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**Related Representations in Civil and Criminal
Matters: the Night the D.A. Ditched his Date for
the Prom**

Randy Lee

**RELATED REPRESENTATIONS IN CIVIL AND CRIMINAL
MATTERS: THE NIGHT THE D.A. DITCHED HIS DATE FOR THE
PROM**

by Randy Lee¹

“A lady doesn’t leave her escort. It isn’t fair! It isn’t nice!
A lady doesn’t wander all over the room and
blow on some other guy’s dice.”

Sky Masterson²

I. INTRODUCTION

My high school social scene was marked by a plethora of conflicting values and rules. Different groups drew different lines through the shifting sands of every life decision from cigarettes to sexuality. Yet, for all the diversity of vision, one rule was embraced by all: one did not, for any reason, dump one’s date because a better date came along. Yet, the wisdom so clear to my high school classmates has for the most part escaped local district attorney’s offices throughout the country. These offices and the courts that regulate them consistently fail to see a problem in district attorneys abandoning criminal prosecutions to which they have been assigned so they, or their law firms, can represent the crime victims in more lucrative, related civil matters.³

In an ideal world, we could resolve this problem by requiring all government prosecutors to work exclusively for the state. In such a world, each political subdivision could be counted on to “allocate its resources in such a manner to insure that all criminal defendants receive a fair trial,”⁴ and all district attorney’s offices could employ only full-time prosecutors and, thus, eliminate the need for prosecutors to maintain a practice on the side. This would end our reliance on a system that injects “a personal interest, financial or otherwise, into the enforcement process” and, thus, “may bring irrelevant or impermissible

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² Frank Loesser, *Luck Be a Lady*, on GUYS AND DOLLS (MCA Classics 1991).

³ See, e.g., *Commonwealth v. Eskridge*, 604 A.2d 700 (Pa. 1992).

⁴ *Commonwealth v. Breighner*, 684 A.2d 143, 146 n.6 (Pa. Super. 1996).

consent to such abandonment by focusing more on the self-interests of office lawyers than on the public's interests.¹⁵ It will note further that part-time prosecutors may also try to escape the limits of these rules by directing private clients to the prosecutors' private firms rather than assuming the private representations themselves.¹⁶ The article will show that such vicarious conflicts are as potentially misleading to private clients and as threatening to public confidence as would be the prohibited personal representation of the private clients by the prosecutors themselves.¹⁷

In its second section, this article will consider the issue under rules regulating client solicitation,¹⁸ including Model Rule 1.11(c)(2), which prohibits government lawyers from even negotiating "for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially."¹⁹ Although the Bar has, until now, not considered as solicitation the situation of a government lawyer suddenly finding himself representing a private party in a suit related to a case the prosecutor has been handling, the appearance of solicitation and related improprieties to the general public seems inevitable. The article will, in fact, argue that the conduct should be prohibited under solicitation rules,²⁰ and then show that such a prohibition would not violate First Amendment concerns.²¹

This introduction has analogized ethical dilemmas encountered in teen dating to those that arise when district attorneys juggle representations in related civil and criminal matters. It does not do so to trivialize the prosecutor's dilemmas. These questions of professional integrity for prosecutors implicate both the Fifth Amendment of the United States Constitution²² and the responsibilities of those "minister[s] of justice" entrusted with bringing the full force of the State's prosecutorial power against other members of their communities.²³ Only the most irresponsible of commentators could take such a situation lightly. Instead, I analogize the two situations to show that the legal system, entrusted with the responsibility of justice and the authority to self-regulate,²⁴ has missed an aspect of decency that has not escaped the wisdom even of adolescents. Here, then, we are confronted with a situation where the Bar will be better able to walk the halls of justice when its most esteemed members²⁵ can accept the example of children.²⁶

¹⁵ See *infra* text accompanying notes 59-135.

¹⁶ See *infra* text accompanying notes 136-70.

¹⁷ See *infra* text accompanying notes 157-63.

¹⁸ See *infra* text accompanying notes 171-228.

¹⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(c)(2) (2001).

²⁰ See *infra* text accompanying notes 171-78.

²¹ See *infra* text accompanying notes 179-228.

²² See, e.g., *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967). In this case, a prosecutor prosecuted a husband for assaulting the wife while representing the wife in the divorce proceeding. *Id.*

²³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. [1] (2001).

²⁴ *Id.* at Preamble [11] ("The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.").

²⁵ See Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607, 625-37 (1999).

²⁶ Compare Luke 18:17 ("Whoever does not accept the kingdom of God as a child will not enter into it") with *id.* at 11:46 ("Woe to you lawyers also! You lay impossible burdens on men but will not lift a finger to lighten them.") (New American).

matter in which the lawyer participated personally and substantially as a public officer or employee.”²⁹ Thus, the rule explicitly would prevent a prosecutor from engaging in the former practice.³⁰ A literal reading of Rule 1.11(a) would not, however, prohibit a prosecutor from simultaneously pursuing both claims because the rule addresses only subsequent, rather than concurrent representations. Courts generally, though, have read Rule 1.11 as a whole to prohibit such concurrent representations.³¹

This follows from the recognition that not only does Rule 1.11(a) prohibit a lawyer from abandoning a matter for the government so he can pursue it for a private client, but Rule 1.11(c)(1) prevents a government lawyer from pursuing a “matter in which the lawyer [has already] participated personally and substantially while in private practice or nongovernmental employment.”³² Given that the Model Rules typically view concurrent conflicts with greater hostility than subsequent conflicts,³³ it seems highly unlikely that those rules would foreclose all forms of subsequent conflict but leave permissible concurrent conflicts.

Although one might try to circumvent the restrictions of Rule 1.11 by arguing that, for example, a civil tort liability suit and a criminal prosecution arising out of the same facts are not the same matter, both the courts and the ABA Center for Professional Responsibility have indicated such arguments are meritless. Courts, for example, have found the same matter not only in criminal and tort actions arising out of a common set of facts,³⁴ but also in divorce actions and related criminal assault prosecutions.³⁵ Meanwhile, the Center for Professional Responsibility has described the broad definition of “matter” in Rule 1.11(d)³⁶ as a codification of “the discussion of the term in ABA Formal Opinion 342.”³⁷ There the ABA Committee on Ethics and Professional Responsibility said that a “matter” can be understood as “a discrete and isolatable transaction or set of transactions between identifiable parties,” or “[t]he same issue of fact

²⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (2001).

³⁰ For a discussion of prosecutors completing criminal prosecutions and then attempting to represent clients in related civil cases, see Underwood, *supra* note 5, at 82-86.

