall be tantamount to probable cause and the Council shall issue a Writ of Inquiry according to the procedure established in § 9. To facilitate this process the Chief Justice of each appellate court shall instruct the clerk of said court to forward to the Council copies of all such opinions as they are announced by the court.

Commentary

These sections comprise the intake mechanism for the Council. Complaints may come from individuals, opinions of appellate courts, or the Council itself. Except when appellate court opinions form the basis of the complaint, a provision allows for intake screening that will dispose of groundless or frivolous complaints, avoiding the extra expense and time required by a formal process. In those jurisdictions with significant complaint volume, assumedly staff personnel will make such preliminary investigations.

Section 9. Writ of Inquiry.

If the Council finds probable cause to institute formal proceedings based upon findings from investigation of a complaint, or based upon an appellate court opinion described in § 8, or based upon the Council's unilateral investigation of a prosecutor's conduct, a Writ of Inquiry shall be issued to the respondent-prosecutor and to the complainant, if any, specifying the factual allegations upon which the inquiry is based and the Standard(s) of Conduct for Prosecutors alleged to have been violated. The Writ of Inquiry shall contain the date set for hearing and shall advise the respondent-prosecutor of his right to file a written answer within ten (10) days prior to said hearing date.

Section 10. Hearing Master.

After a Writ of Inquiry issues, the Council shall select on a rotating basis a judge of an appellate court to serve as a master to determine the

facts and to submit to the Council findings of fact and a transcript of all proceedings before the master.

Section 11. Powers of Hearing Master.

The master shall have the power to administer oaths, to issue subpoenas and other process in conformity with the Rules of Civil Procedure, including process for depositions, and to impose contempt where appropriate for failure to obey said orders.

Section 12. Hearing on Writ of Inquiry.

A hearing on the Writ of Inquiry shall be held by the master. This hearing shall be ex parte in the nature of a grand jury proceeding, and the respondent-prosecutor shall have no right to confront, cross-examine, or call witnesses in his own behalf.

Commentary

These sections constitute the hearing process. Taken together these provisions are an attempt to maximize due process while avoiding the adversarial model. The Writ of Inquiry provides adequate notice of charges, and the hearing master insulates the Council from the inherent conflict of serving as accuser, judge, and jury. The ex parte nature of the hearing is patterned on the grand jury model and is, in fact, the model often adopted by state bar grievance committees.[122]

Section 13. Adjudication.

By majority vote based upon a preponderance of the evidence as determined from the Hearing Master's Findings of Fact and from the transcript of the hearing, the Council shall issue a judgment sustaining the allegations in the Writ of Inquiry or dismissing the Writ of Inquiry as unfounded.

If the Writ of Inquiry is sustained, the Council shall proceed to order a sanction according to § 15.

All judgments and orders of the Council including the outcome of the voting shall be reduced to writing with a copy forwarded to complainant, including the clerk of an appellate court where appropriate; to the respondent-prosecutor; and to the clerk of the Supreme Court.

Section 14. Appeal.

Within ten (10) days from receipt of the judgment and order of the Council the respondent-prosecutor may appeal either the judgment sustaining the Writ of Inquiry or the sanction, or both. Said appeal shall be to the Supreme Court and the substantial evidence rule shall apply.

Commentary

These two sections delineate the adjudication and appeal process. Appeal may be taken either from the finding of a violation of the Standards of Ethics for Prosecutors or from the sanction itself. Perhaps the only

122. Nordby, *supra* note 79, at 383.

noteworthy issue in these two sections is whether the resulting scheme is too summary in nature and lacking in due process. Some might argue that if the hearing on the facts is to be ex parte, section 12, and the adjudication process is likewise ex parte, section 13, without even the right of summation, then at least the appellate process should be de novo, instead of to the Supreme Court as suggested in section 14. Of course, the use of the substantial evidence rule on appeal is controversial as well. The approach taken in sections 12, 13, and 14 reflects an attitude that the prosecutor's office is well suited to a summary disciplinary procedure, reflecting a social attitude that the prosecutor is presumed to be above reproach and unlikely to need the extra protections required by more ordinary officials or individuals against whom disciplinary proceedings might be brought in other circumstances.

Section 15. Sanctions.

1. In imposing sanctions the Council may consider previous instances where the prosecutor has been found to have violated a Standard of Ethics for Prosecutors.

2. If a prosecuting attorney is disbarred or suspended by the State Bar, or has been found guilty of any felony or misdemeanor involving moral turpitude, he shall be considered suspended from office pending the outcome of a petition for removal from office.

3. The chairperson of the Council may petition for the removal from office of any prosecutor who has been found by the Council to have violated a Standard of Ethics for Prosecutors.

4. The Council may order a prosecutor fined from $1.00 to $1,000.00.

5. The Council may issue an admonition and/or requirement that the prosecutor obtain additional training or education.

Commentary

For a prosecutor, suspension or disbarment is not a practical sanction because it is tantamount to removal from office, and removal from office is a mechanism specifically formalized by various statutes in each state. The addition of fines as a sanction is intended to add flexibility to the sanctioning process. Private reprimands are not provided as a possible sanction, which is consistent with the public nature of the prosecutor's office and with the approach taken in section 13 that the complainant is entitled to a written copy of the Council's ultimate judgment.

Section 16. Confidentiality.

All proceedings before the hearing master and all proceedings of the Council, except judgments and orders of the Council, shall be confidential. In cases where the chairperson of the Council considers that the notoriety of a proceeding has resulted in misleading speculation among the public, the chairperson may issue a brief public statement, not referring to any evidence and setting forth the expected date of the filing of the Council's orders and judgment in the matter.

Commentary

Confidentiality of the grievance procedure against any professional is always a matter of balancing the right of the public to know against the right of the individual professional to privacy. Since the judgment of the Council is public record, section 13, and since persons who testify before the hearing master are not required to keep their testimony confidential, a neutral balance has been struck. The public will learn of the Council's judgment, and any witness who cares to discuss publicly his allegations or his evidence is free to do so.

Section 17. Quorum.

A quorum of the Council shall be five. A quorum is necessary for the transaction of any business.

Section 18. Statute of Limitations.

The Prosecutors' Grievance Council has no jurisdiction over any allegation of conduct occurring more than five (5) years prior to the filing of a complaint or judgment by a court of appeal or a unilateral investigation by the Council, provided, however, that this limitation shall not run until the conduct is discovered if the prosecutor made an effort to conceal said conduct.

VI. CONCLUSION

The public, the bench, and the bar all have the right to expect a prosecutor to be the most ethical of advocates. Anything less tarnishes the image of the benevolent power of the state and lessens the worth of a criminal justice system already suffering from numerous weaknesses. However, all available evidence points to the fact that we cannot expect prosecutors to maintain such high standards single-handedly.

For too long we have ignored a self-evident fact—unethical conduct by prosecutors at trial is seldom dealt with by the grievance process. Consequently, we might expect prosecutors to feel some degree of freedom to comport themselves with a zeal that exceeds the bounds of proper professional conduct. The existence of this situation is proof enough of the failure of the conventional grievance mechanisms to deal with the unique personage presented by the image of the professional prosecutor.

What is needed is a new approach to the issue of controlling prosecutors' conduct at trial. One new approach has been suggested here. Others may have better ideas. Something must change.