

# A CODE OF THEIR OWN: UPDATING THE ETHICS CODES TO INCLUDE THE NON-ADVERSARIAL ROLES OF FEDERAL PROSECUTORS

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*The appalling thing about a war like this is that it kills all love of truth.*

—George Brandes, *The World at War*<sup>1</sup>

The trial process in America has been referred to as “a battle of adversaries”<sup>2</sup> or “legal combat.”<sup>3</sup> The adversarial system assumes that truth emerges from the confrontation of opposing views. In its earliest form, brought to England by William the Conqueror, the accused would physically battle with his accuser.<sup>4</sup> The underlying belief was that “[h]eaven would give the victory to him who was in the right.”<sup>5</sup> The modern criminal justice system perpetuates this legacy and is premised on the assumption that the adversarial model is an effective method of finding the truth.<sup>6</sup> Even the scholars who question the effectiveness

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<sup>1</sup> GEORGE BRANDES, *THE WORLD AT WAR* 162 (1917) (quoting letter to Georges Clemenceau, Prime Minister of France (March, 1915)). Brandes's comments were made in response to Clemenceau's criticism that the Danish government had refused to involve itself in the war. Brandes goes on to point out that “[n]o one doubts for an instant that its cause is the just one and deserving of victory.” *Id.*

<sup>2</sup> James A. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play and the Messiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 65 (1988); see also CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 565 (1986) (indicating that “battlelike characteristics that have survived in trials are atavistic emergences of the human qualities that the social arrangement of trials was meant to replace”).

<sup>3</sup> Fred Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 230 (1993). Judge Frankel maintains that during trials the “pervasive air of combat” surrounds the judge, forcing him into the role of “a combatant with a shifting but endless series of opponents.” MARVIN E. FRANKEL, *PARTISAN JUSTICE* 47 (1980).

<sup>4</sup> JOSEPH F. LAWLESS, JR., *PROSECUTORIAL MISCONDUCT: LAW, PROCEDURE, FORMS* 8 n.8 (1985).

<sup>5</sup> *Id.* The trial by combat or wager of war was abolished by the Act to Abolish Appeals of Murder, Treason, Felon or Other Offenses and Wager of Battle 1819. *Id.* (citations omitted).

<sup>6</sup> See, e.g., *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (“The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”); *Mackey v.*

of the adversarial system as a truth seeking device justify it as a great protector of rights or, at least, an attempt to keep the government at bay.<sup>7</sup>

Whatever justification the adversary system has in the trial process, this justification does not apply to the investigative stage of a criminal case.<sup>8</sup> The United States Supreme Court has repeatedly addressed the question of when the adversarial process begins, concluding that the process does not, and should not, begin prior to charging the defendant.<sup>9</sup> The adversarial system fails to enhance the truth-seeking process, and hinders the investigative process before all facts are known. By prematurely forcing the prosecutor into the position of advocate, the system places obstacles in the way of information gathering. Adversaries are not likely to fully disclose all relevant facts to their opponents.

Although the prosecutor has always performed a unique role within the criminal justice system, the "peculiar"<sup>10</sup> nature of the federal prosecuting attorney's work is most pronounced in the investigation. At the early stages of the investigation, offenses are often not defined, nor offenders identified. In determining the offense and the offender, the investigating attorney should act not as an advocate but as a neutral fact finder. In the investigation stage, the goal of truth must be paramount.<sup>11</sup>

Historically, the prosecutor has played a limited role in the investigation of cases. The focus of law enforcement had been, traditionally, on street level crime involving discrete criminal episodes.<sup>12</sup> The prosecutor's role was to present the evidence that had been ferreted out by law enforcement agencies.<sup>13</sup> There were fewer and less complex federal cases.

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Montrym, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error."); *Gardner v. Florida*, 430 U.S. 349, 360 (1977) ("[D]ebate between adversaries is often essential to the truth-seeking function of trials.").

<sup>7</sup> See *infra* text accompanying notes 162-78.

<sup>8</sup> See *infra* text accompanying notes 147-78.

<sup>9</sup> See *infra* text accompanying notes 179-233.

<sup>10</sup> Justice Sutherland talked about the peculiar nature of prosecution in his classic description of the job. He stated, "As such, [the prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1934).

<sup>11</sup> JOSEPH D. GRANO, *CONFESSIONS, TRUTH AND THE LAW* 24 (1993) (indicating that "tension between truth, discovery and other goals should be resolved in a way that leaves truth a dominant goal of the procedural system").

<sup>12</sup> Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 674-79 (1992) (discussing change in role of defense counsel in light of change from discrete criminal episodes to those involving organized crime).

<sup>13</sup> Cf. Jerry E. Norton, *Government Attorney's Ethics in Transition*, 72 JUDICATURE 299, 301 (1989) (concluding that large complex cases are involving prosecutors in investigation).

Changes in the scope of federal criminal statutes, in the selection of cases investigated and in the methods of investigation have expanded the prosecutor's role.<sup>14</sup> The number of federal crimes has grown astronomically over the last two decades, from 115 federal crimes in 1975<sup>15</sup> to 3,000 federal crimes in 1994.<sup>16</sup> Federal criminal laws concerning search and seizure, electronic surveillance and related issues have become more intricate.<sup>17</sup> Today, the prosecutor enters cases involving organized crime, public corruption and large drug organizations much earlier because most inquiry is conducted using subpoenas and grand jury interviews.<sup>18</sup> Furthermore, the methods of investigation, including intricate undercover operations, are more complicated, requiring law enforcement agencies to seek both the advice and the authorization of the prosecuting attorney.<sup>19</sup> The federal prosecutor of today occupies a predominant role in the investigation.<sup>20</sup>

The current rules of professional conduct fail to recognize the expanded role played by the government attorney in the investigation of federal crimes and do not provide sufficient guidance for the gov-

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<sup>14</sup> Deputy Attorney General Gorelick, appearing before the Judicial Conference Committee on Rules of Practice and Procedure in January 1995, explained that in recent years the federal criminal investigations and prosecutions have become more complex and that government lawyers have become more involved, especially in undercover operations. See Committee on Rules of Practice and Procedure, Meeting Minutes (Jan. 12-14, 1995).

<sup>15</sup> JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 9 (1978).

<sup>16</sup> Sara Sun Beale, *Too Many Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980 (1995); see also William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 652 (1994) (noting growing concerns of federal judges over federalization of state crimes).

With the increase in the number and type of crimes prosecuted within the federal system, the number of attorneys prosecuting federal crimes has also multiplied. Between 1983 and 1992, the number of attorneys employed by United States Attorneys' Offices doubled from less than 2,000 in 1983 to 4,291 in 1992. U.S. DEP'T OF JUSTICE, STATISTICAL REPORT: UNITED STATES ATTORNEYS' OFFICES FISCAL YEAR 1992, at 1 (1993).

The United States Department of Justice ("DOJ") budget has increased accordingly, from \$2.3 billion in 1981 to \$9.3 billion in 1993. Jim McGee, *War on Crime Expands U.S. Prosecutor's Powers: Aggressive Tactics Put Fairness at Issue Series: The Appearance of Justice Sends Numbers: 1/6*, WASH. POST, Jan. 10, 1993, at A1.

<sup>17</sup> Ronald Goldstock, *The Prosecutor as Problem-Solver: Leading and Coordinating Anticrime Efforts*, CRIM. JUST., Fall 1992, at 3.

<sup>18</sup> Between 1992 and 1994, although the number of proceedings decreased, the number of attorney work hours devoted to grand jury proceedings increased. U.S. DEP'T OF JUSTICE, STATISTICAL REPORT: UNITED STATES ATTORNEYS' OFFICES FISCAL YEAR 1994, at 5 (1995).

<sup>19</sup> For a description of a complicated undercover investigation, see JAMES B. STEWART, *THE PROSECUTORS: INSIDE THE OFFICES OF THE GOVERNMENT'S MOST POWERFUL LAWYERS* 87-133 (1988) (describing undercover operation involving sale of trade secrets to foreign corporations).

<sup>20</sup> Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 395 (1992).

ernment attorney's behavior.<sup>21</sup> The rules are premised on the adversarial model of dispute resolution and ignore the daily situations that a government attorney faces during the investigation of a case. Recently, the defense bar has attempted to expand general rules regarding attorney conduct to cover the non-adversarial actions of the investigating attorney. Nowhere are these attempts more obvious than in the debate over Model Rule 4.2, sometimes called the "anti-contact provision" of the code.<sup>22</sup> The disagreement comes from a lack of definition of the role played by the federal attorney in the investigation of an offense and from the tendency of the defense bar to view the government attorney as an adversary, not as a "minister of justice."

This article, rather than also consider state and local prosecutors, focuses on federal prosecutors because of their increasingly active role in investigations.<sup>23</sup> State and local prosecutors generally play a less active role in the investigation stage of the criminal case because of the nature of state criminal laws,<sup>24</sup> the cases prosecuted and the lack of resources available to undertake protracted investigations.<sup>25</sup> Therefore, many of the issues raised regarding the investigative stage of a criminal case arise more frequently for federal prosecutors than for state prosecutors.<sup>26</sup>

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<sup>21</sup> Throughout this Article I will refer to the American Bar Association's ("ABA") *Model Rules of Professional Conduct* and *Model Code of Professional Responsibility*. Where there are distinctions, I will note the distinctions. As to the statement that the rules are premised on the adversarial model of dispute resolution, however, there is no distinction and therefore I will refer to them generically as rules of professional conduct or ethics rules.

<sup>22</sup> Roger C. Cramton & Lisa R. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 292 (1992).

<sup>23</sup> See *infra* text accompanying notes 76-92.

<sup>24</sup> Of course, the roles state prosecutors play may differ depending on the geographical location they represent. See JOAN JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 273-95 (1980) (documenting differences between urban prosecutor's office and suburban or rural offices).

<sup>25</sup> The federal prosecutor is more often involved in a proactive case, one in which the crime is on-going, such as a racketeering case, a public corruption case or a case involving organized crime. See generally John C. Jeffries, Jr. & Judge John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1098 (1995). The state prosecutor is much more likely to become involved in a case after the completion of crimes, which is called a reactive case. *Id.* The kinds of offenses prosecuted in the state system are likely to be discrete offenses. *Id.* Additionally, this diversity is due, in part, to the quantity of cases handled by the state system. *Id.* The state prosecutor struggles to prosecute cases involving crimes already committed with little time to devote to investigating future crimes. *Id.*

<sup>26</sup> Although this Article examines the federal attorney, the definition of the role of the prosecutor in the investigation applies equally to those occasions when a state prosecutor is involved in the investigation. The rules described *infra* notes 356-59 and accompanying text should be adopted by the states as part of their ethics provisions and applied to the state prosecutor as well.

This article explores the need to amend the current codes of professional conduct to recognize and define the non-adversarial role of the federal investigating attorney. New provisions are necessary to assist the federal attorney in conforming her conduct to ethical standards and to further the ends of truth-seeking in the investigation and the administration of justice. The code provisions should reflect this non-adversarial role and guide the attorney's conduct as a neutral fact finder. The provisions should include specific limitations on the investigating attorney, defining the contours of her discretionary powers to investigate crimes and criminals.

Part I of this article discusses the history of the prosecuting attorney and her distinctive role in the criminal justice system. Part II discusses the adversarial process and the problems inherent in utilizing that system in the investigative stage of a criminal case. Part III explores the modern rules of professional conduct and their roots in the adversarial process, concluding that many of the rules are inapplicable to the investigating attorney. Part IV discusses the need for code provisions and rules to guide and restrain the prosecuting attorney in the investigation of a case and how those provisions should be developed and adopted. Part IV includes a proposal for a general definition provision and suggested areas for additional regulation.

Federal prosecutors have been accused in recent years of attempting to exempt themselves from ethics regulations.<sup>27</sup> These actions may, however, be merely an effort to find guidance where none exists. This article will assist in focusing the debate on the need for additional specific ethics provisions to provide that guidance for investigating attorneys.

## I. THE ADVERSARIAL PROCESS AND THE DIVERSE ROLES OF THE FEDERAL PROSECUTING ATTORNEY

The adversarial process of the American criminal justice system requires that each side of a conflict be represented by a zealous advo-

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<sup>27</sup> Mark Ballard, *ABA Notebook*, LEGAL TIMES, Aug. 15, 1994, at 7 (quoting ABA President R. William Ide, III, as commenting that the DOJ regulations regarding contacting represented parties were an "unilateral effort to exempt Justice attorneys from the ABA's Model Rule 4.2"); Leonard H. Becker, *Should Prosecutors Be Exempt from the Rules of Professional Conduct?*, WASH. LAW., July-Aug. 1995, at 7 (in discussing § 502 of 1995 Crime Bill which delegated all ethics regulation of federal prosecutors to DOJ, Bar Counsel Becker stated, "[t]o introduce a wholesale exemption based upon the happenstance of employment by the federal government would work an unprecedented departure from the unifying embrace of the Bar's ethical rules"); John M. Fitzgibbons, *The Tug of War over Ex Parte Contact by Federal Prosecutors*, FED. LAW., June 1995, at 16 ("[T]he Department of Justice has unilaterally declared that its attorneys constitute a unique and elite breed of lawyers whose conduct in these instances is unreviewable.").

cate.<sup>28</sup> In the United States federal courts, the people are represented by an Assistant United States Attorney. As an advocate for the government, the prosecuting attorney plays a distinctive role with roots in both history and common law. Although the prosecutor is an advocate, identifying or even defining her client is difficult. While she is an integral part of the adversary system, she is not only an advocate but also a "minister of justice." A brief look at the history of prosecution in America, and the special role played by the prosecutor in the system, will be helpful in understanding our current system.

### A. *The History of Prosecution in America*

Although the American criminal justice system traces its origin to English common law, the American prosecutor has no real counterpart in England.<sup>29</sup> In England, the duty of criminal prosecution has never been vested in one group of attorneys.<sup>30</sup> Rather, attorneys are appointed to prosecute individual cases. An English attorney may act as an appointed prosecutor in one case and as a defense attorney in another case.<sup>31</sup>

In England, because of the division of labor within the legal system, one attorney acts as counsel or solicitor until the case arrives at trial. The case is then given to a barrister who acts as the litigator.<sup>32</sup> The solicitor's job, however, does not encompass the pre-charging investigation.<sup>33</sup> The investigation is the sole responsibility of the po-

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<sup>28</sup> See *infra* text accompanying notes 129-32.

<sup>29</sup> Some commentators have noted with cynicism that the American prosecutor of today may resemble the earlier British prosecutor. In medieval England, justice was believed to follow from the Monarch, who prosecuted crime to keep order. Joseph Lawless notes that "[M]any prosecutors believe their duty is to keep the 'King's peace' rather than 'do justice,' to be the zealous avenging angel of society rather than the vigilant guardian of the rights of both the innocent and the guilty." LAWLESS, *supra* note 4, at 4.

<sup>30</sup> The Director of Public Prosecutions acts as a solicitor for the Crown, but the trial work is still distributed to independent barristers. MICHAEL MCCONVILLE ET AL., *THE CASE FOR THE PROSECUTION: POLICE SUSPECTS AND THE CONSTRUCTION OF CRIMINALITY* 5 (1993).

<sup>31</sup> PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 21 (1960) (Lord Devlin suggests that because barristers are not professional prosecutors, they are not "prosecution-minded").

<sup>32</sup> A result of this division is that the solicitor has more direct contact with the individuals involved in the case, while the barrister is merely "briefed as to the matter prior to the trial and has far less contact with the individuals involved in the case." See WOLFRAM, *supra* note 2, at 7. This division of labor has been cited as the source of great efficiency in the British system. See LAWLESS, *supra* note 4, at 6. Part of the American prosecutor's duty, however, is to serve the victim of the crime which requires more than just a briefing and a quick trip to the courthouse. See generally ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY, AND HUMAN RIGHTS* (1986); Karen L. Kennard, *The Victim's Velo: A Way to Increase Victim Impact in Criminal Case Dispositions*, 77 CAL. L. REV. 417 (1989).

