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Belle Yan

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# Prosecuting Members of Defense Legal Teams and Its Ethical Implications for the Prosecutor: A Proposal for a New Ethical Standard

BELLE YAN\*

## Abstract

This Note explores improprieties and conflicts of interest that may arise when a prosecutor's office investigates and files charges against defense counsel or a member of the defense legal team. Specifically, this Note focuses on such investigations and charges that arise from defense counsel's representation of a defendant whom the same prosecutor's office is prosecuting. The intimately adversarial and professional relationships between prosecutors and defense attorneys taint the legitimacy of any charges against defense counsel for alleged misconduct. The ethical standard proposed here suggests a non-waivable conflict of interest. This would assist the prosecutor's office in avoiding the appearance of impropriety in such a prosecution. It may even legitimize the threat which otherwise may be seen as having an intentional chilling effect on the defendant's legal representation. This Note's proposal is two-fold: First, it analyzes a relationship that raises a conflict of interest for prosecutors; and second, it guides prosecutors through the processes necessary for the prosecution of defense counsel for conduct arising from their legal representation of a client, helping them to act in good faith and in the interests of justice.

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## Introduction

A public defender investigator arrived at a housing complex, looking for a police log from the housing authority police office for an upcoming rape trial.<sup>1</sup> She walked into the office, inquired about the log, and handed to two officers her business card, which identified her as an investigator employed by the public defender's office. An officer later went to the public defender's office to deliver the piece of evidence sought.

A few days after the trial ended with a guilty verdict, the New Orleans District Attorney's Office—the same prosecutor's office that had just secured a conviction in the trial—indicted the investigator for impersonating a peace officer, specifically a member of the prosecution team. One of the officers with whom the investigator had spoken at the housing authority office told an attorney with the housing authority that the investigator worked at the prosecutor's office. The housing authority attorney then called the prosecutor's office with questions about the case. As a result, the defense investigator was charged in court, arraigned, and had bail set at \$50,000.

This public defender employee was not the only person in her office charged by the same prosecutors against whom the office litigates its cases. *The Guardian's* investigation discovered that the New Orleans District Attorney's Office charged or threatened to charge six public defender employees for separate actions taken during the scope of their employment, either as an attorney or a part of the legal team representing indigent clients.<sup>2</sup> The investigator fought her case for two years until the court refused to grant the prosecution's fourth request for a continuance, and the prosecutor dropped the charge.<sup>3</sup>

This is not unique to New Orleans. Defense counsel and public defender employees in other jurisdictions have been arrested or charged for conduct

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1. See Della Hasselle, *After Delays, DA's Office Abruptly Drops Charges Against Investigator Accused of Posing as Staffer*, NEW ORLEANS ADVOC. (Jan. 3, 2017), [https://www.theadvocate.com/new-orleans/news/courts/article\\_52ca2fc6-d200-11e6-b6b6-a374cf3f0f61.html](https://www.theadvocate.com/new-orleans/news/courts/article_52ca2fc6-d200-11e6-b6b6-a374cf3f0f61.html); Aviva Shen, *Prosecuted by Her Legal Counterpart: 'It Destroyed my Life in so Many Ways'*, THE GUARDIAN (May 1, 2017), <https://www.theguardian.com/us-news/2017/may/01/prosecuted-law-new-orleans> [hereinafter *Prosecuted by Her Legal Counterpart*]; Lorelei Laird, *Public Defenders Allege Prosecutor's Office Filing Unwarranted Charges Against Them*, A.B.A. J. (May 2, 2017), [http://www.abajournal.com/news/article/public\\_defenders\\_allege\\_prosecutors\\_office\\_filing\\_unwarranted\\_charges\\_against\\_them](http://www.abajournal.com/news/article/public_defenders_allege_prosecutors_office_filing_unwarranted_charges_against_them); Joshua Vaughn, *New Orleans Public Defenders Punished for Locating Key Witness*, THE APPEAL (Oct. 29, 2019), <https://theappeal.org/new-orleans-defenders-rape-case/> ("citing past situations where criminal justice agency employees wound up 'in handcuffs,' [Orleans Public Defender chief district defender] said his attorneys invoked their right to remain silent only as a precaution.").

2. *Prosecuted by Her Legal Counterpart*, *supra* note 1.

3. *Id.* During the proceedings against her, the investigator left the office to pursue social work, but was unable to pursue opportunities to work with children because of her open case).

related to their representation of clients.<sup>4</sup> For example, a San Francisco detective arrested a volunteer deputy public defender for suborning perjury after his client testified.<sup>5</sup> In another California county, a deputy public defender was charged with dissuading a witness after the witness accused him of presenting himself as the prosecutor.<sup>6</sup> Criminal defense attorneys in Chicago were indicted and later acquitted in a bench trial for suborning perjury.<sup>7</sup>

Criminal cases like these raise questions about prosecutors' intentions. In particular, the collateral consequences of criminal cases underscore the impact such charges have on the defendant. When that defendant is defense counsel or a member of the defense legal team, the filing of charges may suggest that that action is a trial tactic designed to have a chilling effect on the counsel's ability to zealously represent clients in future cases. After all, prosecutors and defense counsel face each other every day and are repeat players in the same courtrooms.<sup>8</sup> Facing arrest as a result of courtroom conduct carries weighty consequences for defense counsel and their clients

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4. It should be noted that this paper is not a discussion on charges brought against attorneys and employees of public defender's office based on allegations of misconduct occurring outside of their representation of their clients. *See, e.g.*, Sonseeahray Tonsall, *Former Solano County Public Defender Accused of Raping Fellow Attorney*, FOX 40 (Aug. 8, 2018), <https://fox40.com/2018/08/08/former-solano-county-public-defender-accused-of-raping-fellow-attorney>. Rather, this paper will discuss alleged misconduct that is related to attorney representation. *See, e.g.*, Barry Tarlow, *The Moral Conundrum of Representing the Rat*, 19 CHAMPION 15, 16 (1995) ("Assistant United States Attorney (AUSA) White . . . . claim[ed] that much of Patrick Hallinan's legal representation was intended to further the illegal aims of the Mancuso enterprise.").

5. The prosecutor's office declined to charge the attorney. *See* Chris Roberts, *Turns Out SFPD's Go-To Guy on Gangs is a Bit of Bigot, Too*, S.F. WEEKLY (May 3, 2016), <http://www.sfweekly.com/news/turns-out-sfpds-go-to-guy-on-gangs-is-a-bit-of-bigot-too/>.

6. Jess Sullivan, *Judge Hears Probable Cause Case Against Solano Deputy Public Defender*, DAILY REPUBLIC (Jan. 30, 2019), <https://www.dailyrepublic.com/all-dr-news/solano-news/fairfield/judge-hears-probable-cause-case-against-solano-deputy-public-defender/>; Richard Bammer, *Judge Delays Ruling in Witness-Dissuading Case Involving Rookie Deputy Public Defender*, THE REPORTER (Feb. 15, 2019), <https://www.thereporter.com/2019/02/15/judge-delays-ruling-in-witness-dissuading-case-involving-rookie-deputy-public-defender/>.

7. Assistant United States Attorneys from a different federal district prosecuted the case. William R. Coulson, *Takeaways from Rare Perjury Prosecution of Attorneys*, LAW360 (Aug. 31, 2015), <https://www.law360.com/articles/696892/takeaways-from-rare-perjury-prosecution-of-attorneys>.

8. *See* Charlese David Phillips & Sheldon Eklund-Olson, *Repeat Players in a Criminal Court - The Fate of Their Clients*, 19 CRIMINOLOGY 530, 531 (1982) ("When we restrict our attention to the role of attorneys, we must recognize that one lawyer, the prosecutor, is always a repeat-player. Any variations in contact or interaction with the criminal courts come largely among members of the defense bar. Some defense lawyers are 'regulars'; others are almost 'one-time players.'").

alike. In an effort to avoid criminal charges, a defense attorney may be forced to change their approach to legal representation, which, in turn, serves as a detriment to their clients.

The unique power of prosecutors to bring criminal charges explains why they are guided by specialized ethical standards.<sup>9</sup> Rule 4.4 of the American Bar Association Model Rules of Professional Conduct (“ABA Model Rules”) states “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .”<sup>10</sup> Scholars have addressed how prosecutors use their wide-ranging discretion to prosecute as a trial tactic to gain advantages in litigation.<sup>11</sup> Literature has also discussed how prosecutorial conflicts of interest arise and how they may be resolved.<sup>12</sup> What is missing, however, is scholarship addressing whether the prosecution of defense counsel, or members of the legal defense team, creates a conflict of interest when the alleged misconduct arises from a criminal proceeding the prosecutor initiated. Similarly, there is little guidance about how to mitigate such a conflict.<sup>13</sup>

Using established frameworks—the ABA Model Rules and existing ABA Criminal Standards for the Prosecution Function—this Note examines the ethical ramifications for prosecutors who charge members of the defense legal team for conduct arising in the scope of their legal representation. Part I introduces the power a prosecutor has in the different stages of criminal proceedings and the prosecutor’s ethical duties. Part II discusses Bennett L. Gershman’s categories of threats from prosecutors and the framework he

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9. See MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASSN’N, Discussion Draft 1983).

