STATE OF MICHIGAN

OFFICE OF THE ATTORNEY GENERAL

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff.

-vs-

[redacted]

Defendant.

PETITION FOR APPOINTMENT OF SPECIAL PROSECUTOR

Lauren Wickman, Prosecuting Attorney for Delta County, hereby petitions the Attorney General pursuant to *MCL § 49.160(1)* for the appointment of a Special Prosecuting Attorney for the following reasons:

1. On [redacted] occurred in Wells Township, Delta County Michigan. The report of the [redacted] was called in by [redacted] The [redacted] was reported to have occurred between [redacted] and [redacted]. [redacted] had called [redacted] and indicated that [redacted] had assaulted her with a glass bottle, as well as grabbing her by the neck. When contacted by law enforcement, [redacted] did not report any assault. [redacted] agreed to leave the residence and spend the night at a friend's house.

2. The Delta County Prosecutor's Office works with law enforcement in the Delta County area, including Delta County Sheriff's Office and Escanaba Public Safety Department. The Prosecutor's Office works closely with law enforcement officers on a daily basis from both departments.

3. In this instance, [redacted] is employed as a [redacted] with [redacted]. One of [redacted] job duties includes courthouse duty, requiring him to come to the Delta County Prosecutor's office several times a week.

4. [redacted] is married to [redacted], who is employed as a [redacted]. [redacted] is currently assigned to the [redacted], and works on a daily basis with Prosecutor Wickman, reviewing cases, discussing strategies, and drafting search warrants.

5. Upon information and belief, the friend's house that [redacted] walked to is the residence of another [redacted].

6. Individuals within the Delta County Prosecutor's office have socialized outside of the work setting with both [redacted] and [redacted] as well as [redacted]

7. Under *MCL § 49.160*, "If the prosecuting attorney of a county determines himself or herself to be disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, he or she shall file with the attorney general a petition stating the

conflict or the reason he or she is unable to serve and requesting the appointment of a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve."

8. The Delta County Prosecutor's Office believes we are disqualified from pursuing a criminal case against [redacted], given his role as law enforcement, the witnesses being local law enforcement, and close ties to several individuals involved with the Prosecutor's Office.

WHEREFORE, your Petitioner requests that a Special Prosecuting Attorney be appointed in this matter to review for review of the above referenced case and for any additional relief that law and justice may require.

Dated: September 11, 2022

Lauren Wickman, Delta County Prosecuting Attorney

FW: [redacted] (Delta County SPA)

From : Collins, Dianna (PACC) <CollinsD15@michigan.gov> Mon, Sep 19, 2022 03:09 PM
Subject : FW: [redacted] (Delta County SPA) 1 attachment
To : Lauren Wickman <lwickman@deltacountymi.org>, Paige Tardiff <ptardiff@deltacountymi.org>

Hi Lauren -
The AG denied your request for special prosecutor on this case, so you are able to keep it for prosecution.

Thanks -
Dianna

Dianna L. Collins (P53371)
Assistant Executive Director
Prosecuting Attorneys Coordinating Council
116 W. Ottawa Street
Lansing, MI 48913
(517) 334-6060, Ext. 502

-----Original Message-----
From: Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>
Sent: Thursday, September 15, 2022 10:28 AM
To: Collins, Dianna (PACC) <CollinsD15@michigan.gov>
Cc: AG-CRIM-SPA <AG-CRIM-SPA@michigan.gov>; Elve, Meagan (AG) <ElveM@michigan.gov>; Reakoff, Robin (AG) <ReakoffR@michigan.gov>
Subject: FW: [redacted] (Delta County SPA)

I don't see a conflict.

-----Original Message-----
From: AG-CRIM-SPA <AG-CRIM-SPA@michigan.gov>
Sent: Wednesday, September 14, 2022 4:27 PM
To: Hagaman-Clark, Danielle (AG) <HagamanClarkD@michigan.gov>
Cc: Collins, Dianna (PACC) <CollinsD15@michigan.gov>; Elve, Meagan (AG) <ElveM@michigan.gov>
Subject: [redacted] (Delta County SPA)

This SPA has been opened in Legal Files and is now awaiting a decision to keep or place with PACC/PAAM.

Thank you,

Robin Reakoff
Legal Secretary

Criminal Trials and Appeals Division
3030 W. Grand Blvd., Suite 10-200
Detroit, MI 48202
(313) 456-0180

-----Original Message-----
From: Collins, Dianna (PACC) <CollinsD15@michigan.gov>
Sent: Monday, September 12, 2022 8:37 AM
To: AG-CRIM-SPA <AG-CRIM-SPA@michigan.gov>; Elve, Meagan (AG) <ElveM@michigan.gov>
Subject: SPA- Delta Co. [redacted]

Dianna L. Collins (P53371)
Assistant Executive Director
Prosecuting Attorneys Coordinating Council
116 W. Ottawa Street
Lansing, MI 48913
(517) 334-6060, Ext. 502

-----Original Message-----
From: Paige Tardiff <ptardiff@deltacountymi.org>
Sent: Monday, September 12, 2022 7:53 AM
To: Collins, Dianna (PACC) <CollinsD15@michigan.gov>
Cc: Lauren Wickman <lwickman@deltacountymi.org>
Subject: SPA- Delta Co. [redacted]

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Good Morning-
Please see the attached Petition for Special Prosecutor and referenced police report. Please let us know if this is granted.

Thank you.

Paige Tardiff
Circuit Court & Evidence Clerk
Delta County Prosecutor's Office
Phone: 906-789-5115
Fax: 906-789-5149

[redacted](Delta County SPA).pdf
216 KB

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION
CONFLICT OF INTEREST/SPECIAL PROSECUTOR

Central to the integrity of the criminal justice system is a prosecuting official free of bias or conflict that would undermine faith in the independence of the office. A prosecutor's ability to ensure the guilty are held accountable, the innocent are protected and the interests of crime victims and the community are safeguarded requires such independence.

Prosecutors are elected to represent the People of the State of Michigan in their community and not any one entity or individual. Because of that unique position in the criminal justice system, disqualification is not a decision to be taken lightly.

Seeking to maintain the dignity and honor of the profession and compliance with the high standard of professionalism required to maintain the public trust, the Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors should be knowledgeable of the Michigan Rules of Professional Conduct as to this subject, including relevant case law, statutes, and ethics opinions.

- An elected prosecutor who has conflict a conflict will require recusal of the entire prosecutor's office. A supervising prosecutor with a conflict may require office recusal depending on the screening procedures in place.

- Procedures within a prosecutor's office should be established to address actual or potential conflicts, which include the creation of firewalls and conflict teams or supervisors to ensure conflicts are identified and necessary screening occurs. The manner in which conflicts or potential conflicts are handled should be documented. National Prosecution Standards (NDAA) 1-3.4.

- As soon as a conflict is discovered that requires the disqualification of a prosecutor's office, the prosecuting attorney should seek a special prosecutor by submitting a petition and supporting documents (e.g. police report) to the Department of Attorney General, pursuant to MCL 49.160. The petition should articulate the basis for the disqualification and rely on more than a mere claim that someone might question whether the prosecutor should be disqualified. A copy of the petition and supporting documents should be provided to the Prosecuting Attorneys Coordinating Council. If the supporting

documents are voluminous, a summary of the case or investigation should be provided. The procedure for appointment of special prosecutors as established by PAAM should be followed.

- A prosecutor should not accept appointment as a special prosecutor unless the prosecutor is confident that they possess the ability, expertise, staff, and other support and resources necessary to prosecute a case through conclusion, including any interlocutory or post-conviction appeals.

- Once the appointment of a special prosecutor is made, the disqualified prosecuting attorney should refrain from discussing the merits and any potential disposition of the case with the special prosecutor or the media. This does not limit contact between offices to insure that all relevant material is transferred to the special prosecutor. It is generally permissible for the disqualified prosecutor to provide general information to the Special Prosecutor, including information about victim services available in that county. The Special Prosecutor should be responsible for all victim notifications and ensuring that the requirements of the Crime Victim's Rights Act are observed. Additionally, the special prosecutor should notify the disqualified prosecuting attorney as to the disposition of the case upon its conclusion. Nothing in this recommendation should be construed to limit consultation by the Special Prosecutor with any victim under the Crime Victim's Rights Act.

A best practices recommendation by the Prosecuting Attorneys Association of Michigan (PAAM) is the product of careful consideration of experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions to reach the same or similar objectives.

Date approved by PAAM: February 10, 2017

Delta County Prosecutor's Office

Lauren M. Wickman
Acting Prosecutor
Civil Counsel
Beth Wickwire
Chief Assistant Prosecutor
Deputy Civil Counsel

MEMO

DATE: September 26, 2022

TO: Tpr Leinonen, Michigan State Police

FROM: Lauren Wickman, Chief Assistant Prosecuting Attorney Delta County

RE: MSP Incident No. 84-1384-22 ([redacted])

I have reviewed the above-referenced matter. Based upon my review, our office will not be authorizing criminal charges, as there are multiple, conflicting stories on what had occurred that night. Moreover, the alleged victim has contacted our office several times to indicate that the matter was simply a "misunderstanding" and that she did not want to pursue charges.

Please do not hesitate to contact me with any questions or concerns. Thank you.

Lauren Wickman

310 LUDINGTON STREET, SUITE 237 ESCANABA MI 49829
(906)789-5115

Delta County Prosecutor's Office

Lauren M. Wickman
Prosecuting Attorney
Civil Counsel
Beth Wickwire
Chief Assistant Prosecutor
Deputy Civil Counsel

MEMO

DATE: May 20, 2024

TO: Tpr Polley, Michigan State Police

FROM: Lauren Wickman, Prosecuting Attorney Delta County

RE: MSP Incident Number 84-717-24 ([redacted])

I have reviewed the above matter. Based on my review of the matter, our office will not be issuing a criminal charge in this matter, as there is no indication of an assault occurring. As such, our office would not be able to sustain the necessary burden of proof.

Please note, this matter was not sent for review to determine if a Special Prosecutor was needed. A previous matter was sent for review in 2022, at which time the Attorney General's Office determined there was no a conflict of interest. There is not a substantial change in the relationship with [redacted] and myself, or the office as a whole. As such, I did not feel an additional determination was necessary. However, if you wish to have this done, please contact me and I will file the necessary paperwork.

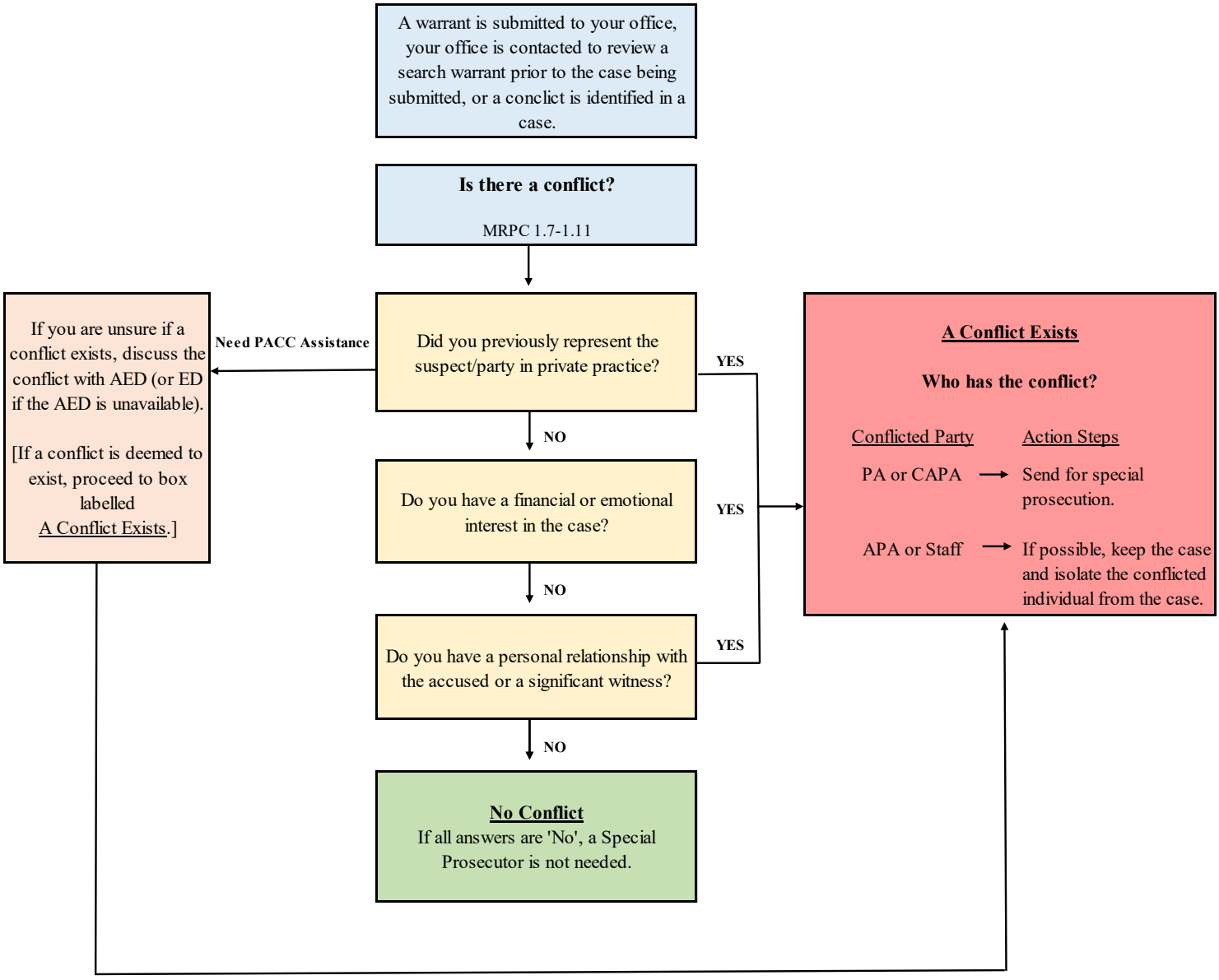
Please do not hesitate to contact me with any questions or concerns. Thank you.

