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High-Profile Prosecutors &(and) High-Profile Conflicts

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HIGH-PROFILE PROSECUTORS & HIGH-PROFILE CONFLICTS

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"Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer."[1]

In high profile cases, prosecutors are often their own worst enemies. The pressure to succeed too often causes prosecutors in the spotlight to make strategic and ethical decisions that can backfire against their case. Several recent high-profile cases illustrate this problem: (1) the Michael Jackson child molestation trial, (2) the Jesse James Hollywood murder prosecution, and (3) the clemency proceedings of murderer Michael Morales.

This essay is not intended to embarrass any particular prosecutor. Indeed, prosecutors in high-profile cases face a particularly difficult task. Each decision they make is put under a microscope by the media and its legal commentators.[2] Defense lawyers are quick to claim prosecutorial misconduct,[3] knowing that

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1. MODEL CODE OF PROF'L RESPONSIBILITY EC 1–2 (1981).

2. For the ethical responsibilities of prosecutors in evaluating these cases, see Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator III*, 50 MERCER L. REV. 737 (1999); Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997); Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303 (1996).

3. There is a plethora of excellent articles discussing the general problem

in high-profile cases, mistakes that would have otherwise gone unnoticed easily become morning headlines. The high-visibility prosecutor cannot afford the missteps that plague others in cases that escape public detection.

While there are many different types of prosecutorial misconduct,[4] this essay will focus on one rarely examined by the legal community—conflicts of interests for high-profile prosecutors. Whether caused by other cases they have handled or actions they have taken in the high-profile case itself, prosecutors can find themselves confronting conflict of interest situations when handling a case that garners great media attention.

In considering these cases, it is important to remember that prosecutors have ethical obligations beyond those of other attorneys.[5]

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of prosecutorial misconduct. *See, e.g.*, Jennifer Blair, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. § 530B and the Reality of Inaction*, 49 UCLA L. REV. 625 (2001); Abbe Smith, *Can You be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001); Ellen Yaroshefsky, *Zealous Advocacy in a Time of Uncertainty: Understanding Lawyers' Ethics: Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275 (2004); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 Geo. WASH. L. REV. 169 (1997); Catherine Ferguson-Gilbert, Comment, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283 (2001); Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298 (October 1988); *see also* Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, *in* HARMLESS ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (2003), http://www.publicintegrity.org/pm/default.aspx?act=main; The Innocence Project: Official Misconduct, Police and Prosecutorial Misconduct, http://www.innocenceproject.org/causes/policemisconduct.php (last visited Oct. 18, 2006).

4. Prosecutorial misconduct may range from vindictive prosecution and grand jury abuse to suborning perjury, discovery violations and improper closing arguments. Curiously, the Center for Public Integrity that studies prosecutorial misconduct does not list ethical conflicts as a type of prosecutorial conduct. *See* Weinberg, *supra* note 3. Part of the goal of this Essay is to direct more attention to this issue so that both prosecutors and their monitors will have greater sensitivity to the impact of conflict issues on the fairness of criminal proceedings.

5. *See generally* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORD. URB. L.J. 553

Their job is not to win, but to "do justice."[6] A prosecutor must pursue the guilty, but also protect the innocent. The prosecutor must combine the public welfare with the protection of the individual citizen.[7] The prosecutor does not have the luxury of just trying to "win" a case. The prosecutor must strive to reach the just verdict in a case.[8] In addition to the ordinary codes of conduct governing lawyers in their jurisdictions,[9] prosecutors operate under internal policies[10] and ABA Standards for the Administration of Criminal

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(1999) [hereinafter Levenson, *Working Outside the Rules*].

6. The United States Supreme Court in its famous opinion in *Berger v. United States*, stated that the prosecution's interest "is not that it shall win a case, but that justice shall be done . . . ." 295 U.S. 78, 88 (1935). For thoughtful discussions of a prosecutor's duty, see Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607 (1999); Ferguson-Gilbert, *supra* note 3, at 284–95.

7. The Supreme Court of Tennessee wrote:

> [The prosecutor] is to pursue guilt; he is to protect innocence; . . . to combine the public welfare and the [safety] of citizens, preserving both, and not impairing either; he is to decline the use of individual passions and individual malevolence, when he cannot use them for the advantage of the public; he is to lay hold of them where public justice . . . requires it.

Foute v. State, 4 Tenn. (3 Hayw.) 98, 99 (1816), *quoted in* JOHN JAY DOUGLAS, ETHICAL ISSUES IN PROSECUTION (2d ed. 1993). While there have been thoughtful discussions of what it means for a prosecutor to serve the "public interest," it is not generally contested that a prosecutor has the additional responsibility to serve the broader public interest, and not just to obtain a guilty verdict in a case. *See* Steve K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000).

8. *See* Bennett L. Gershmann, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 455–58 (1992) (discussing the need to produce a prosecutorial ethos that is associated with "seeking justice, rather than an ethos based on winning convictions").

9. Each state has rules of professional conduct to govern lawyers who practice in that state. Additionally, there are model rules of conduct upon which these state rules are based. *See generally* MODEL RULES OF PROF'L CONDUCT (2002–03); MODEL CODE OF PROF'L RESPONSIBILITY (1981); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000). For an excellent discussion of the court's role in enforcing lawyer's ethics, see Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORD. L. REV. 71 (1996).