10. MODEL RULES OF PROF’L CONDUCT r. 4.4.

11. See generally Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 LOY. U. CHI. L.J. 327 (2014) [hereinafter *Threats and Bullying*]; Note, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748 (2018); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

12. See generally Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. REV. 463 (2017) [hereinafter *Rethinking Prosecutor’s Conflicts*]; Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutor’s Offices*, 22 CORNELL J.L. & PUB. POL’Y 53 (2012).

13. There is a substantial list of cases on prosecuting attorney’s conflict of interest that arises from the relationship with the accused, but those relationships are related to attorney-client relationships, “past civil litigation” with opposing counsel, “actual or perceived threat by defendant against prosecutor[,]” “prosecutor victimized by defendant’s criminal acts[,]” and “political confrontation between defendant and prosecutor[.]” Allen L. Schwartz & Danny R. Veilleux, *Disqualification of Prosecuting Attorney in State Criminal Case on Account of Relationship with Accused*, 42 AM. L. REV. 5TH 581 (2018). Other articles cited in this Note also do not address if a conflict of interest arises during the prosecution of defense counsel or a member of the defense legal team for alleged misconduct from their representation of a client charged by the same prosecutor.

designed to explain whether such behavior is ethically legitimate.<sup>14</sup> Part III identifies examples of prosecutors charging members of a defendant's legal team for conduct undertaken during the scope of that representation and discusses how that behavior fits into Gershman's framework. Part IV discusses the effects such threats and charges have on defense legal teams, their duty to their clients, and their ability to represent those clients with "zeal in advocacy."<sup>15</sup> Lastly, Part V begins with an illustration of the potential conflicts of interest that may arise when prosecutors pursue charges against defense legal teams for conduct arising from the course of representation, and offers guidance on how to resolve and reconcile these conflicts.

This Note argues that the prosecution of a member of the defense legal team by the same prosecutor's office that opposed that defense team should be understood as a conflict of interest. As a result of this conflict, local prosecutors' offices should recuse themselves or be removed from such prosecutions. More generally, this Note proposes a set of conflicts of interest guidelines that should be adopted, possibly into the ABA Criminal Standards for the Prosecution Function, and applied to prosecutors "to guide decision-making and conduct."<sup>16</sup>

### **The Role Prosecutors Play in Charging and Other Criminal Proceedings**

A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.<sup>17</sup>

In 1940, then-Attorney General Robert H. Jackson described the role of a federal prosecutor in the pursuit of justice in his landmark speech, "The Federal Prosecutor."<sup>18</sup> These words still ring true today. The idea that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America" is reflected throughout the criminal justice system, particularly in the power the prosecutor has to file charges against criminal

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14. *Threats and Bullying*, *supra* note 11, at 339.

15. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1.

16. Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1116 (2011).

17. Robert H. Jackson, Attorney Gen. of the U.S., *The Federal Prosecutor*, Address at the Second Annual Conference of U.S. Attorneys (Apr. 1, 1940), in 24 J. AM. JUD. SOC'Y 18 (1940), 31 J. CRIM. L. 3 (1940).

18. *Id.*

defendants.<sup>19</sup> Jackson professed that this power is tempered by the ability of prosecutors to enforce and police their own exercise of power.

### ***Responsibilities of a Local Prosecutor***

The responsibilities of a local prosecutor can be categorized into commencement, investigative, and adjudicative roles,<sup>20</sup> three roles that are “sequential and interwoven[.]”<sup>21</sup> This culminates to the trial prosecutor’s main goal, to “provide a fair trial.”<sup>22</sup> Society “can—and ha[s]—promised fairness. And the prosecutor’s job is to fulfill that promise.”<sup>23</sup>

After receiving information from some law enforcement entity, or because of their own investigation, prosecutors decide whether to bring criminal charges against a person.<sup>24</sup> This power over the criminal process continues with every decision point in the case’s investigation and advancement through the judicial proceedings. In preparation for, and at each court appearance, both the prosecutor and defense attorney strategize to determine the next step. In lieu of litigating motions the defendant brings before the court, or going to trial, the prosecutor has the power to dispose of the case. Perhaps the prosecutor will dismiss the case in the interest of justice. More likely, the prosecutor will try to plea bargain, when he wields most, if not all, of the power.<sup>25</sup>

From commencement to investigation and trial, the prosecutor has many opportunities to assert his discretionary power. While interwoven, the distinct phases of prosecution may allow for different attorneys to appear at different phases of the case. Thus, there need not be a single prosecutor who follows a case from beginning to end. The power the prosecutor wields at different junctures also creates opportunities for the prosecutor to overstep ethical boundaries to succeed in resolving a case or to rectify actions that

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19. *Id.*

20. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695, 1697-98 (2000) [hereinafter Uviller, *The Neutral Prosecutor*].

21. *Id.*

22. *People v. Force*, 39 Cal. App. 5th 506, 508 (2019) (“Fairness is the sine qua non of the criminal justice system, and no amount of technical brilliance or advocative skill can make up for a failure to provide it.”).

23. *Id.*

24. Uviller, *The Neutral Prosecutor*, *supra* note 20, at 1697-98.

25. Studies have shown that more than 95% of criminal cases end up in negotiated disposition. LINDSEY DEVERS, PLEA AND CHARGE BARGAINING RESEARCH SUMMARY 1 (Dep’t J, Bureau of Just. Assistance, Nov. 2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (“[S]cholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.”).

may be tainted by an appearance of impropriety.

### ***Ethical Duties of a Local Prosecutor***

In performing their responsibilities, prosecutors are also informed by their state's code of ethics or professional responsibility. While not every state has adopted the ABA Model Rules in full, each state has codified its own ethical codes and guidelines that all attorneys in that jurisdiction must rely upon.<sup>26</sup> The Model Rules clearly articulate the special responsibilities prosecutors have, acknowledging the unique role prosecutors play in the justice system.<sup>27</sup> The ABA has also adopted guidelines for prosecutors, the Criminal Justice Standards for the Prosecution Function ("The Standards"). The Standards are "intended to provide guidance for the professional conduct and performance of prosecutors [but] are aspirational or describe 'best practices,' and are not intended to serve as the basis for the imposition of professional discipline."<sup>28</sup> The National District Attorneys Association also publishes standards to supplement existing rules.<sup>29</sup> Together, these rules and standards guide prosecutors in their practice.

Conflict of interest rules exist in an area in which ethical standards do not fully consider prosecutors, despite a specific section that enumerates prosecutorial ethics. Both the ABA Model Rules and The Standards define and direct prosecutors in how to identify and address conflicts of interest when the attorney has some relationship with a client or responsibilities to a third party. A concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."<sup>30</sup> The comment explains that "if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."<sup>31</sup> However, a plain language reading of these rules causes

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26. *Alphabetical List of Jurisdictions Adopting Model Rules*, A.B.A. (Mar. 28, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules); see Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093, 1093 (2011).

27. MODEL RULES OF PROF'L CONDUCT r. 3.8.

28. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1(b) (4th ed. 2015).

29. NAT'L DIST. ATTORNEY'S ASS'N, NATIONAL PROSECUTION STANDARDS (3rd ed. with rev. commentary 2009), <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Rev-ised-Commentary.pdf> [hereinafter NATIONAL PROSECUTION STANDARDS].

30. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2).

31. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 10.

concerns about how they apply to prosecutors because the ABA Model Rules about conflicts of interest pertain to former or current *clients*.<sup>32</sup> Prosecutors are believed to represent the People, not a specific client, which makes the concept of conflict of interest distinct from that of defense attorneys.<sup>33</sup>

While the ABA Model Rules governing conflicts of interest focus on government attorneys more generally, the Standards further explain how these conflicts of interest rules apply to criminal prosecutors: “prosecutorial conflicts of interest can include any personal or professional interests, relationships, or beliefs that might lead prosecutors to act in their own self-interest or in others’ interest, rather than disinterestedly.”<sup>34</sup> Abiding by the standards of professional conduct requires prosecutors to avoid any appearances of impropriety.<sup>35</sup> Most relevant to the choice to prosecute an individual with whom the prosecutor has some relationship, Standard 3-1.7(f) provides that

[t]he prosecutor should not permit the prosecutor’s professional judgment or obligations to be affected by the prosecutor’s personal, . . . professional, . . . or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.<sup>36</sup>

The National Prosecution Standards suggest that a prosecutor should excuse himself when “a fair-minded, objective observer [would] conclude that the prosecutor’s neutrality, judgment, or ability to administer the law in an objective manner may be compromised.”<sup>37</sup> Together, these Standards suggest prosecutors should identify any preexisting relationships with the accused and their defense counsel, and consider whether that relationship undermines the prosecutors’ neutrality during the commencement, investigation, and adversarial stages.