<sup>33</sup> Police are very powerful within England's criminal justice system. They make critical

lice.<sup>34</sup> The policeman is viewed as a litigant represented by the attorney appointed to his case.<sup>35</sup> In essence, British criminal prosecution is a system of private prosecution.<sup>36</sup>

The American criminal justice system is predominately a system of public prosecution.<sup>37</sup> Early in American history, the responsibility for the prosecution of criminal offenses was assigned to a designated group of professional prosecuting attorneys, whose full-time job was to prosecute criminal offenses. By 1665, Philadelphia had appointed a prosecuting attorney to handle the prosecution of all criminal offenses.<sup>38</sup> In 1704 and 1711, Connecticut and Virginia, respectively, had provided for the use of public prosecutors.<sup>39</sup>

The British system of solicitor/barrister also did not make it to the new world. The class system of lawyering did not translate well for colonists attempting to escape the tyranny of a caste system. The American prosecutor has always been a "jack of all trades," handling the investigation, charging, pretrial proceedings and trial. Finally, unlike the British attorney, the contemporary American prosecutor is intimately involved in the investigation of many crimes.<sup>40</sup>

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decisions about charging and continuing prosecution. MICHAEL MCCONVILLE & JOHN BALDWIN, *COURTS, PROSECUTION AND CONVICTION* 96-97 (1981).

<sup>34</sup> DAVID M. NISSMAN & ED HAGEN, *THE PROSECUTION FUNCTION* 4 (1982). Wolfram suggests that this division of labor in the British system might be conducive to allowing the prosecutor to reexamine the prosecution throughout the proceedings. The American system, however, makes it almost impossible because filing the charges requires the prosecutor to form the opinion that the individual should be prosecuted. WOLFRAM, *supra* note 2, at 766.

<sup>35</sup> Justice Devlin characterized the policeman's role in the English system as "like any other litigant, and to a large extent in the hands of his counsel." LAWLESS, *supra* note 4, at 5.

<sup>36</sup> LAWLESS, *supra* note 4, at 3-7; *see also* JACOBY, *supra* note 24, at 1-39. The system can be called "private prosecution" because the attorneys who represent the prosecution are not part of a select group that only prosecutes. LAWLESS, *supra* note 4, at 3-7; *see also* JACOBY, *supra* note 24, at 1-39. England did not have private prosecution from the standpoint that individual victims would pursue prosecution through privately retained counsel. LAWLESS, *supra* note 4, at 3-7; *see also* JACOBY, *supra* note 24, at 1-39. The office of Director of Public Prosecution was created in Great Britain in 1879. LAWLESS, *supra* note 4, at 3-7; *see also* JACOBY, *supra* note 24, at 1-39. The office is in charge of appointed attorneys to prosecute individual cases. LAWLESS, *supra* note 4, at 3-7; *see also* JACOBY, *supra* note 24, at 1-39. For a more detailed look at the differences between the English system of prosecution and the American system of prosecution, *see* LAWLESS, *supra* note 4, at 3-7; *see also* JACOBY, *supra* note 24, at 1-39.

<sup>37</sup> Some jurisdictions, however, maintain the common law institution of the private prosecutor, a lawyer who is hired by a victim to assist in a criminal prosecution. *See generally* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994); Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85 (1992).

<sup>38</sup> NISSMAN & HAGEN, *supra* note 34, at 4.

<sup>39</sup> JACOBY, *supra* note 24, at 14.

<sup>40</sup> *See infra* text accompanying notes 78-87.

Some commentators believe the origin of the American prosecuting attorney is not England at all but, rather, an adaptation of the continental European inquisitorial system.<sup>41</sup> The prosecutor's predecessor was the *jud d'instruction*, an appointed official or assistant judge whose role included that of police officer and judge. The duty of the assistant judge was to uncover all evidence that pointed to the commission of a crime and to identify the perpetrator.<sup>42</sup> The thrust of the position was that the appointed official represented the community's interests, not the interest of any one individual. This characterization is the nucleus of the role of the American prosecutor, as echoed in Justice Sutherland's classic definition:

The U.S. 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.<sup>43</sup>

In 1789, Congress inaugurated the federal system, establishing the office of United States Attorney and, accordingly, federal prosecuting authority.<sup>44</sup> Each federal district has one United States Attorney who is appointed by the President, with the advice and consent of the Senate, and can only be dismissed by the President. The United States Attorney, through appointed Assistant United States Attorneys, represents the federal government in the federal courts and prosecutes all federal crimes.<sup>45</sup> The role played by the representative of the United States in a criminal case is not the mirror image of the role played by the defendant's attorney.

### B. *The Prosecuting Attorney's Unique Role as an Advocate*

The prosecuting attorney's role differs from that of private counsel in significant ways. As one commentator stated, "[T]he legal profession's basic narrative . . . pictures the lawyer as a partisan agent acting with the sanction of the constitution to defend a private party against the government."<sup>46</sup> This description correctly focuses on the

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<sup>41</sup> It is interesting to note that the founding fathers rejected all other parts of the inquisitorial system. LEWIS KATZ, *JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES* 16 (1972).

<sup>42</sup> *Id.*

<sup>43</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>44</sup> EISENSTEIN, *supra* note 15, at 9-10.

<sup>45</sup> *Id.*

<sup>46</sup> Geoffrey Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991).

role of the defense attorney as an advocate for his client. However, the definition by its terms excludes the government's attorney, who does not represent a single client and whose job is defined as being at least in part non-partisan.

### 1. An Advocate Without a Singular Client

When one thinks about an attorney, one naturally pictures a lawyer representing an individual client with individual interests.<sup>47</sup> The prosecuting attorney is hard-pressed to name any one client or even one interest that she represents.<sup>48</sup> Instead, the prosecutor represents groups of constituencies.<sup>49</sup> Consider the constituencies that the prosecutor must appease: the crime victims, law enforcement agencies, the prosecutor's office's policies and the elusive concepts of "truth" and "justice." Each plays a vital role in the prosecutor's exercise of discretion.<sup>50</sup>

Although the prosecutor does not represent the victim, the victim's desires are considered as part of the prosecutor's decision making process.<sup>51</sup> The weight given those desires is influenced by a variety of different factors.<sup>52</sup> The victim's involvement in the criminal process has

<sup>47</sup> The ABA *Model Rules of Professional Conduct* discourage representation of clients with conflicting interests. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.").

<sup>48</sup> As Justice Sutherland stated, "The U.S. Attorney is the representative not of an ordinary party to a controversy." *Berger*, 295 U.S. at 88; see also *Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698, 705 (6th Cir. 1985) ("The public prosecutor cannot take as a guide for the conduct of this office the standards of an attorney appearing on behalf of an individual client."), *cert. denied*, 482 U.S. 905 (1987).

<sup>49</sup> WOLFRAM, *supra* note 2, at 759.

<sup>50</sup> See Drew S. Days, III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 489 (1994) (discussing Solicitor General's clients in terms of variety of relationships).

<sup>51</sup> Several articles and books have been written about the victim's struggle to be part of the system. See, e.g., GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995); Donald J. Hall, *Victims' Voices in Criminal Court: Need for Restraint*, 28 AM. CRIM. L. REV. 233 (1991); David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim"*, 17 PEPP. L. REV. 35 (1989); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987).

Of course, not all crimes have victims. Many crimes within the federal system are regulatory crimes or crimes against the government. Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 803 (1996). The most obvious of these crimes are the drug crimes, which are so often the focus of federal prosecution. Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 364 (1996). In these crimes, there is no "victim" as it is commonly defined.

<sup>52</sup> See, e.g., Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 938, 948 (1975) (factors that affect weight given to victim's desires include sufficiency of evidence, seriousness of offense and attitude of individual prosecutor); Elizabeth A. Stanko, *The Impact of Victim Assessment on Prosecutor's Screening Decisions: The Case of the New*

increased in recent years,<sup>53</sup> but the victim still does not have the status or influence exercised by an individual client.<sup>54</sup>

Another possible client for the prosecution is the law enforcement officer who initiated the case. In many cases there are no identifiable victims and all the witnesses are law enforcement personnel. In all federal cases, at least one law enforcement agency is involved.<sup>55</sup> Neither the Department of Justice ("DOJ") nor the individual United States Attorney's office pursues offenses without the aid, and most times initiation, of a law enforcement agency.<sup>56</sup>

Even though the interests of law enforcement are of paramount importance, the prosecutor is not an advocate for law enforcement agencies.<sup>57</sup> The courts have declared that the prosecutor does not and should not consider law enforcement a client.<sup>58</sup> Although much time is spent advising agents on obtaining credible and convincing admissible evidence, the confidentiality and loyalty rules associated with a lawyer/client relationship do not apply to the prosecutor/law enforcement relationship.<sup>59</sup> An attorney who determines that a law enforcement official has committed a crime is obligated to reveal the information and prosecute the offender.<sup>60</sup> Additionally, the information obtained by law enforcement is not confidential, and a prosecutor must disclose to the defendant any information that is helpful on the issue of the defendant's innocence.<sup>61</sup>

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*York County District Attorney's Office*, 16 L. & Soc'y REV. 221 (1981-1982) (discussing effect of victim's believability on prosecutor's charging decisions).

<sup>53</sup> Kirk Johnson, *Crime Victims Getting a Day, and a Say, in Court*, N.Y. TIMES, Apr. 1, 1988, at B7 (citing Anne Seymore, spokeswoman for Sunny VonBulow National Victim Center, who said, "[T]en years ago there weren't victims, just witnesses, whose only role was to come forward and say what happened to them so that the state could find justice.").

<sup>54</sup> *Id.* Charles M. Oberly, Delaware's Attorney General, said "[Y]ou don't give the victim the right to say 'This is how the case will be handled, this is how it will be done.' The system just doesn't work that way." *Id.*

<sup>55</sup> For an extensive description of the relationship between assistant United States attorneys and law enforcement officials, see EISENSTEIN, *supra* note 15, at ch. 8.

<sup>56</sup> The United States Manual delegates which investigating agency will investigate certain crimes. U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL §§ 9-61.620 (1994).

<sup>57</sup> One need only consider the issue of confidentiality to see that law enforcement agencies could not be the client. See generally Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625 (1979).

<sup>58</sup> See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 395 (1987) (prosecutor represents public, not police); see also *Burns v. Reed*, 500 U.S. 478, 485 (1991) (where court denied prosecutor absolute immunity for giving advice to police).

<sup>59</sup> Lawry, *supra* note 57.

<sup>60</sup> *Id.*

<sup>61</sup> See *United States v. Bagley*, 473 U.S. 667, 676 (1985) (holding that prosecutor's failure to disclose impeachment evidence violates due process); *United States v. Agurs*, 427 U.S. 97, 114 (1976) (holding that due process violation did not occur when prosecutor failed to turn over evidence favorable to defense in absence of specific request); *Brady v. Maryland*, 373 U.S. 83, 87

In some respects, the prosecuting attorney is not only the advocate but also the client.<sup>62</sup> In pursuing the goals of a criminal case, the prosecuting attorney need not consult with any private individual. As one commentator noted, the only mind the prosecutor must make up is his own.<sup>63</sup> The prosecutors's discretion is unique because in many areas it is unfettered. In contrast, the defense counsel is controlled in many respects by the individual desires of his client.<sup>64</sup> The lack of a clearly defined client and the need to consider several contrasting interests distinguishes the prosecutor from other attorneys who, as Lord Brougham said, "know no other, except his client."<sup>65</sup>

## 2. An Advocate Without a Singular Purpose

In addition to the lack of a discernible client, the prosecutor also has a distinct mission. Unlike the defense attorney,<sup>66</sup> the prosecutor does not merely seek to defeat his adversary.<sup>67</sup> She must strive to seek justice and fairness.<sup>68</sup> The prosecutor is required to protect his own case and, in some situations, the opponent's case as well.<sup>69</sup>

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(1963) (holding that suppression of favorable evidence by prosecution after specific request by defense violates due process).

<sup>62</sup> *People v. Kelly*, 142 Cal. Rptr. 457, 458 (Cl. App. 1978) (court observed that in practical effect, public prosecutor functions in dual capacity as both agent and principal, as both attorney and client); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 393 (3d ed. 1992); William Edwards, *Professional Responsibility of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, 513 (1983) (discussing that prosecutors make decisions that client usually makes).

<sup>63</sup> See GILLERS, *supra* note 62.

<sup>64</sup> The *Model Rules of Professional Conduct* define the requirements of an attorney in consulting with, and abiding by, the wishes of the client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1994). The *Rules* state in relevant part:

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

*Id.*

<sup>65</sup> 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821), *quoted in* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 n.1 (1975); WOLFRAM, *supra* note 2, at 759 n.8; Lawry, *supra* note 57, at 628.

<sup>66</sup> For an interesting contrast of views regarding the duty of the defendant to seek justice, see David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993).

<sup>67</sup> See ABA Joint Conference of Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958) (describing dual role of prosecuting attorney to "furnish that adversary element essential to the informed decision" and to seek "impartial justice").

<sup>68</sup> The ABA *Model Rules of Professional Conduct* require the prosecutor to act as a "minister of justice." Rule 3.8 cmt (1983). The *Model Code of Professional Responsibility* provides that the prosecutor should "seek justice." EC 7-19 (1980).

<sup>69</sup> See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors*

The dual role of the prosecutor produces a quasi-judicial office rather than that of a partisan advocate.<sup>70</sup> As one court noted, "In a criminal case, the government must wear two hats. The prosecutor must act as an advocate, although he or she is repeatedly cautioned to put ahead of partisan success the observance of the law."<sup>71</sup> Yet, the prosecutor is still called upon to participate in an adversarial process and to face the dilemmas and contravening issues of these inconsistent duties.<sup>72</sup>

Our criminal system has been called a "modified" adversarial system because of the dual role played by the prosecutor.<sup>73</sup> After indictment, when an adversary relationship is defined and properly in place, the appropriate role for the prosecutor is as "modified" advocate—modified because she is simultaneously both a zealous advocate and a minister of justice.<sup>74</sup> In the investigation stage, however, the prosecutor should play a singularly non-adversarial role, that of a non-partisan fact finder. During the investigation, the prosecutor is exclusively a minister of justice.

### C. *The Investigating Prosecutor's Role as a Fact Finder*

The investigating attorney is not a member of the adversary process and should perform a radically different role. During the investigation, where the elements of the adversary system and its safeguards are not yet defined, the prosecutor must fulfill a quasi-judicial role.<sup>75</sup> The role of the investigating attorney is not that of an advocate but that of a neutral fact finder.

Before a grand jury is convened, an indictment is signed or a defendant is arrested, the prosecuting attorney may have spent hundreds of hours on the case. With the increase in white collar crime, organized crime and public corruption, prosecutors are becoming involved in cases at earlier stages.<sup>76</sup> Historically, investigations were

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*Do Justice?*, 44 VAND. L. REV. 45, 66-74 (1991) (discussing prosecutor's responsibility to "do justice" when opposing counsel is ineffective).

<sup>70</sup> WOLFRAM, *supra* note 2, at 759 n.8.

<sup>71</sup> *Blair v. Armontrout*, 916 F.2d 1310, 1352 (8th Cir. 1990).

<sup>72</sup> Compare Robert Saltzburg, *Lawyers, Clients and the Adversary System*, 37 MERCER L. REV. 647, 656 (1986) (arguing that at trial, prosecutor should present "strongest argument" for conviction) with H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethic Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1159 (1973) (urging that prosecutors act primarily as zealous advocates).

<sup>73</sup> See *supra* note 72.

<sup>74</sup> See generally Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988).

<sup>75</sup> See *id.*

<sup>76</sup> Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How*

conducted by law enforcement agencies and the prosecutor became involved only when the time came to charge the defendant and begin formal criminal proceedings.<sup>77</sup> Today, the use of complicated investigative techniques and the investigation of complex crimes cause law enforcement agencies to require assistance from the prosecutor in the early stages of an investigation.<sup>78</sup>

The use of an undercover investigation to obtain evidence of criminals and crimes is nothing new.<sup>79</sup> During the past two decades, however, the complexity of the undercover investigations in the federal system has increased enormously.<sup>80</sup> Undercover operations often involve infiltration through the creation of elaborate schemes.<sup>81</sup> The prosecutor has been called upon to assist in complicated undercover operations to assure the legality of the investigation by advising law enforcement agencies on the constitutionality of their proposed actions and on the proper methods of obtaining evidence.<sup>82</sup> Congress has explicitly given federal prosecutors control over particular investigative techniques, such as eavesdropping applications.<sup>83</sup>

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*Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 409 (1993); Norton, *supra* note 13, at 301.