10. *See, e.g.*, U.S. ATTORNEYS' MANUAL (U.S. Dept. of Justice 2006); *see*

Justice created expressly to guide prosecutors.[11]

Thus, prosecutors must be on heightened alert. Yet, when it comes to high profile cases, prosecutors seem to commit the most basic ethical violations, even those that they would be unlikely to commit in a non-high-profile case. Why is this so? As this Essay will suggest, high-profile cases put added pressures on prosecutors. Not only do they feel extraordinary pressure to win, but they often feel that they must personally succeed in the case. They sense that they must go the extra mile in ensuring their case is a success, even if it means taking steps they would not abjure in another type of case.

There are many lessons to be learned from high-profile cases. However, one of the most basic is that prosecutors must be sensitive to conflicts of interest they may encounter and quickly remedy them. Failure to do so can compromise both the government's case and the prosecutor's personal integrity.

I. THE WORLD OF CONFLICTS: POP STARS, JESSE JAMES & LETHAL INJECTION

Prosecutors, like other lawyers, are governed by professional rules of conduct. As members of the Bar, they must follow the ethical codes of their states.[12] Additionally, they must abide by the ethical standards prescribed specifically for prosecutors.

One thing common to all of these codes is the prohibition against conflicts of interest. In general, prosecutors "should avoid a conflict of interest with respect to his or her official duties."[13]

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also Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

11. In particular, prosecutors are governed by the internal policies of their prosecutorial agency; they are also guided by prosecution standards of ethics. *E.g.*, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PROSECUTION FUNCTION (1993); NATIONAL PROSECUTION STANDARDS (Nat'l District Atty's Ass'n 2d ed. 1991).

12. In 1998, Congress passed the Citizens Protection Act. Pub. L. No. 105-277, 801, 112 Stat. 2681-118 (Oct. 21, 1998). The law overruled an internal Justice Department policy that had exempted federal prosecutors from state ethical rules. Thus, federal prosecutors, like their state counterparts, are subject to the ethical rules of the jurisdiction. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 457 (2001).

13. STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE,

Specifically, prosecutors, like other lawyers, are prohibited from: (1) concurrently representing clients with direct adverse interests,[14] (2) representing clients whose interests are adverse to those of former clients,[15] and (3) representing clients when the lawyer has a personal or business interest adverse to the client.[16] Prosecutors are also cautioned against becoming witnesses in their own cases.[17]

Prosecutors, even more than other lawyers, must retain the role of advocate without becoming personally invested in a case. Prosecutors are not allowed to permit their professional judgment "to be affected by his or her own political, financial, business, property, or personal interests," even though all high-profile prosecutors know that the cases they are handling can make or break their futures.[18]

PROSECUTION FUNCTION Standard 3-1.3(a) (1993).

14. Model Rule 1.7 reads:

> [A] lawyer shall not represent a client if the presentation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client wilbe directly adverse to another client; or (2) 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 persona interest of the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

15. Model Rule 1.9 reads:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client unless the former client gives informed consent, confirmed in writing.

Id. R. 1.9.

16. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8.

17. Model Rule 3.7 provides:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work a substantial hardship on the client.

Id. R. 3.7.

18. *See, e.g.*, Christine Hanley, *Enron Prosecutor to Return to O.C. to Work at Law Firm*, L.A. TIMES, Oct. 5, 2006, at B1. Ironically, even prosecutors who lose high-profile cases can end up with new career opportunities, including those in the media. *See, e.g.*, Marcia Clark, http://www.answers .com/topic/marcia-clark (last visited Jan. 21, 2007).

A. Catching the King of Pop

Although these rules seem straightforward, time after time prosecutors have run afoul of them. An infamous example is the case of *People v. Michael Jackson.*[19] Veteran Santa Barbara County District Attorney Thomas Sneddon[20] passionately pursued his case against international pop star Michael Jackson.[21] His actions raised two important ethical issues: (1) Is it unethical for a prosecutor to be too passionate in his efforts to convict a defendant? and (2) Is it appropriate for a prosecutor to participate in an investigation in a manner that makes it likely that he will be a witness in the case?

Ethically, there is nothing wrong with a prosecutor wanting to convict someone he sincerely believes is guilty.[22] However, as

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19. People v. Jackson, No. 1133603 (Santa Barbara County, Cal. Super. Ct. 2004).

20. District Attorney Thomas Sneddon served as a career prosecutor for the County of Santa Barbara. He failed to charge a 1993 allegation of child molestation by Jackson because the victim would not cooperate after receiving a large civil settlement. Following the 1993 investigation, Jackson recorded a thinly disguised song attacking Sneddon. *See Jackson Not Guilty: Jurors Acquit Pop Star of All Molestation Charges*, CNN.com, June 13, 2005, http://www.cnn.com/2005/LAW/06/13/jackson.trial; *Michael Jackson Sings of D.A. on Previous Album*, CNN.COM, Nov. 19, 2003, http://www.cnn.com/2003/SHOWBIZ/Music/11/19/jackson.prosecutor.reut/index.html.

21. Michael Jackson, the "King of Pop," became a singing sensation when he was eleven years old. He initially sang for Motown with his brothers as part of the acclaimed group, "The Jackson 5." Later, he became an international singing star, appearing with his one sequined glove and dancing his signature moonwalk. Beginning in the 1990's, Jackson gained more infamy than fame, with charges of child molestation in 1993 and a short-lived marriage to the daughter of Elvis Presley. *See generally* Steve Huey, *Artists A-Z: Biography: Michael Jackson*, *in* ALL MUSIC GUIDE (2005), http://www.vh1.com/artists/az/jackson_michael/bio.jhtml.

