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## The National District Attorneys' Association

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# Articles, Reports, and Notes OF THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION

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## CORRECTION

The Annual Mid-Winter meeting of the NDAA will be held in Tucson, Arizona, on *March 8, 9, 10 and 11*. In the November-December number of the *Journal*, it was incorrectly reported that the meeting would be held on March 1, 2 and 3.—EDITOR.

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## THE CAREER PROSECUTOR

### Defects and Problems of the Present Prosecutor System

DUANE R. NEDRUD

This is a continuation of an article the first installment of which appeared in this section in the September-October, 1960, number of the *Journal* at pages 343-355.—EDITOR.

It is not the intention of the writer to paint a distorted picture of the prosecutor, but to bring to light some of the facts, no matter how unpleasant they may seem. Many plaudits are due the present prosecutors. Criminal laws for the most part have been adequately administered; however, the reason is not because of the present system, but in spite of it.

The obvious defects of the various prosecutor systems were shown, merely by citing statutory or constitutional enactments. Some of the more serious hidden or underlying defects and problems which are results of those same enactments, are herein presented. They are discussed in relationship to conflicts of interest, bias, and "unprofessionalism."

### CONFLICTS OF INTEREST

*Personal and business.* This type of conflict was adequately and frankly stated by a prosecutor in the State of Oregon. Referring to the fact that serious felonies are not a problem, but that "public welfare" offenses and minor crimes committed by business or potential business clients, are, he said:

". . . These matters involve state law. But how often do you imagine I recommend enforcement, to set an example for other wrongdoers? I am a struggling lawyer. The \$333.00 a month from the state is just a start toward my family's expenses. The bank robber never will be my client, the meat market might. I can't afford to offend powerful people in the com-

munity when I have to build my law practice at the same time that I serve my term. What chance do you think there is for impartial enforcement of state laws against the high and low alike, until folks learn that the District Attorney should serve only the public and nobody else."<sup>1</sup>

In addition, preferential treatment is often extended to sons, daughters and relatives of business owners, in all forms of crimes. The prosecutor may extend his complacency about criminal violations in order to satisfy customers or friends of clients, to show he is a "right guy."<sup>2</sup>

There is also a conflict involved in whether or not to prosecute in motor vehicle violations, if prosecution would involve the giving up of a lucrative personal injury case. In the event of criminal action, the prosecutor would be barred from handling the civil case for the plaintiff, the defendant, or passengers in either vehicle.<sup>3</sup>

*Time.* In 1952, the new District Attorney of Philadelphia reorganized his office, thereby eliminating the part-time assistant prosecutors and hiring only full-time attorneys. Some of the members of the bar questioned the wisdom of his change, saying that this would prevent the use of more experienced and better lawyers as assistants, in that they could not afford to give up their private practices. The District Attorney's reply was:

"... this is, of course true, but it is equally true that even the most high-minded attorney will inevitably devote more attention to the development of a lucrative practice than to a salaried job as a public official."<sup>4</sup>

The conflict of interest in time needed for business purposes and time to be spent on criminal and county affairs is very evident. It was determined in a 1933 survey made of an Illinois county of 100,000 people, that of 50 callers a day at the office of the State's Attorney, only one-quarter of them were on criminal business.<sup>5</sup> This writer's

experience in a county of 40,000 in rural North Dakota, substantiates this percentage figure as of 1957. Even the most conscientious prosecutor would be tempted to put off his public trust, rather than refuse private business.

*Political.* It is not intended that political conflict of interest should mean that public concern over law enforcement should be ignored. Without the backing of public opinion, law enforcement officers are powerless.<sup>6</sup> Any prosecutor must be aware of the public pulse. There should be no unpopular temerarious crusades, nor should there be a refusal to strike down crime and corruption. The discussion here concerns that type of political conflict of interest that interferes with the law enforcement expected from the prosecutor, even in instances where the public "dander" has not been aroused.

For example, a State's Attorney who does not eliminate wide-open gambling, because of illegal revenue obtained by the county,<sup>7</sup> succumbs to a form of political pressure which is in conflict with his duties. Preferential treatment of party officers, office holders or heavy contributors to campaign funds is commonplace,<sup>8</sup> culminating in a payoff in the form of election and votes, not a money bribe. Political conflict of interest is written in the history of every county in the United States. This occurs in states having "no-party" designations as to the prosecutors, as well as in those that do have "party" designations, although conflict is probably more obvious and more frequent in the latter.