Lauren Wickman
Prosecuting Attorney

310 LUDINGTON STREET, SUITE 237 ESCANABA MI 49829
(906)789-5115

Special Prosecution Assignment (SPA) Process

Remember: "While a prosecutor must prosecute vigorously, he must also prosecute impartially."
P v Doyle, 159 Mich App 632, 643



When submitting a case for special prosecution, please email the following documents:

- Petition
- Complete charging documents (if the case has been charged)
- Police report

Copies of these documents should be sent to both of the following:

ag-crim-spa@michigan.gov
collinsd15@michigan.gov

Special Prosecution Assignment (SPA) Checklist

Remember: "While a prosecutor must prosecute vigorously, he must also prosecute impartially." *People v Doyle*, 159 Mich App 632, 643 (1987).

A warrant is submitted to your office, your office is contacted to review a search warrant prior to the case being submitted, or a conflict is identified in a case:

- Is there a conflict? MRPC 1.7-1.11
  - Did you previously represent the suspect/party in private practice?
  - Do you have a financial or emotional interest in the case?
  - Do you have a personal relationship with the accused or a significant witness?
  - Is it an actual conflict or is just uncomfortable?
  - Who is the conflict with?
    - If conflict with PA or CAPA – send for SPA.
    - If conflict is with APA or staff member, can you isolate the person with the conflict from the case?
      - If yes, then do a conflict wall and isolate the person from the case.
      - If no, then send for SPA.
  - To submit a SPA: email a petition describing the conflict, the police report, and charging documents (if case is charged) to the AG and the AED of PACC.
- If there are questions as to whether there is a conflict or not, discuss the conflict with the AED or ED.

After the AG agrees there is a conflict, the case will either stay at the AG's office or be sent to PACC to contact counties to take the case as a SPA. Once a new office is assigned to the case, an Order of Appointment of Special Prosecutor will be sent to all parties by the AED.

Do Not: discuss the facts or disposition of the case with the SPA, as your office has been removed from the case.

Do: act upon the conflict as soon as it is identified, preferably pre-charge.

Do: discuss logistical things that they may need to know, such as, court dates, victim services, discovery, or evidence that needs to be sent to them.

Conflict of Interest

A PROSECUTOR'S GUIDE TO CONFLICT OF INTEREST.

Prosecuting Attorneys Coordinating Council
November 2015

TABLE OF CONTENTS

Overview 1

Introduction 2

The Michigan Rules of Professional Conduct and Ethic Opinions 4

National Prosecution Standards 6

Attorney-Client Relationship 8
- Prior Relationship 8
- Defense Counsel Becoming Prosecutor 8

Personal Interest in Litigation 20
- Personal Relationship 21
- Prosecutor Related to Judge 25
- Campaign Contributions 25
- Relationship with Court Personnel 27
- Prosecutors as Target of Litigation 28
- Prosecutor as Witness 29
- Sharing/Renting Office Space 33
- Financial Interest 34

Special Prosecutors 37
- Statutory Process 43

OVERVIEW

- Prosecutors should be knowledgeable of the Michigan Rules of Professional Conduct and as to this subject, specifically MRPC 1.7 - 1.11.

- Knowledge of the National Prosecution Standards promulgated by the National District Attorneys Association, specifically 1-3.1, et seq. is instructive.

- Prosecutors rarely have the opportunity to avoid potential conflict issues because they do not choose cases and participants who come before them.

- Initially, resolving questions of a conflict of interest is primarily the responsibility of the attorney undertaking the representation. Comment to MRPC 1.7; MCL 49.160.

- Conflicts arise typically out of two subject categories: a professional, attorney-client relationship, such as when a defendant is the former client of the prosecutor; and situations where the prosecutor has a personal interest in the litigation, whether financial, emotional or due to some relationship with the accused or significant participant.

- An elected prosecutor who has conflict a conflict will require recusal of the entire prosecutor's office. A supervising prosecutor with a conflict may require office recusal, depending on the screening procedures in place. MRPC 1.11

- Procedures within a prosecutor's office should be established to address actual or potential conflicts, which include the creation of firewalls and conflict teams or supervisors to ensure conflicts are identified and necessary screening occurs. Also, the manner in which conflicts or potential conflicts are handled should be documented. NPS 1-3.4.

INTRODUCTION

Central to the integrity of the criminal justice system, is a prosecuting official, free of bias or conflict, which would undermine faith in the independence of the office. A prosecutor's ability to ensure the guilty are held accountable, the innocent are protected and the interests of crime victims and the community are protected requires such independence.

This guide discusses conflicts of interest and the relationship such conflicts have with the ability of prosecutors to maintain the dignity and honor of the profession and compliance with the high standard of professionalism required to maintain the public trust. The National Prosecution Standards, presented by the National District Attorneys Association states in its commentary concerning conflict of interest:

> "There are few topics of ethical orientation more pervasive than conflicts of interest. Conflicts may arise not only from relationships with current or former clients, but also with a prosecutor's other activities - financial or otherwise.
>
> Conflicts of interest problems are founded on the premise of the inability to serve two masters with foreseeable different interests that compete or contend.
>
> Conflicts present themselves differently to the prosecutor, compared to the private practitioner, because the prosecutor does not initially select those subject to prosecution. Nor is there usually a choice of which prosecution office should proceed." *Commentary* 1.3, National Prosecution Standards, Third Edition.

As indicated above, prosecutors rarely have an opportunity to avoid potential conflict issues in that they do not choose the defendants who come before them, nor does venue requirements allow for prosecution options.

The disqualification of prosecutors due to conflict of interest generally falls into two primary categories. First, a disqualification for conflict may arise out of some professional, attorney-client relationship, such as when a defendant is the former client of the prosecutor. The second involves situations where the prosecutor has a personal interest, often financial or emotional in the litigation or some personal relationship with the accused or significant participant, such as a victim or witness. This duo nature of prosecutorial conflicts was recognized in *People v Doyle*, 159 Mich App 632 (1987). In *Doyle*, the Court of Appeals upheld the trial court's decision to disqualify the entire prosecutor's office because the disqualified

assistant prosecutor failed to voluntarily withdraw from a case where the assistant's personal interest was obvious, and because he held a supervisory position in the office. In reviewing the law relative to disqualification of prosecutors, the Court stated:

> "Cases discussing disqualification of prosecutors fall into two main subject categories. The first category involves disqualification for a conflict of interest arising out of some professional, attorney-client relationship, as when the defendant is a former client of the prosecuting attorney. The prior existence of an attorney-client relationship raises typical privilege and conflict of interest questions. Cases in this category discuss whether the prosecuting attorney became privy to confidential information which he may not ethically use against the defendant and whether such information may be imputed to other members of the prosecutor's office. The vast majority of published cases seem to be of this type [citation omitted]"
>
> "The instant case falls into the second category, which includes situations where the prosecuting attorney has a personal interest (financial or emotional) in the litigation, or has some personal relationship (kinship, friendship or animosity) with the accused. In Michigan, the recusal of a prosecuting attorney who has a personal interest in the case is required by the Code of Professional Responsibility. Canon 9 provides that 'a lawyer should avoid even the appearance of professional impropriety." At 641-642.

The prosecuting attorney is a public official representing an office which at all times must be kept free of suggestion of adverse influences and conflicting interests. Failure to abide by statutory or ethical standards in this regard could lead to a reversal. See, *In the Matter of Dylan Osborne*, 230 Mich App 712 (1998). Thus it is important to determine whether a conflict of interest exists and if so, determine the appropriate response.

THE MICHIGAN RULES OF PROFESSIONAL CONDUCT AND ETHIC OPINIONS

The Michigan Rules of Professional Conduct provide general and specific provisions relative to conflict issues. MRPC 1.7 provides general rules for all attorneys and states as follows:

> "(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affected;
>
> and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implication of the common representation and the advantages and risks involved." MRPC 1.7

The comment section to MRPC 1.7 provides that "Loyalty is an essential element in the lawyer's relationship to a client." The State Bar Ethics Committee has stated in several opinions, that a prosecutor represents an entity rather than an individual. RI-47, RI-96, RI-112. While the client may be the state in which the prosecutor serves, caution must be taken because of the unique role of the prosecutor in criminal matters, where her client is not merely a single entity, but rather can be viewed as multiple parties, namely the public, the accused and the victim. See Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah Law Review 289 (1999). Consequently, prosecutors have a

larger task in identifying potential conflicts due to their representation of a community of members in each case.

Initially, "resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation." Comment to MRPC 1.7. In litigation, either opposing counsel or the court may raise the question if circumstances so justify.

A pertinent section of the ethical rules as related to prosecutors is MRCP 1.9, which considers conflicts resulting from former clients. It reads:

> "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> (b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented the client
>
> > (1) whose interests are materially adverse to that person, and
> >
> > (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.
>
> (C) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally know; or
> >
> > (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client."

Additionally, MRPC 1.11 is directed specifically at successive government and private employment, and as to situations where a private attorney elected or hired as a prosecutor, prohibits participation in a case or matter when the prosecutor personally and substantially participated in the representation of the client while in private practice. MRPC 1.11(c).

NATIONAL PROSECUTION STANDARDS

The National District Attorneys Association via the National Prosecution Standards, Third Edition, has compiled a series of rules specific to conflicts which may arise with prosecutors. Specifically, 1-3.3 provides the prosecutor should excuse himself or herself from the investigation and prosecution:

> a) . . . of any former client involving or substantially related to the subject matter of the former representation, unless after full disclosure, the former client gives informed written consent permitting the prosecutor's involvement in the investigation or prosecution.
>
> b) . . . of any matter where information known to the prosecutor by virtue of a prior representation and subject to the attorney-client privilege would be pertinent to the criminal matter, unless, after full disclosure, the former client gives informed written consent permitting the prosecutor's involvement in the investigation or prosecution.
>
> c) . . . of any person who is represented by a lawyer related to the prosecutor as a parent, child, sibling, spouse, or domestic partner, or who has a significant financial relationship with the prosecutor.
>
> d) . . . or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's neutrality, judgment, or ability to administer the law in an objective manner may be compromised.
>
> e) If an assistant or deputy prosecutor learns of the potential of a specific conflict, he or she should immediately report the matter to the chief prosecutor or a designee thereof.

Additionally, the Standards urge the establishment of procedures for handling actual or potential conflicts, which include the creation of firewalls and conflict teams to ensure prosecutors with conflicts are not exposed to information or improperly disclose information. Prosecutors should document the manner in which conflicts are handled. Commentary to the Standards recognize that the extent to which firewalls and filters may be effective could depend on the size of the office and position of the conflicted prosecutor. The smaller the office or greater the supervisory authority of the conflicted prosecutor potentially impacts the ability of screening efficacy.

The National Prosecution Standards augment the provisions of the Michigan Rules of Professional Conduct and should be considered together with pertinent MRPC provisions.