While the list is not exhaustive, these standards highlight the unique position prosecutors are in without traditional clients and provide guidance

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32. See MODEL RULES OF PROF’L CONDUCT r. 1.7-1.9.

33. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.3 (“The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim.”); *Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 471.

34. *Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 472.

35. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(a); *Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 472.

36. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7(f).

37. NATIONAL PROSECUTION STANDARDS, *supra* note 29, § 1-3.3.

in navigating the discretion and power prosecutors have in performing the prosecutorial function. One area that deserves more examination is the discretion of prosecutors to employ threats despite an ABA Model Rule that proscribes them.

### **The Legitimacy of Prosecutor’s Threats and Bullying**

Threats by prosecutors are pervasive in the criminal justice system and have ethical implications. In *Threats and Bullying by Prosecutors*, Bennett L. Gershman considers prosecutors’ “ability to threaten, intimidate, and embarrass anyone—defendants, witnesses, lawyers—without any accountability, or apology” to be “one of the most prominent features of U.S. prosecutors[.]”<sup>38</sup> While courts may find some threats “legally permissible[, that] does not necessarily mean that the threat is an appropriate form of prosecutorial behavior.”<sup>39</sup> Some courts may even encourage these threats.<sup>40</sup>

Gershman analyzes ten categories of what he terms as “threats and bullying”: intimidating grand jury witnesses, coercing guilty pleas, attacking defense witnesses, bullying defense witnesses, bullying prosecution witnesses, compelling waiver of civil rights claim, retaliation, demagoguery, shaming, and coercing corporate cooperation.<sup>41</sup> Gershman utilizes hypotheticals drawn from real-life examples to illustrate each one of these categories to demonstrate the difficulty of “attempting to draw a clear line between permissible and impermissible threats.”<sup>42</sup>

Particularly, his examples of prosecuting a defense expert witness and threatening a defense co-participant witness exhibit the lengths to which prosecutors have gone to deter defense witnesses from testifying in present or future cases. In the defense expert witness example, a forensic pathologist offered testimony that criticized the prosecution’s legal theory—the scientific veracity of Shaken Baby Syndrome.<sup>43</sup> The defendant was later acquitted of the murder charge. Shortly after, the prosecutor charged the defense expert witness with perjury for giving false testimony about his credentials, though he was later acquitted.<sup>44</sup> Gershman questions whether

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38. *Threats and Bullying*, *supra* note 11, at 328.

39. *Id.* at 330.

40. For example, the U.S. Supreme Court has held that where a prosecutor carries out a threat to reindict a defendant on more serious charges if the defendant refuses to plead guilty to the original charges there is no due process violation. *Threats and Bullying*, *supra* note 11, at 330, n.19 (citing *Bordenkircher v. Hayes*, 434 U.S. 357 (1978)).

41. *Threats and Bullying*, *supra* note 11, at 331-37.

42. *Id.* at 339.

43. *Id.* at 333.

44. *Id.* at 333, 340.

these charges “were brought to silence an outspoken prosecution critic.”<sup>45</sup>

Gershman also examines the experience of a defense co-participant witness, whose case was dismissed because she was a juvenile.<sup>46</sup> She had planned on testifying for the defendant.<sup>47</sup> The prosecutor then contacted the defense attorney to warn the co-participant that if she testified, the dismissed charges would be reinstated, among other consequences. The prosecutor served a subpoena on the co-participant-witness and had three federal agents bring the juvenile into his office, where he again warned her that she would be prosecuted for her conduct. Gershman questions whether the “prosecutor’s conduct in warning [the co-participant witness] of the consequences of her testifying was proper.”<sup>48</sup> Both these examples demonstrate the constitutional concerns stemming from the prosecutor’s ability to intrude on defense counsel’s ability to put on a defense and call witnesses to testify on behalf of the defendant.<sup>49</sup>

Gershman further explores the tactic of shaming. When investigating an investment banker, a prosecutor threatened to charge a banker after the banker claimed to be unable to reveal any information incriminating his employers.<sup>50</sup> The next week, federal agents arrested the banker at his place of business, “forcibly escort[ing] him off the trading floor” in handcuffs.<sup>51</sup> Reporters and photographers waited outside for the banker, creating a “perp walk” scene. The “perp walk” tip-off demonstrates the influence prosecutors have in shaping public perception of cases they bring.<sup>52</sup>

Not all threats are egregious or proscribed. Threats that promote a legitimate law enforcement objective may be reasonable. Some “threats and incidents of bullying might appear as a necessary, if overly aggressive, means of investigating and prosecuting crime.”<sup>53</sup> Prosecutors may use their “considerable leverage . . . to induce people to assist law enforcement.”<sup>54</sup> For example, providing immunity to witnesses to testify for the prosecution

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45. *Id.* at 334.

46. *Id.*

47. *Id.*

48. *Id.*

49. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to have compulsory process for obtaining witnesses in his favor . . . for his defense.”); *Threats and Bullying*, *supra* note 11, at 341 (“threats that drive defense witnesses off the stand burden the defendant’s right to compulsory process”).

50. *Threats and Bullying*, *supra* note 11, at 337.

51. *Id.*

52. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.10 (“Relationship with the Media”).

53. *Threats and Bullying*, *supra* note 11, at 329.

54. *Id.* at 330.

has been found constitutional.<sup>55</sup> Gershman highlights the importance of the effectiveness of threats: when threats are made, they must aim to achieve the justice the prosecution is seeking.

The absence of clear professional guidelines to delineate what is legitimate prompts Gershman to introduce a framework to determine the legitimacy of prosecutors' threats and bullying. His test is as follows:

In order for a prosecutor's threat to be legally and ethically legitimate: (1) there must be a legal basis for the threat; (2) the prosecutor must have a good faith belief that the individual has the ability to comply; (3) the prosecutor must reasonably believe that the threat will cause the individual to comply; (4) and the prosecutor must reasonably believe that the need for the threat in light of legitimate law enforcement interests outweighs any burden on the rights, interests, and sensibilities of the person threatened.<sup>56</sup>

This framework is premised on the idea that the prosecution can use threats to control and persuade the receiving ends of these threats to do what the prosecution wants.<sup>57</sup> But courts may find such tactics impermissible when a threat burdens the constitutional rights of the accused.

The components of Gershman's test are not elements, such as in a crime or a tort, where each must be met, but rather factors to be considered in determining legitimacy under a factual basis approach. Applying the framework to the case of the defense expert witness demonstrates how all of the factors need not to fail in order to find a prosecutorial threat to be a "gratuitous exercise of unconstrained power and evince an all-out effort to insult, humiliate, and intimidate. . . ."<sup>58</sup> Indeed, Gershman's discussion of the factors indicates that they are to be considered qualitatively. First, the "legal basis for the charges is minimal"<sup>59</sup> and "the prosecutor's good faith purpose clearly is suspect."<sup>60</sup> Charging the expert witness with perjury after the defendant was acquitted "suggest[ed] that the prosecutor's motive was to retaliate against the expert and silence him."<sup>61</sup> This is particularly egregious

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55. See *Kastigar v. United States*, 406 U.S. 441 (1972).

56. *Threats and Bullying*, *supra* note 11, at 339.

57. *Id.* ("These cases expose, in different ways, the nature and extent of the prosecutor's awesome powers, and how bullying tactics can enhance or supplement the prosecutor's already virtually unlimited and uncontrolled discretion.")

58. *Id.* at 340.

59. *Id.* It is important that the first factor is not a binary yes-or-no: "the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support." STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.4(a).

60. *Threats and Bullying*, *supra* note 11, at 340.

61. *Id.* (citing Mark Hansen, *Battle of the Expert: A Forensic Pathologist Successfully Fights Criminal Charges Stemming from His Testimony in a Shaken Baby Case*, A.B.A. J., Dec. 2005, at 56-57).

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because, along with the minimal legal basis of the charges, the prosecutor was no longer trying to stop the witness from testifying in this Shaken Baby Syndrome case. Instead, the prosecutor's actions suggest he was attempting to cause a chilling effect on this expert witness that would dissuade him, and to warn other expert witnesses, from testifying for the defense in the future. Lastly, Gershman argues that "the impact on the expert's right to pursue his calling and provide critical testimony for a defendant charged with murder outweighs any arguable interest by the prosecutor in vindicating the rule of law or exposing perjury."<sup>62</sup> Gershman's framework is a tool to understand whether certain prosecutorial threats are legitimate. Threats used to "discover probative evidence of crime," or to "serve valid law-enforcement interests" may be more likely to be legitimate.<sup>63</sup> Other threats, though, are "abusive, humiliating, and involve the gratuitous infliction of harm [and] resemble the conduct of a bully"<sup>64</sup> and do little to further the legitimate purpose of the prosecution.