In 2004, Jackson was charged with four counts of lewd conduct with a child younger than 14; one count of attempted lewd conduct; four counts of administering alcohol to facilitate child molestation; and one count of conspiracy to commit child abduction, false imprisonment and extortion. *See* Indictment, People v. Jackson, No. 1133603 (Santa Barbara County, Cal. Super. Ct. 2004). After a several month trial, Jackson was acquitted of the charges.

22. "In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980).

Justice Robert Jackson cautioned:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . [A] prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense—that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal.[23]

Therefore, the question becomes whether a prosecutor has become so obsessed with convicting a particular individual that he has lost his judgment in evaluating the case.[24]

Certainly, in the Jackson case, there was more than enough evidence to give the prosecutor strong suspicion that the defendant had molested his victim. Police found mounds of sexually explicit magazines inside Jackson's estate, Jackson admitted to sleeping with the boy, and Jackson had a history of suspicious conduct. To date, there is no evidence that Sneddon prosecuted Jackson simply because he had a vendetta against him. Yet, the public perception was that the case had become personal. Not only did this create ethical challenges for Sneddon,[25] it undercut his credibility in the way that he handled the matter and gave the defense the perennial

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23. Robert Jackson, U.S. Attorney Gen., Address to the Second Annual Conference of U.S. Attorneys (Apr. 1, 1940), *in* 24 J. AMER. JUD. SOC. 18 (1940), *available at* http://www.roberthjackson.org/Man/theman2-7-6-1/.

24. *See* William Booth, *Gloves Off: DA Thomas Sneddon Is Set to Go Another Round with Michael Jackson*, WASH. POST, Dec. 17, 2003, at C01; Wendy Thermos & Catherine Sillant, *D.A. in Jackson Case Failed in 1993, but has Reputation for Persistence*, L.A. TIMES, Nov. 20, 2003, at A24.

25. In the end, the prosecution was able to successfully defend against a motion to remove the entire district attorney's office, but the conflicts issue by Sneddon's animus toward Jackson created a major distraction for the prosecution as it prepared for trial. *See* Steve Shawkins, *Jackson Team Seeks to Oust D.A. From Case*, L.A. TIMES, Oct. 8, 2004, at B7.

"rush to judgment" defense.[26] Future prosecutors would be best off by scrupulously following the ethical prohibition against having "his or her personal judgment or obligations . . . affected by his or her own political, financial, business, property, or personal interests."[27]

Additionally, prosecutors in high-profile cases should avoid creating unnecessary conflicts of interest for themselves. Again, the Jackson case demonstrates how this easily occurs. In pursuing the investigation against Michael Jackson, prosecutor Sneddon personally drove the 150 miles down to Los Angeles to meet individually with witnesses and to take photographs and descriptions of a search location.[28] This conduct also created the potential for a serious ethical problem.[29]

It is easy for a prosecutor to end up as a witness in his or her own case if the prosecutor is not careful. The ethical rules warn against a prosecutor taking too active a role in the investigative phase of a case. ABA Prosecution Standard 3-3.1(a) begins, "A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts . . . ." It is only when those agencies cannot or will not do their job properly that a prosecutor should become more active. However, even when a prosecutor becomes active in an investigation, it is important for a prosecutor not to create a situation where he will become a witness in his own case. Mr. Sneddon nearly fell into this trap by meeting individually with his witnesses. As ABA Prosecution Standard 3-3.1(g) states, "Unless a prosecutor is prepared to forego impeachment of a witness by the prosecutor's own testimony . . . or to seek leave to withdraw from the case . . . , a prosecutor should avoid interviewing a prospective witness except in the presence of a third person."

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26. This phrase was coined by the legendary defense lawyer, Johnnie Cochran, in his successful defense of football star, O.J. Simpson. *See* Associated Press, *On Camera, The Defense Speaks; O.J. Simpson a Victim of "Rush to Judgment," Mishandled Evidence*, CHI. TRIB., Jan. 25, 1995, at C1.

27. STANDARDS RELATING TO THE ADMIN. OF JUSTICE, PROSECUTION FUNCTION Standard 3-1.3(f) (1993).

28. *See* Michelle Caruso, *Jacko Gets to See His DA Grilled*, N.Y. DAILY NEWS, Aug. 15, 2004, at 16.

29. *See generally* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in their Investigative Role*, 68 FORDHAM L. REV. 723 (1999) (discussing the ramifications of increased prosecutor participation in police investigations).

Undoubtedly, Mr. Sneddon believed he was just being conscientious when he went on his own to the search location and met with his witnesses. Yet, this extra step in a high-profile case is likely to cause problems that outweigh any conceivable benefits. Prosecutors must resist the temptation to take the high-profile case into their own hands and participate in ways they would not in other investigations. Unless they have thought through the consequences completely, prosecutors will quickly find themselves in an ethical dilemma.

B. Jesse James Returns

Ironically, the co-prosecutor in the Jackson case also found himself in ethical hot water, but not in the Jackson matter. Ronald J. Zonen, a very capable attorney,[30] co-prosecuted the Jackson case with Sneddon. No sooner did the Jackson case end than Zonen stepped into another high-profile matter.