ATTORNEY-CLIENT RELATIONSHIP

PRIOR RELATIONSHIP

There is a long line of Michigan cases that supports the central position espoused by the ABA standards, the National Prosecution Standards and the Michigan Rules of Professional Conduct concerning prosecutors. In *People v Bussey*, 82 Mich 49 (1890), the Court held that

> "the prosecuting attorney is a sworn minister of justice, whose duty it is to see that the innocent are protected, the guilty are brought to punishment, and then who must also stand indifferent as between the accused and any private interest." At p 60.

The Court further stated that the statute then in effect (now MCL 49.158, prohibition of receipt of fees/rewards by prosecutors) prohibited an attorney from acting as a public prosecutor where the attorney had been engaged in civil suits against the defendant, one of which was directly related factually to the instant criminal case, and the prosecutor was personally prejudiced against the defendant. The Court further held that the statutory violation could not be atoned by a defendant's waiver. The interests of justice required the attorney to refrain from acting as a public prosecutor in the case.

DEFENSE COUNSEL BECOMING PROSECUTOR

Conflicts of interest frequently occur where a prosecuting attorney had engaged in criminal defense work while in private practice prior to coming to the prosecutor's office. There are a number of opinions by the State Bar Ethics Committee that touch on such conflict situations.

In RI-152, the conflict situation involved a former defense attorney who was elected prosecuting attorney. One of the cases handled by the newly elected prosecutor when he was a defense attorney, was now on appeal and being handled by a successor defense attorney. The newly elected prosecutor intended to recuse himself personally from the appellate case. The question presented was: Are the lawyers in the prosecutor's office subject to imputed disqualification when the elected prosecutor is disqualified? The Committee determined that this situation would require recusal of the prosecuting attorney, and his disqualification would be imputed to the entire prosecutor's office.

In this situation, it was improper for the elected prosecutor to handle the case on appeal because of the prosecutor's previous involvement with the case. The prosecutor's loyalty to the State would be adversely affected by the natural desire to see that the

representation of the defendant at trial would not be impugned by the appellate court. Since the elected prosecutor is disqualified, the assistant prosecutors are also disqualified pursuant to MRPC 1.10(a). This is because of the possibility of having to challenge the elected prosecutor's efforts as trial counsel for defendant, or conversely feeling constrained from zealously prosecuting the appeal on behalf of the State. Thus, the prosecutor's personal involvement at the trial court level requires the disqualification to be imputed to the rest of his staff.

The Ethics Committee addressed a similar issue in RI-43. There, the situation involved an assistant prosecutor who was disqualified from involvement in the defendants appeal, due to the assistant's prior involvement with the case as a law clerk. Subsequent to defendant's conviction and sentencing, the law clerk was hired by the prosecutor as chief appellate prosecutor for the office. There were 20 prosecutors in the office, but only one assistant in the appellate division that the new chief appellate prosecutor supervised. The former law clerk, now chief appellate prosecutor disqualified himself from involvement in the appeal. The question presented, was whether the entire prosecutor's office need be disqualified from post-trial proceedings, or whether such disqualification could be avoided by screening the new chief appellate prosecutor.

The Committee opined that MRPC 1.10 and 1.11 did not define the term "firm" relative to the imputed disqualification required if a lawyer in the firm is prohibited from representing a client do to a conflict. In resolving the question, the Committee stated:

> "We believe a prosecutor's office does constitute a "firm" for purposes of the Rules. MRPC 3.8 imposes a special responsibility on the prosecutor as a minister of justice, and therefore it is clear that the prosecutor's office does not lie outside the ambit of ethical constraints. Because the prosecutor has a greater duty of fairness to the opposition than the tort lawyer who was the subject of RI-4 [referenced below], *a fortiori* the strictures of RI-4 should apply to the prosecutor's office."

Having determined that the prosecutor's office was a "firm", the Committee turned to the question of whether imputed disqualification could be avoided by screening. Here, it was determined that screening was insufficient because of the lawyer's supervisory position in the prosecutor's office realistically precluded such screening, and also that the attempt by the prosecutor's office to insulate him was taken after the fact.

Reference in RI-43 was made to RI-4. The concept of screening, or building the "Chinese Wall" is discussed in RI-4. There, the Committee discussed a query from an attorney who was a principal in a tort defense firm and handled much of the firm's medical malpractice cases. He

desired to take a position as a principal attorney in a plaintiff's firm, which also handled medical malpractice claims. The Opinion indicated there was a rebuttable presumption the attorney had acquired confidential information protected by MCPR 1.6 and 1.9(b) and was disqualified from acting in any capacity in his new firm as to pending or future cases involving his former clients. As to the issue of disqualification imputed to the other attorneys in his new firm, the Opinion discussed the screening process necessary pursuant to MRPC 1.10(b), which provides:

> "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, is disqualified under Rule 1.9(b), unless:
>
> > (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> > (2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule."

The Opinion provides that the screening protection must be installed immediately when the disqualified attorney joins the new firm, and must include:

a) exclusion of the disqualified lawyer from any participation in the action,
b) instruction to all other lawyers in the firm
    1) not to discuss the matter in the disqualified lawyer's presence,
    2) not to allow him to view any documents or other material relating to the action or proceeding, and
    3) not to receive any information from the disqualified lawyer concerning the matter.
c) moving the files pertaining to the matter to a physically segregated area or marking them with special coding, and
d) segregation of fees derived from such professional representation, so the disqualified lawyer does not, directly or indirectly, receive any portion of the fees.

Note: it is also suggested that non-lawyer staff which contact applicable files be advised of and adhere to these limitations.

These screening requirements must remain in effect until there is no possibility that information considered confidential might be utilized against a former client of the transferring lawyer. Additionally, the disqualified lawyer must immediately notify all tribunals concerning the change of employment and screening procedure to be utilized. Copies of the notice to

applicable courts must be provided to other parties involved. Notification of the court as to the screening procedure constructed in these circumstances is meant to persuasively demonstrate an adequate Chinese Wall has been has been erected.

A significant appellate case examining the issue of conflict of interest in when a defense attorney becomes a prosecutor is *People v Davenport*, 280 Mich App 464 (2008) and (after remand) 286 Mich App 191 (2009). Here, defendant appealed his jury conviction for sexual assault, claiming ineffective assistance of counsel for to her failure to seek recusal of the prosecutor's office due to a conflict. Defendant was initially represented by a different attorney, who subsequent to the preliminary examination, was hired as an assistant prosecutor in a two-attorney office. Although the elected prosecutor personally tried the case, defendant claimed his second counsel should have raised the conflict issue, believing that the entire prosecutor's office should have been disqualified. At the *Ginther* hearing, the trial court found that defense counsel should have raised the issue and failure to do so fell below the objective standard for reasonable representation. The trial court did not, however, find that the error was outcome-determinative, since appellate counsel failed to present evidence that the former defense attorney shared information with his new employer, the elected prosecutor.

The Court of Appeals determined in its initial review of the case that defendant's trial counsel had committed a serious error in not challenging the potential conflict, and affirmed the trial court's finding that such failure was objectively unreasonable. It further agreed that defendant did not show a reasonable probability that, absent the error, the result would be different. But, the Court also held it was error for the trial court to not sua sponte explore the matter further, and make a ruling that the prosecutor's office had employed adequate safeguards to prevent the sharing of information. Consequently, the case was remanded back to the trial court for further proceedings.

In analyzing the conflict issue to provide guidance to the trial court for its conflict inquiry, the Court stated:

> "Our caselaw does not offer a wealth of guidance about the trial court's inquiry with regard to a conflict of interest, but our Supreme Court has held that, in order to disqualify an entire prosecutor's office, a court must consider 'the extent to which knowledge has been shared by the disqualified lawyer and the disqualified lawyer's role within the prosecutor's office.'" *In re Osborne*, 459 Mich 360, 369-370 (1999) citing *Doyle, supra* at 644-647 [*People v Doyle*, 159 Mich App 632 (1987)] [footnote omitted]. We further hold, as a majority of other jurisdictions have held, that, under these circumstances, in order 'to ensure faith in the impartiality and integrity of the criminal

justice system, and to prevent a chilling effect on a defendant's willingness to confide in defense counsel, the entire prosecutor's office will be presumed to be privy to the confidences obtained by the former defense lawyer.' *State v McClellan*, 179 P.3d 825,831 (Utah App., 2008) [footnote omitted]. Thus, once a defendant has shown that a member of the prosecutor's office counseled him or represented him in the same or related matter, a presumption arises that members of the prosecutor's office have conferred about the matter. See, e.g. *Lux v Commonwealth*, 24 Va. App. 561, 575 (1997). To rebut the presumption of shared confidences, the prosecutor must show that 'effective screening procedures have been used to isolate the defendant's former counsel from the prosecution of the substantially related criminal charges.' *McClellan, supra* at 831." *Davenport* at 471-474.

The *Davenport* decision further identified what, on remand, the trial court should consider as to the whether the presumption of shared confidences could be rebutted:

"With regard to appropriate insulation of counsel, the court should consider whether the prosecutor's office implemented 'effective, written screening procedures' that take into account 'the structural organization of the law firm or office, the likelihood of contact between an attorney with a conflict of interest and the personnel involved in the ongoing representation, and the existence of rules that prevent the attorney with the conflict of interest accessing the files or information pertaining to a particular case . . . ' *Davis, supra* at 615 n. 10 [State v Davis, 141 S.W.3d 600 (Tenn., 2004]. We also emphasize that the size of the prosecutor's office is a factor that the trial court must consider to determine whether effective screening occurred." *Davenport* at 474-475.

After remand, the Court of Appeals revisited *Davenport*, 286 Mich App 191 (2009), and reviewed the evidentiary hearing conducted by the trial court on the conflict issue. The Court found that sufficient measures had been implemented to prevent improper communication between the former defense counsel and his new employer, the prosecuting attorney, and that disclosure had been made to defendant about his former counsel's new position. The Supreme Court denied application for leave to appeal, stating in part:

"A presumption of prejudice exists when a defendant's former defense counsel joins the prosecutor's office that is pursuing the case the defendant. MRPC 1.9(b), 1.10(b). Such a presumption may be overcome, however, if the prosecutor shows that the attorney who has a conflict of interest was properly screened out from 'any participation in the matter.' MPRC 1.10(b)(1)." *People v Davenport*, 483 Mich 906 (2009).

See, also, *People v Hemingway*, 495 Mich 680 (2013), where the Court cited its Order in *Davenport*, and remanded the case to the trial court to determine when the defendant's former counsel's employment with the prosecutor's office began and whether the prosecution rebutted the presumption of prejudice by showing that the former defense counsel was properly screened from any participation in the matter. Subsequently, the trial court determined that the presumption of prejudice had been rebutted. The Court of Appeals affirmed stating:

> "At the *Ginther* hearing, Tuscola County Prosecuting Attorney Mark Reene explained although the Tuscola County prosecutor's office did not have a written policy to address the potential conflict of interest that arose, there was a "blanket policy" that, no matter how minor the previous involvement, Hodges would have "no involvement whatsoever" in any cases that he had represented a criminal defendant. This policy was communicated to the staff at the prosecutor's office before Hodges's employment started. Reene also testified that he directed Hodges not to discuss any of his former cases with the staff and Hodges testified that he never disclosed any confidential information to the prosecution. Eric Wanink, the assistant prosecuting attorney assigned to defendant's case, noted that Hodges was delegated to district court matters for several months after his employment began because, as a defense attorney for Kohl Harris, Hodges had handled felony matters, and the prosecutor's office had wanted to ensure that Hodges had no contact with the felony files that he had previously worked on.
>
> Based on these facts, we conclude that the trial court did not clearly err in its finding that the prosecution overcame the presumption of prejudice." *People v Hemingway*, (Mich App, unpublished, #320783, 2015)

A more direct conflict was examined in the case of *In re Dylan Osborne*, 230 Mich App 712 (1998). There, respondent appealed the termination of her parental rights, claiming she was denied her rights to a fair trial because the assistant prosecutor representing the Department of Human Services had briefly served as one of her five different attorneys during the three year pendency of the case. The assistant prosecutor had previously represented respondent at a review hearing, filling in for her assigned counsel. Neither side raised the conflict issue in the trial court nor did the court itself inquire. The presumption of prejudice was cited by the Court of Appeals when an actual conflict exists.

"In *Cuyler v Sullivan*, 446 U.S. 335, 345-350 (1980), the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid situations likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest . . . Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affect his lawyer's performance.' *Cuyler* at 348 (footnote omitted)" *Osborne* at 717.

Reviewing the conflict, the Court cited MRPC 1.6, 1.7, 1.9 and 1.11, quoting directly from the commentary of 1.9.