While Gershman's article explores ten different ways prosecutors have threatened voluntary or involuntary participants of the criminal justice system, one category remains absent. This category will be discussed in Part III.

### **Prosecutors Charging Opposing Counsel for Criminal Conduct during Scope of Employment**

Gershman identifies a host of categories and challenges to the prosecution threatening various participants in the criminal justice system. His framework does not address, however, the subject of this paper: charging opposing counsel or members of their team with criminal conduct that allegedly arose during the course of the representation of their client. While Gershman discusses the charging of defense witnesses for perjury after they have testified,<sup>65</sup> he does not scrutinize how the prosecution can inquire into an attorney's role in such perjury.

Prosecuting a member of a defense legal team should be considered a threat or bullying under Gershman's framework. As indicated in the Introduction, criminal defense attorneys and investigators have been accused of crimes as a result of their representation of clients, including suborning perjury, intimidating witnesses, obstructing justice, and dissuading a witness from reporting. Such prosecutions cause the same fears that prosecuting a

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62. *Id.*

63. *Id.* at 343-44.

64. *Id.* at 344.

65. *Id.* at 333.

defense expert witness does: it forces an attorney or other members of the defense team to consider the risk of prosecution by opposing counsel and the office prosecuting their client. Prosecuting a member of the defense legal team also may have a shaming effect even prior to a conviction. Newspapers and other media show that there is a particular public interest in cases.<sup>66</sup> These possibilities raise similar concerns to what Gershman emphasizes in his ten categories.

The decision to charge an attorney falls within H. Richard Uviller's "commencement" stage. Unlike most state-level cases that come to the prosecutor's attention from law enforcement,<sup>67</sup> the prosecutor would most likely become suspicious of alleged misconduct directly through their prosecution of the defendant whom the defense attorney represents. This means that the prosecutor's office itself would investigate the alleged misconduct and interview the related district attorney investigator or deputy district attorney—the same individuals who are prosecuting the case in which the misconduct occurred. If the charging prosecutor believed that there was sufficient evidence to charge the defense attorney,<sup>68</sup> the office would then file charges. The case would be assigned to the prosecutor who handled the original case or be handed off to another prosecutor in the office. Consequently, this person would also be a colleague or coworker of the initial prosecutor.

Consider the following hypothetical. Imagine that the fictional Jefferson County District Attorney's Office charges John Smith with one count of burglary, entering a residence with an occupant, colloquially known as a "hot prowl."<sup>69</sup> A deputy district attorney, David Powers, is assigned to prosecute the case. A deputy public defender, Catherine Riggs, is assigned to represent John Smith. The Jefferson County District Attorney's Office and Public Defender's Office have had a contentious relationship, a relationship cultivated from attorneys working hundreds, if not thousands, of cases against each other in the same courthouse with gamesmanship and suspicion.

When investigating the hot prowl, the public defender calls the neighbor, who claims he heard sounds of windows breaking. Riggs

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66. See Hasselle, *supra* note 1; see also *Prosecuted by Her Legal Counterpart*, *supra* note 1; see also Laird, *supra* note 1; see also Vaughn, *supra* note 1; see also *supra* text accompanying note 4; see also *supra* text accompanying note 5; see also Sullivan, *supra* note 6; see also Bammer, *supra* note 6; see also *supra* text accompanying note 7; see also Coulson, *supra* note 7.

67. Uviller, *The Neutral Prosecutor*, *supra* note 20, at 1702.

68. See MODEL RULES OF PROFESSIONAL CONDUCT r. 3.8 (a); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.3(a).

69. See CAL. PENAL CODE §§ 459, 460(a).

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identifies herself as the public defender representing Smith and explains that the deputy district attorney may call the neighbor to testify to the sounds he heard. When the neighbor asks Riggs if she will also ask him questions and what kind of questions she would ask, she answers truthfully that at trial she would have an opportunity to cross-examine him and ask him questions about his hearing.<sup>70</sup> Unbeknownst to all, the neighbor has an unreasonable fear of talking about his ears or hearing. Later, during a phone call with Powers, the neighbor tells him that he spoke with Riggs. He was scared to come to court and refuses to come testify even if subpoenaed. Powers, influenced by his past interactions with Riggs speaking to other government witnesses, believes that Riggs may have intimidated the neighbor from testifying. The trial commences and results in an acquittal for Smith.

Powers initiates an investigation into the interaction Riggs has with the neighbor, and ultimately, the Jefferson County District Attorney's Office charges Riggs for witness intimidation because the office believes the charges are supported by probable cause.<sup>71</sup> The case is assigned to James Chan, another deputy district attorney who trained with Powers when they first started in the office, to prosecute the case. Here, Riggs is charged with a crime that arises from her representation of Smith because she is being charged with something that allegedly occurred when interviewing alleged witnesses of the hot prowl.

Applying Gershman's four-factor framework to determine the legitimacy of the threat or bullying is a fact-intensive inquiry and requires a careful analysis of the facts the prosecution brings to the court. In examining this hypothetical through Gershman's framework, the discussion is most analogous to the example of the expert witness. First, the legal basis is *de minimus*: it is unclear if Riggs said anything untrue to the neighbor or if she knew her comments would cause the neighbor to refuse to testify. It would be reasonable to allege that Riggs's motive to discourage the witness from testifying was to help her client. But if the neighbor refuses to testify, Riggs cannot be blamed for truthfully explaining how the adversarial process

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70. Assume that Ms. Riggs followed the rules set out in MODEL RULES OF PROF'L CONDUCT r. 4.3 ("Dealing with Unrepresented Person"). See STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.3 (4th ed. 2015) ("Relationship with Witnesses"); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 3-1.1(b) ("Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to . . . witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence.").

71. See MODEL RULES OF PROF'L CONDUCT r. 3.8(a); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.3(a) ("prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice).

operates and her role in zealously representing her client, even if her explanation resulted in refusal.

Second, whether Riggs has the ability to comply raises the question of what she would be expected to comply with. This is similar to the defense expert witness example. The hot prowl trial has already been adjudicated. Riggs can no longer cooperate by encouraging the witness to obey the subpoena as the original case has since ended.

The next factor, “the prosecutor must reasonably believe that the threat will cause the individual to comply[.]” may be implicated in terms of what Riggs will do in future trials. Being prosecuted for witness intimidation will certainly influence how Riggs will speak to prosecution witnesses in the future. She will also likely consider sending someone else to interview witnesses rather than going to witnesses personally.

Lastly, weighing the legitimacy of law enforcement interests with the burdens placed upon Riggs lean toward describing the threats as gratuitous.<sup>72</sup> Punishing those who intimidate witnesses is a legitimate law enforcement interest.”<sup>73</sup> It supports the prosecutorial function and its ability to present informed cases before a jury.

The burden on Riggs is great, however, because of the conflict that arises and the constitutional consequences to Riggs’ client. Chan, the prosecutor on Riggs’ case, is a colleague of Powers, the first attorney who first brought attention to the alleged misconduct. Chan may also have a professional relationship with Riggs through their interactions as opposing counsel in the same county. These relationships are governed by Standard 3-1.7(f), that the prosecutor should not allow their professional judgment to be clouded by personal or professional relationships.<sup>74</sup> Furthermore, if Riggs had been charged during the prosecution of her client, Smith, then such charges would have likely disqualified Riggs from representing him.<sup>75</sup> Disqualification interferes with his right to a speedy trial as well as the assistance of counsel when another attorney is appointed to represent them.<sup>76</sup> These considerations outweigh the fact that this was a single witness Powers believed Riggs spoke to inappropriately. Perhaps Powers could have persuaded the neighbor to testify if Riggs spoke to the neighbor again about what would happen in court in a more sympathetic way. Here, it is not so

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72. *Threats and Bullying*, *supra* note 11, at 339.

73. *See* CAL. PENAL CODE § 136.1.

74. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7(f).

75. *See, e.g., United States v. Greig*, 967 F.2d 1018, 1022-23 (5th Cir. 1992) (An actual conflict existed because “counsel was in the position of simultaneously having to defend himself as well as his client regarding their potentially criminal activity.”).

76. U.S. Const. amend. VI.

clear that the legitimate law enforcement interest to deter witness intimidation is outweighed by the burdens on the persons threatened.

While Gershman does not include the prosecution of members of the defense team as one of his categories, such a tactic can be analyzed through his framework. Just as his other ten categories raise intended and unintended consequences on the rights of criminal defendants and the ability of attorneys to present a defense for the accused, prosecuting members of the defense legal team also creates chilling effects on both the member of the legal team as well as the team's ability to represent the client.