Zonen was the prosecutor in the so-called "Jesse James Hollywood" case.[31] Jesse James Hollywood was charged in 2000 with the murder of 15-year-old Nicholas Markowitz. At the time it occurred, and later upon Hollywood's capture, the tragic and sensational crime made headlines.[32]

According to the prosecution, Hollywood and his co-defendants had a falling out with the victim's brother, Ben Markowitz, who owed them money from a drug sale.[33] To get back at Ben, Hollywood gave orders for the others to kill Nick. They obliged by driving the teenager to a trailhead, marching him to his gravesite, binding and blindfolding him, and then beating and shooting him.

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30. Ronald J. Zonen has been Chief Trial Deputy for the Santa Barbara District Attorney's Office since 1991. *See* Findlaw, Lawyer Profile, http://pview.findlaw.com/view/1093488_1 (last visited Nov. 11, 2006).

31. Because of the brutal nature of the case, and the fact that the key suspect became a fugitive on the FBI's "Ten Most Wanted List," the case became a media sensation. *See generally* Jesse Katz, *The Last Ride of Jesse James Hollywood*, L.A. MAG. 42, Feb. 1, 2002, at 42.

32. *See, e.g., id.*; Sue Fox, *The Last Days of Nick Markowitz*, L.A. TIMES, Dec. 10, 2000, at B1.

33. The alleged facts of the crime are spelled out in detail in the prosecution's pleadings in response to the defendant's motion to recuse the prosecutor's office. *See* Hollywood v. Superior Court, 49 Cal. Rptr. 3d 598, 606 (Ct. App. 2006).

Although the body was found in August of 2000, Hollywood was not apprehended until March 2005, when he was arrested in Brazil and deported to the United States. During the time Hollywood was a fugitive, the other Hollywood—the film capital of the world—took an interest in his case. Nick Cassavetes, a film director and screen writer, contacted prosecutor Zonen for his help in making a film, "Alpha Dog," based on the Markowitz murder.

Zonen agreed to turn over materials to Cassavetes and act as a consultant in his production of the film. He gave the director police and probation reports, names, phone numbers and addresses of witnesses, and, inadvertently, rap sheets containing criminal offender information. Zonen was not paid for this assistance,[34] but provided it because he hoped that widespread publicity regarding the case would help locate Hollywood and bring him to justice. He asked for a notice at the conclusion of the film requesting the viewers to contact the police if they knew of Hollywood's whereabouts and announcing a reward for his apprehension.

According to Cassavetes, Zonen was enthusiastic about the film being made and never said "no" to any of the filmmaker's requests. In the words of one of Cassevetes' assistants, Zonen was "star struck and eager to assist the film-makers."[35] Yet another one of the producers, Michael Mehas, described the unprecedented access he was given to Zonen's evidence, including the case computer disks, photographs, audio recordings, videos, law enforcement evaluations, psychological reports, and trial notebook with the prosecutor's handwritten notes and personal impressions of the case.[36]

In addition to working with the filmmaker, Zonen also assisted the producers of a popular television show, "America's Most Wanted," by giving them information about the crime. Once again, he hoped their efforts would result in Hollywood's apprehension.

When he was apprehended, Hollywood wasted no time in filing

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34. The ABA Standards specifically prohibit a prosecutor, prior to conclusion of all aspects of a matter, from entering into any agreement or understanding by which the prosecutor acquires an interest in literary or media rights to a portrayal or account based in substantial part on information relating to that matter. *See* STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PROSECUTION FUNCTION Standard 3-2.11 (1993).

35. *Hollywood*, 49 Cal. Rptr. 3d at 602.

36. *Id.* at 603.

a motion to recuse[37] the entire District Attorney's Office. After attending a screening of "Alpha Dog," his counsel argued that the film portrays Hollywood "in an extremely inflammatory manner, [as] extremely manipulative, vicious, selfish, and without any redeeming character traits whatsoever." Or, as described by other viewers, the character of Jesse James Hollywood in the film is a "monster."[38]

Hollywood's motion to recuse was based upon a claim that Zonen could no longer be a fair and impartial prosecutor because he had compromised his objectivity by his personal involvement in the "Alpha Dog" film. Additionally, Zonen had "potentially infected the jury pool with his views on the strength of the People's case."[39] The California Court of Appeal agreed with the defense and, after an evidentiary hearing by the trial court, issued a writ of mandate recusing Zonen, but not his entire office, from the case.[40]

In its opinion, the appellate court went out of its way not to personally criticize Zonen.[41] Rather, it ordered Zonen off the case, because it was particularly concerned about complications in a death penalty case. Justice Gilbert's concurrence was much more straightforward. He penned: "What is 'over-arching' here is not the 'penalty sought,' but the patent conflict that requires recusal whatever the criminal charge."[42] As the concurrence saw it:

> However appalling the crime for which defendant was charged, he, like anyone charged with a criminal offense, is entitled to a fair trial with all its attendant constitutional and statutory safeguards. This includes not having to face a prosecutor who has a conflict making it unlikely that the

37. *See* Cal. Penal Code § 1424 (West 2000).

38. *Id.*

39. *Hollywood*, 49 Cal. Rptr. 3d at 606.

40. *Id.* On December 20, 2006, the California Supreme Court granted review of the appellate court's decision and ordered its opinion, and that in a companion case, to be depublished. *See* Hollywood v. People, 2006 Cal. LEXIS 15719 (Cal. Dec. 20, 2006); Haraguchi v. Superior Court, No. S148207, 2006 Cal. LEXIS 15058 (Cal. Dec. 20, 2006). The Supreme Court's ruling is pending.