³¹ See, e.g., *State v. Ross*, 829 S.W.2d 948 (Mo. 1992); *State ex rel. Bailey v. Facemire*, 413 S.E.2d 183 (W.Va. 1991). But see *Davis v. Southern Bell Tel. & Tel. Co.*, 149 F.R.D. 666 (S.D. Fla. 1993).

³² MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.11(c)(1) (2001). See also *In re Williams*, 50 P.2d 729, 732 (Okla. 1935) (where court disciplined prosecutors who brought criminal action to further civil action they were already handling and where court stated, “the powers of the office of county attorney were thrown into the scale of a civil lawsuit in favor of the defense when the county attorney’s office by law and by all ethics was required to be and remain neutral”); Underwood, *supra* note 5, at 77-79.

³³ For example, Rules 1.9(b) & (c) & Rule 1.10(b) draw the vicariousness of conflict disqualification less stringently for subsequent conflicts than 1.10(a) draws it for concurrent conflicts. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9(b), (c) & 1.10(b) (2001) with Rule 1.10(a).

³⁴ See, e.g., *Commonwealth v. Breighner*, 684 A.2d 143 (Pa. Super. 1996); *Kentucky Bar Ass’n v. Lovelace*, 778 S.W.2d 651 (Ky. 1989).

³⁵ See, e.g., *Humphrey v. State*, 537 S.E.2d 95 (Ga. App. 2000); *State ex rel. Bailey v. Facemire*, 413 S.E.2d 183 (W. Va. 1991); *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967).

³⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(d) (2001).

³⁷ ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 185 (4th ed. 1999) [*hereinafter* CENTER FOR PROFESSIONAL RESPONSIBILITY].

office.⁴⁴ Either option, of course, will have to be paid by the locality to its detriment.⁴⁵

Furthermore, one can argue that this outside prosecutor will function at least less efficiently and perhaps even less effectively than the local prosecutor would have. This is so because an outside prosecutor will not know the local police, lawyers, and judges to the extent the local prosecutor would have. The outside prosecutor will also lack the local prosecutor's insights into the community itself. This level of unfamiliarity is even compounded because the local prosecutor's office, having been conflicted out of the case, will be prohibited from providing any guidance to the outside prosecutor.⁴⁶ On top of all this, the outside prosecutor will incur travel costs, which a local prosecutor would not have. Thus, the prosecutor's employing political subdivision, and client, appears indeed disadvantaged when the prosecutor abandons a criminal prosecution to accept a related private representation.

One could also argue a strong potential for the prosecutor's public client to be disadvantaged by the employment even if the prosecutor continued to represent the public as well as the private interest. Here again one must recognize that the prosecutor's public income would necessarily be a fixed amount while his income for the private representation would have the potential to vary in response to hourly wages or, more ominously in this context, a contingent fee. Given the fixed versus variable financial incentives, a lawyer simultaneously representing public and private clients would be under pressure to overemphasize the private representation to the detriment of his public one.

In *Young v. United States ex rel. Vuitton et Fils S.A.*, Justice Brennan, while writing for a majority of the Court, endorsed the view expressed here that ABA ethical provisions prohibit prosecutors from approaching a matter with divided loyalties to public and private interests.⁴⁷ There the Court held that a district court could not appoint counsel for an interested party to prosecute a criminal contempt action.⁴⁸ Furthermore in *Nix v. Whiteside*, the Supreme Court held that a criminal defendant has no right to expect her lawyer to help her testify falsely.⁴⁹ If the defendant has no right to expect her lawyer to abuse his office on

⁴⁴ *Id.*

⁴⁵ *Commonwealth v. Eskridge*, 604 A.2d 700, 702 (1992) (Cappy, J., concurring) (observing that the substitution by the county prosecutor's office of outside counsel is "extremely costly in terms of public dollars").

⁴⁶ *Breighner*, 684 A.2d at 147 ("We hold that once a conflict arises, it is improper for the conflicted district attorney to engage in any decision-making in the case, including choosing who will handle the prosecution.").

⁴⁷ 481 U.S. 787, 803-05 (1987). Professor Underwood has observed that the Reporter's Note to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 216 (Tentative Draft No. 4, 1991) parallels Brennan's analysis of this issue. See Underwood, *supra* note 5, at 74.

⁴⁸ For a discussion of the government practice of using "private prosecutors" to pursue or aid in government prosecutions, see John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994). The Supreme Court considered the issue of private parties pursuing the monetary interests of the federal government in civil suits in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) and determined private citizens had standing under qui tam statutes to litigate interests on behalf of the federal government. This was done, however, without consideration of separation of powers concerns. Instead the Court looked only to history and an assignment theory of standing. *Vermont Agency of Natural Resources*, at 773-78.

⁴⁹ 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is

related civil action.⁶³ Instead, they have held only that “a defendant need not prove actual prejudice in order to require that [a prosecutor’s] conflict be removed,”⁶⁴ and that in curing such conflicts, “all decision-making duties of the conflicted district attorney must cease and the matter must be referred to the Attorney General” rather than designating the matter to another county’s district attorney.⁶⁵

Such state approaches do not reflect a cavalier disregard for the letter of the law because two additional dynamics captured in the Rules of Professional Conduct permit the perpetuation of the practices discussed here. These are first, the ability of a prosecutor’s office to waive the public’s conflict interests and second, the degree to which the conflict of a prosecutor may be imputed to his fellow prosecutors or to his law firm colleagues.

B. Effect of Consent by a District Attorney’s Office

1. Interests Implicated in the Waiver Decision

Rule of Professional Conduct 1.11(a) would allow a prosecutor to represent a private client in a matter related to a case he had prosecuted as long as “the appropriate government agency consents after consultation.”⁶⁶ This consent would not extend to Rule 1.11(c)(2)’s prohibition of a prosecutor negotiating for private employment with a party to a matter he was prosecuting,⁶⁷ nor could it remove restrictions under Rule 1.11(b) that the prosecutor not represent anyone in a civil matter if during a prosecution, he has obtained “confidential government information about a person” and that “information could be used to the material disadvantage of that person” in the civil matter.⁶⁸ Although the nonconsentable portions of Rule 1.11 would appear to continue to place substantial obstacles in the path of a prosecutor seeking to abandon a prosecution to embrace a related civil action, courts have read the consent provision of Rule 1.11(a) to pave the way for such abandonment.⁶⁹ If we accept this reading, one still is left to ask whether a district attorney’s office should ever be able to consent to this practice. The answer appears to be no.

First, the consent of the district attorney’s office appears to be incapable of protecting all the conflicted interests implicated in the situation. For example, though Rule 1.11(b) protects only against a government lawyer’s abuse of

⁶³ See *id.* at 147 (indicating sympathy for position that withdrawal from the civil matter “should” be the appropriate step).

⁶⁴ *Eskridge*, 604 A.2d at 702.

