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THOUGHTS ON THE ETHICAL CULTURE OF A PROSECUTOR'S OFFICE

Patrick J. Fitzgerald*

INTRODUCTION

I am truly honored to be asked to speak at this event, particularly an event held in honor of Norm Maleng. I want to talk about maintaining an ethical culture in a prosecutor's office and give you a perspective on the things that have struck me after being an Assistant U.S. Attorney for about thirteen years—approaching seven years this fall as a U.S. Attorney, so about twenty years as a prosecutor. Some of the things I will say are obvious but worth repeating because we have to bear them in mind. Some are slightly subtle but worth pointing out. I want to talk about prosecutorial ethics in general, and also explain the importance of an ethical culture in a prosecutor's office and discuss why we focus on the culture rather than the individuals. It is not a topic we discuss often, which is remarkable if you consider the impact of what goes on in prosecutor's offices.

Everyone in this room knows it, but every once in a while you have to step back and think about the awesome power that a prosecutor has, for good or for bad.¹ We need to have that power to do our jobs, but we should recognize how powerful the position is and recognize the risks that accompany it. Across the country, at both the federal and state level, there are an awful lot of prosecutors who have the power to seek the death of a defendant based upon a crime he or she committed. There are few types of power greater than having a role in seeking to take someone's life. Short of that, many prosecutors have the power to seek life imprisonment without parole. For many people, that is a fate about

* Patrick J. Fitzgerald has served as the United States Attorney for the Northern District of Illinois since 2001. Mr. Fitzgerald delivered the following remarks at the University of Washington School of Law's symposium on "The Prosecutorial Ethic: A Tribute to King County Prosecutor Norm Maleng" in May 2008.

1. Editor's note: *See Young v. United States*, 481 U.S. 787, 814 (1987) (noting that the prosecutor "has the power to employ the full machinery of the state in scrutinizing any given individual"). For more details on prosecutorial powers, see Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 245–47 (2008).

as bad as death—to be locked up in a jail cell and never see the light of day for the rest of your life. Even if the sentence is thirty days in jail, or sixty days in jail, or two years in jail, for the people who spend that time in prison—hopefully guilty, but guilty or not—that is a significant deprivation of their liberty. Even for people who do not go to jail, their reputations can be tarnished by an indictment or a conviction, or merely by being investigated. Corporations can go out of business, not just by being indicted, but also for the fact that they are being investigated. This can affect corporations that may have earned it by their conduct, and can also affect employees who had nothing to do with the wrongdoing.² In many cases, witnesses who have done nothing wrong have their lives turned upside down merely because they had to testify in court against a friend, a colleague, or a loved one; had to walk into court as part of their obligation to share the truth; or had to expose personal secrets that they would otherwise not choose to share. When you think about a prosecutor’s power and how it can affect people in very drastic ways—whether they are convicted, charged, called as witnesses, or simply mentioned—you have to think about how much of that power is exercised behind closed doors.

On the optimistic side, I have often said that I think the general public would be impressed with the places I have worked and the people I have worked with. I think they would be impressed to see what happens behind closed doors when prosecutors discuss the facts and merits of a case, the reasons why we should or should not prosecute, and the reasons why we should or should not seek tougher penalties. But power, even when it is necessary, poses the risk that people will abuse it—either by negligence, recklessness, or worse—and power exercised behind closed doors poses an even greater risk. The fact is that more of a prosecutor’s important work takes place behind closed doors than in public. We prosecutors should be wary of how we choose to exercise that power when a relatively great amount of it is exercised in the dark.

When you think about that—and I hope I am starting to scare you—you recognize that the risks are not just for the individual, and the risks are very serious. There is nothing worse than the notion of someone going to jail who should not. It is also terrible when people who should be in jail (because they are guilty) are convicted by improper means.

2. Editor’s note: For an exploration of “collateral consequences of prosecution” of corporations, particularly in the context of deferred prosecution agreements, see generally Candace Zierdt & Ellen S. Podgor, *Back against the Wall: Corporate Deferred Prosecution through the Lens of Contract Policing*, 23 FALL CRIM. JUST. 34 (2008).

This poses a risk to the criminal justice system because if the improper conviction comes to light—and one hopes it does—there is a loss of confidence in our system. There is nothing worse than when the general public loses confidence in the criminal justice system and does not trust that prosecutors are behaving ethically and bringing charges because they truly believe that something illegal has happened.

CREATING AN ETHICAL OFFICE

When we think about exercising prosecutorial power with care and retaining the public's confidence in the criminal justice system, we often talk about training prosecutors in the rules of ethics and professional responsibility. However, I do not think that most of our ethical problems come from people who could not pass the Multi-State Professional Responsibility Exam (MPRE).³ I do not think you could line up the MPRE scores and predict that this person will be ethical in the future because she scored 100 and had all the right answers, but another person struggled a little bit with a complex question so we ought to worry about his ethics. It usually is not a question of brains. Training is important because, for example, when you get into Rule 4.2 issues of contact with represented parties, it is not necessarily intuitive how the rule works.⁴ Trying to figure out whether a person is represented for the purposes of one case, or for a matter where an investigation is broader than the person knows, is complicated.

We need to have training,⁵ but I think the important thing when creating an ethical office culture is character and values—people knowing what they should do and doing it without hesitation. We have

3. Editor's note: The Multi-State Professional Responsibility Exam, a multiple-choice examination required for bar admission in most states. It is examined in more detail, as part of a broader discussion about reforms in the legal profession, in Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 56–59 (2004–2005). For an analysis of a variety of tools for evaluating professionalism and ethics, including the MPRE, and recommendations for improving assessment in the legal profession, see Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 509–10 (2008).