41. For example, Justice Perren wrote: "Zonen gets high marks for his zeal in attempting to bring Petitioner to justice. This is consistent with his oath as a prosecutor. The manner in which he went about achieving his goal, however, is quite another matter." *Hollywood*, 49 Cal. Rptr. 3d at 607.

42. *Id.* at 608.

> defendant will receive fair treatment "during all portions" of his trial.[43]

Zonen created a disqualifying conflict by assisting the media, even if he was doing it for well-intentioned motives. "[Zonen's] actions allowed 'show business' to cast an unseemly shadow over this case. The prosecution of criminal cases and entertainment enterprises are best kept separate."[44]

In every high-profile case, there is a risk that the prosecutor will fall into the trap of cozying up too much to the media. With the perception that there are two trials to win—one in the courtroom and one in the court of public opinion—prosecutors often make the mistake of playing to the media. As the *Hollywood* case demonstrates, these actions are likely to backfire. In handling a high-profile case, prosecutors must be acutely aware of the conflict of interest created by the prosecution becoming overly engaged with the media. In the past, the worst that prosecutors had to fear was an admonition from the court or a gag order. Now, courts are willing to find that it creates a disqualifying conflict of interest for a prosecutor to blatantly use the press to the prosecution's strategic advantage or for personal profit or self-promotion.[45]

High-profile prosecutors have many challenges in dealing with the press, but they can avoid their biggest problems by remaining true to their ethical obligations. As public servants, prosecutors are not allowed to use their official positions to obtain personal financial gain. Moreover, as the Court of Appeal adjudged in a companion

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43. *Id.* at 609.

44. *Id.* at 609.

45. In a companion case, the California Court of Appeal addressed the issue of whether it creates a disqualifying conflict of interest for a prosecutor to write and promote a novel that includes details from a case the prosecutor is handling. *See* Haraguchi v. Superior Court, 143 Cal. Rptr. 3d 590 (Ct. App. 2006), *review granted*, No. S148207, 2006 Cal. LEXIS 15058 (Cal. Dec. 20, 2006). In *Haraguchi*, the prosecutor published a novel, *Intoxicating Agent*, that was closely based upon one of the rape cases she was handling. Even the physical description of the characters matched those in her real-life case. The prosecutor promoted her book in the same county in which her case was being tried, leading to a significant likelihood that potential jurors would be influenced by her version of the case and her bias for the prosecution. *Id.* at 592–95.

case, *Haraguchi v. Superior Court*,[46] becoming entangled with the media in an ongoing case creates a "disabling conflict of interest" for a prosecutor. Prosecutors can become lost in the quest for personal glory or profit, leading them to make decisions in cases that they would not otherwise make. For example, after promoting a movie or book that portrays a defendant as particularly heinous and the prosecutor as virtuous and trustworthy, it may be very hard for that prosecutor-author to offer a defendant a plea deal or seek a lesser sentence.[47] There are no medals or monetary rewards for a prosecutor who negotiates a settlement in a case, although it might be the best for the defendant and the criminal justice system.

High-profile cases are traps for prosecutors. They must work hard to successfully present a case that the media is watching. Yet, they cannot be seduced by the media. To do so risks compromising the prosecutor's objectivity and professionalism.

C. Lethal Injection: Killing a Client

The scheduled execution of death row inmate Michael Morales made headlines in California, primarily because the defendant contested the means of execution—lethal injection. The court stayed the execution in order to hold evidentiary hearings as to whether the manner of execution was cruel and unusual punishment. While a great deal of attention was focused on this aspect of the case, less attention was given to another important issue—i.e., whether the prosecutors in the clemency proceedings had a disqualifying conflict of interest.

Morales was prosecuted by the San Joaquin County District Attorney's Office for the brutal rape and murder of a high school student. According to the testimony in the case, Morales killed the girl as a favor to his cousin who was jealous because the girl was having an affair with the cousin's homosexual lover.[48]

The number two official in the District Attorney's Office happened to be a lawyer who had previously served as a public defender. In fact, twenty-five years before Morales' clemency

46. 143 Cal. Rptr. 3d 590 (Ct. App. 2006), *review granted*, No. S148207, 2006 Cal. LEXIS 15058 (Cal. Dec. 20, 2006).

47. *Id.* at 597.

48. For a full account of the case, see *People v. Morales*, 770 P.2d 244 (Cal. 1989).

proceedings, the Assistant District Attorney actually represented Morales in the very murder trial that landed Morales on San Quentin's death row.

It is axiomatic that lawyers cannot accept employment adverse to a former client without the client's informed consent.[49] Even the prosecutor conceded this during the proceedings. He agreed to a court order that would prohibit him from talking to anybody in his office about the Morales' case. However, the issue remained as to whether his entire office would have to be recused from the clemency proceedings.

The court held that the office was not recused, notwithstanding the disqualifying conflict of the individual prosecutor. Ordinarily, if one lawyer in a firm is disqualified, the entire office is disqualified.[50] However, the recusal rules for government offices are relaxed. The defense must show that the conflict challenges the impartiality and integrity of the entire office.[51] Morales' lawyers attempted to make this showing by arguing that Morales' ex-lawyer was a high-ranking supervisor in a small office of prosecutors. Some courts have recused entire prosecution offices, even when the individual attorney did not share confidential information with others in the prosecutor's office.[52] Yet, neither the court nor the prosecutors in Morales thought recusal was necessary.[53]

Although their decision may have been legally defensible,[54] it is

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49. CAL. R. OF PROF'L CONDUCT 2-111(B)(2); People v. Lepe, 211 Cal.Rptr. 432, 434 (Ct. App. 1985); People v. Lopez, 202 Cal.Rptr. 333, 341 (Ct. App. 1984). *See also* STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PROSECUTION FUNCTION Standard 3-1.3(c) (1993) ("A prosecutor who has formerly represented a client in a matter in private practice should not, except as law may other wise expressly permit, participate in a matter in which he or she participated personally and substantially while in private practice or non-governmental employment . . . .").

50. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(D) (1980).

51. *See* People v. Hernandez, 286 Cal. Rptr. 652 (Ct. App. 1991).

52. *See, e.g.*, People v. Conner, 148, 666 P.2d 5 (Cal. 1983); People v. Lepe, 211 Cal. Rptr. 432 (Ct. App. 1985).

53. *Hernandez*, 286 Cal. Rptr. at 656.

54. Generally, the ethical rules imputing disqualification to other members of a lawyer's office do not include government offices. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT GUIDE 1.11-4(b) (2005–2006). Moreover, courts have broad

deeply troubling when prosecutors associated with high-profile cases have even a potential conflict of interest. For the general public, it is very difficult to understand how a lawyer who used to represent a defendant could stand by when in his new position he has the power to save that client from execution. The technical rules of conflicts, and the isolation of the lawyer, do not change the perception that a defendant's own lawyer helped run an office that sought his client's execution.

In high-profile cases, prosecutors must take the highest ethical road possible. If and when Morales is executed, the question will remain whether the proceedings, let alone the execution, were handled in the fairest possible manner. The prosecutor's ethical dilemma is likely to cast doubt on that decision.

II. AVOIDING THE CONFLICTS

High-profile prosecutors must be ready for prime time. Their every move will be under scrutiny. As these examples and others[55] suggest, it is actually quite surprising how often high-profile prosecutors find themselves in ethical dilemmas. With all the scrutiny of high-profile cases, it is surprising that there has been

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discretion when deciding recusal motion. Accordingly, even in situations where recusal might be prudent, it is not always required. *See, e.g.*, Millsap v. Superior Court, 82 Cal. Rptr. 2d 733 (Ct. App. 1999); People v. Hernandez, 286 Cal. Rptr. 652 (Ct. App. 1991).

55. For example, the actions of Durham County District Attorney Michael Nifong have come under great scrutiny in the highly publicized case involving rape allegations against a group of Duke University lacrosse players. In December 2006, the North Carolina Bar Association filed an ethics complaint against Nifong, contending that he made prejudicial comments to the press and engaged in deceitful and dishonest conduct by not disclosing exculpatory evidence to the defense. *See* Victoria Ward, *DA Nifong Faces State Ethics Charges*, THE CHRONICLE, Jan. 11, 2007, *available at* http://www.dukechronicle.com/media/paper884/sections/20070111News.html (follow "DA Nifong faces state ethics charges" hyperlink). As with the Jesse James Hollywood case, Nifong's pretrial contacts with the media raised questions about his ability to handle the matter fairly, resulting in calls for his recusal from the case. *Id.* Indeed, Nifong resigned "under an ethics cloud" in early January. David Zucchino, *D.A. in Duke Case Gives Up the Fight*, L.A. TIMES, Jan. 13, 2007, at A1. Each of the lessons being offered in this essay would seem to apply to Nifong's situation, which is only the latest high-profile case to emerge.

relatively little attention focused on the conflict situations that prosecutors can face. Given the recent rash of these incidents, this is the right time for those lessons to be learned.

A. Lesson #1: High Profile Cases Are More, Not Less, Likely, to Create Conflict Issues for Prosecutors

Interaction with the media, the increased zeal "to win the big one," and the reluctance to decline a high-profile assignment increase the chances that a prosecutor will face a conflict issue. High-profile prosecutors should have at the top of their case preparation checklist a full review of their ethical duties, including those involving conflicts of interest. These are the types of issues that often require third party advice from, for example, an ethics expert in the prosecutor's office. There is too much temptation for the individual prosecutor to justify his or her decisions as one made in the best interest of the case. A person not so invested in the case is often in a better position to make that decision.[56]

B. Lesson #2: Prosecutors Must Safeguard Their Objectivity When Interacting with the Media

The one thing that distinguishes high-profile cases from other types of cases is the amount of publicity they receive. It is nearly impossible for prosecutors to avoid interaction with the media in

56. In other contexts, the ethical rules recognize the need for third-party advice regarding conflicts issues. For example, ABA Model Rule of Professional Conduct 1.8 provides that a lawyer shall not entire into a business transaction with a client unless the client "is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction. . . ." MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(2) (2003). Prosecutors do not have individual clients to consult. Rather, they must consider the interest of the public in making their decisions. As a proxy for a client, prosecutors are best off asking the advice of others who can voice the concerns of those who might be affected by the conflict. *Cf.* Rita M. Glavin, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 FORDHAM L. REV. 1809, 1848–51 (1995) (proposing procedures for office approval of disclosures when prosecutor wants to release confidential information to make a movie or publish a book). In situations such as those in *Morales*, there may be individuals representing the client who can and should be consulted regarding the waiver of any client's rights.

high-profile cases. However, prosecutors can—indeed are expected to—interact with the media in a responsible manner. To ensure this, the ethical codes set standards for trial publicity. ABA Model Rule 3.6 provides in pertinent part: "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