⁶⁵ *Breighner*, 684 A.2d at 148.

⁶⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (2001). The proposed amendment to this rule would preserve this but require the consent be “informed” and “in writing.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a)(3) (as amended and accepted by the Ethics 2000 Commission August 4, 2001).

⁶⁷ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(c)(2) (2001).

⁶⁸ *Id.* at Rule 1.11(b); see also Pa. Bar Ass’n Comm. on Legal Ethics and Professional Responsibility, Op. 94-132 (1994).

⁶⁹ See, e.g., *State v. Romero*, 578 N.E.2d 673 (Ind. 1991) (former prosecutor needed consent from prosecutor’s office before representing defendant).

Several state bar associations have taken similar stands.⁷⁶ The Kansas Bar Association, for example, issued an ethics advisory opinion that indicated that government entities are representative and, thus, incapable of consenting for each member of their constituency.⁷⁷ Others have argued that government waiver is unrealistic for two reasons. First, it assumes that what is good for a government office and what is necessary for good government will always be the same, an assumption which will not always be valid.⁷⁸ Further, government waiver also is unrealistic because “[t]he agency employees making the waiver decision would inevitably be influenced by its precedential effect on their own future opportunities for private employment, [and] a regulatory mechanism that itself involves conflicts of interest only compounds the problem.”⁷⁹

2. *Desirability of Waiver of Conflicts*

a. *Shifting the Focus to Attorney Self-Interest*

Even if the district attorney’s office could represent and waive all the implicated interests, it would remain difficult to understand why it would ever want to given its role as public servant. One would expect this waiver decision would be guided by the policies underlying the conflict limitations that have been placed on government lawyers. Comment [3] to Rule 1.11 identifies four such policies:

- 1) the need to prevent “power or discretion vested in public authority” from being used “for the special benefit of a private client;”
- 2) the need to keep government lawyers from “a position where benefit to a private client might affect performance of the lawyer’s professional functions on behalf of public authority;”
- 3) the need to avoid any “unfair advantage [that] could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service;” and
- 4) the “need to attract qualified lawyers.”⁸⁰

The Center for Professional Responsibility traces these policies to an ABA Committee on Ethics and Professional Responsibility advisory opinion.⁸¹ That articulation of the policies there is enlightening here: (1) the treachery of

⁷⁶ *Conflicts of Interest and Government Attorneys*, 94 HARV. L. REV. 1413, 1441-42 (1981) [hereinafter *Conflicts*].

⁷⁷ Kan. Bar Ass’n Ethics Advisory Comm., Op. 85-1 (1985). This opinion, however, was subsequently withdrawn. Kan. Bar Ass’n Ethics Advisory Comm., Op. 95-11 (1995).

⁷⁸ See *Conflicts*, *supra* note 76, at 1415.

⁷⁹ *Id.* at 1441.

⁸⁰ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 cmt. [3] (2001).

⁸¹ CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 37, at 178.

seeks to discourage not only unethical behavior but also behavior from which one might even infer evil, the policy counsels against consent even more vigorously than do the first three common policies. The Model Rules, however, did not retain this policy in comment [3]. Instead, it replaced it with a policy that invites a government office to weigh the desires of its lawyers against the interests of the public. In fact, the comment's articulation of this fourth policy indicates that the drafters intended this policy to temper the ethical demands of the comment's first three factors: "However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards."⁸⁵

The erosion in the ethical demands from the earlier set of policies to the later reflects a conscious decision rather than an oversight.⁸⁶ In fact, the Center for Professional Responsibility has even acknowledged a longstanding effort, reflected in both the Model Rules and Model Code, to end the judiciary's use of an "appearance of impropriety" test.⁸⁷ The Center laments, however, that "the test apparently refuses to die."⁸⁸

The shift in the Rules, away from a desire to instill public confidence and toward a desire to provide professional incentives to lawyers, raises three questions in the context of public and private representations by prosecutors:

- 1) Whether this shift is permissible in a self-regulating profession;
- 2) Whether this shift can lead to appropriate decisions in the context of a prosecutor's office; and
- 3) Whether the shift can even deliver the economic benefits it promises.

b. Focusing on Attorney Self-Interest in a Self-Regulating Bar

First, the shift cannot be permissible in a self-regulating profession because it replaces the public's interest with that of the self-regulating lawyers. As the Preamble to the Model Rules points out, "[t]he legal profession is largely self-governing" because "[a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."⁸⁹ The Preamble points out, however, that "[t]he legal

⁸⁵ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 cmt. [3] (2001).

⁸⁶ One might fairly ask if this erosion is not further evidence of the Bar's struggle to keep its heart pure in the business of self-regulation. See *supra* note 83.

⁸⁷ CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 37, at 176-77.

⁸⁸ CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 37, at 177. See also Underwood, *supra* note 5, at 19-20.

⁸⁹ MODEL RULES OF PROFESSIONAL CONDUCT Preamble [9], [10] (2001). For a different perspective on the state of Bar self-regulation, see Pearce, *supra* note 83, at 1275-76.

a scenario the Center for Professional Responsibility describes as “frequent.”⁹⁵ Thus, there seem to be more than enough lawyers with an interest in government employment to think their own self-interest could influence a policy decision.

It has also been argued that when the Bar seeks to guarantee greater flexibility or income for lawyers, it actually does so in service to the public.⁹⁶ As the argument goes, efforts to guarantee greater professional flexibility for government lawyers serves the public in three ways. First, it facilitates “the model of citizen participation in government, especially by attorneys, that is so essential to our political system” and avoids the creation of “a permanent legal bureaucracy.”⁹⁷ Second, it protects government lawyers from political pressures in their decision-making by preserving their professional options should they need to leave government.⁹⁸ Finally, it has been argued that “it would be extremely difficult for the government to recruit competent employees in the absence of post-employment opportunities in the private sector.”⁹⁹

Even the author of these arguments recognized, however, that, at least in the context of a government lawyer being involved in both public and private cases arising out of the same matter, the arguments are not persuasive.¹⁰⁰ In determining the weight such arguments are to be given in the public interest, the author noted that certain negative effects of lawyer flexibility must be considered as well. For example, visions of future private employment opportunities may lead a government attorney “to abuse his position to benefit his future career in the private sector.”¹⁰¹ In addition, lawyers shifting between government and private practice may lead to former government lawyers abusing confidential information obtained in government service to benefit private clients and such lawyers receiving preferential treatment from their government colleagues who have remained behind in the public sector.¹⁰² Even if such dangers do not materialize, their potential to occur can seriously undermine public confidence in government.¹⁰³ Therefore, at least in this context, the shift from consideration of the appearance of doing evil to the consideration of the promotion of lawyers' professional opportunities is not appropriate for a self-regulated Bar.

c. Attorney Self-Interest and the Distortion of Waiver Decisions

In response to the second question raised by this shift in values, the shift is actually undesirable in the context of a prosecutor's office for three reasons. First, it underestimates the value of protecting against the appearance of evil. Second, it ignores the value that high ethical standards serve in attracting lawyers to government service. And third, it fails to factor in the resourcefulness of part-time government lawyers in adapting to the demands of conflict of interest rules.