"The official Comment to MRPC 1.9 explains the pertinent considerations judging the effect of a conflict of interest:

'The scope of a 'matter' for purposes of this rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited . . . *The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.'" Osborne, supra* at 718-719.

The Court further opined as to the justification for conflict rules, citing from an opinion of the State Bar Ethics Committee.

"These conflict of interest rules are ' a frank recognition that, human nature being what it is, a dual relationship involving adverse or conflicting interests, constitutes enormous temptation to take advantage of one or both parties to such relationship' and that '[t]he purpose of [conflict of interest rules] is to condemn the creation and existence of the dual relationship instead of merely scrutinizing the results that may flow therefrom."' [State Bar of Michigan Ethics Committee] Formal Opinion 160 (November 1954) quoting [State Bar Ethics Committee] Formal Opinion 132 (January 1950)." *Barkley v Detroit*, 204 Mich App 194, 202-203 (1994)." *Osborne* at 719.

Initially, the Court of Appeals found the assistant prosecutor's previous representation of respondent at the review hearing constituted "personal" and "substantial" participation in a matter for purposes of MRPC 1.11(c). Further, that a serious ethical violation occurred by representing DHS in the same proceeding. The Court reversed the termination of parental rights and remanded the matter for a new trial. The Michigan Supreme Court, however, vacated the Court of Appeals judgment and remanded the matter and ordering the case sent back to the trial court to conduct an evidentiary hearing on the conflict issue to determine whether the case needed to be retried. *In re Dylan Osborne*, 459 Mich 360 (1999). The Court agreed with the Court of Appeals that the assistant prosecutor, who represented respondent at a review hearing, should have recognized and avoided the conflict by not participating in the termination trial. The remedy of reversing a termination decision two years later appeared to the Court to be more problematic.

> "Though the interests that underlie MPRC 1.9 and 1.11 are of undeniable importance, we cannot hold as naught the last two years of Dylan's life in order to protect those interests. [Footnote omitted]." At 369

The Supreme Court went on to say that the record did not persuade it that the case must be retried and remanded the matter for a hearing by the trial court. Such a hearing was conducted, at which time the only testimony taken was that of the assistant prosecutor who stated during the three day termination trial, he had no recollection of his single representation of respondent, his questioning of her at the review hearing, or obtaining any confidential information from her. The trial court found that respondent had suffered no prejudice from the conflict. The Court of Appeals reluctantly affirmed the termination based upon the trial court's ruling, urging the Supreme Court to reconsider its earlier decision. *In re Dylan Osborne*, 237 Mich App 597 (1999). The Supreme Court denied an application for leave to appeal. 462 Mich 931 (1999). See, also *State v Woods*, 283 So 2d 753 (1973, La).

While the series of appellate decisions in *Osborne* leave the door slightly ajar as to avoiding an automatic reversal when prosecutors have "switched sides" in the same matter, a review of those decisions clearly suggest the termination trial was affirmed on a very narrow factual basis. Great caution must be taken when attorneys move from defense practice to the a prosecutor's office to avoid this potential error [i.e. screening].

Other state appellate courts have addressed conflict issues in cases where prosecutors have previously represented defendants in criminal cases. In *State ex rel. Romley v Superior Court,* 184 Ariz 223 (Ct App 1995), a deputy county attorney for the Maricopa County Attorney's Office had previously represented several defendants before taking his current

position. The trial court determined that individual personally participating in the prosecution of a number of defendants and had previously received confidential information while representing them in connection in criminal cases when he worked as a defense attorney. The trial court not only disqualified the deputy county attorney, but also determined that the screening procedure in place was insufficient to avoid disqualification of the entire office. The Arizona Court of Appeals, analyzing the Arizona Rules of Professional Conduct which are comparable to the Michigan Rules of Professional Conduct, agreed that during his representation of the defendants, the deputy county attorney had acquired "confidential information" and as such, the representation was "personal" and "substantial" requiring disqualification from participation in their prosecution. As to disqualification of the entire office, however, the Court reversed the order of disqualification, stating that defendant's expectation that his or her interests will not be compromised can be maintained in many circumstances.

The Court opined that while the burden is on the defendant to demonstrate that the subject attorney is disqualified, if successful, the prosecutor's office must then demonstrate why vicarious disqualification is not required.

> "In beginning its analysis, the trial court should first look to the appearance to the particular defendant that is created by the transfer of his former attorney (or associate of same) to the prosecutor's office. In judging this appearance, the court must consider such matters as the length of the prior representation, the intensity of the representation, the nature of the crime and the notoriety the crime may have received. The court should then examine the countervailing considerations including the size of the prosecutor's office, [footnote omitted, but the Court did indicate that while the size of the office has some bearing on the ability to effectively screen, there is no reason to believe a small office cannot create a satisfactory mechanism], the placement of the newly hired attorney in the office, and the screening mechanism, if any, that is put in place to protect against impropriety. [footnote omitted] The court should then apply a 'reasonable person' standard to answer the question whether a reasonable person standing in the shoes of the defendant should be satisfied that his or her interests will not be compromised by the hiring." At 228.

The Court determined that applying a "reasonable person" standard, none of the cases was of a high public profile, had political overtones or in any way carried the risk of intentional violation of ethical proscriptions. The subject attorney was one of 240 attorneys in the office, and was placed at a lower level with little contact with the attorneys prosecuting the defendants. Further, an adequate screening procedure was in place which provided for the following:

1) that the attorney was not to speak with anyone about any previous representation of a criminal defendant, including cases where he personally represented the defendant or may have spoken to the attorney of record;

2) he was reminded of his ethical obligation to maintain the confidences of his former clients and told that if he disclosed such information he would be disciplined by the office and reported to the state bar;

3) he turned over to the office a list of 211 criminal cases, including the cases at issue, in which he had performed some activity while in private practice; and

4) the office directed that a memorandum be permanently attached to each of those files directing that no attorney or staff member discuss that case or any aspect of the prosecution with the attorney.

See, also, *State of Florida v Fitzpatrick*, 464 So.2d 1185 (1985), in which the Florida Supreme Court reversed the decision of the trial court disqualifying the entire state attorney's office because an attorney with whom defendant had discussed his case, subsequently was hired as an assistant state attorney in that office.

In *People v Lepe*, 164 Cal App 3d 685(1985, 4th Dist), the Court upheld recusal of the entire office in an assault with a dangerous weapon case, where the district attorney, before assuming that office had defended the same defendant in two prior criminal cases, one being an assault to which the victims in the instant case were witnesses, and the second involving a charge of intimidation of the victims. The Court stated that the district attorneys prosecution of the case would necessarily be influenced by his knowledge of defendant and that information logically gained of the "now twice-tormented victims" from the defendant during his prior representation. The Court further held that [a]s the deputies are hired by . . . evaluated by . . . promoted by . . . and fired by [the district attorney] we cannot say the office can be sanitized such to assume the deputy who prosecutes the case not be influence by considerations which bar [the district attorney] himself from participating in the case." At p 689.

Likewise, a prosecutor was disqualified from a case where he was the defendant's attorney on a *previous* case, rather than the case at issue. *In State ex rel Burns v Richards*, 248 S.W. 3d 603 (2008, Mo), the newly elected prosecuting had previously represented a defendant in another county on a drug charge. Now, she was being prosecuted in his county on a similar

charge. Defendant alleged that the prosecutor had highly confidential information from the previous case, "highly relevant to her defense" in the current prosecution. The appellate court reversed the trial court's refusal to disqualify the prosecutor, even though the prior representation was a different case.

> ". . . although the foregoing cases [cited in the opinion] are distinguishable to the extent that the prosecuting attorney had represented the defendant in the same matter, rather than in a substantially related matter, the principle behind the holdings applies nonetheless. Where, as here, the two matters in question have such close temporal proximity and similarity of subject matter, the appearance of impropriety is inherent, and a defendant need not plead the use of any confidential information, or show actual prejudice, in a prosecution by her former defense counsel." At p 605

In *State of West Virginia v Keenan*, 584 S.E. 2d 191 (W Va 2003), the Supreme Court of West Virginia was confronted with a claim that prosecutor's office should have been disqualified from undertaking the prosecution in his homicide trial due to the fact that the prosecuting attorney and one of his assistants had represented defendant on a false pretenses charge approximately 14 years prior. The Court affirmed the trial court's ruling after hearing, that disqualification was unnecessary because 1) other members of the prosecutor's office were conducting the prosecution and the prosecuting attorney's only involvement was signing the indictment; 2) there was no evidence that either of the prosecutors who had earlier represented defendant had obtained any privileged information which could have been adversely used in the present case, and 3) that the matters were neither the same nor substantially related to one another.

In an earlier appeal by the same defendant seeking dismissal of the criminal recidivist information, however, the Court viewed the relationship of the prosecuting officials differently, reversing the trial court's denial of the motion to disqualify. *State of West Virginia v Keenan*, 557 S.E. 2d 361 (2001)

> "In the instant case, the circuit court took the position that the recidivist proceeding did not involve privileged information because evidence of Keenan's former convictions was a matter of public record. While we do not question the fact that petitioner's former convictions are a matter of public record, we cannot discount the substantial risk that confidential information derived from the prosecutor's former representation may have some bearing upon the instant recidivist proceeding, including the prosecutor's underlying decision to seek such sentencing enhancement." At p 368.

But see, *Jaske v State*, 553 NE 2d 181 (1990, Ind App), where prior to election as prosecutor, the prosecutor had represented defendant in a post-conviction proceeding concerning his murder conviction. That prior representation did not disqualify him from prosecuting defendant for conspiracy to commit escape. The court characterized as "minimal at best" the relationship between the prosecutor's representation of defendant during the post-conviction action and the prosecution for escape, and it was "not so substantially related" to the former representation so as to require disqualification. Also, note *Alpha Capital Mgt, Inc. V Rentenback*, 287 Mich App 589 (2010), where the Court addressed the issue of representation of former clients, stating

> "[a]n attorney does not necessarily breach his or her duty of loyalty and confidentiality to a former client by representing a new client whose interests are merely adverse to those of the former client. The attorney breaches his or her fiduciary duty to a former client only by undertaking representation of a client who has interests both adverse and substantially related to work the attorney performed for the former client." At p 604.

See, also, *People v Williams* (Mich App, unpublished, #296521, 2011).

Some situations suggest that the appearance of an impermissible conflict should be avoided even though recusal may not be required. In *People v Gierke*, 437 Mich 696 (1991), defendant's trial counsel was hired by the prosecutor's office midway through his trial, but did not start work at the prosecutor's office until after the trial was completed. The Court of Appeals affirmed defendant's conviction and the Supreme Court denied his appeal, the implicit implication being that it was not reversible error for the attorney to continue representing defendant after accepting employment with the prosecutor's office but before he was sworn in as a prosecutor and commenced work there. Justice Levin, in a dissent from the Order denying leave stated he felt that the defense attorney's continued representation after his hire by the prosecutor's office was inappropriate and that is was an undue burden on the defendant to require him to show that he was actually prejudiced by counsel's representation.

When assessing a potential conflict due to prior representation, a prosecutor should review the applicable Rules of Professional Conduct, specifically MRPC 1.9, to determine whether 1) the prior representation involved the current matter; 2) the prosecutor may use information relating to that prior representation to the defendant's disadvantage; or 3) the prosecutor may be in a position to reveal information relating to the prior representation of defendant. *People v Johnson*, (Mich App #268413, unpublished 2007). If any of these may be answered in the affirmative, a conflict or appearance of same may exist.

PERSONAL INTEREST IN LITIGATION

More amorphous than conflicts created by attorney-client relations are those resulting from a personal interest the prosecuting official has with the litigation. This typically manifests itself as a result of a relationship with the defendant, victim or relative of either. In *People v Mayhew,* 236 Mich App 112 (1999), defendant was convicted of involuntary manslaughter and a variety of other crimes, relative to his involvement in a fatal automobile accident. On appeal, defendant argued the trial court erred in not disqualifying the entire prosecutor's office because the victim who died in the accident was the brother of the chief of the Family Support Division of that office. In its review, the Court stated:

> "The disqualification of a prosecutor because of a conflict of interest can occur in situations where the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused. [citations omitted] After a determination has been made that a conflict of interests exists with regard to a prosecutor, the question then arises whether the entire prosecutor's office must be disqualified. *People v Doyle*, 159 Mich App 632. 'If the . . . prosecuting attorney concerned in the conflict of interest has supervisory authority over other attorneys in the office, or has policy-making authority, then recusal of the entire office is likely necessary.' *Doyle* at p 645.
>
> In the present case, David Case's role in the prosecutor's office had nothing to do with the prosecution of defendant. No evidence existed that David Case was involved in any manner with the attorneys who prosecuted this matter. Although Case has supervisory authority and policy-making authority over attorneys in the Family Support Division of the Oakland County Prosecutor's Office, there was no evidence that Case had any supervisory or policy-making authority over the attorneys prosecuting defendant. Thus, the trial court did not clearly err in finding that, while a conflict of interest did exist in this matter with regard to Case, the conflict did not require disqualification of the entire Oakland County Prosecutor's Office." At pp 126-127.