### **Chilling Effect on Legal Representation of Criminal Defendants**

After applying Gershman's framework to ascertain the legitimacy of a threat, deciding whether a threat is permissible prompts a consideration of the full ramifications of the threat or actual prosecution of a member of the defense legal team. "Unquestionably, the mere filing of a charge can have devastating consequences on a person's life, liberty, and reputation."<sup>77</sup> The social condemnation of criminal defendants is well noted, but there are special considerations when an attorney is indicted or charged. Furthermore, the prosecution of such a member of a legal team also directly affects the representation of a client. All of these consequences must be taken into consideration when analyzing the second and third prong, what would encourage an individual to comply if they had the ability, and the fourth prong, how the threat burdens the "rights, interests, and sensibilities" of the person threatened.<sup>78</sup>

### ***Attorney's Individual Consequences of Being Arrested and/or Charged***

Today, different methods induce societal condemnation of those arrested and charged regardless of whether those criminal proceedings result in a conviction. Media reports of allegations risk shaming the defense attorney and their place of employment when identified.<sup>79</sup> This is compounded by the particular crimes with which prosecutors might charge a defense attorney and collateral consequences that follow merely from the

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77. Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1271 (2011).

78. *Threats and Bullying*, *supra* note 11, at 339.

79. See Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2162-63 (2011) ("[S]haming punishments denote state-sponsored punishments that are aimed at humiliating the offender by degrading the offender's status, that is by communicating to others that he is a bad type . . . . [S]haming punishments occur before the public eye, sometimes with the public's participation.").

charge itself. For example, mugshots of those arrested and booked end up as part of an individual's digital footprint with very limited recourse to take down those photos.<sup>80</sup> Arrests appear on an arrestee's criminal record, which may come up during background checks during the onboarding process for a new job. Even some post-conviction remedies will not completely remove an arrest from someone's record.<sup>81</sup>

Furthermore, attorneys face even greater consequences when they have been charged with a crime. Suborning perjury and witness intimidation are the very charges that go to the heart of the moral character of an attorney. Some state bar associations require licensed attorneys within their jurisdiction to self-report incidents when the attorney has been indicted for felonies.<sup>82</sup> Some bar associations require more, placing an affirmative duty on prosecutors to notify the state bar association when they file felonies or misdemeanor charges against an attorney.<sup>83</sup> This provides even greater power to the prosecutor: not only can the prosecutor charge a defense attorney with a crime, but also to report that very attorney to the state bar association for discipline. Such report may initiate disciplinary proceedings.

Returning to our hypothetical: if Riggs were charged with a felony, she may need to report the charge to the state bar. Her arrest and charge will remain on her criminal record until she is eligible to have it expunged. Her

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80. See, e.g., Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS UNIV. L. REV. 557 (2018); see also Sarah Esther Lageson, *It's Time for the Mug-Shot Digital Economy to Die*, SLATE (Mar. 12, 2019, 8:00 AM), <https://slate.com/technology/2019/03/mug-shot-economy-cuomo-proposal.html>.

81. Those asking the court to determine factual innocence, one of the very few remedies to remove an arrest completely off a person's record, face almost insurmountable odds in succeeding. See Natalie Lyons, *Presumed Guilty Until Proven Innocent: California Penal Code Section 851.8 and the Injustice of Imposing a Factual Innocence Standard on Arrested Persons*, 43 GOLDEN GATE U. L. REV. 485, 519 (2013) ("By imposing this substantial burden on the [factual innocence] petitioner, the statute ensures that successful petitions under its purview are 'rare' and that most arrested persons will be barred from its remedy.").

82. See CAL. BUS. & PROF. CODE § 6068(o)(4); see also CAL. BUS. & PROF. CODE § 6068(o)(5) ("The conviction of the attorney. . . of . . . a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, . . . involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.").

83. CAL. BUS. & PROF. CODE § 6101(b); see generally MODEL RULES OF PROF'L CONDUCT r. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."); Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 978 (1988); Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation*, 12 GEO. J. LEGAL ETHICS 175 (1999).

whole office rallies behind her but is now implementing resource-heavy procedures for all of their cases to ensure two people are on every phone call with witnesses. Newspapers write about her case, notifying her family, friends, and colleagues about the pending case.<sup>84</sup> Riggs is concerned about her own future, whether she will be convicted on these charges and how these charges will affect her career even if the charges are later dismissed or she is acquitted.

The defense attorney facing criminal charges is at risk of losing her liberty. Even if acquitted, she would still face a barrage of collateral consequences to her both as an individual and as an attorney. Studies show that arrest records, even with only one arrest, may negatively affect potential employers' consideration of job applications.<sup>85</sup> A state bar disciplinary committee hearing these cases may issue a disposition that results in the attorney being suspended or disbarred, which may be publicly disclosed on the bar website or the attorney's bar profile.<sup>86</sup> Being charged with these crimes cause great personal consequences for attorneys.

### ***Consequences on How Defense Attorneys Will Represent Clients***

To avoid such personal consequences, defense attorneys may act differently in their legal representation to avoid any chances that they could be prosecuted for such crimes. Such actions could be considered a personal conflict of interest, when the lawyer's own interest in the case materially limits her representation.<sup>87</sup> This is particularly troubling because if attorneys, acting lawfully, allow the risk or chance of intensive scrutiny by the prosecutor's office to affect their representation of their clients, this may affect the level of assistance the lawyers provide. This directly implicates the Sixth Amendment's guarantee to the accused of assistance of counsel.<sup>88</sup> Even if the prosecution of the attorney occurs after the attorney's representation concludes, the prosecution of that attorney may influence how that attorney or her colleagues act in the future, potentially impacting the constitutional rights of other defendants.

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84. See Markel, *supra* note 79.

85. See CAL. PENAL CODE § 851.8(a)-(b).

86. Even if the attorney were acquitted of all charges in criminal court, a disciplinary hearing may conclude differently because such a hearing requires different evidentiary rules and standards of proof. See R. OF PROC. OF THE STATE BAR OF CAL. R. 5.104(c) ("The hearing need not be conducted according to technical rules relating to evidence and witnesses" with exceptions.); see generally David M. Appel, *Attorney Disbarment Proceedings and the Standard of Proof*, 24 HOFSTRA L. REV. 275 (1995).

87. See MODEL RULES OF PROF'L CONDUCT r. 1.7.

88. U.S. Const. amend. VI.

The chilling effects are magnified further by the fact that many defense attorneys are appointed by the court to provide legal representation for indigent clients. Public defenders and private criminal defense attorneys contracted to the county or state to provide services are notoriously limited by the budget provided by local or state government and the court to provide such services.<sup>89</sup> Caseloads may be overwhelming.<sup>90</sup> If solutions they implement consume more resources that otherwise could be spent on providing a more thorough investigation for the client's case, then the risk of being charged will also have directly affected the representation of that client. Recording contacts with witnesses and documenting the interaction that transpires may also raise defense discovery issues.<sup>91</sup> Some commonplace solutions that could be implemented include having two investigators interview witnesses, having witnesses sign a form acknowledging they understand they are speaking to public defender staff, or avoiding interviewing the witness at all.<sup>92</sup>

To minimize personal consequences, attorneys may also become concerned writing declarations because of the risk of being prosecuted for perjury. Attorneys submit declarations to the court that state facts they personally know or facts based on information and belief; however, declaration must be signed under the penalty of perjury.<sup>93</sup> Attorneys learn of these facts from their client, or some other witness. However, attorneys may be at risk of being prosecuted of perjury, if unbeknownst to them, those facts are not true. This requires attorneys to be more careful about asserting facts, or investing resources of investigators or paralegals to confirm and document those facts before submitting such a declaration. Those resources could have gone to a different part of that client's representation.

Actions taken by the defense bar to avoid any chances of prosecution may impact the defense legal team's ability to competently and effectively

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89. See, e.g., Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, PEW (Nov. 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/21/public-defenders-fight-back-against-budget-cuts-growing-caseloads>; see also Oliver Laughland, *The Human Toll of America's Public Defender Crisis*, THE GUARDIAN (Sept. 7, 2016), <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system>.

90. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 3-4.4(a); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.8(c) ("Publicly-funded defense entities should inform governmental officials of the workload of their offices, and request funding and personnel that are adequate to meet the defense caseload.").

91. See CAL. PENAL CODE § 1054.3.

92. These cautionary measures are burdensome and may deter witnesses wanting to speak to defense attorneys. See *Prosecuted by Her Legal Counterpart*, *supra* note 1; see also Laird, *supra* note 1.

93. 28 U.S.C. § 1746 (1948) ("Unsworn Declarations Under Penalty of Perjury").

assist in the representation of their client. Such impacts may directly raise constitutional concerns.