<sup>77</sup> Norton, *supra* note 13, at 301; *see also* Henning, *supra* note 76, at 406 (observing that differences between traditional street crime investigation and investigation of white collar crime are reflected in roles played by prosecutor and investigator). For an extensive look at the investigative process, *see* HARRY I. SUBIN ET AL., *CRIMINAL PRACTICE: PROSECUTION AND DEFENSE* (1992).

<sup>78</sup> Karlan, *supra* note 12, at 700.

<sup>79</sup> *See* William Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 787 (noting that in mid-1970s, federal prosecutors began directing resources to areas of white collar crime). *See generally* G. ROBERT BLAKELY ET AL., *NATIONAL INST. OF JUSTICE, RACKETEERS BUREAU: INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME*, at xiii-xiv (1978).

<sup>80</sup> Gershman, *supra* note 20, at 396.

<sup>81</sup> *Id.* For example, the "Abscam" operation which investigated legislative corruption involved the creation of a fictitious Middle Eastern corporation and used undercover agents posing as representatives of wealthy Arab sheiks. *Id.*; *see also* *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 464 U.S. 908 (1983). The "Courtroom" investigation in Miami, Florida, involved the creation of staged cases to uncover judicial corruption; in *United States v. Murphy*, 768 F.2d 1518, 1529 (7th Cir. 1985), the Seventh Circuit noted that the staging of cases was part of a "nasty but necessary business." For additional examples of complex undercover investigations, *see* STEWART, *supra* note 19.

<sup>82</sup> Floyd I. Clarke, Assistant Director of the Federal Bureau of Investigation, noted that in the area of public corruption cases, the investigation requires "contact with the prosecutor as soon as practical." Letter from Clarke to William Webb, Assistant Attorney General (Aug. 4, 1987), *reprinted in* U.S. DEP'T OF JUSTICE, *PROSECUTION OF PUBLIC CORRUPTIONS CASES A-3* (1988).

<sup>83</sup> A federal wiretap application requires a prosecutor's authorization and supervision. *See* Federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1988).

The courts for decades have recognized the importance and dangers of this investigative tool. *Berger v. New York*, 388 U.S. 41, 63 (1967) ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."). The Supreme Court has attempted to regulate it through constitutional safeguards. *See generally* *Katz v. United States*, 389 U.S. 347

In addition to the complicated undercover investigation, the federal attorney participates in the investigation of complex crimes involving the use of subpoenas of business records and the use of the grand jury.<sup>84</sup> One commentator called the grand jury "one of the most powerful instruments in the arsenal of the prosecutor."<sup>85</sup> The prosecutor is involved in the issuance of subpoenas and directing grand jury proceedings.<sup>86</sup> The use of the grand jury in an investigation of a complex white collar crime to produce documentary evidence is indispensable.<sup>87</sup>

While some authors have suggested that prosecutors should not be involved in the investigation,<sup>88</sup> the courts have recognized the importance of the involvement of the prosecutor in the investigative

(1967); *Silverman v. United States*, 365 U.S. 505 (1961); *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting). *Berger v. New York* set forth constitutional safeguards requiring:

1. A showing of probable cause to believe that a particular offense has been committed;
2. A description of the conversations to be intercepted;
3. A specific and limited time period for the surveillance;
4. A request to renew the warrant based on a showing of continued probable cause;
5. Termination of the wiretap once the evidence has been seized;
6. Notice to the subject of the eavesdropping, unless a factual showing of exigency has been made; and
7. A return of the warrant so that the court can supervise and restrict the use of the seized evidence.

388 U.S. at 54-60.

<sup>84</sup> Karlan, *supra* note 12, at 700.

<sup>85</sup> BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 2.2 (1995). A criticism or justification of the grand jury process or its use by the prosecutor is beyond the scope of this article. See generally Peter Arnella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Convictions Without Adjudications*, 78 MICH. L. REV. 463 (1980); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995); Jon Van Dyke, *The Grand Jury: Representative or Elite?*, 28 HASTINGS L.J. 37 (1976).

<sup>86</sup> Leipold, *supra* note 85, at 315.

<sup>87</sup> Genego, *supra* note 79, at 792; Leipold, *supra* note 85, at 315. The modern grand jury has two related functions. Some have described the grand jury as being a shield and a sword. The indicting grand jury functions as a screening device to "shield" citizens from unwarranted charges. SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY PRACTICE § 1:07, at 35 (1986). The investigating grand jury acts as a "sword" to discover and eliminate criminal conduct. *Id.*

In the federal system, the Fifth Amendment requires that every person accused of a felony be indicted by the grand jury. U.S. CONST. amend. V. The Fifth Amendment states in part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." *Id.* The Supreme Court has held that this provision does not apply to the states. See *Hurtado v. California*, 110 U.S. 516, 521 (1884). For a summary of states' grand jury indictment requirements, see BEALE & BRYSON, *supra*, § 2:03, at 16-18.

<sup>88</sup> JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER 395 (2d ed. 1996) (indicating that as general matter, prosecutors should not be involved in police investigations because of risk of becoming witness). I was present at the June 23, 1995, meeting of the Florida Bar's Professional Ethics Committee when an attorney commented that he believed that the involvement of an attorney in the investigation of a criminal case "degraded the profession."

stage. In *United States v. Guerrenio*, the United States District Court for the Southern District of New York observed that during the investigation, the prosecutor is in a better position to protect the potential criminal defendant's rights.<sup>89</sup> The court attributed this protection to the prosecuting attorney's obligation to see that justice is done.<sup>90</sup> The court noted that the exclusion of the attorney from the investigation may "promote rather than inhibit" inappropriate investigative tactics.<sup>91</sup> Without attorney involvement, investigative decisions would be left solely to law enforcement personnel who are subject only to legal, not ethical, constraints. It is the prosecutor's responsibility to be a non-partisan, non-advocate when she is determining whether an offense occurred. As Justice Robert Jackson said, "[A] citizen's safety lies in the prosecutor who . . . seeks truth and not victims."<sup>92</sup> It is at this stage that the attorney's neutral exercise of discretion is paramount.

The investigating attorney must act as a judge and fact finder in deciding how to proceed during an investigation. The prosecutor must interpret the law and attempt to apply it to law enforcement's proposed investigative actions. She must determine whether the proposed techniques are lawful and if they will lead to admissible evidence.<sup>93</sup> In addition, she must assist in the protection of citizens' rights. As a minister of justice, the investigating attorney's goals must not be merely to seek evidence but also to protect the rights of others in the process.

The prosecutor must also exercise discretion in deciding what charges to investigate.<sup>94</sup> Professor Uviller emphasizes that this is "one of the more significant exercises of discretion in the prosecution's arsenal."<sup>95</sup> The prosecution assists in deciding where limited resources should be spent.<sup>96</sup> Part of that determination is whether to pursue investigations of specific crimes or investigations of specific criminals.<sup>97</sup>

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<sup>89</sup> 675 F. Supp. 1430, 1435 (S.D.N.Y. 1987).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Robert H. Jackson, The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys, (Apr. 1, 1940), in NATIONAL COLLEGE OF DISTRICT ATTORNEYS, ETHICAL CONSIDERATIONS IN PROSECUTION: ROLES AND FUNCTIONS OF THE PROSECUTOR 2 (John J. Doglass ed., 1977).

<sup>93</sup> Zacharias, *supra* note 69, at 50 n.19. Professor Zacharias identifies part of the pre-trial prosecutor's job as predicting "the appropriate result." *Id.*

<sup>94</sup> Even in the federal prosecutor's office there are many cases in which the prosecutor is not involved in the investigation of the case. Norton, *supra* note 13, at 301.

<sup>95</sup> Uviller, *supra* note 72, at 1151.

<sup>96</sup> *Id.* at 1147. See also Jackson, *supra* note 92, at 3 (Justice Jackson noted that "[O]ne of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints").

<sup>97</sup> Compare Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*,

A prosecutor must exercise this discretion with a non-partisan assessment of the public's concerns.<sup>98</sup>

Finally, the prosecutor must be a fact finder. The prosecutor seeks the truth in order to assess appropriate actions. The *Model Rules of Professional Conduct* indicate that a prosecutor should never file a case unless probable cause exists.<sup>99</sup> However, the standard for filing charges is actually higher than just probable cause.<sup>100</sup> The *National Prosecution Standards* developed by the National Association of District Attorneys state that "the prosecutor should file only those charges which she reasonably believes can be substantiated by admissible evidence at trial."<sup>101</sup> Some prosecutors believe that in addition to the presence of sufficient evidence, the prosecutor should have an abiding conviction that the defendant is guilty of the offense charged.<sup>102</sup> The *ABA Standards of Criminal Justice* provide that the prosecutor should consider his or her beliefs as to the guilt of the suspect in the charging decision.<sup>103</sup> Just as a trial attempts to reconstruct past events,<sup>104</sup> a prosecutor during an investigation must reconstruct past events to determine who should be charged.<sup>105</sup> In this capacity, the investigating prosecutor seeks to ascertain the truth and acts as judge, not advocate.

As a non-adversarial fact finder, the attorney must scrupulously avoid a presumption favoring a certain result.<sup>106</sup> The attorney must confront factual uncertainty with inquiry, not with a "working assumption of guilt."<sup>107</sup> She must continually assess what facts have been learned

55 GEO. L.J. 1030, 1034 (1967) (asserting that targeting individuals is unethical) with Uviller, *supra* note 72, at 1151 (suggesting that target can be either crime or criminal and that issue should be motivation of prosecutor).

<sup>98</sup> See Jackson, *supra* note 92. Justice Jackson articulated the danger that the prosecutor "will pick people that he thinks he can get, rather than pick cases that need to be prosecuted." *Id.* He urged prosecutors to select cases in "which the offense is the most flagrant, the public harm the greatest, and the proof the most certain." *Id.*

<sup>99</sup> Rule 3.8(a) (1994).

<sup>100</sup> NATIONAL DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 43.3 (2d ed. 1991).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* § 43.6 ("prosecutor should exercise his discretion to file only those charges which he considers to be consistent with the interest of justice").

<sup>103</sup> THE PROSECUTION FUNCTION, ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9(b) (i) (1995); see STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 540 (1996).

<sup>104</sup> See STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 1 (1993).

<sup>105</sup> Justice Frankel suggested that "the objective ought to be as close an approximation as we might find to seeking the facts about crimes while attempting to be civilized in our treatment of criminals." FRANKEL, *supra* note 3, at 98.

<sup>106</sup> Fisher, *supra* note 74, at 230.

<sup>107</sup> Albert Alschuler, *Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 64 n.42 (1968).

and confront all doubts of credibility.<sup>108</sup> Finally, the neutral fact finder must make conclusions based on independent judgments of the facts. All of these responsibilities require the prosecutor to step out of the role of advocate and into the role of a "minister of justice."

## II. THE ADVERSARIAL PROCESS AND THE NON-ADVERSARIAL INVESTIGATION OF A CRIMINAL CASE

The adversarial process is as much a part of the American heritage as capitalism or sporting competitions.<sup>109</sup> Yet, the Constitution does not specifically mention the existence or creation of the adversary system.<sup>110</sup> While the Constitution provides for due process of law in the Fourteenth Amendment, it does not mandate that due process be afforded within an adversarial system.<sup>111</sup> Nevertheless, American courts recognize the significant part the adversarial process plays in our criminal justice system.<sup>112</sup> Perhaps the adversary process is, as one commentator noted, "so basic that the Constitution does not even mention it."<sup>113</sup>

While the adversarial process may have an important role in the adjudication of guilt, it has no place in the pre-indictment investigation, where the goal must be to determine the facts. The adversarial process should not begin until after the investigation is complete and a defendant is accused.<sup>114</sup> Prior to charging, the basic elements of the adversary process are simply not present, because there are no adversaries yet identified. In addition, if the adversarial process was initiated prior to charging, the prosecutor would be prevented from "weeding out" those cases that do not warrant continued investigation or prosecution.<sup>115</sup>

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<sup>108</sup> See Fisher, *supra* note 74.

<sup>109</sup> The existence of such a system of dispute resolution reflects a society that, in all aspects of its public intercourse, adheres to the idea that "competition among individuals produces the maximum collective good." Robert Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER* 174 (David Luban ed., 1983). This process of dispute resolution reflects the value America places on competition between individual citizens, whether it be in the marketplace, on the playing field, or in the courthouse. *Id.* In contrast, see JAMES KAPLAN, *CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS* 264-65 (1973) ("In a Socialist state, there is no division of duty between the judge, prosecutor and defense counsel . . . the defense must assist the prosecution to find the objective truth in a case." (citing a Bulgarian attorney)).

<sup>110</sup> David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 98 (David Luban ed., 1983).

<sup>111</sup> *Id.*

<sup>112</sup> See *Herring v. New York*, 422 U.S. 853, 858 (1975) (stating that "closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial"); Kirby v. Illinois, 406 U.S. 682 (1972) (discussing beginning of adversary process in criminal case).

<sup>113</sup> Luban, *supra* note 110.

<sup>114</sup> *United States v. Guerrero*, 675 F. Supp. 1430, 1438 (S.D.N.Y. 1987).

<sup>115</sup> In fiscal year 1994, federal prosecutors declined 42,870 cases for a number of different

The adversarial process is not an effective truth seeking device because it prioritizes truth very low.<sup>116</sup> During the investigation, all law enforcement personnel—both investigators and attorneys—must conduct a “search for the truth.” Finally, the Supreme Court has recognized that in balancing the justifications for the adversary process against the need for effective law enforcement, the adversarial process does not, and should not, begin in the investigative stage of the case.

### A. *The Elements of the Adversarial Process*

The adversarial process requires three entities. The system assumes that there are conflicting parties who believe in the rightness of their position. Each perspective is represented by a zealous advocate. Finally, the ultimate decision as to which party prevails is left to an impartial tribunal. In a criminal case, none of these entities are defined until after the investigation is complete.

#### 1. Adverse Sides

The first basic premise of the adversary system is that at least two parties have a dispute upon which they cannot agree.<sup>117</sup> The assumption is that each party believes its perception of the facts to be correct, and they are unable to reconcile their positions. This premise requires individuals to “choose sides,” to take a position in order for the adversary process to function. The parties in the adversary system initiate and control the definition of the dispute.<sup>118</sup> In a criminal prosecution, the government initiates the dispute by filing a charging document on behalf of the people.<sup>119</sup>

At the beginning of an investigation, the individuals being prosecuted are not always defined.<sup>120</sup> The prosecutor is not in a position to

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reasons, including a finding that no federal offense had been committed. U.S. DEP'T OF JUSTICE, STATISTICAL REPORTS, UNITED STATES ATTORNEY'S OFFICE, FISCAL YEAR 1994, at 70-71 (1995). See HALL, *supra* note 88, at 189 (suggesting that all search and arrest warrant affidavits should be approved by prosecution to allow eliminating cases which do not warrant changing).

<sup>116</sup> As Judge Frankel noted, the adversary process “rates truth too low.” Marvin E. Frankel, *The Search for Truth: An Imperial View*, 123 U. PA. L. REV. 1031, 1032 (1975).

<sup>117</sup> Murray Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER* 150, 153 (David Luban ed., 1983).

<sup>118</sup> See *Bronston v. United States*, 409 U.S. 352, 358 (1972) (noting that in adversary process, each side is responsible for presenting favorable evidence).

<sup>119</sup> See *infra* text accompanying notes 147-49.

<sup>120</sup> *United States v. Lemonakis*, 485 F.2d 941, 955 (D.C. Cir. 1973) (court noted that in investigative stage of the case, subject matter of representation is obscure), *cert. denied*, 415 U.S. 989 (1974).

advocate any side because the government has not "committed itself to prosecute."<sup>121</sup> To "choose sides" before the completion of the investigation is premature and negatively impacts both the government and the innocent defendant who is prematurely targeted.

## 2. Zealous Advocates

The second premise is an extension of the first. In believing in the rightness of its position, each party is ultimately responsible for presenting his or her case. The responsibility is to zealously present one side of the dispute—not an even-handed presentation of the facts. The opponent is responsible for zealously presenting its side. Each party, either alone or through legal representation, seeks to "put his best foot forward."<sup>122</sup> The entire process anticipates the contentious presentation of evidence from beginning to end.<sup>123</sup> The rules of the process call for reciprocation, not cooperation. As Robert Kutak explained, "a fundamental premise of the adversary system of jurisprudence is that a competitive rather than cooperative presentation and analysis of the facts underlying a dispute will produce a greater number of correct results."<sup>124</sup> At the center of this competitive model of dispute resolution is the assumption that neither side is responsible for the competence of the other.<sup>125</sup>

In most criminal cases, the defendant is represented by a lawyer.<sup>126</sup> Usually, interested third parties do not participate directly, except as witnesses.<sup>127</sup> In putting forth his best case, the advocate will zealously present his position. At its very core, the adversary system requires one-sided loyalty.<sup>128</sup> The adversary system presupposes that each side bears the obligation not only to present evidence supporting its case, but also to ferret out all evidence that supports his case and contradicts the opponent's case.<sup>129</sup>

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<sup>121</sup> *Kirby*, 406 U.S. at 682.

