

## FINDING A HAPPY AND ETHICAL MEDIUM BETWEEN A PROSECUTOR WHO BELIEVES THE DEFENDANT DIDN'T DO IT AND THE BOSS WHO SAYS THAT HE DID

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The increasing prevalence of DNA testing has proven that, at times, our criminal justice system renders wrongful convictions.<sup>1</sup> Extrapolating from such significant errors, we can infer that smaller mistakes also occur. Because criminal prosecution is not an exact science, like DNA evidence,<sup>2</sup> prosecutors can disagree about aspects of a case—whether to reward a cooperating defendant with a sentence reduction, whether to indict a defendant under a mandatory minimum statute, and even whether a defendant is guilty of a crime. This Essay examines the tension that arises when the prosecutor handling a case disagrees with her boss<sup>3</sup> about one or more of these significant issues<sup>4</sup> and offers an ethical solution for resolving such disputes that will not undermine a criminal defendant's chances of justice.

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<sup>1</sup> See Editorial, *More Than a Steak Dinner*, N.Y. TIMES, Jan. 10, 2008, at A30, available at [http://www.nytimes.com/2008/01/10/opinion/10thu3.html?\\_r=1&scp=3&sq=dna+exonerate&st=nyt&oref=slogin](http://www.nytimes.com/2008/01/10/opinion/10thu3.html?_r=1&scp=3&sq=dna+exonerate&st=nyt&oref=slogin) (reporting that more than 200 inmates have been freed based on DNA evidence) (link).

<sup>2</sup> Although DNA evidence is scientifically reliable, human uses of it are not always. See, e.g., Drummond Ayres, Jr., *Defense in Unabom Case Attacks U.S. Search*, N.Y. TIMES, May 24, 1997, § 1, at 10, available at <http://query.nytimes.com/gst/fullpage.html?res=9A01E2DC113BF937A15756C0A961958260&scp=1&sq=drummond%20ayres%20unabom%20may%2024&st=cse> (relating an accusation by Ted Kaczynski's defense attorney that prosecutors, while claiming to have DNA evidence implicating her client, were not actually in possession of a proper sample of Kaczynski's DNA) (link).

<sup>3</sup> In this Essay, "the prosecutor" refers to the line attorney who handles the day-to-day decisions on a case, the person who actively interviews witnesses and appears at the hearings and trials, the one who talks with the defense counsel and the judge. In contrast, "boss" is any supervisory prosecutor who holds oversight duties.

<sup>4</sup> Not just rank separates "line" prosecutors from supervisory prosecutors. A "line" prosecutor, who personally drafts an indictment, appears at hearings and trials, and otherwise presents the government's case, enjoys absolute immunity from damages actions arising from his advocacy. See *Imbler v. Pachtman*, 424 U.S. 409, 427, 430–31 (1976). Next term, the Supreme Court will decide whether supervisory prosecutors enjoy the same protection as line prosecutors. See *Van de Kamp v. Goldstein*, 128 S. Ct. 1872 (granting cert. to *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007) (denying absolute immunity to a district attorney and deputy district attorney acting as supervisors in a case alleging that they failed to adequately train and supervise a line prosecutor)).

This Essay develops in three parts. Part I provides a concrete example of the ethical dilemma that can result when a prosecutor and her boss disagree about a defendant's guilt. Part II discusses the ethics rules that guide prosecutors and the gap in the rules for prosecutor-boss disputes. Part III offers a proposal grounded in candor and transparency to resolve these disputes without compromising the defendant's substantive and procedural rights.

## I. THE PROBLEM

A recent example from *The New York Times* underscores the ethical issues that arise when a prosecutor and his boss disagree about an important aspect of a case. *The Times* highlighted a standoff between supervisors and a veteran prosecutor, which affected the likelihood that two imprisoned men would be released based on new evidence casting doubt on their earlier convictions.<sup>5</sup> Evidence surfaced about a 1990 shooting.<sup>6</sup> Because of that new evidence, supervisors asked Daniel L. Bibb, a prosecutor for twenty-one years, to reevaluate the case.<sup>7</sup> After an extensive reinvestigation, Bibb resolved "that the two imprisoned men were not guilty, and that their convictions should be dropped."<sup>8</sup> Despite Bibb's conclusions, when he presented his findings to his bosses, they decided that the office still "had good reason to believe that the two men were guilty."<sup>9</sup>