### ***The Proposed Solution***

As demonstrated by Gershman's framework, charging defense attorneys and other members of the defense legal team for crimes such as suborning perjury or intimidating witnesses could be considered legitimate, depending on the context. Prosecutors should not be discouraged from pursuing justice and prosecuting cases they believe have merit. Defense attorneys who overstep ethical bounds should not be immune from prosecution. There is always opportunity for rogue agents.

Current professional standards, however, do not provide enough guidance as demonstrated by how such a threat or actual prosecution raises questions about illegitimacy or bullying under Gershman's framework. In fact, Gershman argues professional "disciplinary bodies probably would acknowledge that attempting to draw a clear line between permissible and impermissible threats is either too difficult or unmanageable."<sup>94</sup> But rather than relying on rules of professional conduct with which attorneys comply and disciplinary bodies regulate, guidance articulated in the Criminal Standards for the Prosecution Function better provides the "best practices" standard for prosecutors to navigate the permissibility of threats.<sup>95</sup>

These standards already provide a framework for prosecutorial conflicts of interest. Standard 3-1.7 refers to the following situations regarding the prosecutor's relationship to the accused: when the prosecutor represents the defendant,<sup>96</sup> when the accused is involved with a matter that the prosecutor previously participated in as a non-prosecutor,<sup>97</sup> when the prosecutor formerly represented the now-accused,<sup>98</sup> or when the prosecutor is in negotiation for private employment with the accused or a person under investigation.<sup>99</sup> These categories do not include when the prosecutor's relationship with the accused is opposing counsel or a defense legal team member.

Furthermore, Standard 3-1.7(f), which suggests prosecutors should not allow their personal or professional relationships to affect their professional judgment, provides minimal and vague guidance on the intimacy of the relationship or precisely how a prosecutor's professional judgment should

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94. *Threats and Bullying*, *supra* note 11, at 338-39.

95. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1(b).

96. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7(b).

97. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7(c).

98. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7(d).

99. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7(e).

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not be affected. The professional relationship of a prosecutor to opposing counsel affects the professional judgment required to decide whether to charge defense counsel. The standard, however, underemphasizes this professionally intimate yet adversarial relationship.

Criminal defense attorneys, whether court-appointed or retained, and their staff are the counterparts of the prosecution. The very fact that they are same repeat players in the same courtroom, interacting with one another in an adversarial relationship, raises serious questions of personal and professional relationships prosecutors have with those charged. Charging the adversary also may implicate Standard 3-4.4(b)(ii), “[i]n exercising discretion to file and maintain charges, the prosecutor should not consider: hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor . . . .”<sup>100</sup> The current standards are insufficient to consider the nature of the adversarial relationship between the prosecutor and the defense attorney.

### ***How Prosecutorial Conflicts of Interest Are Identified and Addressed***

A way to examine the legitimacy of such prosecutions is to determine whether the investigating and charging of opposing counsel rise to the level of a prosecutorial conflict of interest. As discussed earlier, prosecutorial conflicts of interest are viewed differently from conflicts that arise from representation of a client.<sup>101</sup>

Beyond the guidance provided in the ABA Model Rules and Criminal Standards for the Prosecution Function, Bruce A. Green and Rebecca Roiphe categorize prosecutorial conflicts that are not enumerated or easily identified as such. They group these conflicts in three ways: disinterestedness, pervasive individual conflicts, and institutional conflicts.<sup>102</sup> Under these definitions, the prosecution of a defense attorney may fall under any of these categories.

First, the close personal or professional relationships that prosecutors have to the accused primarily constitute conflicts to “disinterestedness” when they present risk of bias or favoritism against the defendant.<sup>103</sup> These direct person-to-person relationships are the kind of conflicts identified in the Criminal Standards for the Prosecution Function.<sup>104</sup> Here, the adversarial relationship between the line prosecutor and the defense attorney calls into question the prosecutor’s disinterestedness, when it is the prosecutor who

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100. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.4(b)(ii).

101. *Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 469.

102. *Id.* at 473.

103. *Id.* at 471.

104. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7.

initiates an investigation of the defense attorney. After all, it is the prosecutor who is pursuing charges against the defense attorney and the original defendant.

Second, “[p]ervasive individual conflicts arise out of commonly shared personal interests that may influence the decision-making of all prosecutors in an office.”<sup>105</sup> A prosecution may attract media attention and thus bolster the political nature of a prosecutor’s job.<sup>106</sup> Of course, such media attention may also lead to a backlash against the prosecutor’s office, and thus, complicate the chief prosecutor’s re-electability. Beyond political considerations, line deputy prosecutors not involved with the prosecution at issue may nevertheless have an interest because of negative past interactions they had with the specific defense attorney that did not rise to unethical or unlawful conduct at the time.<sup>107</sup>

Third, the institutional conflicts category considers the individual line prosecutor’s relationship to the particular prosecutor’s office, and even their identity *as a prosecutor*, “rather than any personal interest or relationship to another party.”<sup>108</sup> Green and Roiphe argue, “an institutional conflict may be said to exist in cases where the prosecutor’s office is, or perceives itself to be, the victim.”<sup>109</sup> They directly refer to prosecutions of perjury and obstruction of justice.<sup>110</sup> “Perceiving that the office has an institutional interest in avenging the wrong, a prosecutor may proceed more zealously or harshly than in a similar case where a different prosecutor’s office was the victim.”<sup>111</sup> Protecting the integrity of the institution includes prosecuting defense counsel who stepped outside of ethical and lawful bounds and illegitimately interfered with a prosecution.

Such prosecutions raise questions of illegitimate interestedness in all three categories Green and Roiphe described due to the relationship between the line prosecutor and the criminal defendant, the line prosecutor and the defense counsel of the original defendant who is now being prosecuted, and

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105. *Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 471.

106. See Hasselle, *supra* note 1; see also *Prosecuted by Her Legal Counterpart*, *supra* note 1; see also Laird, *supra* note 1; see also Vaughn, *supra* note 1; see also Sullivan, *supra* note 6; see also Bammer, *supra* note 6.

107. Repeat players in the same courtroom means prosecutors and defense counsel may have long-term relationships. *Contra Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 474-75 (“any prosecutors who work regularly with police officers in the jurisdiction had a personal interest in favoring the police officers who were on trial, in order to remain in other officers’ good graces.”).

108. *Id.* at 471.

109. *Id.* at 479.

110. *Id.*

111. *Id.*

the two line prosecutors in both cases.

Green and Roiphe also acknowledge the challenge of addressing conflicts. After all, not every conflict “necessarily skew[s] the prosecutors’ judgment” such that the alleged conflict of interest requires action.<sup>112</sup> Nonetheless, identifying and mitigating that conflict is difficult considering the role of the prosecutor in society and the limited checks on prosecutorial discretion. “Like other public officials with ultimate decision-making authority, the chief prosecutor has broad discretion in determining the public interest and extremely limited oversight in the exercise of that discretion.”<sup>113</sup> It is this expansive power, in which prosecutors are not beholden to any one specific client, that leads the loyalty of a prosecutor to be ambiguous and complicated to identify.<sup>114</sup> The basis of prosecutorial decision-making is the prosecutors’ “fiduciary obligation to act in the public interest, not in furtherance of any private interests, including their own.”<sup>115</sup> Regulating adherence to such obligation is difficult because most decisions to effectuate justice are “judicially unreviewable.”<sup>116</sup> If a conflict exists, then the prosecutor must decide whether it would be permissible to proceed with the case. Given that the guiding standards to identify a prosecutorial conflict are lacking, there is a question of whether prosecutors are equipped to identify such conflicts that may not be so readily apparent.

Indeed, scholars who have examined prosecutorial “refusals to recuse themselves have . . . found that an actor’s own assessment of her partiality is not reliable for a number of reasons having nothing to do with her conscious motives.”<sup>117</sup> Kate Levine theorizes how unconscious biases can “infect a forward-looking decision about a conflict, as well as a backward-looking justification for a refusal to recuse oneself from a case or representation.”<sup>118</sup> A personal bias, or even a bias of an office, would hinder judgment calls that normally are part of the broad discretion of a prosecutor’s office. As such, a clearer standard articulated in a nationally recognized guide to prosecutorial ethics would assist prosecutors in identifying when a conflict does exist so they can act appropriately.

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112. *Id.* at 484.

113. *Id.* at 470.

114. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.3; see also *Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 471.

115. *Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 471.

116. *Id.* at 472.

117. Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1462 (2016).

118. *Id.* at 1463.