<sup>122</sup> Schwartz, *supra* note 117.

<sup>123</sup> WOLFRAM, *supra* note 2, at 564.

<sup>124</sup> Kutak, *supra* note 109, at 174.

<sup>125</sup> *Id.*

<sup>126</sup> *Faretta v. California*, 422 U.S. 806, 834 (1975) (right to self-representation has been deeply rooted in our system from foundation of our federal law).

<sup>127</sup> WOLFRAM, *supra* note 2, at 564. One is reminded of the saying, "[a]n attorney who represents himself has a fool for a client." *Id.*

<sup>128</sup> See *infra* text accompanying notes 251–53.

<sup>129</sup> Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 130 (1988).

### 3. Neutral Decision Maker

Finally, the adversary process assumes that both sides will present their case to a neutral, passive tribunal.<sup>130</sup> In most American criminal cases, the impartial tribunal is made up of lay jurors.<sup>131</sup> The assumption is that the fact finder, whether it be judge or jury, is neutral.<sup>132</sup> The fact finder begins the process without demonstrable bias<sup>133</sup> or knowledge of the facts.<sup>134</sup> Although the judge may have some knowledge of a case from pretrial motions, any independent knowledge of the facts would usually disqualify him.<sup>135</sup>

In order to insure impartiality, the tribunal has no responsibility to investigate or present any evidence. The parties explore the issues.<sup>136</sup> The fact finder takes no initiative to define the issues in the case, to elicit any evidence or to investigate any uncharted avenues of defense.<sup>137</sup> The fact finder is required to make its decision solely on the evidence chosen and presented by the parties.<sup>138</sup>

During the investigation process, neither the adversaries nor the passive tribunal is present.<sup>139</sup> Therefore, the prosecutor usually takes on the role of attempting to judge the facts and law to determine whether charges should be filed. The prosecutor must not be prematurely forced to advocate a side and become embroiled in an adversarial process prior to the completion of the investigation.<sup>140</sup>

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<sup>130</sup> Zacharias, *supra* note 69, at 85.

<sup>131</sup> GRANO, *supra* note 11, at 6.

<sup>132</sup> WOLFRAM, *supra* note 2, at 566.

<sup>133</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(a) (1990) (requiring recusal because of personal bias); *id.* at Canon 3(D) (must disclose bias to advocate and obtain consent to continue); see also Roberta K. Flowers, *Does it Cost Too Much? A 'Difference' Look at J.E.B. v. Alabama*, 64 FORDHAM L. REV. 491, 534-35 (1995) (concluding that advocates can attempt to eliminate prejudice but not perspective of jurors).

<sup>134</sup> *Commonwealth v. Stewart*, 295 A.2d 303, 307 (Pa. 1972) (Roberts, J., concurring) (prosecutor required to disclose juror's relationship to victim). But see VALERIE P. HANS & NIEL VIDMAR, *JUDGING THE JURY* 23-24 (1986) (stating that early jurors were required to know either parties or facts to qualify for jury service).

<sup>135</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 2(B) (1990) (prohibiting judges from allowing relationships to influence judicial conduct).

<sup>136</sup> WOLFRAM, *supra* note 2, at 564.

<sup>137</sup> See also *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court.")

<sup>138</sup> Zacharias, *supra* note 69, at 61.

<sup>139</sup> See *supra* notes 89-92 and accompanying text (discussing role of the grand jury in investigation).

<sup>140</sup> See Luban, *supra* note 66, at 1744 (discussing effect of defense attorney's actions as "exerting enormous gravitational force" hardening the prosecutor's position).

### B. *The Adversarial System's Effect on Neutral Fact Finding*

Imposing the adversarial process on the investigative stage of the case hinders neutral fact finding in two ways. First, it leads the prosecutor as a partisan adversary to charge or prosecute regardless of whether the crime or criminal warrants prosecution. Second, it hinders the obtaining of the necessary information to identify the crimes or the criminals. In other words, the "search for the truth" is thwarted before it begins.

#### 1. The Creation of Advocates

The adversary process demands that each attorney take the position of zealous advocate. Placing the government attorney prematurely into that position negatively impacts their ability to seek the truth. The investigating attorney should not act as an advocate, but rather as a screening device whose task is to eliminate poor cases as well as to facilitate the making of strong cases.<sup>141</sup> As Jo Ann Harris observed about her job as a prosecutor:

[m]y client has *always* been served when I do the right thing even if it means dismissing or losing a case. Indeed, one of the major satisfactions of the various roles I have played in the Department of Justice has come from the responsibility to use this power in the public up to its very limits, and *no further*, to exercise it in decisions not to prosecute as firmly as in decisions to indict.<sup>142</sup>

The prosecutor has a duty not to bring a case which is not supported by sufficient evidence.<sup>143</sup> If the prosecutor prematurely advocates a position, then she shirks her responsibility and does the case and the public a disservice. Throughout the process the prosecutor is a "modified" advocate.<sup>144</sup> In the investigative stage, the prosecutor should not be an advocate.

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<sup>141</sup> See William H. Simon, *Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767, 1768 (1993) (recognizing that there is no comparable screening role for defense counsel).

<sup>142</sup> STEWART, *supra* note 19, at 37.

<sup>143</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1983) (prohibiting prosecutor from pursuing charge which is not supported by probable cause).

<sup>144</sup> *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., dissenting) (discussing defense attorney's role in the "modified" adversary system); *Tyson v. State*, 619 N.E.2d 276 (Ind. 1993), *cert. denied*, 114 S. Ct. 1216 (1994); *State ex rel. W.C.*, 426 A.2d 50 (N.J. 1981) (discussing role of prosecutors in discovery phase based on "modified" adversary system).

The term advocate is defined as an individual who "pleads the cause of another."<sup>145</sup> The definition reflects the ideals contained in the famous words uttered by Lord Brougham in his defense of Queen Caroline before the House of Lords in 1820:

An advocate, in the discharge of his duty, knows, but one person in all the world, and that person is his client. To save that client by all means and expedients—and at all hazards and costs to other persons and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.<sup>146</sup>

The position of advocate creates pressure to represent a side and to be single-minded in persuading others of the rightness of your position.<sup>147</sup> A prosecutor advocating a position early in the investigation is ill-suited to be an impartial judge of the law and of the facts.<sup>148</sup>

The Supreme Court in a somewhat different context has acknowledged that a prosecutor should not be an advocate in the investigation of the case.<sup>149</sup> In *Buckley v. Fitzsimmons*, the Court addressed the issue of qualified versus absolute immunity in a civil rights action against a prosecuting attorney.<sup>150</sup> In determining the type of immunity available to the prosecutor, the Court looked to the function that the prosecutor was performing when the alleged civil rights violation occurred.<sup>151</sup> The Court, holding that the prosecutor was entitled to only qualified immunity,<sup>152</sup> stated that "a prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."<sup>153</sup>

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<sup>145</sup> OXFORD ENGLISH DICTIONARY 194 (2d ed. 1989).

<sup>146</sup> Fried, *supra* note 65. In discussing Lord Brougham's declaration, Judge Marvin Frankel lamented that "Lord Brougham was wrong; we should be less willing to fight the world and . . . more concerned to save our own souls. As ministers of justice, we should find ourselves more positively concerned than we now are with the pursuit of truth." *In re Hawaiian Flour Mills, Inc.*, 868 P.2d 419, 437 (Haw. 1994) (Levinson, J., concurring) (quoting WASH. POST, May 7, 1978).

<sup>147</sup> Fisher, *supra* note 74, at 2080.

<sup>148</sup> *Id.*

<sup>149</sup> See generally *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Burns v. Reed*, 500 U.S. 478 (1990); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

<sup>150</sup> 509 U.S. 259, 261.

<sup>151</sup> *Id.* at 267-69.

<sup>152</sup> *Id.* at 269.

<sup>153</sup> *Id.* at 266.

## 2. The Flow of Information

The introduction of the adversary process into the investigation of the case seriously affects the ability of the prosecutor to obtain the necessary information to make a proper charging decision. Judge Frankel, in his critique of the adversary process, urged consideration of whether the system "made unduly elaborate and effective the means of blocking proof of guilt."<sup>154</sup> Courts have recognized that the professional responsibilities of defense counsel may require them to "become obstacles of truth finding."<sup>155</sup>

The adversarial process is justified as being "the best method of arriving at the truth, hence yielding a just outcome."<sup>156</sup> The system produces truth through a series of assertion and refutation.<sup>157</sup> The truth-seeking justification is premised on the assumption that each adversary's lawyer will present facts beneficial to his or her client and attempt to avoid facts adverse to his client. Through this process, all relevant facts will be presented to the tribunal, and the fact finder will be able to ascertain the truth. The facts will be better presented by each side than if one side attempted to present all the facts. It is through the zeal present when one takes an adversarial position that the completeness of the facts springs. One commentator analogizes the non-adversary system to the attempt to play chess against oneself. "Neither the black nor the white pieces get played well and second-rate games result."<sup>158</sup> The system relies on the belief that truth can be found through "legal combat."<sup>159</sup>

Ironically, while a primary goal of the adversary system is truth, the process puts greater focus on the rules of the battle rather than the outcome.<sup>160</sup> The adversary system has been lauded as a "celebration of other values than truth."<sup>161</sup> The system is applauded for elevating

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<sup>154</sup> FRANKEL, *supra* note 3, at 100.

<sup>155</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 514 (1966) (Harlan, J., dissenting) (observing that necessity may become an obstacle to truth-finding in fulfilling professional responsibilities); *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., separate opinion) ("Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.").

<sup>156</sup> Allan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER* 127 (David Luban ed., 1983).

<sup>157</sup> *Id.* at 94.

<sup>158</sup> Luban, *supra* note 110, at 95.

<sup>159</sup> Zacharias, *supra* note 69, at 54.

<sup>160</sup> Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 581 (1973) (comparing common-law criminal justice system with civil law).

<sup>161</sup> *Id.* at 580; Luban, *supra* note 110, at 96. Professor Damaska indicates that some commen-

human dignity to the "ultimate value" by allowing "individuals to pursue as far as the law permits what they believe to be a reasonable and justified result."<sup>162</sup> The system is justified because individuals, as a matter of "self realization," are entitled to the freedom to present their positions.<sup>163</sup> The adversary system provides a forum for the untrammelled assertion of one's personal position. It allows even the obviously guilty defendant the opportunity to have his "denials seriously weighed" or his extenuation considered.<sup>164</sup>

In many ways the adversarial criminal system is a recognition of the historical American mistrust of public officials.<sup>165</sup> Some proponents of the adversary system claim it functions as our basic protection against government overreaching.<sup>166</sup> As one commentator put it, the goal of the system is to prevent the "behemoth" state from becoming the "juggernaut."<sup>167</sup> The system is not a truth-seeking system, but rather a "screening system."<sup>168</sup> The adversary system is justified as a means of placing the risk of error on the side of the prosecution.<sup>169</sup> By necessity, the system places a heavy burden on the government when it attempts to infringe on the rights of individuals. Put another way, it is a means of "hobbling" the government.<sup>170</sup> The system loses its focus on truth seeking in favor of setting up a fair fight. The give and take of the adversarial process may make for a fair fight but truth is lost somewhere in the process.<sup>171</sup> As Professor Grano explains, "Equality between

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tators argue that in both common-law and civil law systems, truth has the same importance. Damaska, *supra* note 160, at 580. The difference between the two systems, so the argument goes, is in how much weight is given to other values in relationship to the value given to truth. *Id.* Professor Damaska points out that if one gives more weight to other values than to the value of truth-seeking, then it follows that the truth-seeking ideal has less influence. *Id.* In the adjudicatory area of criminal procedure, the values of individual rights and fair play are at least understandable. *Id.* In the beginning of the investigation, however, when the parties are attempting to determine the existence of a criminal case, truth-seeking needs to weigh more heavily than the other "celebrated values" of our system. *Id.*

<sup>162</sup> Donagan, *supra* note 156, at 126.

<sup>163</sup> Schwartz, *supra* note 117, at 154-55.

<sup>164</sup> Donagan, *supra* note 156, at 128.

<sup>165</sup> See Damaska, *supra* note 160, at 583.

<sup>166</sup> Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 143 (1987).

<sup>167</sup> Murray Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 554 (1983).

<sup>168</sup> Subin, *supra* note 166, at 152.

<sup>169</sup> Schwartz, *supra* note 117, at 158.

<sup>170</sup> Luban, *supra* note 110, at 92.

<sup>171</sup> See *Massiah v. United States*, 377 U.S. 201, 213 (1964) (White, J., dissenting) ("Law enforcement may have elements of a contest but it is not a game.").

contestants makes for good sport, but in a criminal investigation we should be seeking truth rather than entertainment."<sup>172</sup>

### C. *The Court's Balancing of the Costs of an Adversarial Investigation*

The Supreme Court has repeatedly recognized that the costs to society outweigh the benefits of an adversarial process during the investigation of a criminal case. The Court has concluded that the adversarial process should begin when the defendant is charged with a crime. The Sixth Amendment to the Constitution is a critical part of the adversary system, necessary to protect the defendant's rights.<sup>173</sup> Yet, even though the Supreme Court recognizes the importance of the right to counsel, this right is limited to the post-indictment stage of a criminal case.

The Court first addressed the issue of the right to counsel during the investigation phase of a case in *Cicenia v. La Gay*.<sup>174</sup> The defendant in *Cicenia* appealed his conviction claiming that his plea to murder was based on an unlawfully obtained confession.<sup>175</sup> The defendant had been questioned by police for seven hours even though he repeatedly requested an attorney and his attorney waited outside for him.<sup>176</sup> In *Cicenia*, the Supreme Court in a pre-*Miranda* case held that the right to counsel during a police interrogation "in most instances might impair [the police's] ability to solve cases."<sup>177</sup> Although the Court would

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<sup>172</sup> Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogation and Modern Confessions Law*, 84 MICH. L. REV. 662, 677 (1986); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1174 (1987).

<sup>173</sup> See, e.g., *Polk County v. Dodson*, 454 U.S. 312, 318 (1981); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979); *Tomkovicz*, *supra* note 2, at 40; see generally *Culombe v. Connecticut*, 367 U.S. 568 (1961) (pre-*Miranda* case denying right to counsel during police interrogation).

<sup>174</sup> 357 U.S. 504, 508-09 (1958).

<sup>175</sup> *Id.* at 507.

<sup>176</sup> *Id.* at 506.

<sup>177</sup> *Id.* at 509. The Court additionally relied on the incorporation doctrine. *Id.* at 510 (noting that "the States should have the widest latitude in administration of their own systems of criminal justice.").

It is important to note the difference between the right to counsel discussed under Sixth Amendment jurisprudence, which requires that an adversarial process has begun, and the right to counsel discussed in the *Miranda* line of cases. See GRANO, *supra* note 11, at 145-46. The two "rights" protect different issues. *Id.* The *Miranda* right to counsel deals with the inherent coercion presumed to be present in custodial interrogation. *Id.* The right to counsel in those cases stems from the need for protection against coerced confessions. *Id.* The Sixth Amendment right deals with an attempt to level the playing field, a basic tenet of the adversary process, and therefore does not arise until the adversary process is in place. *Id.* The rights protected by *Miranda* only exist when the individual is subjected to custodial interrogation; *Miranda*, therefore, is inapplicable during the investigation stage of a case when no arrests have taken place. *Id.*

later apply the right to counsel in the custodial interrogation area,<sup>178</sup> it would continue to uphold the idea that the search for truth and solving of cases are primary goals of the investigation phase of a criminal case. Accordingly, the Court has persistently found that the application of the adversarial process during the investigation phase may thwart truth-seeking goals.