⁹⁵ CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 37, at 175.

⁹⁶ *See Conflicts*, *supra* note 76, at 1428-30.

⁹⁷ *Id.* at 1428-29.

⁹⁸ *Id.* at 1430.

⁹⁹ *Id.* at 1430. *But see infra* text accompanying notes 111-13.

¹⁰⁰ *See Conflicts*, *supra* note 76, at 1433.

¹⁰¹ *Id.* at 1430.

¹⁰² *See id.* 1431-33.

¹⁰³ *Id.* at 1433.

full force and fury of state resources against private citizens must be willing to take steps to avoid the appearance of being knaves.

Professor Bruce Green has stressed that this need to avoid the appearance of impropriety sustains not only public confidence but judicial trust and prosecutorial morale as well. As Professor Green noted, the reputation for integrity that federal prosecutors enjoyed before judges in the Southern District of New York guaranteed that “new prosecutors, who were not known personally to judges and defense lawyers, nevertheless received the benefit of the office’s reputation” and “were able to work more easily and effectively as a result.”¹¹¹

Professor Green has also indicated that individual federal prosecutors in the Southern District understood that the office’s reputation placed special demands on their own accountability and inspired them in the performance of their duties:

The office was particularly jealous of its reputation for probity, for integrity, for judgment. It was important that its acts appear to be well motivated, that its lawyers’ word be trusted. All of this and more was captured by the concept that prosecutors in the office had a “duty to do justice.” . . . We felt as if we defined the term — which of course we didn’t — or at least gave it new, or special, meaning. In fulfilling this duty, we preserved the office’s great tradition (or in failing to fulfill it, we risked tarnishing the office’s reputation).¹¹²

Given that avoiding improper appearances and maintaining an honorable reputation instills public confidence and professional respect, it follows that prosecutors’ offices that avoid such appearances have less need to create financial incentives to attract qualified lawyers. Certainly it was honor, rather than financial reward, that attracted lawyers to the U.S. Attorney’s Office for the Southern District of New York during Professor Green’s era. Today, Robert J. DeSousa, Inspector General of the Commonwealth of Pennsylvania, recruits lawyers to government service by offering, “that if it is a vocation, a calling, a profession that you are looking for, if it is honor, duty, pride, self-satisfaction, and justice, you will do well to consider government service.”¹¹³

Not only does the ABA’s shift from avoiding the appearance of evil to creating financial incentives underestimate the power a positive professional reputation has to attract and keep lawyers; it also overestimates the economic disruption that strict adherence to conflicts rules would create. On January 19, 2000, the Supreme Court of New Jersey took an even more restrictive step than that considered here when it held that “[a] municipal prosecutor shall not represent any defendant in any other municipal court in that county or in the Superior Court located in that county” in which the prosecutor holds office.¹¹⁴ In

¹¹¹ Green, *supra* note 25, at 609.

¹¹² *Id.* at 607-08.

¹¹³ DeSousa, *supra* note 28, at 210. For a discussion of a government lawyer’s duty to seek justice in all contexts, see Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000).

¹¹⁴ *State v. Clark*, 744 A.2d 109, 112 (N.J. 2000).

Finally, in response to the third question raised, even if the need to use economic incentives to attract qualified lawyers to government service could justify relaxing ethical standards in this context, one still would have to question whether allowing prosecutors to engage in the practice of handling private suits related to their prosecutions actually does provide such incentives. In consideration of this, we may begin by assuming that both the district attorney's offices, who must consent to this practice of switching representations, and the prosecutors, who wish to engage in the practice, have sufficient information to evaluate accurately the economic effects such switching will yield.¹²⁰ As part of such sufficient information, the district attorney's office would know how much additional money the government would have to pay to other government agencies to prosecute those cases abandoned by staff prosecutors because the private matters they have assumed conflict the office out of the prosecutions.¹²¹ Having identified that amount, for the local district attorney's office to be willing to consent, the office still would have to be willing to pay that amount of additional money to its prosecutors. If it were willing to do so, the office would need to decide whether it wanted to pay that amount by refusing to consent to the practice and instead using the money for an across the board salary increase to all of its attorneys¹²² or whether it wanted to pay that amount by consenting to the practice of switching representations and, therefore, concentrating that additional money into subsidizing the decisions of particular lawyers who have decided to abandon their public responsibility so they can represent private clients.

From this vantage point, one would expect that the office would have no incentive of its own to consent.¹²³ By consenting, the office embraces a policy with recognized potential for abuse, and the only purported payback for embracing such a policy is that the office gets to shift income to those

¹²⁰ If such an assumption cannot be made, then no case can be made for consenting for economic reasons because ethical practices, certainly in a prosecutor's office, can never be asked to yield to idle economic speculation and uninformed decision-making.

¹²¹ As noted earlier, the cost of shifting these prosecutions to other government agencies can be substantial and is certainly more than handling the prosecutions in-house. See *supra* notes 42-46 and accompanying text. Furthermore, one cannot assume these costs can be offset simply by assigning an assistant district attorney a new case for the one from which he resigns. The validity of that assumption depends on the work of an assistant district attorney being constant: assistant district attorneys would always be handling a certain number of cases and the number of assistant district attorneys, and the cost of paying them, would expand or contract with changes in the number of available cases. More likely the workload of these lawyers varies depending on the number of open cases in the office. Thus, when an assistant district attorney resigns from one case, he may be assigned another case, but that case will be one that someone currently employed in the office would have handled anyway.

¹²² Such an increase would not necessarily need to be across the board. It could also be targeted to the office's most valued or meritorious prosecutors.