Disqualification due to personal interest in the litigation requires supporting facts to demonstrate an emotional, personal or financial stake. In *People v Ralph*, (Mich App, unpublished #216049, 2000), defendant argued ineffective assistance of counsel due to his failure to move to disqualify the prosecutor's office because the prominence of the complainant's family name produced a conflict of interest and "abandonment of prosecutorial discretion in charging defendant." Denying the appeal, the Court stated:

"The disqualification of a prosecutor may be necessary because of a conflict of interest where the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused. [citation omitted] The defendant need not prove actual bad faith or unethical conduct; the appearance of impropriety is sufficient to justify a disqualification. *People v Doyle*, 159 Mich App 632, 644, modified on other grounds (1987). However, no appearance of impropriety arises unless facts demonstrate an emotional or personal stake in the litigation that warrants disqualification. *Id* at 646. Defendant has presented no facts that demonstrate that the prosecutor had a personal, financial, or emotional interest in the litigation or a personal relationship with the accused or with the complainant. Therefore, we conclude that defense counsel did not fail to function as effective trial counsel by failing to move for the disqualification. [citation omitted]".

PERSONAL RELATIONSHIP

MRPC 1.18(i) addresses family relationships, and states:

"A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

An illustration of how MRPC 1.8(i) might apply to a prosecutor is contained in RI-94, which involved a situation where a municipality proposed to hire a municipal attorney who was the mayor's sibling. The Ethics Committee opined that there is no per se rule of disqualification due to a familial relationship. Rather, the lawyer must determine whether the representation of the municipality will be materially limited by the lawyer's duties to a close relative. If the representation of the municipality would suffer due to the lawyer's loyalties to the sibling mayor, especially where the interests of the municipality and the mayor differ, the lawyer could not ethically continue to represent the municipality. If the sibling lawyer is a member of a firm, the entire firm would be disqualified.

Even when the family relationship is not that of two attorneys on opposing sides of a lawsuit, some courts have held that the mere fact that the parties participating in the suit are related is enough to warrant disqualification of the prosecuting attorney. In *People v Cline*, 44 Mich 240 (1880), the prosecuting attorney was disqualified because the complaining witness was his brother.

In the previously discussed case of *People v Doyle*, 159 Mich App 632 (1987), defendant was the brother-in-law to the chief assistant prosecutor. In companion cases to this appeal, the chief assistant was the brother of the victim/complainant of an alleged felony assault. During the course of the drug prosecution, the chief assistant was involved in plea negotiations with defendant's attorney. He advised the trial court that he was essentially acting only as a conduit of the elected prosecutor relative to plea discussions. As to the assault case, although another assistant prosecutor authorized the complaints, it appears that the chief assistant may have been the supervising attorney at the time. The trial court disqualified the entire office.

Speaking as to the policy considerations concerning disqualification of prosecutors, the Court of Appeals stated:

> "Courts around the country recognize two policy considerations underlying the disqualification of prosecuting attorneys for a conflict of interest. The first policy served by the rule is fairness to the accused. It is universally recognized that a prosecutor's duty is to obtain justice, not merely to convict. While the prosecutor must prosecute vigorously, he must also prosecute impartially.
>
> . . .
>
> The second policy served by disqualification of a prosecuting attorney for conflict of interest is the preservation of public confidence in the impartiality and integrity of the criminal justice system. [citation omitted] American courst have consistently held that the appearance of impropriety is sufficient to justify disqualification of a prosecuting attorney. A defendant need not prove actual bad faith or unethical conduct on the part of the prosecutor and his staff. [citation omitted] It has also been argued that to require a defendant to prove actual impropriety would be too great burden. [citation omiited] At pp 643-644.

The Court affirmed the trial court's decision disqualifying the entire prosecutor's office concerning the drug case against the chief assistant's brother - in - law, stating that although the chief assistant appeared to have been removed from the "decision-making" aspect of the case, his continued involvement discussing the case with defense counsel would require a "fine distinction" to accept the relationship involved only a theoretical appearance of a conflict. A conflict as to the chief assistant clearly existed and his continued involvement in the case along with his supervisory position required recusal of the entire office. As to the assault case, the Court likewise affirmed the trial court's decision to disqualify the entire office, indicating that the chief assistant's relationship as brother to the complaining witness created a conflict, and although he did not have any involvement with the case, he was the "acting prosecutor" the warrants against the defendants were issued.

In the case of *People v Pfaffle*, 246 Mich App 282 (2001) defendant claimed the prosecutor should have been disqualified because his four year old son was friends with the victim's four year old son. The trial court denied the motion stating:

> "Such a connection in a small community like Marquette is commonplace. If prosecutors were to disqualify themselves every time they had such a casual connection with a witness or a victim, it would indeed create severe problems in judicial efficiency in the criminal law area.... As the judge who presided over the trial in this case, I had numerous opportunities to view [the prosecutor's] conduct of the case. I saw no indication during the trial and post-trial proceedings of [his] personal involvement. What I did see was a prosecutor who took a hard stance on this prosecution. He argued for a life sentence, without parole, which this Court declined to give. [The p]rosecutor ... gave valid reasons for his tough prosecution of the defendant. It was his opinion that the defendant was a pedophile [and] not susceptible to rehabilitation and would constitute a menace to children as long as he was not imprisoned. The prosecutor decided that he would settle for nothing less than a 30–year minimum prison term, which was not acceptable to the defendant." At p 290.

The Court of Appeals in its opinion, affirmed the judgment of the trial court, expressing the contact at issue was minor.

> "However, the record in this case plainly indicates that the prosecutor's contact with the Smith family was minor. The prosecutor did not know Smith personally, the prosecutor and the Smiths were not blood relatives, the prosecutor's own son was not an intended victim, and the prosecutor had no stake in the outcome of this case, whether financial or personal, other than to protect the community, which was his job. There is no evidence of an actual conflict of interest.
>
> Nor did any connection between the prosecutor and the Smith family, though less than a conflict of interest, prejudice Pfaffle by affecting the plea bargain process. [footnote omitted] Contrary to Pfaffle's suggestion, the prosecutor did engage in plea negotiations with him. The parties simply did not agree to the minimum prison term Pfaffle should serve. Though we certainly see the attractiveness of a five-year term, which was evidently the time Pfaffle was willing to serve, we agree with the trial court that, given the seriousness of the charges, the prosecutor properly acted within his discretion by refusing to offer a lower sentence in exchange for a guilty plea and by seeking a long sentence following conviction. Though there can be no doubt that the

prosecutor acted zealously in this case, there is no reason to believe that he did so for illegitimate reasons. To paraphrase the Michigan Supreme Court in *People v O'Neill,* 107 Mich 556 (1895) Pfaffle did not have a right to have an attorney who was indifferent to his offenses prosecute the case against him." At pp 292-293.

A lengthy ethics opinion, RI-3, describes the a variety of situations where an attorney is married to opposing counsel, cohabiting or dating. In part, the Ethics Committee stated:

1. Lawyer spouses may represent clients whose positions are adverse only if the clients are informed of the relationship and consent to the representation.

2. A lawyer may represent a client where the adverse party is represented by the lawyer's spouse's law firm, but if the relationship between the spouses and all attendant facts results in any of the lawyer's having a personal interest in the outcome of the litigation then that interest must be disclosed to the clients and the clients must consent to the representation.

3. Where lawyers are cohabiting, or a lawyer and a judge are cohabiting, the rules regarding married lawyers should be adhered to because the cohabitation relationship is akin in terms of intimacy, confidentiality, and shared interest to the marital relationship.

4. Where lawyers are dating and representing adverse parties, or a lawyer is dating the judge hearing the matter, the lawyers must disclose the relationship to their clients if the relationship is sufficiently close that the clients would possibly consider its existence to be prejudicial to the impartial administration of justice.

As related to prosecutors, RI-3 references an older opinion, CI-1130, which provided that it was not proper for the intended spouse of a chief assistant prosecutor to represent criminal defendants or others whose interests were adverse to those represented by the prosecutor's office in that county. The opinion was limited in scope to those situations where the spouse employed in the prosecutor's office was in a supervisory position.

Another older opinion, CI-607, superseded by RI-3 provided that an assistant prosecutor and a defense counsel who were cohabitants and close friends for 10 years may not represent adverse parties to the same case. While RI-3 had eclipsed the rule espoused in CI-607, it does, in reference to that earlier opinion, state that if the facts suggest the possibility that the lawyer's personal interests could be affected by the representation, MRPC 1.7(b) is applicable.

Clearly, the better course if a married, cohabiting, dating or other close relationship exists, recusal of the effected assistant prosecutor would be the better course.

PROSECUTOR RELATED TO JUDGE

The general rule governing disqualifications related to the judiciary is contained in MCR 2.003, which warrants disqualification of a judge from a case where one of the advocates is related to the judge within the third degree of relationship. While these conflicts typically focus on the judge's ethical responsibilities, prosecutors may need to insure disclosure of the relationship. JI-133 responded to an inquiry, where the judge was married to an assistant prosecutor practicing in the same jurisdiction. The prosecutor never appeared before her spouse, and had no supervisory authority in the office. In determining that adequate screening and disclosures were in place, the Ethics Committee concluded:

> "The judge married to an assistant prosecutor must disclose the marital relationship whenever the prosecutor's office appears in a matter pending before the judge, *and the prosecutor appearing should disclose whether the spouse has participated personally and substantially in the pending matter.* If the spouse is not personally or substantially involved and has no supervisory role in the pending matter, and if screening procedures are in place as to the spouses, the judge is not automatically disqualified, and may preside over the matter following disclosure to the parties. In such an event, a party to the proceeding reserves the right to file a motion to disqualify the judge under MCR 2003[now (D)]. If the spouse is personally and substantially involved in, or has a supervisory role relating to, the pending matter, the judge is recused unless the disqualification is remitted pursuant to MCR 2.003[now (E)]" Emphasis added.

See, also JI-101, superseded by JI-133, but cited in the more recent Opinion relative to the additional onus causing disqualification of the prosecutor spouse holds a supervisory position in the office.

CAMPAIGN CONTRIBUTIONS

Conflict of interest arguments as to friendships in the context of campaign contributions were at issue in *People v Salerno*, (Mich Ct app, #307087, unpublished 2013). There, the defendant sought to disqualify the entire prosecutor's office because relatives of a prosecution witness who had been offered immunity in exchange for testimony against defendant, had made contributions to the elected prosecutor. Defendant claimed that the parents and fiancé of the witness made contributions of $100, $325 and $500 respectively to the prosecutor's 2008 election campaign. Further, defendant claimed that the mother of the fiancé was a

personal friend to the prosecutor and as such this relationship, along with the financial conflict required disqualification of the entire office.

In upholding the trial court's denial of the motion to disqualify, the Court recognized that a defendant moving for disqualification based upon a conflict had the burden of showing both the conflict of interest and a specific prejudice. *People v Waterstone*, 287 Mich App 368 (2010), rev'd on other grounds 486 Mich 942 (2010). The Court held that defendant failed to demonstrate that a conflict of interest existed.

> "Defendant's argument is principally based on his claim that a close association between the county prosecutor and Ribitwer's family resulted in a conflict of interest that led to Ribitwer receiving special treatment. However, a prosecutor's decision not to prosecute a suspected criminal does not fall within any definition of 'conflict of interest.' *People v Herrick*, 216 Mich App 594 (1996) Moreover, defendant has shown nothering more than that a witness's family and friends made contributions to a prosecutor's election campaign. Defendant has not shown that those contributions, or any alleged personal relationship between the prosecutor and the witness's family or friends establish a personal, financial, or emotional interest in the prosecution of *defendant*, the accused. There is no financial or personal relationship between the prosecutor and defendant.
>
> Although defendant asserts that he is not raising a claim of selective prosecution, the focus of his argument is directed at challenging the prosecutor's decision to prosecute defendant, while offering immunity to Ribitwer. The power to decide on charging decisions is vested entirely with the prosecutor. *People v Barksdale*, 219 Mich App 484 (1996) And that power is abused only if a choice is made for reasons that are unconstitutional, illegal or ultra vires. *Id* at 488.
>
> Here, defendant does not claim that the prosecutor engaged in selective prosecution for reasons that are prohibited by law or the Constitution. [citation omitted] Instead, defendant continues to challenge the prosecutor's motivation for negotiating the immunity agreement with Ribitwer. Because defendant has not demonstrated an acutal conflict of interest, particularly with respect to the prosecution of defendant, there is not merit to his argument that disqualification of the prosecutor's office was warranted." Salerno at p 2.