Justice Stewart, who became the primary voice for the demarcation between the investigation and the adversary process, first asserted in *Spano v. New York* that post-indictment interrogation violated the Constitution.<sup>179</sup> In his concurring opinion, Justice Stewart wrote that interrogation without counsel violated the Constitution if the defendant had been indicted.<sup>180</sup> He believed that the critical issue was whether the interrogation took place during the "course of an investigation of an unsolved crime" rather than post-indictment.<sup>181</sup>

Five years later, Justice Stewart was consistent in writing for the majority in *Massiah v. United States*.<sup>182</sup> While some commentators have called this an "oddball Sixth Amendment case"<sup>183</sup> the case has had "enduring quality."<sup>184</sup> In *Massiah*, the defendant was convicted of narcotics violations based partially on statements he made to a co-defendant after his indictment and release on bail.<sup>185</sup> Unbeknownst to the defendant, the co-defendant agreed to work for the government and allowed government agents to install a radio transmitter in his car.<sup>186</sup> During the course of the conversation, government agents listened to the transmission.<sup>187</sup> At trial, the government introduced several incriminating statements made by the defendant.<sup>188</sup> The defendant was convicted and the Second Circuit Court of Appeals affirmed the conviction.<sup>189</sup>

The Supreme Court reversed the conviction based on the timing of the interrogation.<sup>190</sup> Justice Stewart, writing for the majority, stated that "the petitioner was denied the basic protections of [the Sixth

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<sup>178</sup> See *Miranda v. Arizona*, 384 U.S. 436, 443-45 (1966).

<sup>179</sup> 360 U.S. 315, 320-21 (1959) (Stewart, J., concurring).

<sup>180</sup> *Id.* at 321 (Stewart, J., concurring).

<sup>181</sup> *Id.* at 327 (Stewart, J., concurring). See GRANO, *supra* note 11, at 150.

<sup>182</sup> 377 U.S. 201, 205-06 (1964).

<sup>183</sup> See GRANO, *supra* note 11, at 150.

<sup>184</sup> Uviller, *supra* note 172, at 1155.

<sup>185</sup> 377 U.S. at 202.

<sup>186</sup> *Id.* at 202-03.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 206.

<sup>190</sup> *Massiah*, 377 U.S. at 207.

Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited after he had been indicted and in the absence of his counsel."<sup>191</sup> He opined that after the indictment "any secret interrogation of the defendant without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."<sup>192</sup> The majority was concerned with the effect on the defendant's representation if he is denied the protection of counsel "from the time of his arraignment until the beginning of his trial."<sup>193</sup> The court, however, noted the critical necessity of "consultation, throughgoing [sic] investigation and preparation," after the charges had been issued.<sup>194</sup>

The dissent, although strenuously objecting to the majority's position, did not discuss the timing of the right to counsel.<sup>195</sup> Justice White's dissent reflected his concern over the opinion's "effect on law enforcement's legitimate goal of maintaining its capacity to discover transgressions of the law and to identify those who flaunt it."<sup>196</sup> The dissent reasoned that this form of law enforcement did not "present an unconstitutional interference" with the Sixth Amendment right to counsel.<sup>197</sup> It concluded that the majority presented a "thinly disguised constitutional policy" against the use of evidence from the "mouth of the defendant"—a policy which the dissent believed has devastating consequences on law enforcement.<sup>198</sup>

Justice Stewart's definition of where the adversary process begins re-emerged in *Kirby v. Illinois*, in which his plurality opinion affirmed the defendant's robbery conviction.<sup>199</sup> The defendant's conviction was

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<sup>191</sup> *Id.* at 206.

<sup>192</sup> *Id.* at 205 (quoting *People v. Waterman*, 9 N.Y.2d 561, 565 (App. Div. 1961)).

<sup>193</sup> *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

<sup>194</sup> *Id.*

<sup>195</sup> *Massiah*, 377 U.S. at 205 (White, J., dissenting). The dissent contains no mention of the bright line established for the Sixth Amendment right to counsel.

<sup>196</sup> *Id.* at 207 (White, J., dissenting).

<sup>197</sup> *Id.* at 209 (White, J., dissenting).

<sup>198</sup> *Id.* (White, J., dissenting).

<sup>199</sup> 406 U.S. 682, 688–89, 691 (1972). Between *Massiah* and *Kirby*, Justice Stewart's Sixth Amendment analysis fell out of favor for a short time. See *Escobedo v. Illinois*, 378 U.S. 478, 488–90 (1964). In *Escobedo v. Illinois*, the majority found a Sixth Amendment right to counsel during the pre-indictment interrogation of a defendant. *Id.* The Court held that "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate and under the circumstances here the accused must be permitted to consult with his lawyer." *Id.* at 490. Stewart found himself in the dissent again, writing that the Sixth Amendment protections did not attach at any point prior to

based in part on a police station identification by the victim six weeks before indictment.<sup>200</sup> The defendant argued that he was entitled to counsel and that the police line-up violated his Sixth Amendment rights.<sup>201</sup>

Relying on the "explicit guarantees of the Sixth Amendment," Justice Stewart limited the accused's right to counsel to the "criminal prosecution."<sup>202</sup> He further recognized that there exists a starting point for the adversary process in criminal cases:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute and only then that the adverse positions of the government and defendant have solidified.<sup>203</sup>

Justice Stewart wrote that it is only after the indictment that the defendant "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."<sup>204</sup> He acknowledged that there must be a balancing of the rights of a suspect with the interest of society.<sup>205</sup> The postponement of the imposition of the adversarial process strikes such a balance.<sup>206</sup>

In subsequent cases, the Supreme Court made clear that it would not tolerate interrogation of any kind after the commencement of formal proceedings.<sup>207</sup> However, equally clear was its commitment to keep the adversary process out of the investigative stage.<sup>208</sup> In *Moran*

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the indictment. *Id.* at 493 (Stewart, J., dissenting). Later, in *Kirby*, the majority would limit *Escobedo* to its facts and conclude that *Escobedo* was a case involving the need for counsel to protect against the coercive nature of the police station during custodial interrogation. See GRANO, *supra* note 11, at 152.

<sup>200</sup> *Kirby*, 406 U.S. at 685-87.

<sup>201</sup> *Id.* at 684-86. The Fifth Amendment was not implicated because the Court had previously ruled that self-incrimination was not present in a line-up. *United States v. Wade*, 388 U.S. 218, 223 (1967).

<sup>202</sup> *Id.* at 690.

<sup>203</sup> *Id.* at 689.

<sup>204</sup> *Id.* Justice Stewart articulated the interest as "the rights of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime." *Id.*

<sup>205</sup> *Kirby*, 406 U.S. at 691.

<sup>206</sup> *Id.*

<sup>207</sup> See *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

<sup>208</sup> See *McNeil v. Wisconsin*, 501 U.S. 171, 178-79 (1991) (holding that Sixth Amendment is offense-specific and, therefore, contact with defendant on uncharged crimes is permitted);

*v. Burbine*, the Supreme Court re-asserted its rule that the right to counsel does not attach until the defendant is charged.<sup>209</sup> The defendant was charged with the murder of Mary Jo Hickey, who died of injuries inflicted to her skull by a lead pipe.<sup>210</sup> The defendant was arrested on a separate, unrelated burglary charge,<sup>211</sup> and after being informed of his *Miranda* rights and waiving them, he was questioned about the Hickey murder.<sup>212</sup> Although the defendant did not request an attorney, his sister had retained an attorney.<sup>213</sup> The attorney called the station and was told that the interrogation would not occur until the next day.<sup>214</sup> However, the interrogation occurred that night without the attorney being notified or the defendant being notified of the attorney's existence.<sup>215</sup> The defendant subsequently confessed and the confession was introduced at trial.<sup>216</sup>

In writing for the majority, Justice O'Connor found the defendant's waiver of his right to remain silent valid.<sup>217</sup> The Court held that the Fifth Amendment did not require that the police inform the suspect of the presence of a lawyer, nor inform the attorney of the correct time of the interrogation.<sup>218</sup> Justice O'Connor concluded that *Miranda* had struck a delicate balance between the interest of legitimate law enforcement and the protection of the defendant against coercion.<sup>219</sup> Adding additional obstacles to the investigative effort had a minimal benefit to the defendant but an extreme "cost to society's legitimate and substantial interest in securing admissions of guilt."<sup>220</sup>

Justice O'Connor then turned to the Sixth Amendment issue. The Supreme Court recognized that the purpose of the Sixth Amendment was to "assure that the prosecution's case encounters the crucible of meaningful adversarial testing."<sup>221</sup> She acknowledged that the Sixth Amendment is not a shield to protect a "suspect from the conse-

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Illinois v. Perkins, 496 U.S. 292, 297-99 (1990) (approving use of defendant's statements, made to undercover police officer posing as defendant's cell mate, on uncharged murder case).

<sup>209</sup> 475 U.S. 412, 429-30 (1986).

<sup>210</sup> *Id.* at 416.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 415.

<sup>213</sup> *Id.*

<sup>214</sup> *Moran*, 475 U.S. at 415.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 418.

<sup>217</sup> *Id.* at 421-22.

<sup>218</sup> *Id.* at 423-25.

<sup>219</sup> *Moran*, 475 U.S. at 426.

<sup>220</sup> *Id.* at 427.

<sup>221</sup> *Id.* at 430 (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

quences of his own candor."<sup>222</sup> The Court recognized that the Sixth Amendment requires only that the defendant have a zealous advocate when the adversary system is in place.<sup>223</sup>

The Court has recognized that the adversary process cannot begin prematurely. There is a delicate balance between the protection of individual rights and the rights of society to solve crimes and convict criminals. The search for truth, if not the only goal of our criminal justice system, must remain a paramount concern, at least in the investigative stage of a case.<sup>224</sup>

### III. THE ADVERSARIAL PROCESS AND THE ETHICS CODES

The ethics codes have traditionally been a guide to all attorneys. However, the investigative prosecutor must be guided during the investigation in a way that is consistent with the non-adversarial function that she is performing. It is necessary to explore the codes to see how they interact with the non-adversarial role of the investigating attorney.

#### A. *The Adversarial Nature of the Ethics Codes*

The American bar functioned for almost two centuries without any formal code of ethics.<sup>225</sup> In the early 1900s, the ABA began promulgating ethics codes which were subsequently adopted by the states as enforceable rules of the profession.<sup>226</sup> The ABA first codified the ethics rules in 1908. Called the *Canons of Professional Ethics*, they were in effect for sixty-two years.<sup>227</sup> In 1970, the ABA supplanted the *Canons* with the *Model Code of Professional Responsibility*, which was adopted in some form by every state within a few years.<sup>228</sup> The states' variations in the code were nominal, except in California which amended most of the disciplinary rules and completely eliminated the ethical considera-

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.* The Court determined the presence of a zealous advocate is necessary to "assure that the defendant is not left to his own devices." See also *United States v. Vasquez*, 675 F.2d 16, 16 (2d Cir. 1982) (holding that beginning of grand jury investigation does not constitute beginning of adversarial proceedings).

<sup>224</sup> See GRANO, *supra* note 11, at 6.

<sup>225</sup> Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 693 (1981); see also Amy Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 672 (1994) (indicating that ethics codes of today stem from creation of ABA in early 1900s).

<sup>226</sup> Mashburn, *supra* note 225, at 672.

<sup>227</sup> HALL, *supra* note 88, at 2-3.

<sup>228</sup> *Id.*

tions.<sup>229</sup> In 1977, the ABA began the task of rewriting the ethics rules and replacing them with the *Model Rules of Professional Conduct* ("Model Rules").<sup>230</sup> As of the fall of 1995, about thirty-eight states had adopted the *Model Rules* in some form.<sup>231</sup>

The rules of lawyer conduct throughout the United States are founded on the adversarial process.<sup>232</sup> As Professor Rhode noted, "In any system of justice, particularly one whose central premise is combative, participants must share a common understanding of the ground rules that constrain their partisanship."<sup>233</sup> The ethics codes serve as the ground rules for the legal profession. The rules assume the existence of an adversarial system and attempt to structure adversarial practice.<sup>234</sup> The regulations seek to maintain a balance between the adversaries and level the playing field between lawyers so that the "battle" can proceed.<sup>235</sup>

The professional codes regulate the relationships among the adversarial entities: the adverse parties, the zealous advocates, and the neutral tribunal.<sup>236</sup> The ethics rules enforce three ideals, which reflect the adversary nature of the code: confidentiality, loyalty and candor to the court.<sup>237</sup> The first two ideals define the relationship between the lawyer and his client and the third defines the relationship between the lawyer and the neutral fact finder.

The code specifies that the attorney's ultimate duty is to his client.<sup>238</sup> As part of his professional obligation, the lawyer must keep confidential information that he receives from his client. The basic rule is that "a lawyer shall not reveal any information relating to the representation of a client . . . ."<sup>239</sup> This ideal reflects the adverse nature of the system. Each adverse party is responsible for the presentation of

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<sup>229</sup> GILLERS & SIMON, *supra* note 103, at xvii.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Zacharias, *supra* note 69, at 53.

<sup>233</sup> Rhode, *supra* note 225, at 706.

<sup>234</sup> Zacharias, *supra* note 69, at 53. Professor Lawry discusses another assumption underlying the ethics code; there exists a "readily identifiable" client. See Lawry, *supra* note 57, at 625.

<sup>235</sup> *United States v. Guerrero*, 675 F. Supp. 1430, 1438 (S.D.N.Y. 1987) (discussing Model Rule 4.2 and noting that "the Disciplinary Rule is calculated to lend balance to an adversarial relationship").

<sup>236</sup> See *supra* text accompanying notes 123-46.

<sup>237</sup> Hazard, Jr., *supra* note 46, at 1246.

<sup>238</sup> Zacharias, *supra* note 69, at 53 (describing duties of lawyer as representing his clients zealously, remaining loyal at all times and keeping his clients' secrets).

<sup>239</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). Rule 1.6 contains exceptions,

his case and has no duty to help the other side.<sup>240</sup> The second ideal reflects the zealous nature of the advocate. The code requires that the lawyer remain loyal to his client at all times.<sup>241</sup> The lawyer must represent his client zealously within the bounds of the law.<sup>242</sup> As Professor Lawry noted, "[A]t the heart of the Code of Professional Responsibility [is the assumption] that the world is composed of two groups, clients and non-clients; clients are to be embraced and non-clients to be kept at arm's length."<sup>243</sup>

The third ideal reflected in the code is the requirement of candor to the court.<sup>244</sup> This candor serves to regulate the presentation of the evidence to the neutral tribunal in an adversary system. The fact finder is not permitted to investigate the facts but must rely on the presentation of the evidence by the adverse parties through their representatives.<sup>245</sup> As Professor Hazard explains, "the profession's basic rules paint a picture of protagonists who are faithful to client interest under a governing but qualified obligation of truthfulness in dealing with the courts."<sup>246</sup> This basic adversarial premise is clearly manifested in the anti-contact provisions of the rules.

### B. *The Anti-Contact Provision of the Ethics Codes*

The anti-contact rule prohibits attorneys from communicating with individuals who are represented by an attorney without the consent of the individual's attorney. The rule has a long history,<sup>247</sup> and has been adopted in almost every state in one form or another.<sup>248</sup> The

including 1) if the client "consents after consultation"; 2) "to establish a claim or defense on behalf of the lawyer"; and 3) the client fraud exception. *Id.*

<sup>240</sup> See *supra* text accompanying notes 133-38.

<sup>241</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983) ("loyalty is an essential element in the lawyer's relationship to a client"); CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1981) ("professional judgment of the lawyer should be exercised . . . solely for the benefit of his client and free of compromising influences and loyalties").

<sup>242</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983) (requiring lawyer to advocate "with zeal"); CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981) (lawyer's duty is to "represent his client zealously").

<sup>243</sup> Lawry, *supra* note 57, at 629.

<sup>244</sup> Hazard, Jr., *supra* note 46, at 1246.

<sup>245</sup> See *supra* text accompanying notes 137-47.

<sup>246</sup> Hazard, Jr., *supra* note 46, at 1249.

<sup>247</sup> *United States v. Jamil*, 546 F. Supp. 646, 651-52 (E.D.N.Y. 1982) (noting that American Bar has observed this rule since "time immemorial"), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983).

<sup>248</sup> Bruce A. Green, *A Prosecutor's Communications with Represented Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283, 284 (1988).

anti-contact provisions speak in adversarial terms and thereby appear to further the adversarial process.

