Winter 1986

Advances in Prosecutors' Ethics

Monroe H. Freedman
Maurice A. Deane School of Law at Hofstra University

how recently enacted "victims rights" statutes have influenced the practice of criminal justice around the country. Since 1980, some 40 states have adopted such statutes. The project will entail extensive telephone surveys, as well as personal interviews with prosecutors, judges, defense attorneys and other criminal justice practitioners. Contact Victim/Witness Project Director Susan Hillenbrand in the Section's staff offices at 202/331-1160.

For Juvenile Court Judges

The Section's Juvenile Justice Project has published a new monograph entitled *An Emerging Judicial Role in Family Court.* The publication provides practical guidance to the juvenile court judge who, unlike colleagues in adult criminal or civil court, must be well-versed in child development, family dynamics, children's needs, and dispositional alternatives for youths. It is based largely on a unique experimental training and consultation project operated in the Family Division of the District of Columbia Superior Court. Copies are available from ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, Illinois 60611. The order number is 509-0026, and the cost is $5 to Section members, prepaid.

Sample Pleadings to Use in Juvenile Court

Another new Juvenile Justice Project publication is entitled *Sample Pleadings for Use in Juvenile Court Proceedings.* It is a companion volume to *Checklists for Use in Juvenile Delinquency Proceedings,* and is designed to assist lawyers new to delinquency practice or those representing juvenile clients on an infrequent basis. A selection of sample pleadings frequently used in juvenile court is included. Copies are available from ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, Illinois 60611. The order number is 509-0027, and the cost is $5 to Section members, prepaid.

Marcia Christensen *is the assistant staff director of the American Bar Association's Section of Criminal Justice.*

LEGAL ETHICS

By Monroe H. Freedman

ADVANCES IN PROSECUTORS' ETHICS

Virtually all authorities agree that the public prosecutor should be held to different standards than defense attorneys. Since those dual standards derive from the significantly different role and functions served by each, the prosecutor's obligations are not, as is sometimes said, "higher" than the defense lawyer's—they are simply different.

The differences in role and function are clear. The defense lawyer represents individuals whose rights are guaranteed by the Constitution. The accused, not the state, has a Sixth Amendment right to effective assistance of counsel, a Fifth Amendment privilege against self-incrimination, and a First Amendment right to freedom of speech. The prosecutor, on the other hand, acts in the name of the government, with all its majesty and power. Conduct that may be tolerable on the part of private individuals may be reprehensible when done under color of law, on behalf of the nation or state. The prosecutor also has unique powers of discretion, requiring special ethical rules to guard against abuse.

Despite a professional consensus that the prosecutor has special ethical obligations, there is relatively little scholarly work on prosecutors' ethical responsibilities. (A notable exception is Alschuler, "Courtroom Misconduct by Prosecutors and Trial Judges," 50 *Tex. L. Rev.* 629 (1972).) Although the Code of Professional Responsibility (1970) and the Model Rules of Professional Conduct (1983) both recognize the general proposition that prosecutors must be subject to distinctive rules, neither code follows through by providing specific rules where they are most needed.

The inclusion of several important new provisions for prosecutors in the District of Columbia Bar's revisions of the Model Rules is, therefore, a major advance. In fact, the thoroughgoing revision of the Model Rules by a special committee of the D.C. Bar is the best and most important effort to codify rules of professional responsibility. The committee, chaired by Robert E. Jordan III, the president-elect of the bar, devoted two years of intensive

study, debate, and extensive redrafting to the ABA's Model Rules. After careful review, the Board of Governors has recommended adoption of the committee's proposal by the D.C. Court of Appeals.

The new prosecutorial provisions originated with a subcommittee of seven members. Significantly, four members of the subcommittee were representatives of the United States Attorney's Office and the Justice Department (under Attorney General Meese), and another member was a former federal prosecutor. The subcommittee unanimously supported all of the provisions adopted by the Jordan Committee except one (which is not among the three discussed here).