¹²³ If a state allowed a local district attorney's office to assign a case to the state's attorney general's office without compensating the attorney general's office for handling the case, the local district attorney's office would be able to *externalize* the cost of the practice of local prosecutors conflicting themselves out of prosecutions, effectively escaping the cost of this practice by passing that cost on to the attorney general's office. In such a scenario, the local district attorney's office would have great incentive to embrace this practice: that office could simultaneously cut its own costs while giving its prosecutors an opportunity for private gain. Thus, in jurisdictions where the practice of prosecutors embracing related private matters is permitted, states must, at least, require those jurisdictions to bear, or *internalize*, the cost of shifting the prosecutions to other governmental bodies.

ones in the office least likely to value their public responsibilities or most likely to press for excessive rewards from their civil representations, and the district attorney's office should have little interest in obliging those lawyers at the expense of more loyal public servants.

e. Other Factors in Waiver Decisions

Other values beyond that in comment [3] can also be advanced to justify consent, but none stands up any better under scrutiny than does "the need to attract qualified lawyers."¹²⁷ For example one might argue that withholding consent deprives civil clients of a right to the counsel of choice.¹²⁸ However, conflict rules always interfere with a right to counsel of choice so one can hardly expect to carry the day simply by asserting that right in any context. Furthermore, the public, itself, must enjoy a similar right, which they exercised when they hired the prosecutor in the first place. If the right to counsel of one's choice means anything at all, it must at least guarantee that once a client has chosen a lawyer, the lawyer will not abandon the client merely to embrace a more lucrative opportunity.¹²⁹

Alternatively, one might argue that the dangers that consent will be abused or that any real harms from conflicts will arise are overstated here because the political process will protect against such abuse. After all, would not the fear of losing re-election prevent a county district attorney from consenting irresponsibly to subsequent representations after withdrawals? Apart from the obvious answer, that reality indicates otherwise,¹³⁰ one also must point out that the public's already poor perception of our legal system¹³¹ hardly needs a host of political campaigns centered around the issue of whether the central figure in a county's criminal justice system allows his subordinates excessively to cast off their public responsibilities for personal gain. One can also add fuel to that fire by suggesting that beneficiaries of consent decisions might well have an

¹²⁷ See *supra* text accompanying note 80.

¹²⁸ See *Wheat v. United States*, 486 U.S. 153 (1988) (recognizing in criminal context right to counsel of one's choice in Sixth Amendment).

¹²⁹ The Model Rules reflect the serious responsibility associated with a lawyer's withdrawal from a representation. Model Rule 1.16(b), for example, limits permissive withdrawal to primarily situations where the "withdrawal can be accomplished without material adverse effect on the interests of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (2001) (noting six exceptions). Also Rule 1.16(c) allows a tribunal to require a lawyer to remain in a representation even when the lawyer has "good cause for terminating the representation." *Id.* at Rule 1.16(c).

¹³⁰ Professor Underwood has observed that "voters often don't understand what is going on or don't care." Underwood, *supra* note 5, at 100. See also *supra* notes 41-47 and accompanying text.

¹³¹ John A. Humbach, *Abuse of Confidentiality and Fabricated Controversy: Two Proposals*, THE PROFESSIONAL LAWYER, Summer 2000, at 1:

During the past decade the percentage of people willing to rate lawyers' honesty and ethical standards as 'high' or 'very high' has dropped from 22% to 13%, an average decline of nearly 1% per year. According to the pollsters, lawyers are ranked among "the five professions and occupations considered least honest by the American public," and the legal profession is among the three that had "lost the most in the ratings over the last ten years.

Id.

personal conflict rules by guiding cases to lawyers with whom the prosecutor works. Here we must consider both whether conflicts may be imputed to other lawyers within the prosecutor's office and also whether they may be imputed to other lawyers within the prosecutor's private firm.

The comments to Rule 1.11(c) indicate that that rule is not intended to "disqualify other lawyers in the agency with which the lawyer in question has become associated."¹³⁶ Thus, a prosecutor's conflicts would not be imputed to the other lawyers in the district attorney's office. Rule 1.11(a), however, does impute conflicts to other members of a prosecutor's private firm¹³⁷ although such vicarious disqualification can be escaped by screening the disqualified lawyer and notifying the prosecutor's office so it can ascertain compliance.¹³⁸ Amendments to Rule 1.11 accepted by the Ethics 2000 Commission would preserve this approach.¹³⁹

The Restatement (Third) of the Law Governing Lawyers would impute the conflict to lawyers in the prosecutor's district attorney's office under Section 123(2),¹⁴⁰ but would allow screening of the conflicted prosecutor under Section 124(2).¹⁴¹ Meanwhile Section 123(1) would require imputation of the prosecutor's conflict to his private firm.¹⁴² Importantly, since the prosecutor has resigned from the original prosecution and functions in his firm as a "former government lawyer," the screening section that would apply to his colleagues in his private firm would be Section 124(3).¹⁴³ The critical difference between Sections 124(2) and 124(3) is that only Section 124(2) requires that "any confidential client information communicated to the personally prohibited lawyer [be] unlikely to be significant in the subsequent matter."¹⁴⁴ Thus, while both the lawyers in the district attorney's office and those in the private firm would have to show "adequate" screening measures and "timely and adequate notice of the screening to the 'affected clients,'"¹⁴⁵ only lawyers in the district attorney's office would have to show that the personally prohibited prosecutor did not hold any confidential information significant to the matter within their office.

One might argue that few, if any, district attorney's offices would be disqualified under this significant confidential information requirement. Here one would argue that information given to the prohibited lawyer while he handled the matter as a prosecutor cannot be confidential as to the district attorney's office, and if the lawyer is properly screened at his private firm, he will gain no new information dealing with the matter. This argument assumes, however, that it will always be clear exactly when the prohibited lawyer ceased to act as a prosecutor and began the process of ushering the client to his private

¹³⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 cmt. [9] (2001).

¹³⁷ *Id.* at Rule 1.11(a).

¹³⁸ *Id.* at Rule 1.11(a)(1)-(2).

¹³⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(b) (as amended and accepted by the Ethics 2000 Commission August 4, 2001).

¹⁴⁰ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 123(2)(1998). For a discussion of the application of the term "organization" to prosecutors' offices, see Underwood, *supra* note 5, at 90-93.

¹⁴¹ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS at § 124(2)(1998).

¹⁴² *Id.* at § 123(1).

¹⁴³ *Id.* at § 124(3).

¹⁴⁴ Compare *id.* at § 124(2)(a), with *id.* at § 124(3).

¹⁴⁵ *Id.* at § 124(2)-(3).

Supreme Court “quietly informed municipal prosecutors that their law partners could continue to handle criminal defense work in the same county until at least the end of 2002.”¹⁵⁵ Georgia, meanwhile, imputed the conflict to members of the private firm and then refused to allow members of the firm to act as lawyers in the matter.¹⁵⁶

Any discussion of whether to disqualify lawyers vicariously for conflicts must begin with a discussion of screening. This is so because if we are to permit lawyers with divergent loyalties and opposing confidences to work side by side in the same law office, we must have some confidence that the loyalties of each will be preserved and protected. Thus, whether we decide that we will not impute certain conflicts or that we will impute them but will require implicated lawyers to be screened, we must base that decision on a certainty that available safeguards will protect the interests of clients from harm. If such safeguards do not exist, then conflicts must not only be imputed, but all lawyers with the imputed conflict must be disqualified.