### 1. The Language of the Anti-Contact Provisions

The anti-contact rule is found in essentially the same form in the *Model Rules* and the *Model Code of Professional Responsibility* ("*Model Code*").<sup>249</sup> *Model Rule* 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.<sup>250</sup>

The language of the anti-contact rule reflects the same adversarial components that are embodied in much of the code. The rule prohibits its attorneys who "represent a client" from communicating with persons about the "subject of the representation." All of these terms imply adversarial relationships. The courts have agreed.<sup>251</sup>

The court in *United States v. Ryans* recognized that the anti-contact provisions reflect an adversarial relationship and are misapplied to the investigation of a criminal case.<sup>252</sup> The Federal Bureau of Investigation and the Antitrust Division of the DOJ investigated Donald Ryans for alleged price fixing in violation of the Sherman Act.<sup>253</sup> During the course of the investigation, the prosecuting attorney directed the FBI to tape record three conversations between Ryans and a co-conspirator,

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<sup>249</sup> In 1995, the American Bar Association's Standing Committee on Ethics and Professional Responsibility changed the word "party" in the anti-contact provision to the word "person." See *infra* text accompanying notes 318–20.

<sup>250</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1995); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7–104 (A)(1) (1981) states:

A. During the course of his representation of a client a lawyer shall not:  
1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law so to do.

*Id.*

<sup>251</sup> See, e.g., *United States v. Ryans*, 903 F.2d 731 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); see also *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.) (pre-indictment tape recording does not implicate adversarial ethics problems addressed by *Code*), *cert. denied*, 452 U.S. 920 (1981); *United States v. Lemonakis*, 485 F.2d 941, 956 (D.C. Cir. 1973) (contours of representation must be defined in order to apply this ethical rule), *cert. denied*, 415 U.S. 989 (1974).

<sup>252</sup> 903 F.2d 731, 738–39 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990).

<sup>253</sup> *Id.* at 732.

who was cooperating with the government.<sup>254</sup> At the time of the taped conversations, the prosecuting attorneys knew that Ryans was represented by counsel.<sup>255</sup> Two and one-half years later, the government indicted Ryans for violating the Sherman Act by conspiring, with unnamed co-conspirators, to restrain and suppress competition in the provision of moving services, in unreasonable restraint of interstate commerce.<sup>256</sup> Ryans moved to suppress the statements contained in the tape recordings. The district court suppressed the recordings,<sup>257</sup> finding a violation of the anti-contact rule.<sup>258</sup>

The Tenth Circuit in *Ryans* reversed the district court allowing for the admission of the tape recordings into evidence.<sup>259</sup> The court stated that DR 7-104(A)(1) contemplated an adversarial relationship, which does not exist during the investigation of a criminal case.<sup>260</sup> The court held that the rule did not apply until the commencement of the criminal proceeding because the language of the rule contemplated an adversarial process.<sup>261</sup> The court reasoned that the terms "during the course of the representation of a client" and "on the subject matter of the representation" imply that an adversarial system is in place.<sup>262</sup> Further, the court defined a "party" as a litigant.<sup>263</sup> The term "party" implies that the positions of the advocates have been fixed.<sup>264</sup>

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<sup>254</sup> *Id.* at 734.

<sup>255</sup> *Id.* In the conversations, Ryans talked about his meetings with his attorney. *Id.*

<sup>256</sup> *Id.* at 735.

<sup>257</sup> *Ryans*, 903 F.2d at 733. Only two of the taped conversations were suppressed. *Id.* Although the third conversation was not suppressed, Ryans did not challenge the District Court's ruling. *Id.*

<sup>258</sup> *Id.* at 734.

<sup>259</sup> *Id.* at 741.

<sup>260</sup> *Id.* at 737. The court distinguished its earlier decision in *United States v. Thomas*, 474 F.2d 110 (10th Cir.), cert. denied, 412 U.S. 932 (1973), because the defendant's right to counsel had attached and the defendant was in custody. *Id.* The court noted, however, that the holding announced in *Thomas* "clearly contemplated an adversarial relationship." *Id.*

<sup>261</sup> *Id.* at 739.

<sup>262</sup> *Ryans*, 903 F.2d at 739 ("Although the code does not define these terms [representing a client], the rule appears to contemplate an adversarial relationship between litigants.").

<sup>263</sup> *Id.* The newly enacted *Model Rule* uses the term "person" instead of "party." Due to the recency of the change, however, no states have yet adopted the ABA amendment. For an example of a version of Rule 4.2 that reflects the ABA amendment but was enacted previously, see FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-4.2 (1994), which provides in part:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

*Id.*

<sup>264</sup> See Cramton & Udell, *supra* note 22, at 333; Uviller, *supra* note 172. See also *United States v. Partin*, 610 F.2d 1000 (9th Cir.), cert. denied, 446 U.S. 964 (1980) (finding that person remains "party" for purposes of anti-contact rule even after conviction, sentence and appeal).

The language of the anti-contact rule reflects its application to an adversarial process. The term "represent a client" implies that an adversarial system is in place. The lawyer is performing his required role in the adversary system: that of the "zealous representative."<sup>265</sup> This rule tempers the advocate's "zeal" by defining the behavior appropriate in performing his duty. The term implies that the client is identifiable, and that the attorney is representing one client.<sup>266</sup> In those codes that retain the term "party," the language of the rule denotes that it does not apply until the formal proceeding begins.<sup>267</sup> Finally, the rule prohibits only those conversations dealing with "the subject matter of the representation."<sup>268</sup> The term "subject matter of the representation" implies that the scope of the criminal case has been defined.<sup>269</sup> The accusatory instrument defines a criminal case.<sup>270</sup> As one district court noted: "[A] criminal case is nebulous until the time of the formal initiation of the prosecution."<sup>271</sup> The rule is deeply rooted in the adversarial model of dispute resolution.

## 2. The Objectives of the Anti-Contact Rule

In addition to the language of the rule implicating the formation of an adversarial relationship, the purposes asserted for the rule imply an adversarial model of fact finding. In *Papanicolaou v. Chase Manhattan Bank*, the United States District Court for the Southern District of New York stated that the anti-contact rule "guarantees fairness in the adversarial system."<sup>272</sup> Several purposes for the rule have been asserted, all stemming from the adversarial nature of a zealous advocate for each side of the controversy. Courts have recognized that the rule protects

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<sup>265</sup> See *supra* text accompanying notes 128-35.

<sup>266</sup> George Hazard stated, "The legal profession's rules of ethics provide what is perhaps worse than no guidance [on the issue of client-identity]. Instead of saying how or on what grounds the question of client identity is to be resolved, they assume it has somehow been resolved *ex ante*." Lawry, *supra* note 57, at 632.

<sup>267</sup> Cramton & Udell, *supra* note 22; F. Dennis Saylor, IV & Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459, 469 (1992).

<sup>268</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983).

<sup>269</sup> Cramton & Udell, *supra* note 22, at 335.

<sup>270</sup> *Lemonakis*, 485 F.2d at 955 (finding that in investigatory stage of case, contours of "subject matter of the representation . . . were less certain and thus less susceptible to the damage of artful legal questions"). Cf. *Illinois v. Perkins*, 476 U.S. 292, 298 (1990) (holding that Sixth Amendment attaches only to offenses found in charging instrument).

<sup>271</sup> *Gurreria*, 675 F. Supp. at 1438.

<sup>272</sup> 720 F. Supp. 1080, 1084 (S.D.N.Y. 1989); see also Amy Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473, 480 (1995).

the attorney-client relationship.<sup>273</sup> Others have suggested that the rule preserves the abilities of the lawyer to monitor the client's case.<sup>274</sup> The anti-contact provision, some argue, seeks to address the imbalance between the knowledge and skill of a lawyer and the knowledge and skill of the lay person.<sup>275</sup> The rule protects the client from entering into an "ill-considered settlement."<sup>276</sup> The rule is premised on the notions of "fairness in the adversarial system."<sup>277</sup>

Because the language and purpose of the rule reflect its basic adversarial premise, its application to the investigation of a criminal case is misplaced. Although *Model Rule 4.2* continues to be the source of substantial disagreement between prosecutors and the defense bar, the debate has failed to address the root of the problem. Instead, each side is attempting to define, and thereby control, access to information during the investigation of a case—one to gain access and the other to limit it.

### C. *The Debate Over the Initiation of the Adversary System*

The rhetoric of the anti-contact debate focuses on conflicting perceptions. The criminal defense bar perceives that the DOJ has attempted to exclude its lawyers from the rules of ethics. The DOJ perceives that the defense bar is more interested in subverting the process than in the "search for truth." The issue is whether the adversary system is appropriate in the investigation phase of a case.

The courts have routinely found the anti-contact rule to be applicable to prosecutors<sup>278</sup> and law enforcement authorities acting as the prosecutor's alter ego.<sup>279</sup> The courts, however, have not consistently

<sup>273</sup> See, e.g., *United States v. Batchelor*, 484 F. Supp. 812 (E.D. Pa. 1980).

<sup>274</sup> See, e.g., Neals-Erik William Delker, *Ethics and the Federal Prosecutor: The Continuing Conflict Over the Application of the Model Rule 4.2 to Federal Attorneys*, 44 AM. U. L. REV. 855, 858 (1994).

<sup>275</sup> See, e.g., Alafair S.R. Burke, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635, 1639 (1994); Uviller, *supra* note 172, at 1137.

<sup>276</sup> Saylor & Wilson, *supra* note 267, at 464.

<sup>277</sup> Papanicolaou, 720 F. Supp. at 1084.

<sup>278</sup> See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1991); *United States v. Hammad*, 858 F.2d 834, 838-40 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990); *United States v. Ferrara*, 847 F. Supp. 964, 968-70 (D.D.C. 1993), *aff'd*, 54 F.3d 825, 825 (D.C. Cir. 1995); *Jamil*, 546 F. Supp. at 652; see also *Ryans*, 903 F.2d at 735 ("It is now well settled that [the anti-contact rule] applies to criminal prosecution as well as civil litigation"). Some state courts have refused to apply the anti-contact rule. See, e.g., *State v. Richmond*, 560 P.2d 41, 46 (Alaska), *cert. denied*, 433 U.S. 915 (1977); *State v. Nicholson*, 463 P.2d 633, 636-37 (Wash. 1969).

<sup>279</sup> See *Hammad*, 858 F.2d at 837-38; *United States v. Pinto*, 850 F.2d 927, 934 (2d Cir.), *cert. denied*, 488 U.S. 932 (1988); *Jamil*, 707 F.2d at 645; *United States v. McNaughton*, 848 F. Supp.

applied the rule to the investigative stage of the case.<sup>280</sup> Prior to 1988, most courts held that the anti-contact provision was inapplicable to the pre-indictment investigation of a criminal case.<sup>281</sup> A few courts recognized that the anti-contact rule might be implicated in the pre-indictment stage of a criminal case but refused to find a violation.<sup>282</sup> However, in 1988, a New York district court found that the anti-contact rule had been violated and suppressed several statements made by a suspect during the investigation of a case.<sup>283</sup> A debate ignited over the use of the anti-contact provision to prohibit prosecutors from continuing an investigation through contacting represented suspects.

In *United States v. Hammad*, the Second Circuit reversed the district court's suppression of evidence based on a violation of the rule.<sup>284</sup> However, it failed to limit the reach of the anti-contact rule into the investigation of a case. The court refused to link the application of the anti-contact rule to Sixth Amendment jurisprudence, finding that the protections involved with the anti-contact provision were different than those afforded under the Sixth Amendment.<sup>285</sup> Additionally, the court was concerned that since the prosecutor could control the indictment process, she could delay the indictment in order to avoid the constraints of the rule.<sup>286</sup>

In responding to the impact of the *Hammad* ruling, the DOJ unfortunately focused the debate on the issues of the Supremacy Clause. Attorney General Dick Thornburgh penned a memorandum, answering what he termed the "expansive reading" given to the anti-contact rule, with what some would call his expansive reading of the authority of the DOJ.<sup>287</sup> After outlining the history of several recent cases dealing

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1195, 1202 (E.D. Pa. 1994); *cf.* *United States v. Massiah*, 307 F.2d 62, 66 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201 (1964).

<sup>280</sup> *See Ryans*, 903 F.2d at 739 (holding that rule does not apply to investigation); *Hammad*, 846 F.2d 854, 858 (same), *amended by* 858 F.2d 834 (2d Cir. 1988).

<sup>281</sup> *See, e.g., Sutton*, 801 F.2d at 1366; *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982); *Kenny*, 645 F.2d at 1327; *Lemonakis*, 485 F.2d at 954-56; *Burke*, *supra* note 275; *Karlan*, *supra* note 12, at 702-03; *Mashburn*, *supra* note 272, at 277.

<sup>282</sup> *See, e.g., United States v. Sam Goody, Inc.*, 518 F. Supp. 1223, 1224-25 n.3 (E.D.N.Y. 1981); *see also United States v. Weiss*, 599 F.2d 730, 740 (5th Cir. 1979) (indicating that government had "flirted with" violation of anti-contact rule by contacting criminal suspect, knowing that he was represented by counsel).

<sup>283</sup> *Hammad*, 858 F.2d at 841.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 839.

<sup>286</sup> *Id.*

<sup>287</sup> Attorney General Dick Thornburgh, Memorandum to all Justice Department Litigators Re: Communication with Persons Represented by Counsel at 1, *In re Doe*, 801 F. Supp. 478, 488-93 (D.N.M. 1992) [hereinafter Memo]. *See Mashburn*, *supra* note 268, at 517 (discussing

with the application of the rule of conduct in a criminal case, Thornburgh announced the DOJ's position.<sup>288</sup> He indicated that although the states could regulate the ethical conduct of those attorneys who they license, the states' authority was limited to those areas which did not conflict with federal law.<sup>289</sup> The memorandum exempted investigation from the ambit of the anti-contact rule because the prosecutor is "authorized by law" to conduct undercover investigations,<sup>290</sup> and the federal authority to direct federal investigations preempts any state rule.<sup>291</sup>

The immediate response from the criminal defense bar and the ABA was to respond to the preemption assertion.<sup>292</sup> The ABA House of Delegates overwhelmingly approved a resolution that addressed the attempt by the DOJ to "unilaterally" exempt its lawyers from the ethics codes that regulate all lawyers.<sup>293</sup> One ABA delegate deemed the position "sheer governmental arrogance."<sup>294</sup>

Some courts were equally appalled by the actions of the Attorney General.<sup>295</sup> In *United States v. Lopez*, the court called the Attorney

questionable authority of DOJ to regulate attorney ethics in light of derivative admissions requirements).

<sup>288</sup> Memo, *supra* note 287, at 2-3.

<sup>289</sup> *Id.* at 3.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> See Nancy J. Moore, *Intra Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515, 517 (1992). Tom Watson, AG Decrees Prosecutors May Bypass Counsel, LEGAL TIMES, Sept. 26, 1989, at 1 (quoting one lawyer who proclaimed Thornburgh memo was "a declaration of war"); Tom Watson, *Thornburgh Memo Has Defense Bar Up In Arms*, MANHATTAN LAW., Oct. 3, 1989, at 4 (Michael Bender, Chairmandelect of ABA's Criminal Justice Section accused Attorney General of "playing footloose with the traditional rules"); ABA STANDING COMM. ON PROFESSIONAL DISCIPLINE ET AL., REPORT TO HOUSE OF DELEGATES 3 (Feb. 1990) (claiming that federal prosecutors have attempted to exempt themselves from "time-honored" ethics rules). See also Richard Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 JUDICATURE 290 (1991) (Attorney General responded to criticism leveled at him by accusing defense bar of using *Model Rules* as defense tactic to protect their clients).

<sup>293</sup> 6 Laws. Man. on Prof. Conduct (ABA/BNA) 25, 27 (1990). The full text of the resolution states:

- That it is the policy of the American Bar Association
  - a. That Department of Justice lawyers may not be given blanket exemption from the requirements of Rule 4.2 of the ABA Model Rules of Professional Conduct or Disciplinary Rule 7-104(A)(1) of the predecessor ABA Model Code of Professional Responsibility as adopted by individual jurisdictions.
  - b. To oppose any attempts by the Department of Justice unilaterally to exempt its lawyers from the professional conduct rules that apply to all lawyers under the applicable rules of the jurisdictions in which they practice.

*Id.*

<sup>294</sup> Cramton & Udell, *supra* note 22, at 321.