As to the decision not to prosecute, see, also, *People v Herrick*, 216 Mich App 594 (1996), where the trial court appointed a special prosecutor after the prosecutor initially declined to charge,

then refused to prosecute a citizen's warrant obtained by the complainants. The Court of Appeals cited the two main categories of conflicts of interest and refused to expand that definition to include a prosecutor's decision not to prosecute.

> ". . . such a construction would divest prosecutors of their executive discretion by making a particular exercise thereof grounds for the appointment of a special prosecutor. In our view, such a result would constitute a clear violation of the principle of separation of powers by permitting the judiciary to overrule the prosecutor's exercise of executive discretion." At p 600.

The Court further opined that a court-approved issuance of a citizen's warrant did not trigger the ability of a court to appoint a special prosecutor. Related, see *People v Draheim*, (Mich App, unpublished #244218, 2004), where the Court stated that the purported existence of an immunity agreement claim by defendant, who was convicted at trial, did not support disqualification of the prosecutor's office.

Also, see RI-23, where the Ethics Committee did not find a conflict requiring recusal, where the father-in-law of an accused made a $25 campaign contribution to the prosecuting attorney.

> "The Committee does not believe that the acceptance of a $25.00 campaign contribution received during a general election from a relative of an accused creates a *per se* conflict of interest requiring recusal of the prosecuting attorney from the decision-making process, absent other circumstances suggesting an attempt to subvert the candidate's loyalty of office if elected. One example might be an unusually large contribution from a close relative of the accused while charges are pending against the contributor's close relative."

RELATIONSHIP WITH COURT PERSONNEL

Prosecutor ties to court personnel were considered by the Court in *People v Mayen*, (Mich App, unpublished, #301505, 2012). In that case, prior to trial, defendant unsuccessfully moved to disqualify the entire prosecutor's office because of the connections of the victims to the local court system. Defendant was charged with home invasion of the residence of the a long time public defender who presently operated the county's public defender office and his wife, the county's Friend of the Court Referee and Magistrate. Defendant argued that it was "reasonable to believe the county prosecutor my have a conflict of interest with these proceedings . . . due to the victims' close ties to the Isabella County Trial Courts." At p 8. The Trial court denied the motion which was upheld on appeal, stating:

"A prosecutor may be disqualified because of a conflict of interest where the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused. *People v Mayhew*, 236 Mich App 112 (1999) Neither basis is applicable here. Mayen has presented no facts showing that the prosecutor had a personal, financial, or emotional interest in the litigation. There is also no evidence that the prosecutor had been involved with Mayen outside this prosecution. The victims' close ties to the court system are not a sufficient bais to mandate disqualification of the prosecutor's office. Indeed, as the trial court noted, the fact that the prosecutor knew the victims and was advocating for them does not establish a conflict." At p 8.

PROSECUTORS AS TARGET OF LITIGATION

Prosecutors occasionally are the target of civil litigation filed by defendants. Such action does not necessarily lead to disqualification due to a conflict of interest due to bias or animosity. The majority of cases nationwide suggest that the mere fact that a defendant has a previous or pending civil action against a prosecutor does not lead to a need to disqualify the prosecutor. In *State v Sonka*, 893 S.W.2d 388 (Mo App, 1995), the court held that a burglary defendant's filing of a civil rights lawsuit against the prosecutor did not establish hostility of the prosecutor toward the criminal defendant requiring disqualification. "Allowing the filing of such litigation to *require* the disqualification of a prosecutor could paralyze prosecutions of criminal defendants." Emphasis added. At p 389. Error was alleged in the case of *Kindred v State*, 521 N.E.2d (Ind, 1988) due to a denial of defendant's motion for a special prosecutor. Defendant, one day prior to the filing of criminal charges, filed a federal lawsuit alleging that the county prosecutor, had violated his civil rights, including false and malicious prosecution. Also, at the trial, allegations were made that the defendant had threatened the prosecutor's life. Defendant argued that these circumstances led to an appearance of an improper interest by the prosecution, requiring disqualification. The appellate court agreed with the prosecutor and trial court that no conflict of interest existed, and that to allow prosecutors to be disqualified merely upon the unilateral action of defendants, such as filing lawsuits, would lead to absurd consequences. But see, *Maple Heights v Redi Car Wash*, 554 N.E.2d 929 (Ohio App, 1988), where defendant successfully obtained disqualification of a prosecutor in a criminal prosecution for operating a business without a license. Defendant convinced the court that personal animosity existed from the assistant prosecutor handling the case because a million dollar libel suit had been filed against defendant by the prosecutor, defendant had filed a grievance against the prosecutor, and the trial court found that the prosecutor had threatened the defendant with additional charges at a court hearing.

PROSECUTOR AS WITNESS

RI-233 addresses the issue of when a prosecutor may be called as a witness in a criminal case. That opinion addressed the situation where, on the first day of trial, defendant's attorney advised the assistant prosecutor trying the case that he intended to call another member of the prosecutor's office as a character witness for the defendant. The Ethics Committee cited MRPC 3.7(b) which states:

> "(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."

The Comment to MRPC 3.7 states in part:

> "Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also."

MPRC 1.7(b) states:

> "(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) the client consents after consultation,. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

The Committee found that under the facts of the inquiry, MRPC 1.9 was inapplicable since it addresses conflicts with former clients, and MRPC 1.7 discusses the meaning of "lawyer's own interests" in reference to primarily financial or other business-related interests, neither of

which are present as related to a prosecutor's office. Consequently, neither the assistant prosecutor assigned to the case, nor the entire prosecutor's office would be disqualified. Clearly, however, the assistant prosecutor to be called as a character witness would be disqualified from involvement in the case.

More significant in terms of potential testimony, is the fact situation reviewed by the Ethics Committee in CI-713. There, an assistant prosecutor was the recipient of a voluntary confession and set to testify against the defendant. Rejecting the need for disqualification, the Opinion advised that a prosecutor is in a unique position, distinguishable from a lawyer in a law firm or partnership.

> "The Prosecuting Attorney has no clients, but represents the people of the State of Michigan. The Prosecuting Attorney does not share monetarily in the outcomes of the court proceedings and can accept no money for prosecutorial services other than the salary set by the Board of Commissioners. The Prosecutor appoints Assistant Prosecuting Attorneys t fill the number of positions set by the Board. In addition, Assistant Prosecuting Attorneys appointed by the elected Prosecutor serve at the Prosecutor's will during the term for which he or she is elected.
>
> . . .
>
> As an elected official, the Prosecuting Attorney and the appointees take a court oath of office, in addition to the oath required to become a member of the State Bar. The courts of this State have held that the Prosecuting Attorney is the chief law enforcement officer of the county, and as such, establishes standards and procedures in this area. A special Prosecuting Attorney's policies or procedures and, therefore, such special Prosecuting Attorney would not be subject to the control of the electorate.
>
> The appearance before a jury of a person other than a duly appointed member of the Prosecuting Attorney's staff or the Prosecuting Attorney, might create in the minds of the jurors some undue significance to the case to the detriment of the defendant and this could possibly deny the defendant a fair trial."

Further, CI-713 cited the case of *People v Lemble*, (Unpublished, #46914 1981), in which defendant claimed the prosecutor's office should have been disqualified from prosecuting the case since an attorney from that office had been present at defendant's arrest and testified at trial. In rejecting the claim, the Court stated:

"In light of the particular nature of the prosecutor's office, the trial court was justified in refusing the request for dismissal of the people's counsel where the grant of such a request and the securing of independent prosecutorial counsel would cause time and money expenditures without an accompanying increase in the 'fairness' provided to defendant."

See, also *State v Hought*, 371 S. E.2d 54 (W Va, 1988), where the Court did not find error even though the trial prosecutor had participated in the investigation and accompanied police on a search of defendant's girlfriend's home and witnessed defendant's arrest. While the prosecutor did not testify, defendant claimed he had abandoned his quasi-judicial role and should have been disqualified from trying the case. Although determining that defendant had failed to "prove that the prosecutor's activities evidenced that he had a personal interest in the case so as to conflict with his duty to promote the 'fair and impartial administration of justice'" at 565, the Court found the prosecutor's actions ill-advised and stated the prosecutor should have exercised better judgment and refrained from accompanying the officers in the search and arrest of defendant.

More problematic, however, is an instance where a prosecutor takes the lead role in conducting the forensic interview of a child sexual assault victim. In *People v Tesen*, 276 Mich App 134 (2007), the Court was confronted with an appeal by the prosecutor relative to the circuit court's ruling disqualifying him from prosecuting a case because the defense may call him as a witness. A criminal and child protective investigation was initiated on the basis of a complaint that defendant has assaulted his 12 year old son. The investigating officer did not conduct a detailed interview of the victim, instead, a coordinated, multi-disciplinary team-based interview was conducted, by one of the team members, an assistant prosecutor, with five other team members watching. Subsequently, the interviewing prosecutor authorized multiple counts of sexual assault and the case was assigned to him to prosecute. Before the preliminary exam, the defense attorney moved to disqualify the assistant prosecutor as a material witness and one he intended to call. The motion was denied. Defense counsel renewed his motion at the circuit court level at which time the motion was granted.

The Court acknowledged that findings of fact on a motion for disqualification are reviewed for clear error. But, a de novo review is conducted as to the trial court's application of law to the facts. Further, that the application of "ethical norms" to a decision whether to disqualify counsel is also reviewed de novo. *Tesen* at p 141, citing *Rymal v Baergen*, 262 Mich App 274 (2004). When deciding whether a prosecutor should be disqualified from trying a child sexual abuse case because he or she took a lead role in the investigation by conducting the forensic interview of the victim, the Court stated that a prosecutor may properly conduct

interviews of prospective witnesses, including the victim. Those interviews, however, generally occur after the police have completed their investigation and prosecution has been initiated. The Court further suggested that a third party be present during such interviews unless the prosecutor is prepared to forgo impeachment of a witness from the interview.

The Court affirmed the disqualification of the assistant prosecutor from prosecuting the case, stating:

> "The party seeking disqualification in such a situation bears the burden of showing that the attorney is a necessary witness. *In re Susser Estate*, 254 Mich App 232 (2002). While there is no Michigan case explicitly defining the term "necessary witness," both the Michigan Supreme Court and this Court have found that attorneys are not necessary witnesses if the substance of their testimony can be elicited from other witnesses and the party seeking disqualification did not previously state an intent to call the attorney as a witness. [citation omitted]. The prosecution argues that Rose is not a necessary witness because the substance of his testimony can be elicited from the five other people who observed the interview.
>
> However, as defendant notes, the observers cannot testify regarding Rose's qualifications to conduct the interview, whether he has received training in the forensic interview Protocol, how many forensic interviews he has conducted, and how and why he developed the questions and hypotheses that he used during the interview. These questions are important because the Protocol for interviewing child victims is very specific and detailed to address the difficulties that may be encountered when interviewing children. The questions would clearly be of some value to a fact-finder trying to determine the weight and credibility of the victim's account of the charged offenses. Rose may well have other personal knowledge of information relevant to contested issues, and, again, much of that personal knowledge cannot be discovered through the observers' testimonies. Also, defendant clearly stated in his circuit court motion for disqualification an intent to call Rose as a witness, and the prosecution does not claim any hardship if Rose's disqualification requires that another prosecutor be assigned to handle the trial. Finally, we note that the circuit court was probably, cautiously and appropriately, trying to stave off a mistrial in the event that, in the middle of trial, it became more obvious that Rose was a necessary witness." At pp 144-145.