How was the conflict resolved? According to Bibb, he was "ordered to go to [a] hearing, present the government's case and let a judge decide—a strategy that violated his sense of a prosecutor's duty."<sup>10</sup> If Bibb thought the hearing was unwarranted, why didn't he refuse to participate? Reportedly, he worried that if he refused, another prosecutor would replace him and pursue the case more vigorously.<sup>11</sup> Instead of asking to be reassigned, Bibb took part in the hearing but helped the defense.<sup>12</sup> Bibb admits striving to avoid undermining the credibility of defense witnesses, including performing a cursory cross examination of one witness who had been convicted of six murders.<sup>13</sup> Why would a veteran prosecutor help the defense and intentionally undercut the government's case? He explained: "I worked for what I thought was the right thing."<sup>14</sup> Was the prosecutor's approach, in fact, the "right thing"? In light of his ethical obligation to zealously

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<sup>5</sup> Benjamin Weiser, *Doubting Case, City Prosecutor Aided Defense*, N.Y. TIMES, Jun. 23, 2008, at A1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

represent his client, it is doubtful. So what could the prosecutor have done to ethically and professionally resolve such a critical conflict with his bosses?

## II. THE PROSECUTOR'S DISTINCTIVE DUTIES OF JUSTICE

Prosecutors are not typical employees. They owe ethical duties to the government client and to the court.<sup>15</sup> Therefore, if a supervisor urges a prosecutor to act illegally or unethically, and the prosecutor complies, both the supervisor and the prosecutor can be held responsible. Rule 5.1(c)(1) of the Model Rules of Professional Conduct says that a supervisor is ethically responsible “for another lawyer’s violation of the Rules of Professional Conduct if . . . the [supervisory] lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved[.]”<sup>16</sup> Similarly, the line prosecutor is accountable under Rule 5.2, which states: “A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”<sup>17</sup>

But the tough cases do not involve plainly unlawful conduct or conduct prohibited by an ethics rule. The difficult cases are those in the gray areas: (1) those in which it is not clear what the law requires or the ethics rules expect; (2) cases in which a well-meaning supervisory prosecutor thinks she’s right but the hard working, hands-on prosecutor thinks his opposing view is more just; and (3) dynamic cases that develop during the hearing or trial in unexpected ways, requiring prosecutors to “think on their feet.” The case reported in *The New York Times* is a great example. There, Mr. Bibb, the veteran prosecutor with extensive, first-hand knowledge of evidence and witnesses, genuinely and passionately believed that the defendant was not guilty. Nevertheless, the district attorney,<sup>18</sup> with slightly less information but much more political accountability,<sup>19</sup> and arguably, a more balanced

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<sup>15</sup> A state prosecutor is governed by the rules of ethics applicable to practicing lawyers in her state. A federal prosecutor is subject to the ethics standards imposed on every practicing lawyer by the state in which she practices law and to the local federal court rules of that state. See Citizens Protection Act of 1998 (McDade Amendment), 28 U.S.C. § 530B(a) (2000) (link).

<sup>16</sup> MODEL RULES OF PROF’L CONDUCT R. 5.1(c)(1) (2008).

<sup>17</sup> MODEL RULES OF PROF’L CONDUCT R. 5.2(a) (2008).

<sup>18</sup> Robert M. Morgenthau was the Manhattan district attorney in charge of the office in which Mr. Bibb was an assistant district attorney. See Weiser, *supra* note 5.

<sup>19</sup> Of course, there are risks associated with political accountability too. See Dan Eggen and Amy Goldstein, *Political Appointees No Longer to Pick Justice Interns*, WASH. POST, Apr. 28, 2007, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/27/AR2007042702190.html> (reporting on allegations that the Department of Justice engaged in hiring and firing practices based purely on an employee’s or potential employee’s political leanings) (link).

view of the case, believed the contrary. Now what? There is no black-letter law or rule of ethics to solve the dilemma.<sup>20</sup>