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### *A Proposed Standard*

Once a conflict is identified, the question then turns to what happens next given that the prosecutor does not have a client who can waive such a conflict. Considering the prosecutor's immense power to charge cases, even if that power is tempered by the guidance of the Criminal Standards that "the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support," the Standards should adopt a new standard nested in its section on "Conflicts of Interest."<sup>119</sup> This Note proposes the following standard:

When the prosecutor wishes to initiate criminal proceedings for conduct arising from legal representation against an attorney or a member of the legal team representing the accused in a matter in which the prosecutor previously participated or currently participates in as a prosecutor, a conflict of interest arises. This conflict of interest should be non-waivable and imputed to the entire office, absent a meaningful and enforced ethical firewall. Without a firewall, the prosecutor should recuse its office from further participation in the matter.

The accusing prosecutor's office thus would not lead or conduct the investigation, the pleadings, litigation, or resolution of the criminal case against the accused, unless the conflict could be first resolved.

This language is adopted from already-existing standards,<sup>120</sup> and worded in consideration of general drafting guidelines the task force formed to consider revisions to the Criminal Justice Standards for the Prosecution and Defense Functions.<sup>121</sup> Such a proposed standard is supported by existing standards and ABA Model Rules of Professional Conduct. For example, the standard is similar to the existing Standard 3-1.7(h), but further articulates the specific relationship the prosecutor has with the accused. It also acknowledges that the charges stem from an adversarial professional relationship the prosecutor has with the accused.

Furthermore, imputing the conflict to the entire office is supported by the ABA Model Rules on imputation,<sup>122</sup> as well as practices of defense

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119. See generally Rita M. Glavin, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 *FORDHAM L. REV.* 1809 (1999) (proposing new standards for the ABA Model Rules).

120. See *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION* § 3-1.7(a), 3-1.7(c).

121. Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 *HASTINGS L.J.* 1111, 1115-18 (2011) ("1. Do Not Change Existing Language or Structure Unless You Have To . . . 2. Do Not Say Too Much, or Try for Too Much Detail, in a Standard . . . 3. Restatement, Best Practices, or Aspirational?").

122. See *MODEL RULES OF PROF'L CONDUCT* r. 1.10.

offices when faced with conflicts of interest due to relationships.<sup>123</sup> Public defender offices will declare a conflict that cannot be resolved by an ethical firewall when the complaining witness or percipient witness is an employee of the office or a close family member of an employee of the office.<sup>124</sup> Such offices may also declare a conflict when one attorney in a defense counsel office would otherwise have to call another attorney in the office to testify for the client.<sup>125</sup> Here, the complainant or percipient witness is the prosecutor who raised the concern about the alleged violation of the law. The head prosecutor would have the ability to impose ethical firewalls, but a firewall may not be practicable as discussed below.

Imputing the conflict to the entire office would mean recusal of the office from the prosecution. In a related argument, Levine also suggests office-wide recusal in prosecutions of police officers.<sup>126</sup> The dependent relationship between prosecutors and law enforcement of the same county raises “cognitive biases and political pressures” that complicates the prosecutor’s decision-making regarding removal.<sup>127</sup> Green and Roiphe specifically address Levine’s concerns about such per se removal: they view the prosecutor-police relationship not as one in which “prosecutors’ judgment might be skewed because of a relationship of particular officers under investigation but that the prosecutors have some particular sympathy toward police officers in general.”<sup>128</sup> In contrast, here, the considerations of the existence of conflicts are not limited to the general adversarial relationship between prosecutors and defense attorneys due

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123. See, e.g., *People v. Singer*, 226 Cal. App. 3d 23, 39 (1990) (where defense counsel’s sexual relationship with defendant’s wife “deprived defendant of his constitutional right to the ‘undivided loyalty and effort’ of his attorney.”).

124. See, e.g., KING COUNTY PUBLIC DEFENSE CONFLICTS WORK GROUP, CONFLICTS OF INTEREST CASE ANALYSIS PROTOCOLS, § 4.11 (June 18, 2013), <https://kingcounty.gov/~media/Council/documents/Issues/PDAT/ConflictsPolicyV15.ashx> (“If an employee of the firm is a current witness for the prosecution, the firm may not represent the defendant or any other witness.”); Kimberly Veklerov & Jenna Lyons, *Colleagues Mourn Marla Zamora; Grandnephew Arraigned for Murder*, S.F. CHRON. (May 11, 2016), <https://www.sfgate.com/crime/article/Colleagues-mourn-Marla-Zamora-as-grandnephew-7463194.php> (“[C]onflicts of interest were declared by both the public defender’s office and the San Francisco panel usually assigned in lieu of the former, given that so many in both departments had worked closely with Marla Zamora [past Chief Attorney of the San Francisco’s Public Defender’s Office] over the years.”); *State v. Reedy*, 352 S.E.2d 158, 164 (W. Va. 1986) (“Nondisclosure of the family relationship in this case has denied the defendant his right to effective assistance of counsel.”); see generally, STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.3 (j).

125. MODEL RULES OF PROF’L CONDUCT r. 3.7 cmt. 7 (“Lawyer as a Witness – Comment”).

126. Levine, *supra* note 117, at 1488.

127. *Id.* at 1487.

128. *Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 508.

to the nature of their work.

The focus of these prosecutions is the specific relationship one line deputy in this prosecutor's office has with the defense counsel, or possibly, the specific relationships many line deputies have with this particular defense counsel. The evidence supporting such allegations comes directly from the prosecution of the defense counsel's client. The line deputy or employee of the prosecutor's office may become government witnesses. The defense of the defense-attorney-now-defendant may reveal information about the first client, which may assist the prosecution of the first client.<sup>129</sup> The prosecutors' judgment may be compromised because of the prosecutors' relationship to this particular defense attorney and the attorney's representation of the first client. As such, a proposed standard would provide guidance to prosecution offices on who may prosecute such cases.

#### *Implementation of Proposed Standard*

When an accused is a member of a defense legal team, and the charges stem from the accused's participation in the representation of a criminal defendant, the prosecutor should declare a conflict. The conflict should be imputed to the entire office. Prosecutors could then argue that imputation of the conflict should be limited, and not extended to the entire office if one of two situations apply: first, physical distance may be sufficient to create an ethical firewall between the office of the prosecutor who first suspected the alleged misconduct and other parts of the office. Some offices, or state-wide offices, cover large areas of geography and prosecutors in one office will rarely appear in the same cases opposing the defense attorneys in question.<sup>130</sup> This argument is less compelling, however, in local prosecutor's offices where the county is small in size, the office has few attorneys, or where the office has a tightly-knit community of line deputies where the attorneys freely discuss cases either in person or by electronic communications.

Another possible but unsatisfying solution may be organizing the office

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129. See MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(5) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . .").

130. Even though the United States Department of Justice is considered one office or firm, assistant district attorneys from separate federal districts are partitioned off from one another enough to dissipate any ethical concerns surrounding conflicts. See William R. Coulson, *Takeaways from Rare Perjury Prosecution of Attorneys*, LAW360 (Aug. 31, 2015), <https://www.law360.com/articles/696892/takeaways-from-rare-perjury-prosecution-of-attorneys>; see also *People v. Hernandez*, 235 Cal. App. 3d 674, 681 (1991) ("the problems of insulating the case against Hernandez from the case against Braverman are not insurmountable-not in a prosecuting agency comprised of some 900 attorneys.").

to create distinct and separate units. A prosecutor from one part of an office may legitimately prosecute defense counsel if the office was partitioned off in the way H. Richard Uvillar proposes in *The Neutral Prosecutor*.<sup>131</sup> Uvillar argues that the investigation and adjudication part of an office, where prosecutors investigate allegations before criminal charges are filed and decide the appropriate punishment for such charges, can and should be staffed by prosecutors separate from the adversarial process of litigating motions and trial.<sup>132</sup>

This strategy has been supported by Rachel Barkow through the context of administrative law. Barkow suggests that this type of detachment would be viable to “curb abuses of power through separation-of-functions requirements and greater attention to supervision.”<sup>133</sup> Such a detachment may also work to implement and maintain an effective ethical firewall in order to keep these cases within the same office. Attorneys in the Investigation and Adjudication sections of the office would not currently be in adversarial positions with defense attorneys. A more detached investigation and adjudication section and a well-implemented firewall may be sufficient to remove the taint of an appearance of impropriety in charging because the prosecutors investigating the defense counsel would not have a professional relationship with the accused.

Depending on the nature and size of an office, however, all the prosecutors of such an office may be situated to have judgment-affecting professional relationships with the prosecutor who may become a witness or the accuser. Furthermore, the prosecutor in the Investigation section may have also been the prosecutor, or a colleague of the prosecutor, who investigated the case in which the alleged attorney misconduct occurred. Regardless of personal relationships prosecutors may have with the line deputy of the first case or the defense-attorney defendant in the second case, Green and Roiphe criticize the detached unit approach by recognizing the expectation that prosecutors are to “act as investigators, litigators, and gatekeepers at the same time.”<sup>134</sup> Separating these roles reduces the efficacy of the person doing the job because distinctive functions would mean some prosecutors involved with the case would be less familiar with the facts than

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131. Uvillar, *The Neutral Prosecutor*, *supra* note 20, at 1716.