But see, *People v Petri*, 279 Mich App 407 (2008), where the Court affirmed the trial court's decision not to disqualify the trial prosecutor who conducted a forensic interview of the victim

because the motion was not timely and the defense had not convinced the trial court that the prosecutor was a "necessary witness." In regards to the latter, the Court distinguished this case from *Tesen*, on both basis, and stated as to the latter:

> "Further, we agree with the trial court's determination that defense counsel failed to establish that the prosecutor was a necessary witness. Although given an opportunity to identify a particular issue on which the prosecutor would be a necessary witness, the gist of defense counsel's argument was that any prosecutor should be automatically disqualified if he or she becomes part of an interview team or conducts a forensic interview. Because defense counsel failed to offer any particularized basis for concluding that the prosecutor's testimony would be material to the defense, we uphold the trial court's denial of the motion to disqualify.
>
> The trial court's decision did not deprive defendant of a substantial defense. Defense counsel presented evidence at trial regarding the prosecutor's interview through his cross-examination of Detective Domine. Defendant has not identified any issue that actually arose at trial, or was raised by defense counsel on the basis of the trial evidence, that demonstrates a need for the prosecutor's testimony to support the defense. The right to present a defense may be limited by rules of procedure and evidence designed to ensure fairness and reliability. *People v Toma*, 462 Mich 281 (2000). Because we find no error in the trial court's ruling not to disqualify the prosecutor, and defendant has not demonstrated that he was deprived of his right to present a substantial defense at trial, reversal is denied." At pp 419-420.

SHARING/RENTING OFFICE SPACE

A criminal defense lawyer may *rent* office space for use by a prosecutor, provided both lawyers maintain strict confidentiality of files and otherwise adhere to their respective ethical responsibilities. Sharing of a copier is discouraged. RI-82. However, *sharing* of office space between a prosecutor and criminal defense attorney is improper. CI-706.

> "Further, even though no express partnership arrangement is involved, members of the general public may feel they want a defense attorney who works in the same office with the assistant prosecutor, perhaps because the client feels the defense attorney may be in a position to influence the prosecutor's action through close personal contact with an assistant prosecutor. If the client is then convicted of a criminal charge, the client may feel that the prosecutor's office gained access to confidential information in the defense attorney's file."

FINANCIAL INTEREST

Prosecutors must be mindful of conflicts resulting from pecuniary interests, even if seemingly unrelated to a criminal case. In RI-280, the Ethics Committee addressed a situation not directly involved with the prosecution of a criminal defendant. There, a prosecuting attorney in a rural county was prosecuting an arson case in which the insurance company had fully compensated the home owner, thus becoming the crime victim. Prior to trial, a commercial building owned by the prosecutor's spouse and insured by the same company was destroyed by an accidental fire. The insurance company disputed the claim and the prosecutor determined it was necessary to sue on behalf of his spouse. The claims adjuster was involved in both the defendant's and the prosecutor's spouse's fire. The opinion provides a detailed discussion of the rules applicable to the situation.

"MRPC 1.7 states:

> '2. (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.'

Prosecutors are subject to the Michigan Rules of Professional Conduct to the same degree as other lawyers. RI-152. Ordinarily, a lawyer may not undertake representation directly adverse to a current client, nor undertake representation which would be materially limited by the lawyer's duties to another client, a third person, or the lawyer's own interests. This duty applies because of loyalty to the client, and it does

not matter whether the representation matters are wholly unrelated. MRPC 1.7(a) and (b). In the facts presented the inquirer states the prosecution matter would be adversely affected because of the inquirer's dealings for the spouse on the insurance matter. MRPC 1.7 prohibits litigating both matters.

A disqualification of one prosecuting attorney may also require the disqualification of an entire prosecutor's office. MRPC 1.10(a) deals with imputed disqualification and states:

> '(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a) or (c), or 2.2.'

A prosecutor's office constitutes a "firm" for purposes of these rules. RI-43. As previously stated, the prosecutor is prohibited under MRPC 1.7 from representing the spouse while at the same time prosecuting the arson case. Therefore, MRPC 1.10(a) requires that the whole prosecutor's office is imputably disqualified.

Apart from any imputed disqualification under MRPC 1.10(a), disqualification of a prosecutor may also be required in other circumstances given the special responsibilities imposed upon prosecutors. The Court of Appeals has stated:

> 'The general rule is that a conflict of interest involving the elected county prosecutor himself requires recusal of the prosecutor and the entire staff. Since assistant prosecutors act on behalf of the elected county prosecutor and are supervised by him, the policies of fairness to the defendant and the avoidance of an appearance of impropriety requires this result.' *People v. Doyle*, 159 Mich App 632, 644, modified on other grounds, 161 Mich App 743 (1987).

The proper course of action is for the prosecutor to petition the circuit judge for appointment of a special prosecutor pursuant to MCL 49.160(a); MSA 5.578(1) to pursue the arson matter. If the prosecutor has a conflict which disqualifies the prosecutor from the case, the prosecutor may not select nor supervise the special prosecutor. RI-152.

The prosecutor further inquires whether the entire prosecutor's office must be disqualified in the near future from all criminal matters that may involve restitution to the insurance company. Certain factual circumstances may play into future determinations. For example, if in fact the dispute with the insurance company results

in litigation, whether or not the prosecutor is satisfied with the outcome of the litigation may have a bearing upon future disqualification decisions. Further, the issue of restitution in the present arson case may be considerably more important as well as a greater focus of attention than in other criminal matters involving restitution. Without a particular fact situation to which to apply the ethics rules, we cannot give further guidance.

While the ethics opinion states the correct course would be for the prosecutor to petition the court for appointment of a special prosecutor, the statutory scheme now provides for petitioning the Attorney General. MCL 49.160.

Michigan also has a statute which prohibits prosecutors from deriving a personal gain or participating in civil matters which pertain to cases handled in their official capacity. MCL 49.158 provides:

> "No prosecuting attorney shall receive any fee or reward from or on behalf of any prosecutor or other individual for services in any prosecution or business to which it shall be his official duty to attend, nor be concerned as attorney or counsel for either party other than for the state or county in any civil action depending upon the same state of facts upon which any criminal prosecution commenced or prosecuted shall depend, or in any action for malicious prosecution brought in consequence of any criminal prosecution commenced or prosecuted during his term of office in the county of which he is prosecuting attorney; nor shall any attorney be permitted to prosecute or aid in prosecuting any person for an alleged criminal offense where he is engaged or interested in any civil suit or proceeding depending upon the same state of facts, against such person directly or indirectly."

In *People v Fitzsimmons*, 183 Mich 284 (1914), the Supreme Court addressed a situation contemplated by the foregoing statute. There, the prosecuting attorney was responsible for prosecuting a defendant accused of embezzling funds from a bank where the prosecutor was a depositor. The Court held that as a depositor, the prosecutor had a direct interest in the matter. The same facts which would sustain defendant's conviction would also establish his civil liability to the prosecutor's bank. The Court concluded that because of the prosecutor's direct interest in the case, he should have recused himself. Accordingly, defendant's conviction was reverse. See, *People v Cook*, 223 Mich 291 (1923), where the Court affirmed the conviction of a defendant under a similar fact situation, where the prosecutor disposed his interests as a depositor in the bank prior to the onset of the prosecution.

SPECIAL PROSECUTORS

When a conflict of interest is present, it is incumbent upon a prosecutor to seek the appointment of a special prosecutor to assume full responsibility for the case. The Michigan statute setting forth the process to be used when seeking a special prosecutor is MCL 49.160.

> "(1) If the prosecuting attorney of a county determines himself or herself to be disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, he or she shall file with the attorney general a petition stating the conflict or the reason he or she is unable to serve and requesting the appointment of a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve.
>
> (2) If the attorney general determines that a prosecuting attorney is disqualified or otherwise unable to serve, the attorney general may elect to proceed in the matter or may appoint a prosecuting attorney or assistant prosecuting attorney who consents to the appointment to act as a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve.
>
> (3) A special prosecuting attorney appointed under this section is vested with all of the powers of the prosecuting attorney for the purpose of the appointment and during the period of appointment, including the power to investigate and initiate charges. The cost of prosecution, other than personnel costs, in any matter handled by a special prosecuting attorney shall be borne by the office of the prosecuting attorney who has been determined to be disqualified or otherwise unable to serve.
>
> (4) This section does not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney pursuant to section 18 of chapter 16 of the code of criminal procedure, 1927 PA 175, MCL 776.18, to perform the necessary duties within the constraints of that section or if an assistant prosecuting attorney has been otherwise appointed by the prosecuting attorney pursuant to law and is not disqualified from acting in place of the prosecuting attorney."

The above statute was significantly amended by Public Act 706 of 2002. Previous to the amendment, this statute placed authority to make a finding warranting disqualification with the

court and authorized the court to appoint an attorney to act as special prosecutor. A review of PA 706, juxtaposed against the previously existing statute assists in understanding the change in process authorized by the Legislature

(1) If the prosecuting attorney of a county ~~is~~ DETERMINES HIMSELF OR HERSELF TO BE disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, ~~the supreme court, the court of appeals or the circuit court for that county, upon a finding to that effect by the court, may appoint an attorney at law as~~ HE OR SHE SHALL FILE WITH THE ATTORNEY GENERAL A PETITION STATING THE CONFLICT OR THE REASON HE OR SHE IS UNABLE TO SERVE AND REQUESTING THE APPOINTMENT OF a special prosecuting attorney to perform the duties of the prosecuting attorney ~~in the respective court~~ in any matter in which the prosecuting attorney is disqualified or until ~~such time as~~ the prosecuting attorney is able to serve.

(2) If the ~~prosecuting attorney of a county is disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, the circuit court for that county, upon a finding to that effect by the court, may appoint an attorney at law~~ ATTORNEY GENERAL DETERMINES THAT A PROSECUTING ATTORNEY IS DISQUALIFIED OR OTHERWISE UNABLE TO SERVE, THE ATTORNEY GENERAL MAY ELECT TO PROCEED IN THE MATTER OR MAY APPOINT A PROSECUTING ATTORNEY OR ASSISTANT PROSECUTING ATTORNEY WHO CONSENTS TO THE APPOINTMENT TO ACT as a special prosecuting attorney to perform the duties of the prosecuting attorney ~~in the probate court, the district court, or any other court within the county~~ in any matter in which the prosecuting attorney is disqualified or until ~~such time as~~ the prosecuting attorney is able to serve.

(3) A special prosecuting attorney appointed under this section is vested with all of the powers of the prosecuting attorney for the purpose of the appointment and during the period of appointment, INCLUDING THE POWER TO INVESTIGATE AND INITIATE CHARGES. THE COST OF PROSECUTION, OTHER THAN PERSONNEL COSTS, IN ANY MATTER HANDLED BY A SPECIAL PROSECUTING ATTORNEY SHALL BE BORNE BY THE OFFICE OF THE PROSECUTING ATTORNEY WHO HAS BEEN DETERMINED TO BE DISQUALIFIED OR OTHERWISE UNABLE TO SERVE.

(4) This section ~~shall~~ DOES not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney pursuant to section 18 of chapter 16 of ~~Act No. 175 of the Public Acts of 1927, being section 776.18 of the Michigan~~

~~Compiled Laws~~ THE CODE OF CRIMINAL PROCEDURE, 1927 PA 175, MCL 776.18, to perform the necessary duties within the constraints of that section or if an assistant prosecuting attorney has been otherwise appointed by the prosecuting attorney pursuant to law and is not disqualified from acting in place of the prosecuting attorney.

The salient changes brought about by PA 706 include:

1) A prosecutor, rather than the court, determines whether he or she should be disqualified due to a conflict of interest.
2) The Attorney General instead of the court, upon petition by the local prosecutor, authorizes the disqualification.
3) Rather than the local court appointing "an attorney at law" including one with no prosecutorial experience to act in the place of a disqualified prosecutor, the Attorney General determines whether to proceed in his or her place, or appoint another prosecutor who consents to the appointment.
4) In addition to acting in pending matters, a special prosecutor has the authority to investigate and initiate charges. Previously, a court could only appoint on a pending matter. See, *People v Gottschalk*, (Unpublished, #237682 2002).
5) Any costs of a special prosecutor, beyond that of personnel, shall be borne by the office of the disqualified prosecutor.

The Michigan Attorney General wrote extensively on the special prosecutor statute in OAG 7221 (November 7, 2008). Significant to that Opinion was his determination that the language of MCL 49.160(1) or (2) did not prohibit his office from appointing a special prosecutor absent an initial determination by a prosecuting attorney that he or she has a conflict and should be disqualified.

