ETHICS AND THE PROSECUTOR*

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In addressing the subject "ethics and the prosecutor," one might quickly conclude that there is no reason to distinguish the ethics of the prosecutor from the ethics of any other trial lawyer. To some extent that is true. Unfortunately, too many lawyers regard the Rules Regulating the Florida Bar as aspirational goals. Indeed, they are not. Rather, they are the minimum requirements for lawyer conduct. The demands of professionalism and honor begin at that level. All lawyers who take the oath of office are expected, at least, to conform to the requirements in these rules of conduct. An examination of the oath required for admission to The Florida Bar clearly enjoins the members to even higher standards than those set forth as rules of ethics.[1] With this brief introduction, I will now examine the role of the prosecutor to determine whether, in some respects, the ethical and professional demands on the government lawyer are different. I will preview my conclusion and state that, indeed, the demands made upon the prosecutor, state or federal, are somewhat different.

When the prosecutor responds to the call of the case by stating "Mary Jones for the government, your honor," she is saying to the court and the jury, "I am your representative seeking justice in this case." With this representation, the prosecutor is clothed with enormous power. In the book *Main Justice*, the authors discuss the Department of Justice's Office of Professional Responsibility and refer to the chief counsel's observation: "We believe . . . that we are the only component in the department that is the ultimate check on behalf of the attorney general against prosecutors and misconduct by them . . . and abusing the machinery that they have at their dis-

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1. *See* Oath of Admission to The Florida Bar, *in* R. REGULATING FLA. BAR p. 2 (1997). The oath twice refers to "honor." *See id*. First, the oath states that a lawyer "will employ for the purpose of maintaining the causes confided to [him or her] such means only as are consistent with truth and honor." *Id*. Following this promise is another to "advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which [the lawyer is] charged." *Id*.

posal, which is awesome."[2]

The prosecutor is more than an advocate. In some respects he or she is a judge clothed with significant powers. While the prosecutor's *raison d'etre* is to protect the public and bring the guilty to justice, that pursuit often involves some delicate balancing of rights and obligations. In *Hall v. United States*,[3] the Fifth Circuit noted that "government counsel is, as an individual, `properly and highly respected by the members of the jury for his integrity, fairness, and impartiality'. . . . `Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.'"[4] Likewise, in *Berger v. United States*,[5] the Supreme Court noted,

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[6]

These words apply equally to the state prosecutor.

In the federal system and, perhaps, to some extent in the state system as well, the prosecutor has been given considerable additional power with the advent of new crime legislation including the sentencing guidelines. An example of this expansion of power in the federal system is the elimination of the defendant's right, after sentencing, to petition the court for a reduction under Rule 35.[7] Now, only the prosecutor may make such a motion if he or she determines the relevant conduct justifies such a petition.[8]

The challenges presented to test the prosecutor's mettle are

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2. JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE 211 (1996).

3. 419 F.2d 582 (5th Cir. 1969).

4. *Id.* at 588 (citations omitted) (quoting Thompson v. United States, 272 F.2d 919, 923 (5th Cir. 1959) (Rives, C.J., concurring); Berger v. United States, 295 U.S. 78, 88 (1935)).

5. 295 U.S. 78 (1935).

6. *Id.* at 88.

7. *See* FED. R. CRIM. P. 35(b).

8. *See id.*

many. These range from supervising an investigation, which often involves delicate questions about wiretap applications and search warrants, to determining the quality and quantity of evidence to present to a grand jury. Indeed, *how* to present the evidence to the grand jury may be a problem for a prosecutor whose zeal has dulled his judgment. The prosecutor's role "is not to tack as many skins of victims as possible to the wall, [but] to vindicate the right of the people as expressed in the law and give those accused of crime a fair trial."[9]

Roscoe Pound, in describing a profession stated that "the term refers to a group . . . pursuing a learned art as a common calling in the spirit of a public service — no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."[10] While this should be the standard and the aspiration of all lawyers, the prosecutor, who has devoted his or her work to this quintessential public service, must keep these sentiments continuously in mind.

The pushes and pulls leading to justification and rationalization are many. For example, prosecutors and their investigators may be totally and sincerely convinced that an accused is guilty of serious crimes, yet be concerned that full discovery may compromise the prosecution. There can be only one answer in such a situation — full discovery. Otherwise, misguided thinking by a prosecutor, along with ambition or misdirected passion, may affect the prosecutor in many areas. For instance, a prosecutor must remain diligent in finding and determining what is exculpatory material[11] and promptly disclose it. Prosecutors must also conduct careful and fair preparation of witnesses for trial, and timely, complete compliance with all discovery rules is essential. Moreover, it goes almost without saying that complete candor is required in making representations to the court.[12]

In my twenty-two years of experience on the bench, the men and women dedicated to prosecuting cases, with very few exceptions, have been well-prepared, well-motivated, and bring credit to the

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9. Donnelly v. DeChristoforo, 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting).

10. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

11. Exculpatory material is usually referred to as Brady material, which is named for *Brady v. Maryland*, 373 U.S. 83 (1963).

12. *See* R. REGULATING FLA. BAR Rule 4-3.3 (1998).

government. Nevertheless, it seems useful to keep before us the unique role of the prosecutor and to be mindful of the words of Oliver Wendell Holmes, who reminded lawyers that they may have the opportunity in their practices to "drink the bitter cup of heroism."[13] For the prosecutor, that heroism is resisting any impulse that diverts the quest for fairness. In the prosecutor's charge lies the integrity of the criminal justice system, which gives validity to the Bill of Rights. If personal ambition or misguided zeal interfere with such a sacred mission, not only does the affected accused suffer, the virus of excess infects and weakens the system.

An inscription on the walls of the Department of Justice in Washington, D.C. reads, "The United States wins its point whenever justice is done its citizens in the courts."[14] To conclude, James Madison's words also are appropriate here: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."[15]

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13. OLIVER WENDELL HOLMES, *The Profession of the Law, in* THE ESSENTIAL HOLMES 218, 219 (Richard A. Posner ed., 1992).

14. Brady v. Maryland, 373 U.S. 83, 87 (1963). The quote was originally penned by former Solicitor General Frederick Lehmann in a brief to the Supreme Court. *See* James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 696 n.8 (1990).

15. THE FEDERALIST NO. 51 (James Madison) (1788).