Screening is intended to prevent a lawyer with insights about a former client from sharing them with lawyers in his office who represent an opposing interest. The lawyer with these insights must remain loyal to the former client,¹⁵⁷ but strong temptations will call him to be otherwise. For one, disclosing confidences can prove that the lawyer’s first loyalty rests with his current employer. For another, the lawyer understands that disclosing what he knows to his firm can make the firm more successful and, hence, more profitable, and it is naive to think that the lawyer will not understand that being part of a more profitable firm will not profit the particular lawyer even if he may somehow be screened from the fruits of a particular case.¹⁵⁸ Furthermore, even where a lawyer would never consciously disclose confidences, there still remains the potential for accidental or inadvertent disclosures. In the conflicted environment of his new firm, a work assignment on a secretary’s desk, a letter left on a copier, or a war story by the coffee machine could become an ethical disaster.

In screening, two forces oppose these forces for disclosure. One is the commitment and loyalty of the lawyer who has left his client to work for the enemy. The other is the concept of a screen, a symbolic structure built out of the lawyer and his new firm’s promise not to let the lawyer discuss, work on, or have access to files of the case.¹⁵⁹ The public has little confidence in either of these forces, being increasingly distrustful of lawyers¹⁶⁰ and having “little faith in the ability of the [screening] device to control substantive abuses.”¹⁶¹ No doubt the Bar did not invite much faith in the device when it changed its name from

¹⁵⁵ Hester & Ragonese, *supra* note 6.

¹⁵⁶ *Humphrey v. State*, 537 S.E.2d 95, 98-99 (Ga. App. 2000). Kentucky’s Ethics Committee does not pass the taint of disqualification onto other members of the prosecutor’s office although it will impute conflicts to the prosecutor’s private partners and associates and disqualify them. Underwood, *supra* note 5, at 94-95.

¹⁵⁷ See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9, 1.11(a),(c)(1) (2001).

¹⁵⁸ *But see id.* at Rule 1.11(a)(1).

¹⁵⁹ See, e.g., *LaSalle Nat’l Bank v. County of Lake*, 703 F.2d 252, 259 (7th Cir. 1983).

¹⁶⁰ See Monroe Freedman, *The Ethical Illusion of Screening: Pretending that a Lawyer can switch sides on a Case and be “Screened” off from that Case Represents a Serious Ethical Breakdown*, in ROBERT F. COCHRAN, JR. & TERESA S. COLLETT, *CASES AND MATERIALS ON THE RULES OF THE LEGAL PROFESSION* 144, 146 (1996).

¹⁶¹ *Conflicts*, *supra* note 76, at 1441.

example divorces involving physical abuse or automobile torts, are likely to have criminal implications and, therefore, refuse them. While this may impose some hardship on the firm, having a firm member act as a part-time prosecutor is consistent with the public service commitment of the Bar¹⁶⁸ and with the Bar's recognition that all lawyers must accept some of the unpleasant burdens of administering a system of justice whether they be accepting an unpopular case¹⁶⁹ or passing up a lucrative one.

We must also recognize that to this discussion, the most relevant context in which these vicarious conflicts arise is not the potential criminal defendant who anticipates prosecution and seeks to conflict out the district attorney's office. Instead, it is the situation in which a prosecutor begins work on a criminal case and then realizes his firm could profit from that case by being engaged in a related civil suit. In that light, the problem is not so much the defendant conflicting out the prosecutor's office but the prosecutor and his firm conflicting out their obligations as "an officer of the legal system and a public citizen having a special responsibility for the quality of justice."¹⁷⁰ In that light, one can feel quite comfortable requiring the prosecutor and his firm to bear the responsibility of avoiding such conflicts and to bear the consequences when they allow those consequences to arise.

If a state were to determine that some screening could be justified, in the case of doubly imputed conflicts for example, then the State should insist on strict protections for client interests. In a doubly imputed conflict, lawyer A would be prosecuting a case, and lawyer B, who works with lawyer A in the prosecutor's office, would be imputed with A's conflicts. Then a second level of imputation would occur when B brought his imputed disqualifications back to his private firm for imputation to his colleagues there. A jurisdiction might claim this result too strict because it could have a profound impact on the degree to which a part-time prosecutor's private firm could handle not only criminal law cases but tort and family law cases, among other areas, as well. If such consequences were viewed as too severe, then at a minimum two safeguards would have to be in place before the screening of lawyer B could be permissible. First, lawyer B could have had neither any involvement in nor ever had access to confidential information from either the criminal prosecution or civil case. Second, judicial review and approval of each instance requiring this double screening would also appear to be a minimum condition. Better yet, however, might be a commitment to full-time prosecutors.

In this section, we have seen that current conflict rules rightly agree that a prosecutor may not handle civil cases related to those cases he prosecutes. In addition, States should have little interest in waiving such conflicts, and prosecutors should not be able to further undermine public confidence in the Bar by handing the related civil cases over to other members of the prosecutor's private firm. Thus, even as the Bar chooses to view these practices as exclusively conflicts of interest, the practices should be forbidden. In the next section, we shall consider the issue from a vantage point the public has been

¹⁶⁸ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (2001).

¹⁶⁹ *Id.* at Rule 6.2 cmt. [1] ("An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients.")

¹⁷⁰ *Id.* at Preamble [1].

client.¹⁷⁵ Given Rule 1.11(c)(2)'s prohibition of not only a government lawyer soliciting private employment but even negotiating for such employment if he is approached by a party to a matter in which he has participated personally and substantially, current rules indicate that the Bar is particularly interested in deterring solicitation by government lawyers.¹⁷⁶ In *In re Primus*,¹⁷⁷ the United States Supreme Court did use the First Amendment to carve out an area of solicitation beyond the reach of regulation. The Model Rules of Professional Conduct, as well as the States that have adopted them, however, have continued to regulate solicitation to the limits of *Primus*,¹⁷⁸ and the situation at hand is far removed from any redeeming characteristics of *Primus*.

