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The Asymmetry of Duty in Criminal Trial Practice

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first impression, and that impression is made when the employer quickly flips through your sample and has either a positive or negative gut reaction to it. This may sound harsh, but lawyers make their living by the written word. Employers want to know that the work you produce for them will meet the highest standards of quality. In other words: proofread extremely carefully.

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Off the Record

The Asymmetry of Duty in Criminal Trial Practice

by Maureen A. Howard



Although the American trial system has been likened to an arena in which mental combatants fight “to the death” (the verdict), each warrior similarly skilled and equally committed to vanquishing the other in a forum with formal rules of engagement enforced by a learned and impartial judge, the role of the criminal prosecutor is qualitatively different than that of other advocates. This is because, unlike any other lawyer, a criminal prosecutor has an affirmative duty to the opposing party.

A lawyer who represents an individual client is duty-bound to advance that client's interests vigorously within the bounds of the law. A prosecutor, however, does not represent a single individual, but rather the collective good. As such, a prosecutor's loyalties — unlike those of other lawyers — are divided. A prosecutor's duties include insurance of procedural and substantive fairness to persons accused of crimes because, as one element of a just society, such fairness is in the interests of the collective good. Further, because the defendant is a member of the “represented” collective, a prosecutor must take the defendant's interests into account in assessing the validity of the prosecution.

Under most ethical rules and guidelines, including the Model Rules of Professional Conduct, the Model Code of Professional Responsibility, and the ABA Standards for Criminal Justice, prosecuting attorneys are generally held to a different — some have said higher — standard than attorneys representing clients. This differing standard takes into account the fact that the roles of prosecutor and defense counsel are not symmetrical. The defense attorney is charged only with her client's well-being; she has no corresponding “duty” to the government during the course of the case. Not so for the prosecutor. The ethical duty of a prosecuting attorney goes beyond advocacy; unlike other trial lawyers, a prosecutor is duty-bound to “seek justice.” This responsibility to seek justice includes a duty to the defendant.

As such, ethical guidelines recognize that a prosecutor is a “minister of justice” whose duty is to seek justice, not merely con-

vict. Jurists and scholars have long opined on the meaning of the prosecutor's role as a “minister of justice.” Former U.S. Supreme Court Justice William O. Douglas asserted that the prosecutor's role is “to vindicate the rights of people as expressed in the laws and give those accused of crime a fair trial.” In *Berger v. United States*, the Supreme Court noted that the prosecutor stands in the place of the sovereign “whose obligation to govern impartially is as compelling as its obligation

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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.” The Court emphasized that the prosecutor's interest in a criminal case is not to win but to see that justice is done: “He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”

Not only is the ethical duty of the prosecutor distinct from that of other lawyers, but some scholars have called for a “moral standard” as well, given the immense, unregulated discretionary power of the prosecutor's office. As Bennett L. Gershman wrote: “Why a standard of moral certainty? Such a standard fits the reality that the prosecutor is the gatekeeper of justice. It requires the prosecutor to engage in a rigorous moral dialogue in the context of factual, political, experiential, and ethical considerations. It also requires the prosecutor to make and give effect to the kinds of bedrock value judgments that underlie

our system of justice — that the objective of convicting guilty persons is outweighed by the objective of ensuring that innocent persons are not punished.”

The prosecution has the full weight and power of the government behind it as it enters a criminal trial. The constitutional protections afforded criminal defendants — such as the privilege against self-incrimination, the presumption of innocence, the stringent beyond a reasonable doubt standard, the requirement of a unanimous jury verdict to convict — exist to counter the innate power imbalance that favors the government.⁴

The prosecution carries a disproportionate burden as a matter of public policy in other areas of criminal law practice as well. One example is the duty to produce exculpatory evidence to the defense — voluntarily and without request. The prosecutor may also have a duty to search for evidence that may potentially damage her case, whereas the defense clearly has no corresponding duty.

Likewise, prosecutors have a different duty than defense counsel with respect to witness examination. A prosecutor cannot cross-examine a defense witness to attack his credibility for truthfulness when she knows the witness is truthful. A defense attorney, however, is not so clearly prohibited. Nor may a prosecutor call a witness to the stand whom he knows is likely to perjure himself. In some jurisdictions, however, a defense lawyer may allow the defendant to testify in the narrative, even when she is aware the testimony will be false.

Some jurisdictions also recognize that there need not be an equal number of peremptory challenges afforded to the prosecution and the defense. With respect to non-capital felonies, the prosecution is allotted fewer peremptory challenges than the defense in many states as well as in the federal system. This policy has existed for decades. It was recognized in the English system as well, which eliminated peremptory challenges for prosecutors in criminal actions in 1825.

The responsibilities of a prosecutor do not, however, extend exclusively to those cases assigned to him. National ethical guidelines charge prosecutors with the duty to “seek to reform and improve the administration of criminal justice.” This requires a prosecutor to look beyond her caseload, or even the practices of her unit or office, and be a champion for accountability and change if needed.

A recent study by The Center for Public Integrity of local prosecution practices across 2,341 jurisdictions reported an unsettling account of prosecutorial misconduct

— cases where prosecutors broke or bent the rules to win convictions. The study’s authors report that, since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges, reversing convictions or reducing sentences in over 2,000 cases. In another 500 cases, appellate judges offered opinions — either dissents or concurrences — in which they found the misconduct warranted a reversal. In thousands more, judges labeled prosecutorial behavior inappropriate, but upheld convictions reasoning the behavior constituted “harmless error.”

Many prosecutors do an admirable job of advancing the collective good by considering the interests and rights of both the government and the accused. Yet, the abuse of prosecutorial discretion and power by any prosecutor is, on some level, a failure of prosecutors everywhere. The goal of each prosecutor should not just be ethical practice

and personal accountability in his or her assigned cases, but systemic accountability and defensibility of practice nationwide. ◇

“Off the Record” is a regular column on various aspects of trial practice by Professor Maureen Howard, director of trial advocacy at the University of Washington School of Law. She can be reached at mahoward@u.washington.edu. Visit her webpage at www.law.washington.edu/Directory/Profile.aspx?ID=110.

Notes

1. *Berger v. United States*, 295 U.S. 78 (1935).
2. *Berger*, 295 U.S. at 88.
3. Bennett L. Gersham, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 Fordham URB. L.J. 513 522 (1992).
4. *Id.* at 513.
5. Brooke Williams, *Harmful Error: Investigating America’s Local Prosecutors* (Bill Allison ed., The Center for Public Policy 2003).

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For more information on the YMCA Mock Trial program, contact the YMCA Youth and Government office at 360-357-3475 or youthandgovpdir@qwest-office.net, or the WYLD YMCA Mock Trial Program Chair Megan Valentine at mvalentine@co.grays-harbor.wa.us. Donations may be sent to YMCA Youth and Government, PO Box 193, Olympia, WA 98507.