A prosecutor may want convictions in order to show his records at the next election. He is not interested in public rights when he wonders how he will look to the voters.<sup>9</sup> In order to have his percentage right, he will compromise, or not prosecute at all.

Discretion is more often used in not prosecuting or asking for leniency in cases in which it is believed justice would be thus readily served. But what of the political implications when a member of a prominent family, having violated a law, deserves the tempering of justice with mercy and finds he is prosecuted to the limit? In other words, here is a reverse situation, of justice being dispensed by the

<sup>1</sup> NEUBERGER, *ADVENTURES IN POLITICS* 9 (1954).

<sup>2</sup> See *Wilbur v. Howard*, 70 F.Supp. 930 (E.D. Ky. 1947).

<sup>3</sup> It is interesting to note that New Mexico has by statute prohibited its District Attorneys and assistants from representing any party involved in a civil action where a claim is made for damages growing out of automobile accidents in their districts. N.M. STAT §17-1-3 (Supp. 1957).

<sup>4</sup> Dilworth, *Problems in Reorganizing the District Attorney's Office in Philadelphia*, 57 DICK. L. REV. 82 (1952).

<sup>5</sup> Baker, *The Prosecutor: Initiation of Prosecution*, 23 J. CRIM. L. & C. 775 (1933).

<sup>6</sup> LIPPMANN, *A PREFACE TO MORALS* 279 (1931).

<sup>7</sup> See *In re Wall*, 407 Ill. 484, 95 N.E.2d 375 (1931).

<sup>8</sup> See *What Is Wrong With the Prosecutor?* 11 J. AM. JUD. SOC'Y 67 (1927). See also *The Full Duty of the Prosecutor*, 23 J. AM. JUD. SOC'Y 238 (1940).

<sup>9</sup> See Baker & DeLong, *The Prosecuting Attorney and His Office*, 25 J. CRIM. L. & C. 695 (1935).

prosecutor working against the rich. Thus, if the prosecutor gives a form of "the strangest graduation gift"<sup>10</sup> to a rich man's son, as he might to a poor man's son, the public would be indignant, believing the prosecutor is doing so to obtain favors.

#### BIAS

When a district attorney withholds information by not eliciting from a State's witness the facts favorable to the defendant, and even deliberately tries to give the impression such facts do not exist,<sup>11</sup> or when a prosecutor allows his witness to testify that "no consideration" was given to said witness for cooperation, without correction when that statement is untrue,<sup>12</sup> or when the district attorney, in a weak case, uses words to suggest race prejudice in order to win,<sup>13</sup> or when improper summation tactics are used,<sup>14</sup> it must be classified as "prosecutor's bias." The reason that "prosecutor's bias" continues to exist may be that no lawyer interested in a result can be fair.<sup>15</sup> It is unrealistic to argue that the prosecutor be impartial and let the jury decide.<sup>16</sup> Is the prosecutor to be less interested than the defense lawyer in winning?<sup>17</sup> Human aspects dictate that a lawyer in

<sup>10</sup> Baker, *The Prosecutor: Initiation of Prosecution*, 23 J. CRIM. L. & C. 772-3 (1933). The use of this phrase comes from the discretion used in the case of a boy who robbed with a gun while a high school senior. The State's Attorney let him graduate from high school by not pressing prosecution, then reduced the charge, recommended parole.

<sup>11</sup> See, e.g., *Alcorta v. Texas*, 355 U.S. 28 (1957); *Griffin v. U.S.*, 183 F.2d 990 (D.C. Cir. 1950).

<sup>12</sup> See, e.g., *People v. Savides*, 1 N.Y.2d 554, 136 N.E.2d 853 (1956).

<sup>13</sup> See, e.g., *Handford v. U.S.*, 249 F.2d 295 (5th Cir. 1957).

<sup>14</sup> See 6 UTAH L. REV. 108 (1958).

<sup>15</sup> Clarence Darrow said, "The fact that he (the lawyer) represents the state makes no difference in his psychology." DARROW, *CRIME, ITS CAUSE AND TREATMENT* 118-120 (1922).