132. *Id.* at 1716; *see also Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 502 (“the investigative, charging, and trial functions are combined in a single prosecutorial office, with the result that prosecutors at the trial stage have conflicts arising out of their investigating and charging rule . . .”).

133. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873 (2009).

134. *Rethinking Prosecutor’s Conflicts*, *supra* note 12, at 511.

other prosecutors.<sup>135</sup> Furthermore, such a structural change to an office would require greater consideration than what is proportionate for the rare instance of charging defense counsel. Considering all of these factors, it is likely that even prosecutors in a detached investigation section would not survive an inquiry into whether an ethical firewall is sufficient.

If an ethical firewall is insufficient, then the prosecutor's office has other options to prosecute defense counsel or a legal team member: passing the case to a special prosecutor, the state-level Office of Attorney General, or a local prosecutor's office in a different county.<sup>136</sup> First, the accusing prosecutor's office could bring in a special prosecutor.<sup>137</sup> The office and the special prosecutor would be guided by Standard 3-2.1, which discusses the best practices of how to secure and support a special prosecutor.<sup>138</sup> This independent prosecutor would interview the prosecutor making the allegations against defense counsel, as well as relevant witnesses, and review the evidence before making a decision to charge. The attorney would also pursue the case throughout the criminal proceedings against the accused.

If it were impracticable or too expensive for the prosecutor's office to hire a special prosecutor, however, then the accusing office would need to recuse itself completely. It may involve the state Office of the Attorney General ("AG's Office") or a county-level prosecutor's office in a different jurisdiction. The accusing prosecution office would make a preliminary determination that some conduct or incident should be investigated for alleged misconduct arising from legal representation. Other than that, the office would pass the case to another prosecutorial agency. The AG's Office would be responsible for reviewing the evidence collected, doing an independent investigation, and assessing whether charges should be filed.

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135. *Id.* at 510-11.

136. Having a neighboring county prosecutor's office prosecute a defense attorney may also raise ethical concerns especially with Standard 3-1.7(f), as defense attorneys may practice in multiple counties. While that second prosecutor's office would have not been involved with prosecuting the case from which the alleged misconduct arose, attorneys in that office may still have an adversarial and professional relationship with the defense counsel. Furthermore, prosecutors in other offices may "pursue these cases harshly out of appreciation for the impediment that perjury imposes for their work and out of some sense of identification for the victimized office." *Rethinking Prosecutor's Conflicts*, *supra* note 12, at 479, n.71. To address this concern, the AG's Office should be involved and make the determination of whether the AG's Office can handle the case or if it can ethically be passed off to another county-level prosecutor's office.

137. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-2.1 ("If a particular matter requires the appointment of a special prosecutor from outside the office, adequate funding for this purpose should be made available. Such special prosecutors should know and are governed by applicable conflict of interest standards for prosecutors.").

138. *See id.*

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It would then decide either to file the charges in the county where the alleged conduct occurred and send an assistant attorney general to prosecute the case there or charge the case in a nearby county and assign that local prosecutor's office to prosecute the case. If a county-level prosecutor's office picked up the case, then that office would follow its regular procedures in investigating the case. This process would allow the attorneys to decide to charge or prosecute the case without interviewing or reviewing statements or documents from a colleague or coworker. In severing the commencement and investigation stages by empowering a separate office to pursue the charges, these procedures reflect some degree of detachment to the threat to prosecute defense counsel without creating a rigid process or structure for all cases.

While Green and Roiphe criticize the use of a separate prosecutor to address conflicts of interest, their criticism specifically addresses prosecutions of law enforcement and of a political nature (e.g., where the defendant is a politician that controls the prosecutor's office's budget).<sup>139</sup> As discussed above, a separate prosecutor's office may be inappropriate for prosecutions of police officers because the conflict or bias comes from whether sympathy for police officers is legitimate. "Conceptualizing conflicts of interest to incorporate personal predispositions built up over a lifetime of experiences and education, possibly including professional interaction with police, is impractical."<sup>140</sup> Green and Roiphe do support the employment, however, of a separate prosecutor in prosecutions in which the prosecution's office views itself to be the victim: "a prosecutor who is further removed from the case where the wrongdoing occurred is likely to look at the conduct somewhat more dispassionately and objectively—i.e., disinterestedly."<sup>141</sup> But a separate office's distance from the legal community which encompasses both the originating prosecutor and defense attorney may also dilute the disinterestedness Green and Roiphe identify elsewhere. Here, a separate office uninvolved with the first prosecution would support the prosecuting attorney's disinterestedness and mitigate any appearance that prosecutors are improperly pursuing their opposing counsel. If an investigation by the separate prosecutor leads to charging the defense counsel, then a separate office's decision may mollify Gershman's concerns about the legitimacy of threats and bullying.

This process may involve more resources to justly prosecute the case which may also in turn invoke concerns about special treatment. The extra scrutiny this kind of case should undergo does require extensive resources

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139. *Rethinking Prosecutor's Conflicts*, *supra* note 12, at 511.

140. *Id.*

141. *Id.* at 479, n.71.

that the accusing prosecution's office or receiving office may not have. These procedures are necessary, however, to address the conflict of interest arising from the close adversarial and professional relationships prosecutors and defense attorneys have because the procedures create a separation that avoids the appearance of impropriety and perhaps even legitimizes the decision to prosecute opposing counsel.

Furthermore, the consumption of resources should be considered. The Standards suggest that prosecution offices should contemplate "the fair and efficient distribution of limited prosecutorial resources" when making charging decisions.<sup>142</sup> If the consumption of resources by this other office becomes untenable, then the accusing prosecutors still have recourse. Prosecutors can report the defense attorney to the state bar disciplinary committee even if charges are not filed.<sup>143</sup> The defense attorney would then still be investigated. If the committee found merit in the report, the attorney could be possibly disciplined. An investigation by the state bar disciplinary committee, the AG's Office, or even a neighboring county prosecutor's office would create a more just process because the prosecution by a separate and distinct entity would raise less suspicion of a biased or conflicted prosecution. The accused, the local bar, as well as the public, all have an interest in the fair administration of the criminal justice system.

It is important to balance the constitutional rights of criminal defendants and the rights of their attorneys-now-defendants with the professional responsibilities of prosecutors.<sup>144</sup> An addition to the Standards provides guidance in reconciling the legitimate pursuit of justice to charge defense lawyers who cross the line in advocating for their clients with an overreaching prosecutor's use of their charging power against defense lawyers.

## Conclusion

The ABA Model Rules and the Criminal Standards for the Prosecution and Defense Functions guide prosecutors and defense counsel in the ethical conduct required and expected of criminal justice attorneys. Both sides, prosecutors and defense attorneys, can cross over into the outer boundaries

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142. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.4(a)(xiv).

143. See, e.g., Jeff Adachi & Peter Calloway, *One Simple Way to Hold Bad Prosecutors Accountable*, THE APPEAL (Mar. 21, 2019), <https://theappeal.org/prosecutorial-misconduct-jeff-adachi-commentary>; Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV 1059, 1061 (2009).

144. *Threats and Bullying*, *supra* note 11, at 340 ("Also illegitimate are threats that appear to have no recognizable law-enforcement purpose except to punish or deter persons from exercising their constitutional rights.").

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of ethical behavior. It is the prosecutor, however, who has the sole power to use criminal charges to address conduct that veers too close to those boundaries. This behavior is akin to the different examples of threats and bullying Gershman discusses. It is also similar to the framework he employs to understand the legitimacy of prosecutorial conduct to incentivize or compel assistance to the prosecutor's case at the expense of the interests or representation of criminal defendants. Gershman does not, however, address the legitimacy of charging defense counsel or the members of the defense legal team, and this Note has attempted to do so.

Prosecutions of defense attorneys and members of defense legal teams for conduct relating to legal representation raise concerns about violations of due process and other constitutional rights of defendants and attorneys. This Note looks to frameworks to understand existing platforms to guide prosecutorial ethical behavior and prosecutorial conflicts of interest. This Note suggests a new standard to add to the Criminal Standards for the Prosecution Functions with which to guide prosecutors when considering filing charges against defense attorneys and members of the defense legal team. The distancing of prosecutors from the pursuit of criminal charges against their own opposing counsel may alleviate concerns of retaliation and other improprieties. If the prosecutorial conflict of interest that arises during such a prosecution is fully considered and appropriately acted upon, pursuing attorney misconduct as criminal misconduct may be permissible. A full consideration to ensure the fair administration of justice and fair trials for the original defendant and attorney must recognize the chilling effects of such prosecutions on the effective assistance of counsel for individuals accused of crimes.

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