4. Editor's note: MODEL RULES OF PROF'L CONDUCT R. 4.2 (2007) ("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 to do so by law or a court order.").

5. Editor's note: For a discussion of the problem of lack of training and other factors influencing ethical questions in the exercise of prosecutorial discretion, see Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 686–91 (1992).

to recognize that much of it has to do with culture. We see in life that culture can affect how people behave. We see it in sports teams, like with the Philadelphia Flyers when they were the Broad Street Bullies, the Detroit Pistons, and the Oakland Raiders. These teams had a certain mystique and thought that it was good to be aggressive and test the rules, while other teams did not. We also see it happen in law firms. When people come out of law school they look at a firm and say, “This one has a reputation for being this way. This has a reputation for doing that. Some of them work very hard. They are very aggressive. They are about making money. Some work hard, but also do pro bono work. Some firms are nice places to work.”⁶

Prosecutors’ offices—state, local and federal—have reputations too. They have cultures that can bend people in one direction more than another. As prosecutors, when we look at corporations and try to decide whether to indict them for conduct carried out by some of their employees, one of the key factors we look at is whether the corporation itself encouraged or discouraged that sort of conduct. If the corporation was one in which employees did whatever they could get away with and the corporation repeatedly declined to take action even though there were warning signs that employees were doing something illegal to make money, then prosecutors have to think, “The only way they’re going to take us seriously is if they face an indictment.” Every time they do not get caught or indicted, there is a risk that they will just do it again. But if another corporation consistently takes action when it sees a problem and has people monitoring things and taking firm steps when they find or suspect wrongdoing, then there is a very strong argument for not indicting the corporation. As prosecutors, we ought to hold ourselves to the same standards we apply to others. We ought to look at our offices and say to ourselves, “If it’s important for us to be ethical, then we must act the way we expect corporations to act and create an environment in which ethical behavior is encouraged to the fullest extent possible in a responsible way.”

That is my long way of saying that culture shapes behavior at law firms and in prosecutors’ offices.⁷ In particular, we can affect how

6. Editor’s note: For a general discussion of types of variations in law firms’ cultures, see Ellen Freedman, *What Makes a Law Firm a Good Place to Work?*, 26 DEC. PA. LAW. 14, 16 (Nov.–Dec. 2004).

7. Editor’s note: For an analysis of the influence of office culture on prosecutors’ understanding of ethical duties, see Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 351–53 (2001).

individuals behave by creating an ethical office culture. I have been blessed to work in my former office in the Southern District of New York and my current office in the Northern District of Illinois, places that have had an ethical culture since before I was born. When you walk into those places, you recognize that you are inheriting a culture that pre-existed you, and you want to keep that culture intact. You dream that you could make it better, but your main goal is simply to carry the values that people before you established through to the next generation.

A. Hiring

An ethical culture starts with hiring. You can take people who have good values and good characters and encourage them to be ethical. If people are unethical from the beginning, I doubt they will turn on a dime once you put them in an ethical culture. Similarly, if they are ethical from the beginning, it is less likely that a bad culture will corrupt them. If you look again to the corporate analogy, many people who end up in corporate environments do not go into a company saying, “We’re going to cheat on the books. We’re going to manipulate the stockholders. We’re going to try and make our earnings look better so we will earn a bonus.” They go in with good values, but over a course of years they become acclimatized to the accepted culture within the corporation. As a friend of mine once said, “It’s not as if the room smells when they walk in.” It is like they are cutting onions—they get used to it little by little, and their ethics become worn away until eventually it takes a jolt to wake them up. We want to make sure that our offices are places where we always encourage people to be ethical and never give them the sense that ethics do not matter.⁸

Nobody teaches you how to hire; if they did, I missed that class. They certainly do not teach you in law school. The qualities we look for go beyond just being able to write and think, having a good law-school background, and hopefully, clerking. I picked up my criteria for hiring in Chicago from a woman named Z Scott. We called her Z. Her first name was Zaldwaynaka, so you can see why Z caught on rather quickly.⁹ I

8. Editor’s note: For a review of scholarship supporting the argument that the impact of ethical employees on an organization’s culture can “create an environment in which ethics beget ethics,” see Brian Mittendorf, *Infectious Ethics: How Upright Employees Can Ease Concerns of Tacit Collusion*, 24 J.L. ECON. & ORG. 356, 356–57 (2008).

9. Author’s note: This reference is to Zaldwaynaka Scott, former Chief of the General Crimes Section, U.S. Attorney’s Office, Northern District of Illinois.

remember talking to her once about hiring someone and she said, “You know what the problem is? They can write really well, they’re smart, and they have a great background. They’ll probably do great. But they just don’t have soul. In the end, it just didn’t strike me that the person had a soul.” When you think about the decisions we make with people’s lives in our hands—whether the lives of witnesses, subjects, or defendants—it is really important that prosecutors have that human judgment, that soul.

Before coming to give this speech, I looked at some materials on Norm Maleng and I read his description of hiring. He said a few years ago:

We have a large office with . . . about 500 people . . . and hiring interviews are a large part of our administrative side. When you’re hiring, you’ve already seen the applicant’s resume and academic record. So I don’t sit around in interviews spending a lot of time on that. What I want to know is what is in that person’s soul or heart and I can get an almost instantaneous sense of what type of person I’m dealing with.¹⁰

I found it interesting that the two of us, who likely had never met, both looked to the soul.