<sup>16</sup> The duty to see that justice is done rests with both the prosecutor and defense lawyer. Daru, *Code of Ethics and Principles for the Prosecution and Defense of Criminal Cases*, §§20 & 25, 6 ALA. L. REV. 39 (1945). If the prosecutor does not believe in the guilt of the defendant, he should not prosecute.

<sup>17</sup> In the person of George Francis Vaanderveer, one is able to see both sides of this question. *As a prosecutor*: "... he preferred to win his cases through the orderly processes of logical argument and irrefutable precedent, but he was willing to risk a great deal when risk seemed necessary to the winning of a case. It was the winning that was important." HAWLEY & POTTS, *COUNSEL FOR THE DAMNED* 157 (1953). No discretion was used. He prosecuted everything as a prosecutor. *Id.* at 74. *As a defense lawyer*: "His life and glory were in the courtroom." *Id.* at 32. "He gloried in his courtroom triumphs... even if he wasn't making any money." *Id.* at 131. "... and there can be no doubt that he

a courtroom believes that his case is in the "right." In addition, the prosecutor, as an advocate, has a compulsion to "fight fire with fire" against the tactics used by defense lawyers.<sup>18</sup>

Taking into account all human frailties, the prosecutor cannot be like a defense attorney, but must be above the use of improper methods to win cases.<sup>19</sup> The advocacy on the part of the prosecutor, which puts the desire to convict above all else, is unwarranted.

The so-called "prosecutor's bias," also known as "persecuting complex," has been said to be an occupational disease.<sup>20</sup> With the "germ" of this disease set in human behavior, it cannot be entirely eliminated. One of the most appropriate ways to eliminate, or at least alleviate, such a feeling is the establishment of the Career Prosecutor.<sup>21</sup>

#### "UNPROFESSIONALISM"

*Lack of qualifications.* A prosecutor's special qualification for his position probably amounts to no more than a three-hour course in criminal law.<sup>22</sup> In many instances, he comes directly from law school without any practical experience as a lawyer. There have been instances where a recent

would have sacrificed the friendship of a lifetime to gain the verdict in the most insignificant case." *Id.* at 135.

But Vaanderveer was not alone in his desire to win. "And I get a thrill out of it," says Leibowitz, "because all the magic in the dictionary is summed up for me in two little words: Not Guilty." PASLEY, *NOT GUILTY* 281 (1933). Leibowitz did not dare lose a case as a criminal lawyer. REYNOLDS, *COURTROOM* 359 (1950).

Clarence Darrow admitted, "All it (the state) furnishes is a Tribunal where the contending lawyers can fight, not for justice, but to win. . . oftentime the only question settled in court is the relative strength and cunning of the lawyers." DARROW, *CRIME, ITS CAUSE AND TREATMENT* 128 (1922). "Strange as it may seem I grew to like to defend men and women charged with crime. It soon came to be something more than winning or losing a case. I sought to learn why one goes one way and another takes an entirely different road." DARROW, *THE STORY OF MY LIFE* 75 (1932).

<sup>18</sup> Some of this compulsion, as well as the cause, would be eliminated if the prosecutor had the right to appeal.

<sup>19</sup> "The United States' Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty, whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. U.S.*, 295 U.S. 78 (1935).

<sup>20</sup> Hobbs, *Prosecutor's Bias, An Occupational Disease*, 2 ALA. L. REV. 40 (1949).

<sup>21</sup> *Id.* at 58.

<sup>22</sup> Only a few law schools offer more than this in their curricula. It is well known that law schools treat Criminal Law as a "bastard child," almost making apologies for requiring the students to take one course in the field.

law school graduate has been elected to the office before he has taken the bar examination, and then he has failed to pass it.

The small office is sought as a stepping stone to a better law practice, while gaining trial experience, or as a means of making a living.<sup>23</sup> In metropolitan areas, the assistant district attorneys take the position for the same reasons, as well as to become qualified for the future practice of criminal defense. Most of the best qualified criminal defense lawyers receive their training in prosecuting offices.

A prosecutor's desire to improve his status usually is lacking, since the political implications, the salary and insecurity make for a large turnover.<sup>24</sup> The typical attitude towards the district attorney's office is not to stay in the office too long.<sup>25</sup>

The prosecutor starts as a novice against opponents who were experts when he was still in school.<sup>26</sup> The young ambitious man leaves the office, after he has the experience which would put him on equal footing, and the public is the loser.