B. First Amendment Limits to Regulation

As the Court characterized *In re Primus*, the case dealt with the situation in which a lawyer “seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated.”¹⁷⁹ The lawyer in *Primus*, Edna Smith Primus, had sought to further her ideological goals by representing a woman who had undergone sterilization after the birth of her third child, after such sterilization was presented to her as “a condition of the continued receipt of medical assistance under the Medicaid program.”¹⁸⁰ The potential for representation ended when the woman went to an appointment at her doctor's office about “the progress of her third child who was ill” and there “encountered” her doctor's lawyer, who requested that the unrepresented woman sign a release of liability in the doctor's favor.¹⁸¹ In protecting the actions of Ms. Primus, the Court stressed not only her ideological motive but also that the “act of solicitation took the form of a letter” rather than being “in-person solicitation”¹⁸² and that neither Primus nor any lawyer with whom she was associated “would have shared in any monetary recovery by the plaintiffs.”¹⁸³

J. Robert McClure Jr., *On the Practice of Law: A. Lincoln*, A.B.A.J., Oct. 1990, at 98, 98.

¹⁷⁵ MODEL RULES OF PROFESSIONAL CONDUCT Preamble [2] (2001) (“As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.”). Although the duty to zealously represent a client does not mention the degree of the client's honesty, other rules do limit the scope of a lawyer's representation of a dishonest client. Rule 1.2(d), for example, prevents a lawyer from “counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows [to be] criminal or fraudulent,” *id.* at Rule 1.2(d). Rule 3.3(a)(4) limits the degree to which a lawyer may use his client's false testimony. *Id.* at Rule 3.3 (a)(4).

¹⁷⁶ *Id.* at Rule 1.11(c)(2). ACCORD STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 3-1.3(e) (1992).

¹⁷⁷ 436 U.S. 412 (1978).

¹⁷⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (2001).

¹⁷⁹ 436 U.S. at 414.

¹⁸⁰ *Id.* at 415.

¹⁸¹ *Id.* at 417.

¹⁸² *Id.* at 422.

¹⁸³ *Id.* at 429. The Court did acknowledge, however, that had Ms. Primus been able to litigate the

In *Ohralik*, for example, the Court was particularly sensitive to the State's "special responsibility" for preserving the ethical standards for lawyers and noted that in-person solicitation "has long been viewed as inconsistent" with the ideals of the legal profession and, thus, likely to debase it.¹⁹² The Court stressed that before lawyers may concern themselves with the earning of fees, they first must be "'officers of the courts'"¹⁹³ and "'assistants to the court in search of a just solution to disputes.'"¹⁹⁴ After all, "lawyers are essential to the primary governmental function of administering justice."¹⁹⁵ While one may hope that this is, in fact, true for all lawyers generally,¹⁹⁶ no one can question that it must be true for those lawyers called upon to be the wielder of the sovereign's power and voice of the sovereign's conscience.¹⁹⁷ Thus, when the public recognizes that prosecutors use their public role to gain private clients and then abrogate that public role in favor of pursuing the private profits those clients offer, that recognition strikes at the heart of public confidence in the legal profession.

The Court also emphasized the danger of overreaching, the potential for which, the Court explained, "is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person."¹⁹⁸ The Court noted that the victimization of an individual not only makes the person "more vulnerable to influence but also may make advice all the more intrusive."¹⁹⁹ Given these views, one must conclude that the potential for overreaching and the injuries that come with it would be particularly acute when the solicitation occurred during a meeting between a crime victim and a district attorney. There, not only do we have the "injured or distressed lay person" and the lawyer "trained in the art of persuasion," but we also have more. We have a lawyer bearing the State's seal of approval. The prosecutor does not even need to sell himself in this context because he can use his government position to do the selling. As the Court pointed out, in such circumstances some victims will fall prey to such influence. Others, however, will view any such commercial overtures as being violated yet again and particularly so because the individual the state has placed before them to bring justice to their injury has sought instead to profit from it and from them.

In this context, the *Ohralik* Court did acknowledge that not all information that passes between victims and lawyers creates harm. In fact, the Court indicated that lawyers perform a service when they provide uninformed people "with adequate information about the availability of legal services" and their "legal rights and remedies."²⁰⁰ This is particularly true when others may be simultaneously seeking releases of liability from those people.²⁰¹ District

¹⁹² *Id.* at 454.

¹⁹³ *Id.* at 460 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)).

¹⁹⁴ *Id.* at 460 (quoting *Cohen v. Hurley*, 366 U.S. 117, 124 (1961)).

¹⁹⁵ *Id.*

¹⁹⁶ See generally Robert E. Rodes, Jr., *Government Lawyers*, 9 WIDENER J. PUB. L. 281 (2000).

¹⁹⁷ *Green*, *supra* note 25, at 625-37.

¹⁹⁸ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 (1978).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 458, n.15.

²⁰¹ *Id.* at 459, n.16. As noted earlier, this was the case in *Primus* when the sterilization victim was confronted in her doctor's office by the doctor's lawyers. See *supra* text accompanying note 181; *In re Primus*, 463 U.S. 412, 417 (1978).

matter, she will conflict the prosecutor out of the prosecution. Thus, when retaining the prosecutor, the victim may believe she is getting a lawyer who will be particularly zealous in pursuing the defendant in the civil matter and who will have access to resources and connections that purely private lawyers would not. If, on the other hand, the victim does understand the impartiality with which the prosecutor must approach the criminal, the victim may feel that retaining the prosecutor in the civil matter is a way to buy prosecutorial loyalty to an extent to which the victim would not normally be entitled. In either scenario, the client will be paying for something the prosecutor cannot ethically sell her.²⁰⁶ Thus, both scenarios are likely to create disappointed private clients and necessarily will undermine public confidence in our criminal justice system.

One might argue that while the Court in *Ohralik* did allow States to restrict solicitation by private attorneys in ways that prevent harm before it occurs,²⁰⁷ the Court still allowed only the regulation of solicitation and not the appearance of solicitation. Two factors presented uniquely by prosecutors, however, justify broader restrictions in the public arena. First, the lawyer's role as prosecutor makes it unlikely that solicitation can be detected or proven even when prosecutors have initiated discussions with crime victims about the prosecutor's private retention. As the Court pointed out in *Ohralik*, under even normal circumstances, proving a lawyer's act of solicitation is difficult both because "[of]ten there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place," and because the lay person is frequently "so distressed at the time of the solicitation that he [can] not recall specific details at a later date."²⁰⁸ These problems are further complicated in the context of solicitation by a prosecutor because the prosecutor has a reason, as the prosecutor, to be discussing with the victim the situation that would give rise to the victim's civil action. Thus a crafty prosecutor, trained in artful questioning, would have the opportunity to guide the victim into initiating a discussion of the retention of the prosecutor in any related civil matter. Many solicited clients, therefore, might well leave the prosecutor's office unable to articulate exactly how they had been solicited.

The second factor justifying broader restrictions is that crime victims are unlikely to report prosecutors for solicitation. Even crime victims who understood that they had been solicited might well refrain from reporting such incidents for fear that their complaining about a prosecutor might sour the entire

²⁰⁶ In *In re Truder*, a part-time prosecutor and his assistant, who were prosecuting "a civil action upon the same facts constituting a criminal action" which the lawyer was then prosecuting, apparently went so far as to suggest a settlement in the civil claim would impact the vigor of the criminal prosecution. *In re Truder*, 17 P.2d 951, 951-52 (N.M. 1932). The court there observed:

The incompatibility of public duty and private interest and employment is too plainly illustrated in this case to require discussion. It scarcely aggravates the case to show that one of the respondents actually uttered the suggestion which is implied in the situation itself, that a payment of damages would moderate the vigor or good faith, if not entirely end, the prosecution.