A woman I work with now, Vicki, described the qualities we should look for in an applicant in a different way.¹¹ We were talking about an applicant recently, and she said, “When someone’s alone in their office on a Saturday afternoon before a Monday trial going through a box and they find a document that they never saw before and never turned over to the defense and that document really hurts their case, we need to know that they will not think twice and just turn it over.” That standard stuck in my mind. If you give a person the MPRE and ask, “You find *Brady* material on a Saturday afternoon. What do you do? A: turn it over. B: shred it,” everyone will get the answer (option A) right.¹² But the answer might not be clear to the person who is sitting alone in his

10. Editor’s note: National District Attorneys Association, In Profile: Norm Maleng, http://www.ndaa.org/ndaa/profile/norm_maleng_may_june_2004.html (last visited Jan. 9, 2009), permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev11n10.pdf>.

11. Author’s note: This reference is to Vicki Peters, Associate Chief of the Criminal Division, U.S. Attorney’s Office, Northern District of Illinois.

12. Editor’s note: This refers to the Brady Rule, named for *Brady v. Maryland*, 373 U.S. 83 (1963), in which the Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87.

office on a Saturday afternoon—particularly if it is an important case, particularly if it is a heated case, particularly if it involves defense counsel that he really does not get along with, particularly if it is a close case. He might start to doubt himself and think, “It’s really not *Brady* material. I’m not really worried about it. It’s not that big of a deal.”¹³ We do not want prosecutors who think that way, and it is important to try to find that out in the hiring process.

Another thing that we obviously try to look for in the hiring process is a demonstrated interest in public service. Everyone comes into the interview saying they are interested in public service. Sometimes they do not have a track record of it, but they can explain why they do not. Other people have a lot of experience. One would hope that applicants who have been involved in public-service and volunteer work through school, or who have done other public-interest work, are interested in the job for the right reasons.

We also find that you learn a lot by doing due diligence and researching the applicant’s reputation with his or her former colleagues, particularly if they are former prosecutors whom you trust. Even if those colleagues have left their prosecutor’s office to become a defense attorney, they often still love their former office no matter what position they are currently taking in a case. If they know someone who is applying to the office and they think that the applicant is great, then they would love to see that applicant join the office even if it would hurt their practice. Other times, you call those former colleagues and you can hear them hemming and hawing. They know the applicant looks great on paper and can interview quite well for twenty minutes, but they are not comfortable with who the applicant is as a person. When they tell you that, they do you a great service. It also shows you something about the office ethic if the alums still think that it is their moral obligation to the office and to the public to make sure that you do not make a mistake when hiring.

The process of hiring is a great test of an applicant’s ethics. Sometimes people play a little cute when describing their backgrounds or their role in cases. You do not want to put too much trust in the hands of someone who has been fast and loose with the facts. That one extra phone call, that one check that lets you know an applicant is not

13. Editor’s note: For a discussion of the problem of non-compliance and ways that some prosecutors circumvent the Brady Rule, see Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

someone you want to rely upon, is worth the investment of your time. There have been several times when we have kicked the tires and afterwards said, “Whew, did we dodge a bullet with that one.”

Finally, it is very important that the hiring process be non-political, at least on the federal side, when the U.S. Attorney is a political appointee and everyone else in the office has to be non-political.¹⁴ I do not know the political affiliation of the people in my office, and I like it that way. Occasionally, I have received a resume from an applicant who thought it would help to include a letter from someone affiliated with a particular political party that says, “I think this person is great.” I say, “What are you thinking?” The application is probably not going to go very far. I remove the letter, give the application to my hiring person, and say, “Put it through the process.” But then I tell her about the letter because I view it as a minus when an applicant thinks that political affiliation would make a difference. I do not want to send such a letter to the people interviewing the applicant, who might end up thinking that political affiliation does make a difference to us.

In short, the one thing that I have picked up from talking to U.S. Attorneys is that while everyone focuses on cases or things people have done, most U.S. Attorneys, like most prosecutors, are as proud of the people they hire as they are of anything else they do.

14. Editor’s note: For more information about politicized hiring and firing in the U.S. Department of Justice, see generally U.S. Dep’t of Justice, *An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and the Summer Law Intern Program* (June 24, 2008), available at <http://www.usdoj.gov/oig/special/s0806/final.pdf>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev11n14a.pdf>; U.S. Dep’t of Justice, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division* (July 2, 2008), available at <http://www.usdoj.gov/opr/oig-opr-iaph-crd.pdf>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev11n14b.pdf>; U.S. Dep’t of Justice, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev13n14c.pdf>; U.S. Dep’t of Justice, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (Sept. 2008), available at <http://www.usdoj.gov/oig/special/s0809a/final.pdf>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev11n14d.pdf>. There have been no allegations of politicized hiring or firing at the U.S. Attorney’s Office for the District of Northern Illinois.

B. Acculturation

The most important thing we can do when hiring is spend the time to make sure that we get the people whom we can trust with that box of *Brady* material on a Saturday afternoon. The second thing that we should focus on is indoctrination and training. "Indoctrination" might sound a bit too much like brainwashing, but people take cues from their environment, and what you do from the moment they show up for their first day of work is important.

I like to tell people when they show up on the first day that they should never go home at night, put their head on a pillow, and have trouble sleeping over something that they did at the office. They might be worried about winning a case, or worried about how the witness is going to do, and that is fine. But if there is something that they are doing in their professional capacity that is keeping them awake at night, then something is wrong. We do not pay them enough and we do not give them enough time off for that to happen. It is their job to come in the next day and tell a colleague or a supervisor about what is bothering them so the issue is on the table for us to resolve. Sometimes new employees become concerned that nobody else in the office seems bothered by an issue that is bothering them. However, the reason that we are not concerned, and are perhaps about to do the wrong thing, is because we have our facts wrong. Then, when the new employee pipes up and says, "How could you do this, given X, Y, and Z?" we say, "Well, if you had told us X, Y, and Z, we wouldn't be doing this." Other times there may be an honest disagreement, but the employee should at least put the issue on the table and let the office hear the pros and cons. That way, at the end of the day they will feel like they did their level best to help the office decide whether to charge a person or not. New prosecutors should not bottle up their emotions inside. They are here because they have brains. They may be junior, they may be inexperienced, but they have brains, judgment, and a perspective. It is their job to share those things with us.