Although every trial lawyer owes a duty of candor to the tribunal, under the circumstances described, the prosecutor will not breach that duty. The duty of candor prohibits a lawyer from “*knowingly* . . . mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal,” or from “offer[ing] evidence that [he] knows to be false.”<sup>21</sup> In the reported case, the prosecutor thinks but does not know that the defendant is not guilty. Thus, he will not violate his duty of candor by complying with his supervisor’s instructions. Likewise, Standard 3–3.9, ABA Criminal Justice Section Standards, declares that a prosecutor should not permit the “continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause [or] . . . in the absence of sufficient admissible evidence to support a conviction.”<sup>22</sup> But that standard is not violated in the reported case because probable cause—not a particularly tough standard to meet—apparently continues to support the charge and admissible evidence remains available.<sup>23</sup>

Given a genuine debate about the defendant’s guilt, the credibility of the government’s star witness, or any other important aspect of a criminal case, the only “rule” that arguably governs the prosecutor’s course of action rests with the prosecutor’s unique duty of “justice.” In particular, Standard 3–1.2, entitled, “The Function of the Prosecutor,” explains:

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.<sup>24</sup>

Similarly, Ethical Consideration 7–13<sup>25</sup> says that “[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to

<sup>20</sup> Rule 5.2(b) of the, Model Rules of Professional Conduct, says that a subordinate lawyer “does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” As discussed below, however, prosecutors have an additional and unique duty to seek justice, making the course of action for a subordinate prosecutor less clear than for other lawyers.

<sup>21</sup> *Id.* R. 3.3(a)(3) (emphasis added).

<sup>22</sup> STANDARDS FOR CRIMINAL JUSTICE § 3–3.9 (1993).

<sup>23</sup> The ABA Standards for Criminal Justice also state that “[a] prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.” *Id.* § 3–3.9(c). But, as reported, the prosecutor chose to remain on the case out of fear that another prosecutor would pursue the case with more zeal than he. *See Weiser supra* note 5; *see also supra* notes 10–14 and accompanying text. Thus, he was not “compelled.”

<sup>24</sup> STANDARDS FOR CRIMINAL JUSTICE § 3–1.2.

<sup>25</sup> The Ethical Considerations “are aspirational in character and represent the objective toward which every member of the profession should strive.” MODEL CODE OF PROF’L RESPONSIBILITY, Preliminary Statement (1983) (link). Although the Model Rules have replaced their immediate predecessor,

seek justice, not merely convict. This special duty exists because . . . the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute.”<sup>26</sup>

Because of a prosecutor’s distinct ethical duty to “seek justice,” both he and his supervisor must always consider whether they will violate that duty if, on the supervisor’s instruction, the prosecutor continues the prosecution of a defendant he thinks is not guilty or relies on a witness he believes may be lying about the defendant’s complicity. Certainly, from a common-sense perspective, images of justice are not conjured from a prosecutor pursuing a defendant he thinks is innocent or from his reliance on witnesses he believes are liars. But the views of the supervisor matter too. In addition to serving as a manager, the supervisor is a prosecutor with meaningful perspectives on and experience with the nebulous standard of seeking justice and what the standard requires in a given context.

### III. THE PROPOSAL

What should an ethical and conscientious prosecutor do to satisfy his boss, preserve his dignity, and maintain his reputation for honest and fair dealing with the court and defense lawyers, if his boss orders him to pursue a case, an argument, or a sentencing position that she believes is just but that he does not? The answer rests with candor and transparency—with the supervisor, the court, opposing counsel, victims, and the defendant.<sup>27</sup> A prosecutor should always be permitted to withdraw from the case. That’s easy. But if he wants to continue with the case, he should be welcome, if not encouraged, to share both “the office’s position” and his independent perspective on the relevant issues.

As trained advocates with no personal stake in the outcome of a case, prosecutors are capable of presenting both views. During preliminary hearings, bail hearings, trials, sentencing hearings, and numerous other proceedings, the court routinely asks, “What’s the government’s position?”<sup>28</sup> When a prosecutor disagrees with her supervisor about the government’s position,

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the Model Code, the language of the Model Code remains instructive because it specifically addresses the special role of the prosecutor; that language directed at prosecutors is particularly relevant to this discussion.

<sup>26</sup> *Id.* EC 7-13.

<sup>27</sup> The primary purpose of the adversarial process is, at least in theory, to expose the truth. *See, e.g.,* Steven J. Cleveland, *Process Innovation in the Production of Corporate Law*, 41 U.C. DAVIS L. REV. 1829, 1863 (2008) (“[T]he adversarial system is designed to expose the truth . . .”); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 255 n.128 (2006) (explaining that in the adversarial system, one of the goals is determining “whether the defendant committed the alleged offense.”).