<sup>295</sup> There are only a few cases that addressed the Thornburgh memorandum. See, e.g., *United States v. Ferrara*, 847 F. Supp. 964 (D.D.C. 1993); see also *In re Doe*, 801 F. Supp. at 478, 480

General's attempt to exempt DOJ attorneys from the application of this rule "an arrogation of power" and a violation of the separation of powers doctrine.<sup>296</sup> The *Lopez* court thoroughly analyzed the Thornburgh Memorandum, denouncing the memorandum as "preposterous"<sup>297</sup> and "nothing less than a frontal assault on the powers of the court."<sup>298</sup>

The debate became a tug of war over who should regulate rather than what should be regulated.<sup>299</sup> Finally in 1994, the DOJ promulgated federal regulations defining the role of the prosecuting attorney in contacting represented parties.<sup>300</sup> During the comment period, comments were received from a variety of sources.<sup>301</sup> Many of the comments addressed the authority issue.<sup>302</sup> The federal regulations which were enacted attempted to address the adversarial roles versus the non-adversarial roles of government attorneys. First, the regulations distinguish federal attorneys by the nature of their practice. The new regulations only applied to those attorneys involved in law enforcement and not all government attorneys.<sup>303</sup> Second, the regulations differentiate the role of the federal prosecutor based on the status of the case. The federal prosecutor's role differs under the regulations depending on whether she is dealing with a named defendant, identified as a "represented party," or an individual who has not been charged, identified as a "represented person."<sup>304</sup> Finally, the regulations distinguished the adversarial activities of the federal prosecutor that look like prosecution from those non-adversarial activities that are part of the investigation. The regulations permit the prosecutor to contact a represented

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(condemning Attorney General for displaying "an arrogant disregard" for ethics of legal profession); *United States v. Adonis*, 744 F. Supp. 336, 347 n.50 (D.D.C. 1990) (finding that memorandum by Attorney General is not superior to rules issued by federal court).

<sup>296</sup> 765 F. Supp. 1433, 1455 (N.D. Cal. 1991). This case dealt with an attorney contacted by a represented defendant after the indictment. *Id.* at 1455.

<sup>297</sup> *Id.* at 1453.

<sup>298</sup> *Id.* at 1463.

<sup>299</sup> For a comprehensive summary of the debate over the Memo, see Mashburn, *supra* note 272, at 487-88.

<sup>300</sup> The federal regulations were first introduced in 1992. After President Clinton was elected, however, Attorney General Janet Reno postponed the effective date of the regulation so that she could review the regulations and obtain additional comments. In addition, comment periods were extended to obtain more response. For a complete history of the rule, see *Final Justice Department Rule on Communications with Represented Persons*, 55 Crim. L. Rep. (BNA) 2269 (1994) (discussing 59 Fed. Reg. 39,910 (1994) (to be codified as 28 C.F.R. pt. 77)) [hereinafter *Final Rule*].

<sup>301</sup> *Id.* at 2272.

<sup>302</sup> *Id.* One comment read, "I do not know why it is that the department somehow thinks it can exempt its attorneys from the rules of conduct that all of the lawyers must abide by." *Id.*

<sup>303</sup> *Id.* at 2274.

<sup>304</sup> *Id.* at 2278.

individual either directly or through another person during the course of an investigation. However, the regulations prohibit prosecuting attorneys from entering into conversations of an adversarial nature, such as plea negotiations or immunity agreements, without the consent of the lawyer.<sup>305</sup>

The ABA responded to the regulations with an amendment to the anti-contact provision.<sup>306</sup> In the report that accompanied the amendment to Model Rule 4.2, the ABA indicated that the model rule was intended to apply to the investigation of the case.<sup>307</sup> The amendment sought to overrule those courts that found that the rule did not apply to the investigation of a criminal case.<sup>308</sup> The ABA's intention was to bring application of this adversarial code provision into the investigation phase of the case and hamper the prosecutor's neutral fact finding process.

The result of these actions leaves the investigating attorney in a quandry. The DOJ encourages its attorneys to be involved in the pre-indictment investigation.<sup>309</sup> However, investigating attorneys may face sanctions or disbarment based on actions permissible in one state but impermissible in another.<sup>310</sup> The federal prosecutor is still without guidance as to the aspects of the non-adversarial role she must play in the investigation of the case.

#### IV. NON-ADVERSARIAL ETHICS PROVISIONS FOR INVESTIGATING ATTORNEYS

If the adversarial system does not apply to the investigation of the case, then the current professional responsibility codes, premised on the adversarial process, provide no direction to an investigating attorney. Yet, the prosecutor is in need of guidance and regulation in the important area of investigations.<sup>311</sup> The current ethics codes do not

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<sup>305</sup> *Final Rule*, *supra* note 300, at 2278.

<sup>306</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1995) (amended Aug. 8, 1995); *see* Model Rule 4.2, 64 U.S.L.W. 2097 (Aug. 15, 1995).

<sup>307</sup> Model Rule 4.2, 64 U.S.L.W. 2097.

<sup>308</sup> *Id.*

<sup>309</sup> *Final Rule*, *supra* note 300, at 2270.

<sup>310</sup> Florida has made it clear that it intends to enforce its bar's rule regardless of the DOJ regulations. Gary Blankenship, *Ethics Panel Affirms Opinion on Federal Prosecutors*, FLORIDA B. NEWS, July 15, 1995, at 26 (Florida Bar's Professional Ethics Committee rejected a request to compromise on the issue and reaffirmed the earlier ethics opinion which prohibited federal prosecutors from contacting represented defendants. *Id.*

<sup>311</sup> Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 873-79 (1995) (suggesting that financial incentives, not guidance, are needed to encourage appropriate prosecutorial behavior).

recognize the different role played by the prosecuting attorney when she is investigating a case and fail to provide any instruction other than to mandate that the prosecutor "do justice."<sup>312</sup>

### A. *The Need for Specific Provisions*

One commentator stresses that "it is important for the courts, scholars, bar associations and the press to keep reminding prosecutors that they must comply with an entirely different set of standards than those applicable to the defense bar."<sup>313</sup> If this is true, then clear standards must be delineated.<sup>314</sup> The idea that ethics codes need to "acknowledge that norms of professional conduct may vary depending on the role of the attorney" is not a novel idea.<sup>315</sup>

There are several benefits to a code that specifically addresses the ethical problems unique to the investigating attorney. Specific regulations that proscribe proper conduct make enforcement easier and allow offended parties to explicitly identify misconduct based on the specified rules. The new requirements would allow for the enforcement of non-adversarial standards. Although prosecutors are currently subject to disciplinary procedures,<sup>316</sup> many scholars have lamented the lack of enforcement against federal prosecutors.<sup>317</sup> One reason that

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<sup>312</sup> Zacharias, *supra* note 3, at 249 n.83 (noting that ethics codes fail to identify unique responsibilities and issues facing prosecuting attorney). For an interpretation and criticism of this broad undefined standard, see *id.* at 249.

<sup>313</sup> LAWLESS, *supra* note 4, at xv (quoting Alan M. Dershowitz).

<sup>314</sup> The 1958 ABA report concerning professional responsibility stated that the prosecutor should not use the standards of an attorney appearing on behalf of a client as a guide to her conduct. *Professional Responsibility: Report of Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958).

<sup>315</sup> Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969, 975 (1992); see generally GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* (1978); see also Mashburn, *supra* note 225, at 666 (noting that "fundamental differences among lawyers stemming from a variety of factors, including functional specialization . . . flourish beneath a deceptively cohesive surface").

<sup>316</sup> See, e.g., *United States v. Ferrara*, 847 F. Supp. 964 (D.D.C. 1993); *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992); see also *United States v. Kelly*, 550 F. Supp. 901, 902 (D. Mass. 1982) (applying Massachusetts law but imposing no discipline); *Waters v. Barr*, 747 P.2d 900, 902 (Nev. 1987) (federal prosecutor was subject to state law even though not licensed in that state).

<sup>317</sup> See GERSHMAN, *supra* note 85, at 1-51 (attorney disciplinary sanctions are so rarely imposed as to make their "use virtually a nullity"); LAWLESS, *supra* note 4, at 599 (disciplinary sanctions against prosecuting attorneys are the exception, not the rule); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 673 (1972) ("courts have sometimes exhibited a strange hesitancy to subject prosecutors to the rules that are applicable to other lawyers").

Additionally, commentators have noted that on the rare occasions when prosecutors are disciplined, the sanctions imposed amount to little more than "a slap on the wrist." See, e.g., *Price v. State Bar*, 30 Cal. 3d 537 (1982) (upholding suspension of Price for two years despite that Price was guilty of lying, deceit, fabrication of evidence, collusion with defendant and extended

prosecutors are rarely disciplined is that the standards which guide their behavior are so general.<sup>318</sup> Investigating prosecutors should be required by the ethics standards of their profession to undertake the role of neutral judge of the facts.

Specific ethics regulations are essential because of the lack of an adversary in the investigative stage.<sup>319</sup> The adversary system has the by-product of keeping the government in check.<sup>320</sup> The lack of the adversary system during the investigation of a case should not be seen as an "unleashing" of the prosecutorial forces, unfettered by rule or ruler. Ethics regulation will control the prosecutor in the investigation stage, whether through internal or external restraints.<sup>321</sup>

The greatest benefit of these additional code provisions is not in their enforceability by disciplinary bodies, but in their impact on a prosecutor's self reflection.<sup>322</sup> The proposed code provisions would recognize the distinct non-adversarial role of the investigating attorney. Recognition will sensitize prosecutors to the important issues they must consider in exercising their discretion. The creation of clear rules will force investigating attorneys to consider the issue of impartiality, an issue they may have previously failed to consider.<sup>323</sup>

Additional ethics provisions will encourage right thinking and right behavior in other ways. The most obvious is that it can instruct prosecutors as to the specific ethics behavior or responsibility required. Although the area of investigation and charging is largely discretion-

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cover-up), noted in Richard Rosen, *Disciplinary Sanctions against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 728 (1987) ("It strains the imagination to conceive of more egregious conduct than in Price's case."); *In re Carpenter*, 808 P.2d 1341 (1991) (prosecutor was merely censured for using false testimony at trial); see also *Va. Court Criticized for Refusing to Disbar DA*, NAT'L L.J., August 17, 1987, at 5 (reporting that Virginia Supreme Court reversed disbarment of prosecutor for clear *Brady* violation and that court held that the defendant was not prejudiced because witness had contacted the defendant himself).

<sup>318</sup> Zacharias, *supra* note 69, at 48. Other reasons asserted for the lack of discipline include a hostile attitude on the part of the judiciary toward claims of prosecutorial misconduct based on the relationship of the judiciary to the prosecutors' office, difficulty in obtaining evidence to successfully pursue violations, and a lack of expertise in the criminal law area which causes disciplinary bodies to be reluctant to judge prosecutorial conduct. Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement*, 8 ST. THOMAS L. REV. 69, 70 (1995).

<sup>319</sup> Fisher, *supra* note 74, at 225 (recognizing that presence of adversarial safeguards allows prosecutor to act more like advocate and less like impartial minister of justice).

<sup>320</sup> See *supra* text accompanying notes 171-78.

<sup>321</sup> See Deborah L. Rhode, *supra* note 225, at 707 (ethics codes "promote the appearance and reality of justice, both of which ultimately rebound to the benefit of the profession").

<sup>322</sup> *Id.* at 709 (noting benefits of professional codes "in narrowing attorney's capacity for self-delusion about the propriety of a given action").

<sup>323</sup> Zacharias, *supra* note 3, at 256 n.99.

ary, "[a]s 'professionals,' prosecutors probably are capable of exercising discretionary judgment in a manner consistent with general norms of behavior."<sup>324</sup> Professor Zacharias suggests that a key component of any role-defining regulation is its ability to cause introspection.<sup>325</sup> The key to an effective code section is that it guides attorneys to select appropriate behavior.<sup>326</sup>

Further, code sections specifically addressing investigating attorneys would allow prosecutors a mechanism to refuse to perform questionable conduct imposed upon them by supervisors.<sup>327</sup> For example, the prosecutor can point to a provision that clearly requires her to seek all evidence when sending an investigating officer back to obtain additional information.<sup>328</sup> Specific provisions that address the issues facing prosecuting attorneys would serve to reinforce the resolve in most prosecutors to do the right thing.<sup>329</sup>

### B. *The Initiators of the Provisions*

The pressing issue that now faces federal prosecution is the regulation of investigations by local bars that have no regulations to cover the non-adversarial activities of federal prosecutors.<sup>330</sup> The problem needs to be solved by the adoption of uniform rules in this area. Although the ABA has traditionally fashioned standards that were later adopted by the individual states,<sup>331</sup> in the area of federal criminal prosecution, the ABA is not the best choice. The DOJ seems the natural place to look.

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<sup>324</sup> *Id.* at 258.

<sup>325</sup> *Id.*

<sup>326</sup> Professor Steele framed the question regarding ethics codes as "not how to eliminate discretion but how to control it so as to avoid the unequal, the arbitrary, the discriminatory, and the oppressive." Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 966 (1985).

<sup>327</sup> Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. SCH. L. REV. 177, 178 (1995).

<sup>328</sup> Professor Zacharias stressed the importance of this code function from the defense attorney's perspective, noting that code sections that are specific allow the defense attorney to freely refuse to perform unethical acts at the client's request. Zacharias, *supra* note 3, at 267; see also Rhode, *supra* note 225, at 709.

<sup>329</sup> Norton, *supra* note 13, at 303.

<sup>330</sup> ABA Model Rule 4.2, 1995 Amendments Report clearly indicates that the amendment was intended to apply to the "investigative activities" of prosecutors. Eric Rieder, *Evidence from the Opposition*, 22 LITIG. 17, 22 (1995).

<sup>331</sup> See *supra* text accompanying notes 234-40; see also Mashburn, *supra* note 225, at 657 (noting dominance and control ABA now exercises over regulation of lawyers based on implicit delegation by states to ABA to promulgate rules); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 380 (1994) (discussing limited experimentation by states in devising their own rules).

Recently, commentators have questioned the non-partisan nature of the ABA and its expertise in fashioning ethics rules.<sup>332</sup> In addition to the commentators, prosecutors have traditionally viewed the ABA as an arm of the criminal defense bar.<sup>333</sup> The prevailing prosecutorial perspective is that the ABA often adopts rules that create "a litigation advantage."<sup>334</sup> It is difficult to imagine that this perception would change if the ABA adopted additional constraints on prosecutors.

The adoption by the ABA of the investigative regulations as model rules does not ensure that they will become law. The states are free to fashion different rules or to reject the rules altogether.<sup>335</sup> Therefore, the rules are not guaranteed to be uniform in their adopted form. Further, the time and expense of adoption of the rules would lead to a great time lapse between their production and adoption. The issues raised by the lack of guidance for, and control of, investigating attorneys is a pressing issue that needs to be quickly and efficiently solved.

Finally, in light of the reaction to the protracted debate over *Model Rule 4.2*, the ABA appears unwilling to acknowledge the need for a separate set of regulations that address this issue. On several occasions, the ABA has stated their position that the model code as written is sufficient.<sup>336</sup>

The DOJ should be the entity to begin the creation of prosecution standards for the investigating attorney. Since the DOJ is the supervi-

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<sup>332</sup> See JETHRO K. LIEBERMAN, *CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT* 216-17 (1978) (noting that ABA could never act as neutral body in drafting ethics provisions because it cannot overcome "the conflict of interest inherent in balancing self-interest against public and client interest"); Mashburn, *supra* note 225, at 673 (concluding that "a privileged, powerful group of elite lawyers continues to control the collective identity of the occupational class"); Saylor & Wilson, *supra* note 267, at 461 (noting that of 400,000 ABA members, about 3,800 identify themselves as prosecutors); see also Cramton & Udell, *supra* note 22, at 361 (criticizing adoption of attorney-subpoena rules as "the use of a state forum in which the bar has special privilege and political influence to override longstanding principles of federal constitutional, substantive and procedural law").

<sup>333</sup> See John Flynn Rooney, *Thornburgh Says ABA Rules Hurt Prosecutor's Efforts*, CHI. DAILY L. BULL., Aug. 6, 1990, at 1 (summarizing Justice Department's position on ABA and criminal bar for attempting to use ethics rules to stymie criminal investigations); Tom Watson, *Prosecutors See ABA as Arm of Defense Bar*, LEGAL TIMES, Sept. 17, 1990, at 6 (indicating that prosecutors view new ABA standards as exemplifying ABA's partisan attitude toward them).