C. The Role of Supervisors

Let me talk briefly about supervisors. The one thing that had not struck me yet when I joined the U.S. Attorney's Office in New York is how much people cue in on very minor comments. When I left New York and went to Chicago, I noticed that the two jurisdictions have very

different systems of plea agreement and plea bargaining. When I showed up in Chicago, I said to myself, “This system is very different than the one I am used to.” I wanted to sit down and think about how New York’s method compares to Chicago’s, and figure out the pros and cons. Within hours, the word around the office was that the new U.S. Attorney was going to change the plea-agreement system to the way it is in New York, when all I said was that I would like to compare the two. After comparing the two, I decided that Chicago’s method worked just fine in Chicago and New York’s method worked just fine in New York. It would be a mistake to change either one. This experience shows that if you are a supervisor thinking out loud, people do not just listen to what you say out loud—they read something deeper into your words. As a supervisor, it is very important to not say anything, even in jest, that might lead people to jump to conclusions.

In my experience, many people like to be asked to be supervisors, because it is considered an honor to be promoted. However, not all the people who want to be asked to be supervisors really want to be supervisors. Some people just want to try cases and they are very good at it. The last thing they want to do is deal with management or administration issues, or deal with other people’s issues,¹⁵ and yet they really, really, really want to be asked to be a supervisor.

Supervisors need to take ownership of their office’s culture and ethics. Supervisors need to spend less time on their own cases, the work that is really fun and rewarding and that they joined the office to do. Supervisors need to act like busybodies or like a sponge, constantly absorbing the stuff going on in the office. Maybe it is just the two offices I have been in, but talk flies around an office really fast. There is a culture of benign gossip, and other gossip, and people generally know everything that is going on. If an issue crops up in a case, there is usually a buzz around the office about it. The supervisor should find out about the issue, get behind a closed door and ask someone what is going on, find out the facts, and if there is an issue, address it. I have been very fortunate to see supervisors make that effort and realize that the office’s integrity is at stake, and make sure to train people right. If you have supervisors who are more interested in their own cases, there is a real risk that an issue can fester for awhile.

15. Editor’s note: For a list of concerns that occupy supervisors or managers of prosecutors, see Lisa M. Budzilowicz, *Holding Prosecutors Accountable: What Is Successful Prosecutorial Performance and Why Should It Be Measured?*, 41-JUN PROSECUTOR 22, 27 (May/June 2007).

D. Addressing Ethical Challenges

We also need to confront the fact that there are going to be times when an assistant prosecutor is accused of doing something wrong or unethical. There are certainly going to be times when people bring an allegation of wrongdoing against a prosecutor in good faith, but the allegation is incorrect. Other times, a defense attorney may bring an allegation to gain a tactical advantage, thinking the best way to intimidate a young prosecutor is to challenge her ethics and hope she will shy away from the fight. But there are also times when people bring allegations of wrongdoing and the prosecutor is doing something improper. The most difficult part is when the people bringing the charges loosely happen to be right. We have to make sure that as an office, we dig into those allegations when we hear them. If an assistant is being wrongly maligned and someone is bringing charges to try to intimidate her, then the office must rush to that assistant's defense and defend the integrity of the assistant. Prosecutors put themselves at risk by going into courtrooms and taking positions in cases, and the office must therefore step up and support assistant prosecutors if they are wrongly attacked.

But when the office does not have confidence in someone, it must take action. I explained this once by saying, "If you are a teller at a bank and you are in charge of millions of dollars in cash, the bank has a responsibility to its shareholders to make sure the money does not get thrown out, given away, or stolen. If money keeps disappearing from a teller's drawer, then it doesn't really matter whether he is stealing it, or is negligent, or can't handle it—you, as the bank president, would never leave that person in charge of a desk full of money again because he is going to lose it." Well, what we have is a lot more valuable than money; it is the office's credibility. If there is someone in your office who is bringing that credibility into question, then the whole office suffers. It does not affect just that one person. The important thing is not, I submit, a test of whether or not you can prove an employee has done something wrong. Management has to have confidence that when they find that piece of *Brady* material on a Saturday afternoon, they will turn it over. If you do not have that confidence, you must take action.¹⁶

16. Editor's note: For a discussion of the importance of a head prosecutor's implementing consistent policies and rules of addressing offenses with appropriate discipline to enhance the prosecutor ethics through a "culture of integrity," see Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 632-42 (2007).

Every assistant prosecutor deserves to be backed up to the fullest when they have not done anything wrong, but every office also needs to know that every prosecutor is living up to its standards. If the office senses that someone cannot be trusted, then it has a responsibility to take action and perhaps invite that person to work somewhere else. That is not pleasant or pretty, but we are not here to keep everyone happy. Society trusts that it has honest and reliable prosecutors, and we are here to make sure that trust is validated. I told someone once, "If a person can't write very well, you can send him off to school to learn how to write and you can steer him away from appellate briefs. If another person is a strong writer but is not very good in the courtroom, then you can give her smaller cases to gain experience in the courtroom and learn how to try cases. If another person is a good lawyer but he hits some family illness or stress and is a little less productive for awhile, you have to understand that he is human and recognize that he has worked very hard and will work very hard again once he is back on his feet." When people have these types of issues, you work with them. But when the issue is credibility and ethics, then that is something you cannot work with. A person either has it or does not, and ethics is an area where an office cannot compromise or bend.