Id. at 952.

²⁰⁷ See *Ohralik*, 436 U.S. at 464.

²⁰⁸ *Id.* at 466.

cases by the more immediate threat to professionalism interests that solicitation poses when engaged in by lawyers as opposed to accountants.²¹⁵

Six factors in the professional work of CPA's convinced the *Fane* Court that in-person solicitation by CPA's did not normally present "circumstances conducive to uninformed acquiescence."²¹⁶ First, the Court noted that unlike the lawyer "trained in the art of persuasion," the accountant is trained in "independence and objectivity."²¹⁷ While one could certainly argue that prosecutors are similarly independent and objective seekers of justice,²¹⁸ a prosecutor necessarily departs from that role when he discusses the potential for his private retention with a prospective client. At that point he is particularly his own advocate.

Second, the "sophisticated and experienced business executives who understand well the services that a CPA offers" are able to resist manipulation in the marketplace.²¹⁹ One would hope, however, that the average crime victim has little experience or insight in the role of victim. Furthermore, as noted earlier, the victim may well not understand the legal obligations that prevent the prosecutor from being the victim's lawyer in a criminal trial, particularly when the lawyer is offering to be just that in a related civil case.²²⁰ Thus, the crime victim, unlike the sophisticated and experienced business executive, may well become confused about what she would actually get for her money. This may cause her to believe that retaining the prosecutor for her civil matter may also benefit her in the criminal matter.

Third, the CPA's initial overture is normally over the telephone, and unreceptive individuals "need only terminate the call" to end the solicitation.²²¹ On the other hand, overtures by a prosecutor to a crime victim arise out of the relationships both have to a common ongoing criminal prosecution. Thus, that prosecution will continue to bind them even if the victim chooses to rebuff the lawyer's commercial overture. In fact, as noted earlier, once the prosecutor makes such an overture, the client has no choice but to be bound to the prosecutor. If the client rejects the lawyer as her civil attorney, he will continue to prosecute the criminal matter, and if she accepts the lawyer for her civil case, she will be bound to him in that role even if he will no longer continue to prosecute her criminal case.²²²

Fourth, a CPA will probably meet prospective clients "in their own offices at a time of their choosing," rather than in a setting "of high stress and vulnerability."²²³ When a prosecutor meets a crime victim, however, they meet to talk about a painful topic, at a stressful time, and probably at the district attorney's office, an intimidating and unfamiliar location. All of this increases

²¹⁵ *Id.* at 774-76.

²¹⁶ *Id.* at 775 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 (1978)).

²¹⁷ *Id.*

²¹⁸ See generally Green, *supra* note 25.

²¹⁹ *Edenfield v. Fane*, 507 U.S. 761, 775 (1993).

²²⁰ See *supra* text accompanying notes 205-06.

²²¹ *Fane*, 507 U.S. at 776.

²²² See *supra* text accompanying notes 203-04 (noting the unfortunate situation that a victim who is unimpressed by the prosecutor's offer to represent her civil claims must then choose between accepting that offer or having the unimpressive attorney continue to prosecute the criminal matter).

²²³ *Fane*, 507 U.S. at 775-76.

“officer[s] of the legal system.”²³¹ In the context of prosecutors handling both criminal and civil cases arising from the same matter, however, that politeness that demands that a prosecutor “stick” with the date she came in with²³² would be a welcomed starting point on the road to public trust and ethical behavior.

This article has shown that the rules governing prosecutorial behavior, the policies underlying those rules, and the expectations of our communities all demand that neither a prosecutor nor his private firm should handle any case related to a prosecution in which the prosecutor has played a role. Not only does the handling of such a private case raise the spectre of conflicted interests,²³³ but it also suggests solicitation and a public servant’s efforts to profit from the power her fellow citizens have entrusted to her.²³⁴

Inspector General Robert DeSousa has pointed out that when Shakespeare had Dick the Butcher say “The first thing we do is kill all the lawyers,” Dick said it not because he believed lawyers to be knaves but because he understood that lawyers were all that protected the people from the imposition of tyranny.²³⁵ In that light, the legal profession has been described as the “keepers of society’s faith that ‘[i]n truth, there is a judge and there is justice.’”²³⁶ If we truly can be that, why would we seek to be anything else, in particular why would we seek to be something less?²³⁷

Professor Green has reported that the United States Attorney’s Office for the Southern District of New York did not have to shut down because its prosecutors were not allowed to be knaves; instead it flourished because its prosecutors aspired to be heroes.²³⁸ “Integrity, humility, a sense of duty, and compassion — the light of our nature — are no less present in lawyers than are man’s shadowy traits,”²³⁹ and it is the former which must form our behavior.

²³¹ MODEL RULES OF PROFESSIONAL CONDUCT Preamble [I] (2001).

²³² Loesser, *supra* note 2 (“Stick with me, baby; I’m the fellow you came in with.”).

²³³ See *supra* text accompanying notes 27-170.

²³⁴ See *supra* text accompanying notes 171-228.

²³⁵ DeSousa, *supra* note 28, at 207 (quoting WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2).

²³⁶ Lawrence A. Hoffman, *Response to Joseph Allegritti: The Relevance of Religion to a Lawyer’s Work*, 66 *FORDHAM L. REV.* 1157, 1165 (1998).

²³⁷ Randy Lee, *Lawyers and the Uncommon Good: Navigating and Transcending the Gray*, 40 *S. TEX. L. REV.* 207, 221-22 (1999).

When I decided to become a lawyer the only lawyers I knew were the electronic images I saw on television, and I knew no more about their worlds than I knew of Superman’s Metropolis or Batman’s Gotham City. But in my heart I knew that was all I needed to know.

When the world was blind, Perry Mason could still see; when the world was cowardly, Judd for the Defense was still brave; when the world was mad, the Bold Ones were still wise; and when the world was cruel, the Storefront Lawyers were still merciful. I wanted to be to the world what they were. I wanted to go to Washington to be like Frank Capra’s Mr. Smith and fight for lost causes because, those, after all, were “the only causes worth fighting for.” I wanted to be a lawyer because I wanted to be heroic.

Id.

²³⁸ Green, *supra* note 25, at 607-09.

²³⁹ Randy Lee, *When Giants Walked the Earth*, 30 *TEX. TECH L. REV.* 1409, 1418 (1999) (reviewing *KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION* (1997)).