The rules provide certain guidelines for all lawyers to use to prevent unfair pretrial publicity. In general, information contained in the public record or regarding scheduling matters in a case may be released.[57] Additionally, lawyers may make pleas for assistance in apprehending a suspect, announce progress in the criminal investigation and arrest,[58] and warn of dangers from ongoing criminal activity.[59]

However, in their interaction with the media, prosecutors have special responsibilities. ABA Model Rule of Professional Conduct 3.8(f) states:

> [E]xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightened public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 of this Rule.[60]

The recent decision to recuse the prosecutor in the Jesse James Hollywood case, as well as his colleague, the novelist in *Haraguchi v. Superior Court*, provides a clear indication that the court sees a difference between necessary interaction with the media and

57. MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(2), (4).
58. *Id.* R. 3.6(b)(7).
59. *Id.* R. 3.6(b)(6).
60. *Id.* R. 3.8(f).

exploitation of one's contacts with the media. While no firm line is drawn in these cases, the court seems to be sending the message that becoming invested personally or financially in a media project will endanger a prosecutor's objectivity.

For the last decade, commentators have warned of the danger of prosecutors disclosing confidential information for literary or media purposes.[61] Unnecessary disclosures may prejudice pending investigations, taint the potential jury pool, compromise government informants, and even endanger the lives, safety and reputation of others.[62] It is time to heed such warnings. Prosecutors should limit their disclosures to the media to information that is absolutely necessary. Under no conditions should prosecutors reveal information, such as prior criminal records, that is confidential by the relevant jurisdiction's laws.[63] Prosecutors should also avoid any business deals with the media until a case is concluded. The focus for prosecutors should be on achieving justice in a particular case, not on advancing their own careers or financial status.[64]

One possible challenge to this proposal is that it interferes with a prosecutor's First Amendment rights. Certainly, prosecutors retain some First Amendment rights. However, as the recent decision of the Supreme Court in *Garcetti v. Ceballos*[65] emphasized, those rights

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61. *See, e.g.*, Glavin, *supra* note 54.

62. *Id.* at 1836–41.

63. *See* CAL. PENAL CODE § 11105 (2000); *id.* § 1140 et seq. (2004) (prohibiting unauthorized release of criminal records); *id.* § 1054.2 (prohibiting release of police reports with telephone numbers and addresses of victims); *id.* § 1203.05 (prohibiting release of probation reports). The U.S. Department of Justice standards also prohibit the release of information. DOJ Guidelines will allow the release of nonpublic information if it is in the interest of justice, but will not allow it for personal gain. 28 C.F.R. § 45.735-10 (1994).

64. *Cf.* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 250 (1943) ("The duty of an attorney to his clients is one of great delicacy and responsibility and sometimes of apparent hardship. Every consideration of personal advantage or profit must be subordinated to the interest and welfare of the client, and information derived from the close and intimate relationship necessarily existing should not be used to promote personal interests or for personal gain.").

65. 126 S.Ct. 1951, (2006). In *Garcetti*, a prosecutor claimed he was subjected to retaliatory employment actions when he complained about dishonesty by one of the law enforcement officers in his case. *Id.* at 1956. The Supreme Court held that the government's actions did not violate the

are not unlimited. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[66] Public employers may limit employee statements made pursuant to the employee's official duties.[67] Therefore, when prosecutors speak as prosecutors, they do not enjoy the full First Amendment rights of other prosecutors.

A prosecutor who speaks to the press about a high-profile case is not doing so as a citizen. He or she is doing so as the prosecutor who has oversight for the case and the responsibility for pursuing a just result. Accordingly, a prosecutor must act in a manner that puts the public's interest above that of the individual prosecutor.

C. Lesson #3: Prosecutors Should Not Give the Appearance of a Conflict in a High-Profile Case

"In conflict-of-interest theory, it is not only the reality of a conflict of interest, but also an appearance of one, that is considered undesirable."[68] The Supreme Court emphasized this principle in its seminal decision of *Young v. United States ex rel. Vuitton et Fils.*[69] In holding that the appointment of counsel for a contempt case cannot include an interested party, Justice Brennan discussed the distinctive role of prosecutors and the need for the public to have confidence in their decision making: "The concern that representation of other clients may compromise the prosecutor's pursuit of the Government's interest rests on recognition that a prosecutor would owe an ethical duty to those other clients."[70]

In the *Morales* case, even though the tainted prosecutor was walled off from others in his office, there is still the perception that,

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prosecutor's First Amendment rights, even though he was acting in the role of whistleblower. *Id.* at 1962.

66. *Id.* at 1958.

67. *Id.* at 1960.

68. Beth Nolan, *Removing Conflicts for the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 55–56 (footnote omitted).

69. 481 U.S. 787, 806 (1987) (plurality).

70. *Id.* at 804; *see also* NATIONAL PROSECUTION STANDARDS § 7.1 (Nat'l District Atty's Ass'n 2d ed. 1991) (acknowledging that, because of the need of the public to have confidence in the criminal justice system, there is an extra responsibility for prosecutors to avoid even the appearance of representing conflicting interests).

as a supervisor, he may unconsciously influence the decisions his office makes. It is a no-win situation. If his office vigorously seeks the execution of his former client, his client will wonder why he did not do whatever he could to save his client's life.[71] If his office backs off from seeking the death penalty, members of the public may wonder whether he has used his official position as a high-ranking prosecutor to help his former client.