In many instances, prosecutors do not know the problems of the office and are at a loss when something out of the ordinary occurs. The need for learned men is critical. "Know how" is not obtained with the law school education, particularly in criminal law, where new and improved methods of crime detection, court rules, and legislation, together with the use of the same in the war against crime, must be constantly reviewed. The Career Prosecutor, like the teacher and the doctor, should continue his education in his specialized field.<sup>27</sup>

<sup>23</sup> Baker & DeLong, *The Prosecuting Attorney and His Office*, 25 J. CRIM. L. & C. 695 (1935).

<sup>24</sup> *What is Wrong with the Prosecutor?* 11 J. AM. JUD. SOC'Y 67 (1927).

<sup>25</sup> This point is aptly put in a hypothetical letter from a judge to a young lawyer friend: "Yes, become a Federal Prosecutor; but don't stay too long, if you wish to make your mark in the private practice of law. If you wish to carve a political career for yourself, it's a fine springboard, but if your desires are bent towards the private practice, . . . get the experience, serve the Government well for a short period, and return to private practice." Fogwell, *Yes, But Don't Stay Too Long*, 20 SHINGLE (J. OF PHILA. BAR ASSN.) 139 (1957).

<sup>26</sup> See *The Full Duty of the Prosecutor*, 23 J. AM. JUD. SOC'Y 238 (1940).

<sup>27</sup> At present there are three national short courses for prosecutors (at Northwestern University; Practising Law Institute in New York City; Prosecuting Attorneys' Institute, University of California). While these courses are well attended, only a minority of prosecutors have enrolled, by percentage figures. If the demand existed, there undoubtedly would be specialized schools for prosecutors, such as are now available to law enforcement officers at Michigan State University,

"ORGANIZED LAW ENFORCEMENT VS. ORGANIZED CRIME"<sup>28</sup>

Courts are "hamstringing" the prosecutor with their adverse decisions on wire tapping, search and seizure, inability of the state to appeal, confessions of defendants, and the use of proper law enforcement techniques.<sup>29</sup> Legislatures refused to correct such deplorable decisions, or to make any improvements in archaic criminal laws.<sup>30</sup> This is because courts and legislative bodies are generally uninformed. They listened to "do-gooder" groups and others who desire to portray their law enforcement agents as members of a vicious army.<sup>31</sup>

Who, then, is to champion the war against the improved methods of crime? Who can prevent the whittling away of reasonable weapons that can be used in that battle, and reverse the trend by fostering reasonable legislation that will make the law stringent, yet just? The need for balancing the "equities" must come from a strong national group, as well as state groups of Career Prosecutors.

The National District Attorneys' Association is an excellent organization and has taken up this fight, but even the most adamant supporters will admit that it is handicapped by the lack of stable membership. This is the result of the present-day turnover, and the general lack of interest by so many prosecutors. This association is growing and already has taken its place in its objective of improving law enforcement,<sup>32</sup> but if it could draw as its members Career Prosecutors, its potential, as a force for good, would be unlimited.<sup>33</sup>

Southern California University, the F. B. I. Academy, Northwestern University, and others.

<sup>28</sup> This is the motto of the National District Attorneys' Association.

<sup>29</sup> McDonald, *Problems of a Prosecutor*, 24 N.Y.S. BAR BULL. 221, 235 (1952).

<sup>30</sup> *Broad Program Needed for Crime Control*, 20 J. AM. JUD. SOC'Y 196 (1936); Williams, *The Prosecutor and Civil Rights*, 13 RECORD OF N.Y.C. BAR ASSN. 129 (1958).

<sup>31</sup> McDonald, *supra* note 29 at 233.

<sup>32</sup> As it now stands the members of that organization represent a majority of the people in the United States due to the fact District Attorneys from most of the large metropolitan areas belong. The present membership is 1454. Of these, 690 are active members (an active member is the head of the office, that is the District Attorney, County Attorney, etc., himself) and 764 associate members (this includes assistants, former members, honorary members.) PRESIDENT'S REPORT, NATIONAL DISTRICT ATTORNEYS' ASSOCIATION (1959-60).

<sup>33</sup> As it now stands, the backbone of the organization has been members who could be considered the ideal "Career Prosecutors" who have been in office for many years. These persons include most of the officers of the Association.