There are a couple of golden rules that I have picked up over the years that have stuck in my mind. First, never say anything to a witness that you would not want to see on the front page of the *New York Times*. This is important because sometimes you will see something you have said on the front page of the *New York Times*. Or I have often seen a defense attorney get up and ask, "What did the prosecutor tell you?" There is nothing better than when the witness truthfully answers, "They didn't tell me anything other than just tell the truth, whatever it is." You never want to say something that might embarrass you if it is repeated.

The second rule, which I think I picked up in New York, is to never do anything if you would not feel comfortable explaining to a Second Circuit judge why you did it. I actually had an experience in Africa when the Nairobi and Tanzania embassies were bombed in 1998 that illustrates this rule. I was working on the case with some colleagues in New York, investigating Osama bin Laden when he was relatively unknown.¹⁷ We

17. Editor's note: Judge Sand, the district court judge presiding over *United States v. Bin Laden*, 160 F. Supp. 2d 670 (S.D.N.Y. 2001), recounted asking "the chief government attorney, Patrick Fitzgerald, 'How do you pronounce A-L-Q-A-E-D-A?'" It was the first time I had ever heard of Al Qaeda, and I think for many it was the first detailed exposure to the existence of Al Qaeda and how it operated." Panel Discussion, *Trying Cases Related to Allegations of Terrorism: Judges'*

were in Africa and a person suspected in the bombing was picked up. I wanted to be present at the interview and I was asked to attend the interview, but some people thought that I should not take an active role. We had done a long-range investigation and seen a lot of witnesses, so I wanted to hear what this suspect had to say. His defense for most of the several days that he spent in the Nairobi jail cell was, "I'm a member of Al Qaeda and I was leaving town the night before the bombing but I didn't know it was coming. I had nothing to do with it. I was just told to get out of town."

Before the interview started we gave him an advice-of-rights form that was drafted to deal with overseas situations. The form explained, "You may have a right to a lawyer in Kenya. It's unclear—and sign this form."¹⁸ Before he signed it he said, "Before I talk to you I want to know, do I have a right to a Kenyan lawyer?" While the agent conducting the interview asked a bunch of questions, I was thinking, "What's the answer to that one?" I was thinking and thinking and thinking. The agent did not answer the question and the witness was about to keep speaking. It was a high-profile and high-pressure situation, and I was thinking, "This guy may confess to these bombings." But I remembered who the judge was, and remembered the rule that you have to be able to explain your actions to the Second Circuit judges, and was thinking that I did not want to be in a room where a person asked a question about a lawyer that was not answered. So I said, "Time out. Before we go any further—you asked a question. We're going to get you an answer."

We took a break and I was feeling very, very uncomfortable about stopping what could be the beginning of a confession. We went next door. I was there with a Kenyan police officer. I told the officer, "He asked a question. What's his right to a Kenyan lawyer?" Very calmly the Kenyan police officer said, "Well, this is an important question. The eyes of the world are watching. We must get it right." He took out his

Roundtable, 77 *FORDHAM L. REV.* 1, 14 (2008).

18. Editor's note: For a detailed discussion of the right to have legal counsel present during questioning under the Fifth Amendment of the U.S. Constitution, see Martin J. McMahon, *Necessity that Miranda Warnings Include Express Reference to Right to Have Attorney Present During Interrogation*, 77 *A.L.R. FED.* 123 (1986). For applications of constitutional rights abroad in the context of investigations such as the August 1998 bombings of the U.S. embassies, see Leah E. Kraft, Comment, *The Judiciary's Opportunity to Protect International Human Rights: Applying the U.S. Constitution Extraterritorially*, 52 *U. KAN. L. REV.* 1073 (2004). The author specifically discusses the challenges in adapting the right to have an attorney present during custodial interrogation to law in a foreign country. *See id.* at 1111–12.

little code book and read through it (they have a very British system) and he explained that criminal suspects do not get a lawyer for fourteen days in a capital case. “For something like this they get this, that is the rule. But let me check.” He called an attorney, and they called back and said that is your answer. We took a fifteen-minute break and I was sweating bullets. We went back in and explained the suspect’s rights to him. He basically said, “That’s fine. I just wanted to know, but I want to go ahead and talk.”

I felt a little pressure about interrupting a confession, or about-to-be confession, or pseudo confession, or his admission to being Al Qaeda but denial of participating in the bombing, so I said, “I better write this down.” I handwrote everything that happened while overseas, and thought to myself, “I’ve just disqualified myself in this prosecution.” When we brought the suspect back to New York to stand trial, I turned over my notes in the first batch of discovery and said, “This is great. I’ve worked years on this case and now I’ve just disqualified myself from trying it.” As it turned out, defense counsel never moved to disqualify me until the eve of trial, which the judge found to be untimely. Also, the form that had been signed by the defendant turned out to be defective because instead of saying, “You have a right to an American lawyer that you may not be able to effectuate,” it said, “You have a right to a lawyer.” However, the judge found that the confession was not tainted based on my notes of my contemporaneous statements explaining the suspect’s rights. I said, “You have a right to a lawyer,” and then explained, “But we can’t get you a lawyer.” The judge found that to be a correct explanation of his rights.¹⁹ So, I had inadvertently corrected a defect. I would like to say that had I figured that out on my own, but I did not. By acting in a way so as not to embarrass myself when explaining my actions to a judge, we ended up being better off for it. Someone once told me to never do something that I would not be able to explain to a judge, and I followed that rule.

I learned another lesson during the same case about never saying anything that I would be embarrassed to see on the front page of the *New York Times*. We were prepping a witness remotely because he was in the witness protection program. For some long and complicated reason, I did not realize that our telephone calls with this witness were being taped.²⁰

19. Editor’s note: *See In re Terrorist Bombings of U.S. Embassies in East Africa*, 2008 WL 4967700 (2d Cir. 2008), at *28–30.

