Bloomberg BNA

White Collar Crime Report™

INVESTIGATIONS

Private Funding for Public Prosecution in Complex Cases Poses Ethical Conundrum, Potential Conflict of Interest

BY STEVEN P. SOLOW

In a famous *New Yorker* magazine cartoon, a lawyer sits across his desk from a potential client. The lawyer says, ''You have a pretty good case, Mr. Pitkin. How much justice can you afford?'' Now imagine that instead of a private lawyer it is a prosecutor asking the question. This is not an imaginary scenario, and it should concern members of the white-collar bar.

For example, in 1992, a software developer in California suspected that a senior executive of the company was providing proprietary information to people outside the company. When the executive resigned, the company immediately examined his e-mails. They found messages that they believed conveyed confidential corporate information. The company sought help from the local police, who in turn contacted the district attorney's office.

The local law enforcement officers lacked the expertise to conduct computer searches and realized they needed to hire outside computer forensic specialists. However, they also lacked the funds to hire such experts. What might the prosecutors have done? They might have gone to the county and sought additional funds for a matter they considered of sufficient public interest that it should be pursued. They could have gone to state or federal law enforcement agencies for support. They did neither. Instead, they solicited money from the ''victim'' company, ultimately receiving thousands of dollars to underwrite the costs of the computer experts and a reporting service that transcribed tapes of witness interviews.

Mr. Solow, a partner in the Washington office of Hunton & Williams LLP, is a former chief of the environmental crimes section of the U.S. Department of Justice. He currently serves as the Reporter to the ABA Criminal Justice Standards Committee Task Force on the Prosecutorial Role in Investigations. Mr. Solow can be reached at ssolow@hunton.com.

What's wrong with this picture? In the opinion of the California Supreme Court: ''[F]inancial assistance of the sort received here may create a legally cognizable conflict of interest for the prosecutor. The undisputed facts, moreover, support the trial court's conclusion such a conflict did exist in this case.''[1]

The court's decision upheld the trial court's order disqualifying the prosecutor's office from the case, even though the trial court had failed to find that the conflict was ''so grave as to render fair treatment of the defendant unlikely.'' [2] Two judges, however, wrote separately to assert that recusal of the district attorney's office was required as a matter of law.

Importantly for white-collar practitioners, the concurring opinion noted that obtaining the services of the district attorney in prosecuting the criminal case could significantly aid the ''victim'' company, Borland International (the defendant was Symantec). The court wrote:

> Certainly, the district attorney would have appreciated that Borland stood to benefit from the criminal prosecution . . . . [S]uch a prosecution would assist Borland's parallel civil action, help protect any asserted trade secrets, and serve to deter others . . . but prosecution also would constitute a major disruption and distraction for Symantec Corporation, one of Borland's primary competitors. Under these circumstances, the solicited funds would likely be considered by Borland to be a prudent investment whether or not the prosecution was ultimately pursued to trial and conviction . . . .[3]

This case and the ramifications of private support for prosecutors suggest the need for standards to guide the use of outside economic assistance by prosecutors' offices.[4] Currently, no such standards exist, though the American Bar Association may soon consider additional

[1] *People v. Eubanks,* 927 P.2d 310, 321 (Cal. 1996).
[2] *Id.* at 321.
[3] *Id.* at 324.

 ISSN 1559-3185

Standards for Criminal Justice to address the investigative function of the prosecutor. If incorporated into those new standards, the language set forth below can guide both prosecutors and defense counsel as to whether and in what circumstances the acceptance of private funding may so bias the actions of the public prosecutor as to threaten the equality of treatment and undermine the legitimacy of public prosecutions. In such circumstances, it may be argued that an irreparable conflict of interest has arisen between the prosecutor's public duty and its privately funded activity.[5]

Resources as a Limiting Factor In the Exercise of Prosecutorial Decisions

Prosecutors are constantly making choices as to which laws to enforce and which violations of those laws to prosecute. The National District Attorneys Association's National Prosecution Standards state that among the factors relevant to charging is the potential ''excessive cost of prosecution in relation to the seriousness of the offense.''[6] Moreover, the NDAA Standards explicitly recognize that ''adequate funding'' of the prosecutor's office is necessary to ''fulfillment of the prosecution function'' and attainment of the standards.[7]

The NDAA Standards do not attempt to define ''adequate funding,'' and there may be widely divergent views as to what constitutes ''adequacy.'' What is not in question is the need for the prosecutor to allocate resources in a manner that does not ''discriminate for or against any particular group in deciding which cases to prosecute.'' [8] Acceptance of private resources by public prosecutors has the obvious potential to influence the proper exercise of prosecutorial discretion. This should concern prosecutors as much as others, since the exercise of prosecutorial discretion has largely been exempt from judicial review. By accepting such resources, prosecutors can run afoul of their ethical obligation to be a ''minister of justice'' and avoid being an ''advocate'' for a particular client,[9] and could trigger demands for greater outside oversight and review of their decision-making process.

What Kind of Private Funding Is Toxic? When Does Private Involvement In Public Prosecutions Cross the Line?

To steer clear of these pitfalls and avoid opening their cases to attack on the grounds of conflict of interest, prosecutors' offices may wish to consider the following factors before accepting financial or resource assistance by nongovernmental sources:

1. *What is the nature of the public interest at stake?* The prosecutor should consider whether the offer of assistance advances broad public interests, or is primarily advancing the private interest of the nongovernmental source of funding or resources.