<sup>334</sup> Donald Wise, *Are Federal Prosecutors Beyond State Discipline?*, N.Y. L.J., Mar. 8, 1991, at 1, 2.

<sup>335</sup> For example, most states that adopted the ABA's *Model Rules* changed individual provisions. See Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678, 680 (1986).

<sup>336</sup> The ABA has indicated its belief that "[t]o the extent that there may be reasons to apply a different rule to prosecutors . . . the Department of Justice should seek to amend the Model Rules and the individual jurisdictional rules traditionally based on those rules." Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515, 525 n.63 (1992).

ing entity for all federal prosecutors, the implementation of ethics rules which govern conduct during the investigation of a case would solve the current problem of splintered regulation. Congress has already proposed legislation that would delegate the regulation of federal prosecutors to the DOJ,<sup>337</sup> and the DOJ has the expertise and knowledge to undertake these issues. Additionally, a code devised by federal prosecutors may be more readily received by the prosecution community at not only the federal level but the state level as well.

### 1. The Job Has Been Assigned

In the proposed Crime bill of 1995, Congress delegated the authority to regulate federal prosecutors to the DOJ. Congress mandated that "[n]otwithstanding the ethical rules or the rules of the court of any State, Federal rules of conduct adopted by the Attorney General shall govern the conduct of prosecutors in the courts of the United States."<sup>338</sup> This legislation assigns the governing of the conduct of federal prosecutors, which now number in the thousands,<sup>339</sup> to the DOJ.

If passed, such legislation would put the issues of prosecutorial regulation into the hands of many career prosecutors. It would afford the DOJ the opportunity to demonstrate its ability and willingness to adopt an even-handed code of ethical conduct for prosecutors. The pre-indictment investigative stage of a criminal case has not been addressed in the state codes, which are adopted from the ABA models.<sup>340</sup> This area is ripe for the creation of a code that could guide and influence state regulation of investigating prosecutors.

The need for uniformity in the regulation of attorneys in the federal system is unquestionable.<sup>341</sup> Because the DOJ supervises all

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<sup>337</sup> S. 3, 104th Cong., 1st Sess. § 502 (1995).

<sup>338</sup> *Id.*

<sup>339</sup> At the close of fiscal year 1994, the United States Attorneys' offices employed 4323 attorneys. U.S. DEP'T OF JUSTICE, STATISTICAL REPORT: UNITED STATES ATTORNEYS' OFFICES FISCAL YEAR 1994, at 1 (1995).

<sup>340</sup> Even the ABA *Standards for Criminal Justice* fail to guide the prosecutor in conducting an investigation because they fail to recognize the magnitude of the prosecutor's involvement in the complex investigation. ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.1 (1992) ("A prosecutor ordinarily relies on the police and other investigative agencies for investigation of alleged criminal acts.").

<sup>341</sup> For a discussion on proposals to adopt a comprehensive federal code of professional responsibility, see Zacharias, *supra* note 69, at 335. See generally Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics*, 29 GA. L. REV. 137 (1994); Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 125 (1991).

federal prosecutors, regulations adopted by the DOJ would apply to all federal prosecutors and thereby affect uniformity.

## 2. Skills and Expertise to Undertake the Task

The role of investigating attorney is a relatively new concept,<sup>342</sup> a role that is most familiar to the DOJ as the supervising agency.<sup>343</sup> The DOJ has already established some regulations regarding the conduct of federal prosecutors, although none of the regulations deal with their ethical obligations.

The United States Attorney's Manual contains the beginnings for the proposed provisions. Although the Manual is itself more of a "how to" document, it identifies some role definitions. An example of an attempt to define the prosecutor's role is in the area of her relationship with the grand jury. The Manual defines the role of the prosecutor as follows:

In his/her dealings with the grand jury, the prosecutor must always conduct himself/herself as an officer of the court whose function is to insure that justice is done and that guilt shall not escape nor innocence suffer. . . . The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he/she must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.<sup>344</sup>

This provision is an example of a currently existing rule within the DOJ that should become part of a code of conduct enforceable against the investigating attorney. This section indicates that the DOJ has the expertise to define a non-adversarial role for the investigating prosecutor.

Additionally, portions of the United States Attorney's Manual exemplify the DOJ's ability to list factors to guide the prosecuting attorney's decision-making process. For example, in the area of immunity, the Manual does not seek to set forth specific regulations or mandate specific conclusions. Rather, the Manual seeks to "focus the decision-maker's attention to certain factors."<sup>345</sup> This is the kind of provision

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<sup>342</sup> See *supra* text accompanying notes 78-93.

<sup>343</sup> See generally Moore, *supra* note 336, at 524 (noting that in investigative stage, prosecutor is acting more as government official and less like lawyer representing client).

<sup>344</sup> U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-11.020 (1994).

<sup>345</sup> The factors to be considered are:

which should be contained in the investigating attorney's code of ethics; it is an example of the DOJ's institutional ability to create meaningful regulation to guide, instruct and focus the prosecuting attorney to the issues underlying the exercise of her discretion.

Further, the DOJ has demonstrated its ability to consider differing views in defining its ethics regulations.<sup>346</sup> A clear example is the procedure used to adopt the regulations defining communications with represented parties. Although the DOJ originally published the contents of its regulations on communications with represented persons in the Federal Register on July 26, 1993,<sup>347</sup> the regulations did not become law until August 4, 1994, and were totally rewritten.<sup>348</sup> During the course of the adoption of those regulations, the DOJ extended the comment period twice and republished different regulations on three occasions. Attorney General Janet Reno created a working group comprised of individuals representing different viewpoints to create the final rule.<sup>349</sup> Such a procedure could be adopted to look at the larger questions regarding the regulation of the investigating attorney.

### 3. More Acceptable to the Prosecuting Community

While rules adopted by the DOJ will obviously directly affect the behavior of the federal prosecutors, they will also have a persuasive effect on state and local prosecutors. Although state officials would not initially be governed by these regulations, the concepts of neutrality

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A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;

B. The value of the person's testimony or information to the investigation or prosecution;

C. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;

D. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his/her history with respect to criminal activity;

E. The possibility of successfully prosecuting the person prior to compelling him/her to testify to produce the information; and

F. The likelihood of adverse collateral consequences to the person if he/she testifies or provides information under a compulsion order.

*Id.* § 9-23.210.

<sup>346</sup> Mashburn, *supra* note 272, at 492 (noting that final rule appeared to "be a good faith effort at a thoughtful and reasonable accommodation of the competing interests").

<sup>347</sup> The full text of the rule with accompanying summary and supplemental information is published in *Final Rule*, *supra* note 300, at 2269.

<sup>348</sup> Mashburn, *supra* note 272, at 492 (indicating that rule subsequently enacted was "substantially revised version of the proposed communications regulation").

<sup>349</sup> *Attorney-Client Privilege, Private Attorneys, Reno Meet to Discuss DOJ Proposal on Ex Parte Contacts*, 60 Fed. Cont. Rep. (BNA) 15 d4 (Oct. 18, 1993).

and impartiality could act as a guide to the states.<sup>350</sup> Ethics codes will encourage self-constraint by stimulating attorneys to consider issues that had not been previously explored in the day-to-day rush from one case to another. Thoughtful ethics standards that actually address the issues affecting prosecutors will cause self-evaluation. The impact of the code provisions in encouraging self-evaluations depends on the perception of the prosecutors that the rules are fair. They must balance the legitimate rights of defendants against the legitimate interests in effective law enforcement. Code provisions created by a law enforcement entity are more likely to be accepted by prosecutors at both the state and federal level than those created by an entity that is perceived to be an arm of the defense bar.

### C. *Some Suggested Non-Adversarial Provisions*

In drafting the new provisions of the ethics codes, the DOJ must include both general and specific rules.<sup>351</sup> General sections must define the role played by the prosecutor as a non-adversarial, impartial fact finder. The specific sections must regulate prosecutor conduct and constrain the behavior of over-zealous prosecutors during an investigation.

#### 1. A Definition of the Investigating Attorney's Mission

The code must contain a general definition of the role played by the investigating prosecutor. These types of provisions are "idealized and hortatory in nature."<sup>352</sup> These provisions are likely to direct the investigating attorney's attention to the fact that her role is not to advocate, but to discover facts with a detached evaluation. The general provisions should act as a reference point through which all of the subsequent provisions are viewed.

Within that definition, the drafters must include the role of truth-seeker. Judge Frankel aptly noted that lawyers never talk of loyalty to truth in the same laudatory terms as they exalt loyalty to the client.<sup>353</sup>

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<sup>350</sup> As stated earlier, although I am discussing federal prosecutors and the regulation of federal investigating attorneys, my proposal would contemplate the adoption, in the future, by state bar associations of regulations which recognize the non-adversarial role played by an attorney in the pre-charging stage of a case. It is not a stretch of the imagination for a state prosecutor of the future to find more of her resources devoted to pre-charging conduct and to become intertwined into the investigation of crimes much as the federal prosecutor has slowly become more involved in that stage of the crime.

<sup>351</sup> For a discussion on the comparative worth of general versus specific regulations, see Zacharias, *supra* note 3, at 223.

<sup>352</sup> Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 378 (1994).

<sup>353</sup> In discussing Lord Brougham's famous words regarding his loyalty to his client, Judge

In the investigation of a case, the seeking of truth must be paramount to the investigating attorney.<sup>354</sup> As Justice Jackson noted, a prosecutor must "search for truth, not victims."<sup>355</sup>

For purposes of illustration, I would suggest to the drafters a provision which contains the following language:

A prosecutor, during the pre-indictment stage of a case, should act as an impartial fact finder, and not as an advocate. In that role, the prosecutor should:

- (a) Actively seek all evidence, whether the evidence is favorable or unfavorable to any specific individual.
- (b) Exercise independent judgement in determining the existence of facts and the interpretation of those facts.
- (c) Assure that all investigations which are being conducted under the attorney's supervision are conducted in accordance with the safeguards of the Bill of Rights as implemented by legislation and the decisions of the courts.<sup>356</sup>
- (d) Evaluate, prior to presentation to a judicial official, all search and arrest warrant applications and affidavits, and assure that all exculpatory evidence is present in the affidavit.
- (e) Fairly and impartially exercise the discretion to investigate any person, and not improperly favor or discriminate against any person.

Each part of the provision looks to direct the prosecutor's attention to the importance of neutrality at this stage of the case. Although each of these provisions are covered by other rules, it is important that they be included in the provisions regarding the non-adversarial investigative attorney in order to highlight the areas where impartiality is important.

## 2. Specific Provisions Addressing the Investigator's Non-Adversarial Behavior

In addition to the general definition section regarding the investigator, specific issues that concern the investigating prosecutor should be addressed. For illustration purposes, I suggest only some of the areas

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Frankel noted, "There are, I think, no comparable lyrics by lawyers to The Truth." Frankel, *supra* note 116, at 1036.

<sup>354</sup> In saying that the search for truth must be paramount, that is not to suggest that the prosecutor should ignore the law and the defendant's rights in the search. However, it does mean that, within the bounds of the constitutional law, the prosecutor should examine the evidence to determine what actually happened, not just find evidence that supports a predetermined result.

<sup>355</sup> Jackson, *supra* note 92.

<sup>356</sup> STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION Standard 3-3.1 cmt. (1992).

in which provisions should be adopted. Those areas include constraints on contacting represented and unrepresented individuals, the factors to be considered prior to beginning an investigation (including prohibitions, if any, against targeting individuals rather than crimes), and provisions which enumerate the obligation of the prosecutor to protect the basic rights of individuals regardless of the anticipated use of their testimony.

The area of contacting represented persons has been dealt with by the DOJ in the adopted code of regulations.<sup>357</sup> The portions of the regulations which deal with the pre-indictment stage of a case should be included in the ethics code sections for investigating attorneys. The distinctions between adversarial actions of the investigating attorney, such as discussions regarding agreements, and non-adversarial actions, such as conducting undercover investigations, should be maintained and expanded to include all conversations dealing with the settlement of the case. Additionally, a section should be created which deals with regulations regarding contact with unrepresented individuals. This section of the provisions should recognize the effect the prosecutor's status may have on the individual's ability to communicate and reflect the prosecutor's obligations to treat the individual fairly, regardless of status.

The drafters of these non-adversarial code provisions should enumerate a list of factors that a prosecutor should consider when undertaking an investigation. Several such lists already exist, including the ABA Criminal Standards<sup>358</sup> and the National District Attorney Standards.<sup>359</sup> No standards currently exist, however, regarding the investigation stage. Considerations should be given to the distinction between the charging decision and the decision to pursue an investigation. At the time of charging, the prosecutor has substantially more informa-

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<sup>357</sup> See *supra* text accompanying notes 306-10.

<sup>358</sup> The *Standards* set forth the following factors as illustrative:

1. The prosecutor's reasonable doubt that the accused is in fact guilty;
2. The extent of the harm caused by the offense;
3. The disproportion of the authorized punishment in relation to the particular offense or offender;
4. Possible improper motives of a complainant;
5. Reluctance of the victim to testify;
6. Cooperation of the accused in the apprehension or conviction of others; and
7. Availability and likelihood of prosecution by another jurisdiction.

STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION Standard 3.1 (1992).

<sup>359</sup> See NATIONAL DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS Standard 43.6 (2d ed. 1991) (listing 17 different factors to be considered in charging decision, including many of those listed by ABA and additional factors directly related to impact of prosecution on society).

tion than in the initial stages of the investigation. Therefore, the sufficiency of the evidence is not of primary importance at the investigation stage. The prosecutor should be required to evaluate the investigation independently of the investigating agency and consider such factors as:

1. The source of the original information;
2. The motivation of the investigating agency;
3. The impact of the investigation on citizens, regardless of the outcome of the investigation;
4. The impact of the alleged offenses on the community;
5. Excessive cost of the investigation in relation to the likelihood of discovering evidence; and
6. The likelihood that further investigation will lead to evidence of a crime.

Further, Professor Uvillier proposed a code section articulating the important motivational considerations which should guide a prosecutor when targeting a criminal rather than a crime. He proposed that the prosecutor:

should affirmatively seek the evidence to support a prosecution where in his judgement the well being of the community is seriously threatened by illegal enterprise or by the criminal activities of an identifiable person or persons, notwithstanding the fact that such crime or criminal has thus far escaped detection or arrest.<sup>360</sup>

This provision would be helpful in guiding the drafters in the creation of a provision which permits the investigation of individuals based on proper motivation.

Finally, the investigating provisions should include a section which prohibits an attorney from counseling, encouraging or condoning the violation of any individual's civil rights as enumerated in the Constitution and interpreted by case law. This prohibition would be in effect regardless of whether the prosecutor anticipates using the evidence elicited from the individual. As an example, law enforcement has been known to elicit confessions from individuals in violation of the prescriptions of *Miranda*, knowing full well that the evidence will not be usable in court but merely for their own self-fulfillment.<sup>361</sup> Such actions by a prosecutor should be prohibited by the code of ethics.

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<sup>360</sup> Uvillier, *supra* note 72, at 1154.

<sup>361</sup> See Uvillier, *supra* note 172, at 1137 (discussing practice of some police officers to obtain

The provisions for the investigating attorney must not only satisfy the need for guidance but also appear to be fair to the public.<sup>362</sup> The provisions must guide the investigating prosecutor through an area which is unnatural for the adversarial lawyer. It must place prosecutors on notice that they must leave certain weapons for battle at the front gate of the investigation and pick them up once their "adversarial position is solidified."<sup>363</sup>

### CONCLUSION

In every battle there emerges a winner and a loser. In the adversarial process, the loser is often times the search for truth. Although the American criminal justice system recognizes other goals and justifications for the system, finding the truth remains a primary goal of the system. In the investigation of a criminal case, seeking the truth must be of paramount importance to the players in the system, especially the prosecutor. The prosecutor must not act as an advocate during the investigation, but must sit as a neutral fact finder and non-adversarial evaluator of the evidence. The current ethics codes for attorneys fail to recognize the distinctive roles played by attorneys who are investigating a case. In order to enforce and guide investigating attorneys, specific sections of the code must be added to address this role.

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confession after invocation of *Miranda* rights, knowing that statement can only be used to put police officer's mind at rest that he has correct person).

<sup>362</sup> See generally Patrick Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295 (1995) (discussing importance in government of not only reality of fairness, but also perception of fairness).

<sup>363</sup> *Kirby v. Illinois*, 406 U.S. 682, 690 (1972).