<sup>28</sup> At least this was my personal experience as an assistant U.S. attorney. Even if the court does not specifically ask for “the government’s position,” there will be numerous opportunities to volunteer the information.

what's wrong with telling the court that the "office's position is X but my own view is Y." For a concrete example, consider the prosecutor featured in *The New York Times* article.

At the hearing on the defendant's motion for a new trial, the judge is certain to ask for the government's response. Rather than throw the case, as the prosecutor did in reality, the prosecutor could say something like: "Judge, I've been a prosecutor for twenty years. Because of new evidence, my office assigned me to reinvestigate the case. Based on that investigation, I have real doubts about whether this man committed the crimes for which he was convicted. But my office is full of qualified prosecutors, and the prevailing sentiment in the office is that the evidence, old and new, supports the defendant's guilt. Therefore, the office opposes the motion for a new trial, and I am ready to present argument in support of that position."<sup>29</sup>

What does this colloquy accomplish? The prosecutor maintains his reputation for honesty and fairness with the judge and the opposing lawyers. He complies with his duty to represent his client zealously because he stands ready and willing to make the relevant substantive arguments, opposing the defendant's motion. He fulfills his employment obligations to attend the hearing and oppose the motion. He airs his superior's strong beliefs that the case warrants prosecution, and he tells the judge that he has equally strong reservations about the defendant's guilt.<sup>30</sup>

Judges get the message when a prosecutor expresses concern about a case or an issue. The prosecutor's unease does not mean that the judge will grant a new trial or that she will deny one. A dispute within an office usually signals that the case or issue evokes particularly persuasive arguments, pro and con. By expressly acknowledging an intra-office debate, a prosecutor alerts the judge that the case deserves exceptional attention. In these cases, the judge should pay even greater attention than normal, perhaps asking pointed questions of her own, so that she can serve as the neutral, unbiased arbiter that a judge is intended to provide in the adversarial process.

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<sup>29</sup> I have previously argued that the chief prosecutor in an office should allow an easily-convened neutral party, a grand jury, to decide whether the new evidence warrants dismissal of the case or continued pursuit. See Melanie D. Wilson, *A Return to the Grand Jury to Promote a Zen Zeal in Prosecutors*, WASH. U. L. REV. SLIP OPINIONS, Apr. 2, 2008, <http://lawreview.wustl.edu/2008/04/02/a-return-to-the-grand-jury-to-promote-a-zen-zeal-in-prosecutors/> (link).

<sup>30</sup> Although lacking the transparency I propose, I've seen assistant U.S. attorneys (AUSAs) use a similar version of this type of candor in response to intra-office conflicts about how an argument, issue, or case should be presented in court. More than once I observed an AUSA tell the court with a certain emphasis that "the *Office's* position" was so and so. Perhaps it was the tone. Maybe "the office's position" had become common shorthand, but the district judges usually indicated, verbally or otherwise, an understanding that the prosecutor's view was different. Sometimes the judge would ask whether the prosecutor agreed with the office policy or position, given the specific facts of the pending case. But usually, there was no need for the prosecutor to explain his or her disagreement. The judge "got it." She knew that there was an intra-office dispute about the law, the facts, or policies that affected one or both. The judge perceived that the conflict signaled that the matter deserved especially careful consideration.

## CONCLUSION

Prosecutors are blessed and cursed with extensive discretion. They decide whether and who to prosecute. They can recommend a harsh or a lenient sentence. And when exculpatory evidence surfaces following a defendant's conviction, a prosecutor decides whether to continue to prosecute or drop the case. Because of the importance of criminal prosecutions and the broad discretion prosecutors hold in pursuing them, prosecutors within an office sometimes disagree. When a prosecutor's view of a case differs from her boss's perspective, both lawyers must decide what "justice" requires. A prosecutor is duty bound to "seek justice," not just win a conviction.

The key to achieving justice rests with candor and transparency. When a prosecutor disagrees with her boss, she should be permitted, indeed encouraged, to share with the court and others the basis for the disagreement. This frankness will alert the court and opposing counsel to potential weaknesses in the prosecutor's evidence and to the debatable posture of the matter. This balanced approach to criminal prosecution will promote justice by alerting a neutral party, the trial judge, to pay special attention to the issues and to decide the matter based on the totality of the evidence and circumstances. After all, the goal is supposedly "justice."