2. *What impact will this case have on criminal justice resources overall?* Nongovernmental sources of funding and resources usually offer to provide some narrow band of support: technical experts, certain investigative costs, etc. These represent the tip of the iceberg of the costs of bringing a criminal case. They do not include all the time spent in the prosecutor's office, including the time of various support, administrative, and supervisory personnel. Nor do they include the time of the courts, the judges, and the staff of the judicial system (at the trial and potentially at the appellate levels), or of the corrections system. These costs are real, and using these resources to address one matter will inevitably mean that others will simply not be heard.

3. *How will acceptance of nongovernmental funding and resources impact the equal administration of the criminal law?* As the ABA's Standards for Criminal Justice note: ''[T]he criminal law, unlike other branches of law . . . is designed to vindicate public rather than private interests.''[10] By enabling pursuit of the case of a wealthy victim over other victims, outside assistance can displace the broader public interest and undermine the disinterested exercise of discretion by the public prosecutor.

4. *Might the size and nature of the outside assistance unduly influence the exercise of either investigative or prosecutorial discretion?* As noted by Professor Joseph E. Kennedy, ''Prosecutors who accept private financing of variable costs in white collar cases might feel that their credibility in the relevant business community depends on their ability to justify the investments made by obtaining the results desired by their contributors.''[11]

5. *Might the community view acceptance of outside assistance as inconsistent with the fair and equal administration of criminal justice?* Put another way, outside assistance could be seen as a move toward a ''pay to play'' system of criminal justice, in which those who have the resources would command the attention and resources of the public prosecutor.

6. *Might acceptance of outside assistance raise concerns of undue influence, the appearance of undue influence, and potential conflicts of interest?* Because of the prosecutor's almost unfettered discretion, the acceptance of outside assistance raises the very real possibility that the legitimacy of the criminal justice system will be undermined if prosecutors are influenced, or even appear to be influenced, by outside assistance. According to the California Supreme Court, ''A system in which affluent victims, including prosperous corporations, were assured of prompt attention from the district attorney's office, while crimes against the poor went unprosecuted, would neither deserve nor receive the confidence of the public.''[12]

---

[4] On the general need for ethical standards for prosecutors, *see*, Little, *Proportionality As An Ethical Precept for Prosecutors In Their Investigative Role*, 68 Fordham L. Rev. 723 (1999).

[5] For a more complete consideration of how private financing of government prosecution may harm the operation of the criminal justice system, *see*, Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 23 Hastings Const. L. Q. 665 (Spring 1997).

[6] *See,* National District Attorneys Association, National Prosecution Standards § 43.6(n) (2nd Ed. 1991).

[7] *Id.* at § 36.1 *et seq*. Notably, the NDAA Standards also caution against public reliance on fines and forfeitures as a source of funding. § 36.4.

[8] Kennedy, *supra* at 673.

[9] *See* MR 3.8.

[10] Standards for Criminal Justice, Standard 3-2.1 cmt. (3d ed. 1993).

[11] Kennedy, *supra*, at 695-96.

[12] *Eubanks, supra*, at 318.

  WCR ISSN 1559-3185

Finally, as noted above, acceptance of outside assistance raises potential conflicts of interest. A trial judge may disqualify a prosecuting attorney if the ''judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office.'' [13] In a 2002 case, the California Supreme Court revisited its decision in *Eubanks*. The court held that a payment by one city agency of $314,000 for a certified public accountant to work on the city district attorney's office investigation of fraud by a city contractor did not require recusal of the district attorney.[14] Importantly, the California court did not retreat from the standards it set out in *Eubanks*, but it distinguished the two cases factually. Thus it left standing its two-part test, under which (1) a conflict of interest exists whenever the circumstances of the case evidence a reasonable possibility that the district attorney's office may not exercise its discretionary function in an evenhanded manner, and (2) the conflict is so severe as to disqualify the district attorney from acting. In *Hambarian*, a majority of the court held that even if the first prong of its test had been met, the second had not, and the decision upheld the lower court's refusal to disqualify the district attorney for accepting the assistance of an accountant paid for by the alleged victim.

However, the majority reiterated its concerns that the financial assistance from victims raises a concern as to the wealth of the victim having an ''impermissible influence on the administration of justice.''[15] Moreover, a dissenting opinion contended that the majority had improperly applied its own standard from *Eubanks*, and argued that the ''totality of the circumstances, including the amount of the contributions, the active role of the victim's investigator in the case, and the City's financial stake in the outcome of the investigation, suggests that the discretionary decisions of the prosecutor are within the influence and control of an interested party.''[16] On the basis of these factors, the dissenting judge believed that recusal was required as a matter of law.

All parties in the criminal justice system have a strong interest in the public's perception of the fairness and integrity of the process. As prosecutors' offices wrestle with a criminal code that seems to be ever expanding, and with the costs of investigation and prosecution increasing, the temptation to accept outside funds must be weighed against the need to protect the very integrity of their office. There is, of course, a resource available to provide funds to the prosecutor—the public. It is the public, and not private resources, whom the prosecutor should fairly ask: ''How much justice can you afford?''

---

[13] *People v. Super. Ct. of Contra Costa County*, 561 P.2d 1164, 1173 (Cal. 1997).

[14] *Hambarian v. Super. Ct. of Orange County,* 44 P.3d 102 (Cal. 2002).

[15] *Id.* at 114.

[16] *Id.* at 199.