20. Editor’s note: *See United States v. Bin Laden*, 2005 WL 287404 (S.D.N.Y. 2005), at *7–9.

There is nothing like trying a case, getting a conviction, moving to Chicago, getting a new job, and *then* getting a phone call saying, “By the way, we have eighteen hours of tapes of you prepping a witness. What do we do with them?” You listen to the phone and say “Send them to me.” You hang up the phone, and turn the tapes over to defense counsel, knowing they are going to listen to you for eighteen hours when you did not know that you were being taped. I am very happy to say that my colleagues and I did not do or say anything that we felt uncomfortable about. There was an agent on those tapes, and I was very proud of the fact that when we were out of the room and the witness asked him questions, he just said, “We can’t talk to you about that. We have to wait for the prosecutors to come back. We can’t make you any promises.” After going through that experience, I tell people, “You never know when someone will inadvertently tape your conversations or some other weird thing will reveal your confidential activity. If you play by the rules, then you will be able to say that you acted ethically.”

E. Ethics Advisors

The next issue that I would like to discuss is the process by which prosecutors decide complicated cases. When we have complicated cases in my office, we have indictment committee meetings. During the meeting, we review the case and make sure that we can prove racketeering if we are going to charge racketeering, and look at the strengths and weaknesses of our arguments. We also have ethics advisors, and when we have tough cases and tough problems we run them by the advisors. This is valuable because, first, you have one person who is an expert on the subject—the really, really smart person that you sucker into being the ethics advisor so she can learn Rule 4.2 and all of the case law and state ethics rules. The ethics advisor becomes the expert that you need to walk you through these issues. Second, it makes people put the issue on paper. Prosecutors come in and say, “Well, this person has a lawyer, but the lawyer is a representative for the state case, but we told them it was a federal case, but we only told them about this much and now they are trying to obstruct justice if we want to do this. We want to send someone in to record them,” and so on. Someone has to stop and say, “Let’s walk this through slowly, get it all right, and put it down on paper.” That process usually allows you to untangle the issues.

Many ethical issues are not very complicated. One rule that I picked up around the two offices is: if you are thinking about why you have to turn over a document, then the very reason why you do not want to turn it over may be the reason why you *have* to turn it over. If your reaction is, “Can you imagine what that defense attorney will do to my witness with this?” then that is a good indication that the defense is entitled to it. However, if your reaction is, “This really isn’t relevant and if this gets exposed an informant may get killed,” then that is a valid consideration. If you have a thorny ethics issue, what helps at the end of the day is to write it up, run it by an ethics advisor, run it through the chain right up to the U.S. Attorney in a federal office or the head prosecutor in a state office, and then have them sign off on it. If you are going to ask people to step out on a limb, then you ought to be the one who takes responsibility for the consequences of those actions in the end. Also, if you write the issue down, then people will know what the facts are and if there is an issue later, we can explain to a court, “Well, this was our thinking.”

F. Creating an Ethical Norm

The one thing that sets an ethical office culture apart is how people react when there is actually a problem. For example, someone might come up to you in a big case and say, “By the way, we just came across a new witness,” or, “The agency just went through the files and found this new document. We just found out the witness is wanted in another state.” There are two types of extreme reactions that you could have. One is to shoot the messenger and say, “Oh, this is so terrible. Our case is going down the tubes. What are we going to say? This is horrible.” You might vent and vent and vent and eventually do the right thing, but you have sent the signal that you really did not want to hear that information. The other reaction is to say, “Okay, this is a problem but we need to deal with it,” and recognize that what is really at stake is not the case, but the office’s credibility. An ethical office culture encourages the person receiving the information to say, “Wait a minute, I’m glad you brought this forward. It’s better to deal with it now. Let’s put it on the table. No case is worth losing our credibility. We want to make sure that your reputation and the office’s reputation are intact.” Have that approach.

I think that young attorneys, even the most ethical attorneys who join an office thinking that it is an ethical place, are going to have their moment of truth when the first problem comes up. Their antennae will

be so sensitive to how the office reacts. If people react by throwing things on the floor and saying, “We’re going to lose,” then the new attorney is going to get the impression that the office does not really care about ethics. On the other hand, they will get the right impression if the office reacts with some frustration but does not get upset and encourages the person who brought the issue forward and tells her that she did the right thing, we needed to know that information, we will take action, and everything will be okay. That reaction sends a very different signal. I think that first impression is perhaps the most important one, because a person can interview in the office and hear that it is a great place and the people there are ethical, but when the rubber hits the road and a problem arises, that is when he sees what the office is really like. Similarly, when new information comes in on a case that has already resulted in a conviction, the office culture determines the attitude people take when they get that information.²¹

We all know there are frivolous collateral attacks.²² I remember one in which the lead defendant presented a document that purportedly exposed a secret agreement between the Attorney General of the United States and the main Mafioso from Sicily. It cracked me up because it came with a letter confirming the agreement, signed by a DEA official stationed in Bern, Switzerland, on a given year. There was also a message at the top of the letter that said something along the lines of “super secret document, this is exploding letterhead and if you try to make a copy of this with your Xerox machine the whole thing will explode,” and it referenced some intelligence agency, as if this was super secret information. The irony was that the DEA official did not have an office in Bern, Switzerland, the year the letter was dated—the office was not established until later. The person who purportedly signed the letter eventually worked in Bern, Switzerland, several years after the date of the letter, I think. Ironically, defense counsel submitted copies of this letter with the filing and I took great pleasure in pointing out that evidently reproducing the letter did not cause any explosions. So, when you get used to these frivolous attacks you get into the mode of saying, “Okay, another collateral attack. What is it now? Who’s coming up with