Selective prosecution

It is sometimes said that the Model Rules were inspired by the role of lawyers (the bad ones, that is) in Watergate. Perhaps the most egregious abuse that surfaced in Watergate was the Enemies List, a list of people who were to be investigated and prosecuted by the government because Richard Nixon viewed them as personal or political enemies. The Enemies List, like a similar list and the Get Hoffa Squad of the Kennedy administration, was an extreme example of what Justice Robert Jackson had called "The most dangerous power of the prosecutor:" the discretionary power to target someone for investigation and prosecution for the crime of being "personally obnoxious to or in the way of the prosecutor."

It is ironic, then, that the ABA's Model Rules have no provision forbidding the prosecutorial use of an Enemies List. Rule 3.8(a) says only that a prosecutor shall refrain from "prosecuting a charge" that the prosecutor knows "is not supported by probable cause." This language does not limit targeting someone for investigation for improper reasons. Further, it is virtually useless as an ethical limitation on bad faith prosecutions, because a determined prosecutor, with the resources and power of the government, should be able to meet the minimal requirement of probable cause against anyone for some offense.

Note too that selective prosecution is not proscribed by the Model Rules. Illustrative is *Yick Wo v. Hopkins*, 118 U.S. 356 (1986), where an ordinance made it unlawful to maintain a laundry in a wooden building without obtaining a license. The record showed that virtually all applications filed by Chinese were denied, while virtually all applications by non-Chinese were granted. Thus, the prosecutions of Yick Wo and others were the result of invidious discrimination. Those prosecutions were wrong, therefore, despite the fact that Yick Wo had in fact committed the offense with which he was charged.

Model Rule 3.8(a) is similar to DR 7-103(A) of the Code of Professional Responsibility and the ABA Standards Relating to the Prosecution Function 3-3.9(a). The key phrase "unprofessional conduct" (that is, conduct that could result in disciplinary action) is used in Standard 3-3.9(a) only with regard to instituting or maintaining criminal charges when "it is known that the charges are not supported by probable cause." Beyond that, the prosecutor is urged, but not required, to meet a higher prima-facie-case standard. Also, standard 3-3.9(c) urges but does not require the prosecutor to "give no weight to...personal or political advantages or disadvantages...." This is a tiger that is not only toothless but lame (it omits racist motivation, for example).

In contrast, the D.C. Bar's subcommittee on prosecutors' ethics unanimously proposed the following rules, which were then unanimously adopted by the Jordan Committee and (with amendments of form) unanimously adopted by the D.C. Bar's Board of Governors.

> Rule 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR
> The prosecutor in a criminal case shall not:
> (a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;
> (b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause; [or]
> (c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt....

The D.C. Bar proposal has a three-tier standard for prosecutorial discretion: at the investigation stage (and thereafter) the prosecutor must not invidiously discriminate; at the filing stage (and thereafter) the prosecutor must meet the standard of probable cause; and at the trial stage the prosecutor must meet the standard of a prima facie case. Note, though, that the test is subjective (what the prosecutor "knows"); if a judge grants a motion to dismiss, therefore, the prosecutor is not automatically guilty of unethical conduct.

Pretrial publicity

Another area in which the Model Rules, the Code, and the Standards are inadequate is pretrial publicity. The accused has a First Amendment right to freedom of speech, and will probably never need it more than after an indictment has been published. The prosecutor as an agent of the government has no right of free speech, but is privileged to publish, in an indictment, allegations of felonious conduct which, in any other context, would be libelous *per se*. This is an area where the different roles and functions of prosecutor and defense lawyer clearly call for different rules.

In some jurisdictions prosecutors have purposefully heightened the publicity occasioned by an indictment by holding press conferences and making sensational allegations. This action does not violate the Code or the Model Rules because DR 7-107(C)(8) and (9) and MR

3.6(c)(2) permit publicity regarding information in a public record. (The ABA Standards adopt the Code provisions by reference.) Thus, by creating a "public record" (for example, by filing a "speaking indictment") a prosecutor whose desire for publicity outweighs his or her sense of fairness is virtually unrestricted in calling press conferences to generate the most damaging television and press publicity about an accused.