While it is certainly inconvenient to recuse prosecutorial offices and reassign cases, these measures protect against claims of conflict, particularly in high-profile cases. Moreover, the fact that a case has been with a prosecutorial agency a long time is insufficient to override legitimate conflict concerns.[72] The costs of undermining the legitimacy of the criminal process[73] outweigh the individual burden on the prosecutor or the prosecutorial office.

IV. HIGH PROFILE CASES; HIGH PROFILE ETHICS

To the extent that high-profile cases teach the public about the operations of the criminal justice system,[74] they should reflect the best that the criminal justice system has to offer. Thus, prosecutors should not shy away from tough ethical decision in high-profile cases. Conflict issues do not always have easy answers. However, it is important for the public to see its government officials taking these issues seriously.

Even more than other cases, high-profile prosecutions record for history the priorities and values of the culture in which they are

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71. Indeed, the California Supreme Court has reversed cases because the prosecutor's relationship with the defendant's mother might have led the prosecutors to go even tougher on the defendant to avoid the appearance of favoritism. *See* People v. Vasquez, 137 P.3d 199 (Cal. 2006).

72. Young v. United States ex rel. Vuitton et Fils, 481 U.S. 787, 806 n.17 (1987) (noting that the prosecutor's familiarity with facts of case cannot justify appointment of interested prosecutor).

73. Although technically, a request for clemency is a request for mercy that follows the completion of criminal processes, it is part and parcel of the procedures leading to execution. Accordingly, prosecutors handling clemency proceedings should still be bound by their ethical duties.

74. For a discussion of the lessons that can be learned from high-profile cases, see Laurie L. Levenson, *Media Madness or Civics 101?*, 26 U. WEST. L.A. L. REV. 57 (1995).

tried.[75] It is time that our high-profile cases reflect that prosecutors *and defense lawyers* at all times met their ethical obligations. Although this essay has focused on the ethical obligations of prosecutors, defense lawyers also have ethical duties.[76] They cannot

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75. *See* Linda Deutsch, *Trials of the Century*, 33 LOY. L.A. L. REV. 743 (2000); Laurie L. Levenson, *Lessons of Trials of the Century*, 33 LOY. L.A. L. REV. 585 (2000). To the extent that conflict issues in high-profile cases indicate a systemic problem with a particular prosecution office, that problem should be addressed immediately. It is at least curious that both the Santa Barbara County District Attorney's Office where the Jackson case was tried, and the San Joaquin County District Attorney's Office where the Morales matter was handled, were reported to have other cases with serious ethical problems near the time their high-profile cases were proceedings. For example, in San Joaquin County, a top prosecutor was fired after an investigation into his violation of ethical standards. Evidently, the prosecutor served as the prosecuting attorney in a hit-and-run and insurance-fraud case in which his former girlfriend was the defendant. When an office has repeat ethical problems, it is often a sign that hiring and training policies need to be reexamined. *See* Levenson, *Working Outside the Rules*, *supra* note 5, at 568–71.

76. In fact, in each of the cases discussed in this essay, ethical challenges arose for the defense teams as well. In *People v. Jackson*, questions were raised as to whether Jackson's original counsel had a conflict of interest in representing the pop star given the lawyer's concurrent representation of another death penalty defendant. *See* Monte Morin & Megan Garvey, *Jackson Replaces His Lead Attorneys*, L.A. TIMES, Apr. 26, 2004, at B1. In *People v. Jesse James Hollywood*, the defense counsel faced the most difficult type of conflict. Hollywood called his counsel after he had abducted Markowitz. His lawyer tried to convince him to let his victim go, but Hollywood refused to do so and defense counsel did not contact law enforcement authorities, an act that may have saved the boy's life. *See* Sally Ann Connell, *Lawyer Knew of Kidnapping*, L.A. TIMES, Nov. 17, 2000, at B1. At the time, California law did not have any exceptions to the attorney's absolute duty of confidentiality to a client. Since then, and partially in response to the *Hollywood* case, the California rules on confidentiality have been revised. *See* Mike Kataoka, *Not All Secrets Bind Lawyers*, PRESS ENTERPRISE, June 27, 2004, at B1. Finally, in the *Morales* case, defense lawyers were embarrassed when affidavits they submitted from former jurors turned out to be frauds. *See* Louis Sahagun, *Killer's Legal Team Backs Off in Dispute*, L.A. TIMES, Feb. 14, 2006, at B3, *available at* http://www.latimes.com/news/printededition/california/la-me-morales14feb14,0,7227712.story?coll=la-headlines-pe-california. For an excellent discussion of how courts view conflicts issues and motions to disqualify criminal defense lawyers, see Bruce A. Green, *"Through a Glass, Darkly":*

represent clients with conflicting interests, they cannot represent a high-profile client whose interests are in conflict with a former client, and they cannot use the media in a manner that has a substantial probability of materially prejudicing the proceedings. Moreover, they can only handle high-profile cases if they have the time, ability and experience to zealously represent their clients.

Legitimate concerns can be raised about the conduct of defense lawyers in both high-profile and everyday cases. However, regardless of the conduct of the defense bar, prosecutors must take the high road. The goal of the prosecutor is not to win, but to make sure "justice shall be done."[77]

How the Court Sees Motions to Disqualify Criminal Defense Lawyers, 89 COLUM. L. REV. 1201 (1989).

77. Berger v. United States, 295 U.S. 78, 88 (1935).