21. Editor’s note: See generally Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35 (2009).

22. Editor’s note: For more on the problem of frivolous collateral attacks, see Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148–50 (1970).

some lame story?”²³

The reality is that there are cases in which issues come up, and you have to have an open mind. One case has really stuck in my mind. I do not remember the facts very well, but I remember that it really jarred me. It was a case involving gangs where people started to flip and come in to the office. Finally one witness said, “There’s something I have to tell you. We all committed a murder.” He described how he and his colleagues, whom we had arrested for a drug case, had murdered someone, and he described when and where the murder happened. As a result of the proffer, the agent and the prosecutors went out to investigate the murder and confirmed something that the witness had told them in the first interview. He had said, “By the way, somebody else was charged with the murder and convicted.” When they asked him what those other people did with regard to the murder, he said, “Nothing. We don’t know them. They had nothing to do with it.”

We looked into the underlying case, and it turned out that the first person who was arrested had nothing to do with the murder, but for some reason thought that he was going down for a murder that he had nothing to do with. He thought that the best thing for him to do was to admit to the murder and implicate his friends in order to get a cooperation deal. As a result, they locked up the friends. Then one of the friends figured out that the first suspect had wrongly implicated him in a murder, and the best thing he could do was to say the same thing and get another cooperation deal. Then a third person came in, I think, and pleaded guilty to the murder, which he did not commit. I think one or two other individuals went to trial, and one was acquitted.

When I started working as an Assistant U.S. Attorney in 1988, I would sometimes have multiple witnesses corroborating the same thing and defense attorneys would stand up and say, “Well, they’re just saying what the prosecutor wants them to say.” I would look at a jury and say,

23. Editor’s note: Justice Jackson similarly deplored the overabundance of habeas corpus petitions:

The fact that the substantive law of due process is and probably must remain so vague and unsettled as to invite farfetched or borderline petitions makes it important to adhere to procedures which enable courts readily to distinguish a probable constitutional grievance from a convict’s mere gamble on persuading some indulgent judge to let him out of jail. Instead, this Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones.

Brown v. Allen, 344 U.S. 443, 536–37 (1953) (Jackson, J., concurring) (citations omitted).

“They pleaded guilty. People don’t plead guilty to murders they did not commit. And, how do they all have the same story? How did it all line up if witness A, B, and C all admit that they committed the murder and their stories corroborate each other?” It was, in my view, a slam-dunk. The notion that a defendant could be convicted based on several witnesses who not only got their stories together despite being interviewed in separate rooms, but did it to implicate themselves in something that they did not do, was rather frightening to me.²⁴

This case illustrates the one area where we, as prosecutors, need to be extremely careful. It may be a matter of ethics, or more a matter of professionalism, but we need to do a better job of making sure that we ask questions in an antiseptic fashion. We should not walk into a room and tell a suspect everything we know and ask them to agree with us. We should not have officers or agents tell a suspect, “We know you did it. We know you did it this way. We know you did it with X, Y, and Z,” and then hope that they say, “Yes, that’s right,” and then walk in to the next room and say to his partner, “The first guy told us this is how it happened,” and hope that they agree too.

Instead, prosecutors should ask questions in a way that makes the interview much more antiseptic—where the person being questioned has to tell the story without knowing what the prosecutor knows— and then we will know if the stories line up. I sat in on a bunch of proffers with a prosecutor colleague of mine, Henry DePippo. The witness would sometimes ask him questions, such as, “I don’t know, what was it? Was it a blue car or was it a red car?” He would just say, “I don’t give out information. I just get it.” That was his motto; he never gave out information. I recognized that it did not matter to him whether the car was blue or green, or whether the witness had it right or wrong. He was getting their version of the facts and that was it. He would make an assessment of whether their story lined up. He would put a witness on the stand and if she got it wrong, she got it wrong, but he wasn’t going to ask, “You are sure it was blue? It wasn’t green?” That is the sort of thing that gets people in trouble, and that is one area to which we do not

24. Editor’s note: For more details on the phenomenon of innocent individuals pleading guilty, see Ellen Yaroshefsky, *Ethics and Plea Bargaining*, 23-FALL CRIM. JUST. 28 (2008) and Jeremy W. Newton, *False Confession: Considerations for Modern Interrogation Techniques at Home and War*, 9 J. L. & SOC. CHALLENGES 63 (Spring 2008). For analysis regarding inaccurate cooperator testimony generally, based on interviews with former assistant U. S. Attorneys and defense attorneys, see Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999).

pay enough attention. I do not think that there are too many prosecutors who want to tell someone something that is not true or want to coach people to say something that is not true. Still, there are an awful lot of prosecutors who do not think enough about how to ask questions in a way that ensures they do not accidentally plant information or encourage the witness to say what he thinks the prosecutor wants him to say.²⁵ Asking very short questions that require the witness to talk is a very valuable practice.

I will tell you one last war story, and then I will move on. I once worked on a kidnapping case. It was the Christmas of 1989. Nine guys kidnapped a man in the Bronx and the FBI rescued him. He was kidnapped over a drug debt, so we saved his life from the clutches of these killer maniacs in the Bronx and then put him in handcuffs to stand charges for dealing in drugs. A month later we raided the house and caught the kidnapers. One of them described how a guy named Victor kept menacing him with a knife. It was the Christmas season and they were chopping a chicken or a turkey. Victor kept telling this guy that he was going to chop him up unless the money came for the drugs. This guy was pretty shaken up about it.

Well, one day Victor came in and told us, “By the way, I was a kidnap victim, too. I was being held because I had a drug debt, and I’ve been kidnapped before. When I was kidnapped before they had kidnapped five other people and put electric wires to their heads to electrocute them and make them pay money. One of them was the uncle of the defendants. So, you had me locked up as a kidnapper and I’m a kidnappee. In fact, I was a serial kidnappee. I was dealing drugs, but these guys kidnap all the time.” I remember thinking, “This is one lame story.”