At the same time, the Code and Model Rules severely restrict the ability of the defense attorney to respond. For example, under DR 7-107(C)(11) the defense lawyer is permitted to say only that "the accused denies the charges made against him." *See also* DR 7-107(B) and MR 3.6(b).

Ordinarily, prosecutorial publicity is viewed with regard to its effect in prejudicing the trial. As recognized in the Comment to the D.C. Bar proposal, however, the accused is in effect punished without due process when the prosecutor engages in extrajudicial comment that "serves unnecessarily to heighten public condemnation of the accused ... before the criminal process has taken its course."

The Code and the Model Rules, therefore, apply a dual standard to prosecution and defense counsel that stands upside-down the defendant's right of free speech and the prosecutor's obligation not to punish the defendant without due process of law. Accordingly, the D.C. subcommittee on prosecutors' ethics unanimously proposed a dual standard that would limit pretrial publicity by a prosecutor while providing room for the accused's freedom of speech. That proposal was unanimously approved by the Jordan Committee, and (with amendments that did not change the substance) unanimously adopted by the D.C. Bar's Board of Governors. The key provisions are:

> RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR
>
> The prosecutor in a criminal case shall not:...
>
> (f) Except for such statements as are necessary to inform the public of the nature of the prosecutor's action, make extrajudicial comments which serve to heighten condemnation of the accused without a legitimate law enforcement purpose.

The Comment explains what is "necessary to inform the public of the nature of the prosecutor's action" and what is "a legitimate law enforcement purpose." The prosecutor may inform the public of whether an official investigation has ended and who participated in it, and may respond to inquiries to "clarify ... technicalities of the indictment, the status of the matter, or the legal procedures that will follow." Also, if the defense opens the door by alleging unprofessional or unlawful conduct by the prosecutor's office, the prosecutor may, "insofar as necessary," answer the charges. On the other hand, the prosecutor should "use special care" to avoid publicity that would unnecessarily subject the accused to public condemnation "such as through televised press conferences."

The rule governing defense counsel and all other lawyers is MR 3.6:

> RULE 3.6 TRIAL PUBLICITY
>
> A lawyer engaged in a case *being tried to a jury* shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of mass public communication if the lawyer knows or reasonably should know that the statement will create *a serious and imminent* threat to the impartiality of the jury. (Emphasis added)

The Comment makes clear that "this Rule applies only to extrajudicial statements made after jury selection has commenced."

Grand jury procedures

Another important innovation that originated with a unanimous recommendation of the D.C. Bar's subcommittee on prosecutors' responsibilities relates to the grand jury. It reads:

> RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR
>
> The prosecutor in a criminal case shall not:...
>
> (h) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause....

This provision recognizes that the grand jury's procedures are essentially *ex parte*. Counsel cannot accompany a suspect before a grand jury, present exculpatory evidence, or make arguments on the suspect's behalf. Also, the prosecutor not only presents the government's case to the grand jury as an advocate does, but advises the grand jury much as a judge instructs a petit jury. The prosecutor's role before the grand jury is sometimes described, therefore, as quasijudicial.

The grand jury is in theory an independent body of citizens. Scholarly commentators have noted, though, that prosecutors have at times imposed their will upon grand juries, either to indict or not. That may be done by taking improper advantage of the prosecutor's unique opportunities of *ex parte* persuasion or of *ex parte* presentation of evidence. Some prosecutors have also issued grand jury subpoenas without obtaining the consent of the grand juries.

The subcommittee on prosecutors' responsibilities, the Jordan Committee, and the D.C. Bar's Board of Governors concluded without a single dissent that those potential prosecutorial abuses should be specifically addressed in a comprehensive code of lawyers' conduct.

I would recommend that bar groups in other jurisdictions review these and the other proposed rules