We then decided that we needed to bring the first guy back for questioning. We brought him in and said, “Tell us how that guy Victor got there.” He replied, “It was about Thursday before Christmas and they dragged him in about 3:00.” We all looked at each other and said, “What do you mean they dragged him in?” He explained, “Well, he didn’t want to be there. He owed them money, too.” Then we said, “Well, so he was being—” and he interjected, “Oh, he was kidnapped,

25. Editor’s note: For an in-depth exploration of this topic, see Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997). “No one suggests police set out to extract false confessions or prosecutors intentionally seek to convict the innocent,” write the authors, adding that “poor training and negligence are the principal reasons that false confessions occur.” *Id.* at 983.

but then he was threatening me to make them happy with him.” We asked, “Had he ever been to the house before?” He said, “Yeah, in fact, he told me that this was the second time he’d been kidnapped and the last time he was kidnapped they had five guys with electric wires to their heads.”

I remember thinking at the time that if we had asked the question, “Isn’t it a fact that he’d been kidnapped twice and they had electric wires to his head?” and he said, “Yes,” then we would not have had much confidence in the story. By asking the questions in a way that encouraged him to tell the story, we could be confident that he was telling the truth. We just wanted to throttle him and say, “Why didn’t you mention that before?” If we had, we would have gotten the response, “You never asked.” So, we had to learn to ask all of the kidnapers if they were kidnappees. There is a lot of value in making sure that we go about our jobs so that we are not planting information, we are extracting it. In the words of my colleague Henry, “We don’t give information; we get it.”

G. Leaking Information to the Media

Another important ethical issue in a prosecutor’s office is the issue of leaking information to the media. People know that investigations are supposed to be confidential. People can generally figure out how information ends up in the newspaper—they can guess when it is coming from prosecutors, when it is coming from law-enforcement agencies, or when it is coming from defense counsel. Sometimes it is unclear.

People look for clues as to how ethically people are behaving. A prosecutor’s job is to follow the rules and not leak information to the media.²⁶ The assistants in your office will watch cases in the newspapers and they will watch how the office reacts. The best way to show people that you are serious about your responsibilities is to make it clear that you expect everyone you hire to follow the rules, that you will take responsibility when things go wrong, and you will back them when they have not done anything wrong.

26. Editor’s note: For a discussion of the various rules applicable to prosecutors’ disclosure of information and reasons for limitations on the ability to disclose, see John Q. Barrett, *The Leak and the Craft: A Hard Line Proposal to Stop Unaccountable Disclosures of Law Enforcement Information*, 68 *FORDHAM L. REV.* 613, 627–33 (1999). For more information about the historical evolution of rules regarding extrajudicial comments to the media, see Lonnie T. Brown, Jr., “*May It Please the Camera, . . . I Mean the Court*”—*An Intrajudicial Solution to an Extrajudicial Problem*,

CONCLUSION

The bottom line is that prosecutors have to spend more time thinking about their office culture than they sometimes do. It starts with the people we hire and how we train them. It continues with how we supervise them. When the rubber hits the road and there is a problem, we must tell people that we are going to deal with the problem in a positive way. We must tell people that we are grateful for the information they bring to our attention, because we are.

The best explanation I can give is to borrow a story from someone else, my good friend and colleague, Jim Comey. When he was being sworn in as a deputy attorney general, he told this story. I wish I could say that I wrote this myself, but it is something he said when he was U.S. Attorney in the Southern District of New York:

I meet with each assistant U.S. Attorney in the Southern District of New York on their first morning before I administer the oath, and I give them what they now teasingly call “the speech.” I tell them what my expectations are for their job, and the most important thing I tell them is that they are about to begin the journey of a lifetime because they are about to take a job where their only obligation is to do the right thing, an opportunity few people ever have. And I tell them that, “You are about to get a gift that you didn’t earn, and that was earned for you by things done and sacrifices made by people long since gone, and that is this: When you stand up as an Assistant U.S. Attorney and say, ‘I represent the United States of America,’ people believe the next thing you say. You didn’t earn that. That’s a gift,” is what I tell them. And I tell them that, “You’ve gotten from those people long since gone a reservoir of trust and credibility, and your absolute obligation—and I will insist upon it as your U.S. Attorney—is that you take that reservoir, you guard it, you protect it, and you turn it over to the next group that follows you as full as you’ve got it or fuller.” If I am fortunate enough to be confirmed as Deputy Attorney General, I will receive just such a gift.²⁷

39 GA. L. REV. 83, 94–117 (2004).

27. Editor’s note: *Confirmation Hearing on the Nomination of James B. Comey, of New York, to be Deputy Attorney General, Department of Justice*, 108th Cong. 5–6 (2003) (statement of James Comey), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_senate_hearings&docid=f:93948.pdf, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev11n27.pdf>.

He then went on to describe how he would make sure that he protected that reservoir of trust and credibility.

I think that his words apply to any prosecutor's office in the country. Everyone who walks in to a prosecutor's office, from the boss to the brand new hire, is really walking into a reservoir of credibility. Or, to put it another way, they are inheriting a check whose credit is good, and that credit has been earned in decades before. People have to understand that credibility is a checkbook that everyone in the office shares. If one person bounces that check, then the whole office bounces the check. Everyone has to understand that at the end of the day, at the end of each career when a person leaves the office, it will not be the cases that matter the most. They are important, but what really matters is that the check is still good and the reservoir is still full. It is very important to do everything we can collectively to make sure that people understand this every day, particularly on the days when it is hard.