"Returning to your questions, the text of MCL 49.160(2) does not require that a petition be filed before the Attorney General is empowered to determine that a prosecuting attorney is disqualified and to appoint a special prosecuting attorney, and no words may be added to the statute to reach such a conclusion where the Legislature has not elected to include them. Moreover, to read MCL 49.160(2) as being limited by MCL 49.160(1), under which a prosecuting attorney may initiate a disqualification, would be contrary to the other governing principles of statutory interpretation and inconsistent with the long-established history and practice with which the Legislature is deemed to be familiar. In addition, it would fail to read MCL 49.160 in harmony with the common law and other statutes, including MCL 14.30, that expressly recognize the Attorney General's authority to supervise prosecuting attorneys and to unilaterally address issues

of concern to the State and the people of this State. Under the *in pari materia* doctrine, all these matters must be considered together as constituting one law in order to distill the Legislature's intent. Doing so discloses a clear meaning. While statutes had initially granted courts limited powers to appoint special prosecuting attorneys in pending cases only, present procedures allow the Attorney General to exercise control in a broad array of circumstances, including where a prosecutor submits a petition under MCL 49.160(1) or where the Attorney General determines that the State or the people have an interest. MCL 14.28, MCL 14.30, and MCL 14.101. The Attorney General may either proceed in the matter himself or herself, or may appoint a special prosecuting attorney to perform the duties of the prosecuting attorney in the matter."

It is my opinion, therefore, that if a county prosecuting attorney determines that he or she is disqualified for reasons of a conflict of interest or is otherwise unable to perform his or her duties, the prosecuting attorney has a duty to file a petition with the Attorney General requesting the appointment of a special prosecuting attorney under MCL 49.160(1).

It is my further opinion that, regardless of whether a petition is filed under MCL 49.160(1), the Attorney General has authority under MCL 49.160(2), under other statutes including MCL 14.28, MCL 14.30, and MCL 14.101, and under the common law, to make an independent determination regarding whether a prosecuting attorney is disqualified or otherwise unable to serve in a matter. If the Attorney General determines that a prosecuting attorney is disqualified or is otherwise unable to serve, the Attorney General may elect to proceed in the matter or may appoint a special prosecuting attorney to perform the duties of the prosecuting attorney in the matter."

The special prosecutor statute no longer specifically provides for the trial court to intercede in cases relative to appointment of a special prosecutor as indicated by the change in the law in 2002.

"(2) If the ~~prosecuting attorney of a county is disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, the circuit court for that county, upon a finding to that effect by the court, may appoint an attorney at law~~ ATTORNEY GENERAL DETERMINES THAT A PROSECUTING ATTORNEY IS DISQUALIFIED OR OTHERWISE UNABLE TO SERVE . . ."

However, it appears arguably that the courts retain this ability from appellate decisions which have been rendered since then. A significant recent decision relative to prosecutor conflict was

People v Waterstone, 486 Mich 942 (2010). In that case, the issue presented was whether the Office of the Attorney General should be disqualified from prosecuting a defendant judge, because earlier the OAG had defended her in a civil lawsuit arising from the same set of facts. The defendant argued that since assistant attorneys general had represented her in the civil matter, the OAG could not now prosecute her relative to the same subject matter. The Michigan Court of Appeals rendered a lengthy opinion reversing the decision of the circuit court, holding the OAG was disqualified from acting as the prosecuting agency, due to its prior representation of the defendant. *People v Waterstone*, 287 Mich App 368 (2010) Further, it held that the unique nature of the OAG does not permit an "accommodation" of the Michigan Rules of Professional Conduct to permit it to remain in the case. The Supreme Court, however, reversed the decision, holding:

> "While recognizing that the Attorney General is subject to the rules of professional conduct, we hold that disqualification is not required in this case because accommodation of his unique constitutional and statutory status will not infringe on the defendant's right to a fair prosecution. See *Attorney General v Public Service Comm'n*, 243 Mich App 487 (2000). The Attorney General's unique status 'requires accomodation,' *id* at 506, and such accommodation is particularly apt where no evidence has been presented of any prejudice that would be suffered by the defendant." At pp 942-943.

Note: although the decision of the Court of Appeals was reversed based upon the "accommodation" exception recognized in *Attorney General v PSC*, its Opinion in *Waterstone* provides a lengthy, detailed analysis of the Michigan Rules of Professional Conduct and case law, relative to the issue of conflict of interest as related to prosecutors and should be reviewed.

In *Waterstone*, the investigation was initially presented to the Wayne County Prosecutor's Office for review. That office disqualified itself due to a conflict, and efforts were made to other neighboring prosecutor offices pursuant to MCL 49.160, to accept the case as special prosecutor. After several unsuccessful attempts, the Attorney General ultimately accept the prosecution and assigned the matter to its Criminal Division, which is expressly permitted under MCL 49.160(2). After charges were filed, the defendant moved to disqualify the OAG because of the alleged conflict outlined above. The motion was heard by the district court and denied, appealed to the circuit court which also denied the relief. The issue was then further reviewed by the Court of Appeals and Supreme Court. At no time did any of the reviewing courts determine its ability to hear and rule on a motion to disqualify a prosecutor or prosecutor's office was impeded by the statutory scheme set forth in MCL 49.160. Put another

way, there was no suggestion that a court could not independently review a request to disqualify a prosecutor due to a conflict.

There are several other cases reviewed by the Court of Appeals since the statutory change to MCL 49.160, which indicate court review of conflict of interest claims against prosecutors continues. See, *People v Davenport*, 280 Mich App 464 (2008), after remand 286 Mich App 191 (2009); *People v Hemingway*, (#147003) 836 NW2d 691 (2013; *People v Salerno*, (unpublished #307087, 2013); *People v Mayen*, (unpublished #301505, 2013). Additionally, the Comment to MRPC 1.7 provides that a litigant or the court may raise the question of a conflict of interest.

Consequently, there exists three avenues for appointment of a special prosecutor:

1) a prosecutor determines he or she is disqualified by reason of a conflict of interest or is otherwise unable to attend to the duties of the office,
2) a determination by the Attorney General that the prosecutor is disqualified or otherwise unable to serve, or
3) a ruling by the court that a conflict of interest exists requiring removal of the prosecutor.

The first two options are available either prior to the determination to initiate charges or after charges are filed. A court cannot intercede for purposes of appointing a special prosecutor for the purpose of making a charging decision. *In re Appointment of Special Prosecuting Attorney*, 122 Mich App 632 (1983), where subsequent to the declination of charges by the county prosecutor, several individuals petitioned the circuit court seeking appointment of a special prosecutor due to their disagreement of the prosecutor's decision. Upholding the circuit court's denial of the request the Court [interpreting the pre-2002 statute] stated:

> "Decisions regarding the initiation of criminal charges are discretionary executive acts. In deference to principles of separation of powers, judicial interference with the exercise of this discretion is severely limited. *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672 (1972); *People v Thomas*, 118 Mich App 667 (1982). If the amended statute [MCL 49.160] were interpreted as allowing the appointment of a special prosecutor to initiate criminal charges, even for legitimate reasons such as a conflict of interest, the court's appointment of a special prosecutor would constitute judicial second-guessing of the prosecutor's actions. Because such action by the courts is suspect under constitutional principles, we hesitate to make such an interpretation of this statute, since the statute does not explicitly provide for that kind of judicial power.

Once a case is brought to court, the substitution of a special prosecutor does not constitute such an obvious interference with prosecutorial discretion." At p 636.

See also, *People v Herrick*, 216 Mich App 594 (1996).

While declination of prosecution does not allow the court to "second-guess" the decision to prosecute, the Attorney General does have independent authority to proceed on a criminal matter denied by a local prosecutor. MCL 14.28, *Fieger v Cox*, 274 Mich App 449 (2007).

As previously indicated, should an elected prosecutor determine that a conflict exists for him or herself or if such a conflict exists with a supervising attorney in the office, the conflict will be imputed to the entire office and recusal is necessary. If, however, the conflict exists for a non-supervisory assistant prosecutor, it is likely that a screening procedure to isolate that prosecutor from the case can be sufficient to allow the office to continue with the case. Building such a "firewall" is discussed earlier in this chapter in the context of the findings of an ethics opinion, RI-4.

STATUTORY PROCESS

As indicated by MCL 49.160, when a prosecuting attorney determines himself or herself to be disqualified due to a conflict of interest, the procedure to petition the Attorney General advising of the conflict, and requesting appointment of a special prosecutor. The process agreed upon by the Attorney General and the Michigan Prosecuting Attorneys Coordinating Council (MCL 49.101 et. seq.) is as follows:

1. The prosecuting attorney seeking a special prosecutor shall submit a petition and related case information to the Office of the Attorney General at the following address by mail, fax, or email:

   Attorney General Bill Schuette
   Criminal Division
   3030 W. Grand Blvd., Ste 10-200
   Detroit, Michigan 48202

   FAX 313-456-0181

   Email: AGCriminal@michigan.gov

2. The petition should be submitted in the name of the elected prosecutor, outlining nature of the case and the reasons for the disqualification.

3. If the police report or any other related case information is too large to transmit, a summary of the case or investigation should be provided.

4. The Criminal Division of the Attorney General will review the petition and determine pursuant to MCL 49.160(2), if disqualification is necessary, and if so, elect to proceed in the matter or appoint a prosecuting attorney from another county, who consents to such appointment.

5. If the Criminal Division elects not to proceed in the matter, it will refer the approved disqualification to PACC for the purpose of locating a special prosecutor. The referral will include the petition and related case material. PACC will not conduct any substantive review relative to the decision concerning the initiation of charges in the matter.

6. When received by PACC, a commitment will be secured from a prosecuting attorney as special prosecutor. An order of appointment will be prepared and forwarded to both the new special prosecutor and the disqualified prosecutor. Case related material will be also be forwarded to the special prosecutor.

7. The case tracking number (CTN) from the originating county shall be utilized by the special prosecutor. The special prosecutor should confirm with the originating prosecutor's office that he or she has received all relevant material concerning the case.

8. Upon completion of the case, the special prosecutor shall advise PACC as to the disposition of the matter for record-keeping purposes.

Prosecuting Attorneys Association of Michigan

BEST PRACTICES RECOMMENDATION
CONFLICT OF INTEREST/SPECIAL PROSECUTOR

Central to the integrity of the criminal justice system is a prosecuting official free of bias or conflict that would undermine faith in the independence of the office. A prosecutor's ability to ensure the guilty are held accountable, the innocent are protected and the interests of crime victims and the community are safeguarded requires such independence.

Prosecutors are elected to represent the People of the State of Michigan in their community and not any one entity or individual. Because of that unique position in the criminal justice system, disqualification is not a decision to be taken lightly.

Seeking to maintain the dignity and honor of the profession and compliance with the high standard of professionalism required to maintain the public trust, the Prosecuting Attorneys Association of Michigan (PAAM) recommends:

- Prosecutors should be knowledgeable of the Michigan Rules of Professional Conduct as to this subject, including relevant case law, statutes, and ethics opinions.

- An elected prosecutor who has conflict a conflict will require recusal of the entire prosecutor's office. A supervising prosecutor with a conflict may require office recusal depending on the screening procedures in place.

- Procedures within a prosecutor's office should be established to address actual or potential conflicts, which include the creation of firewalls and conflict teams or supervisors to ensure conflicts are identified and necessary screening occurs. The manner in which conflicts or potential conflicts are handled should be documented. National Prosecution Standards (NDAA) 1-3.4.

- As soon as a conflict is discovered that requires the disqualification of a prosecutor's office, the prosecuting attorney should seek a special prosecutor by submitting a petition and supporting documents (e.g. police report) to the Department of Attorney General, pursuant to MCL 49.160. The petition should articulate the basis for the disqualification and rely on more than a mere claim that someone might question whether the prosecutor should be disqualified. A copy of the petition and supporting documents should be provided to the Prosecuting Attorneys Coordinating Council. If the supporting

documents are voluminous, a summary of the case or investigation should be provided. The procedure for appointment of special prosecutors as established by PAAM should be followed.

- A prosecutor should not accept appointment as a special prosecutor unless the prosecutor is confident that they possess the ability, expertise, staff, and other support and resources necessary to prosecute a case through conclusion, including any interlocutory or post-conviction appeals.

- Once the appointment of a special prosecutor is made, the disqualified prosecuting attorney should refrain from discussing the merits and any potential disposition of the case with the special prosecutor or the media. This does not limit contact between offices to insure that all relevant material is transferred to the special prosecutor. It is generally permissible for the disqualified prosecutor to provide general information to the Special Prosecutor, including information about victim services available in that county. The Special Prosecutor should be responsible for all victim notifications and ensuring that the requirements of the Crime Victim's Rights Act are observed. Additionally, the special prosecutor should notify the disqualified prosecuting attorney as to the disposition of the case upon its conclusion. Nothing in this recommendation should be construed to limit consultation by the Special Prosecutor with any victim under the Crime Victim's Rights Act.

A best practices recommendation by the Prosecuting Attorneys Association of Michigan (PAAM) is the product of careful consideration of experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions to reach the same or similar objectives.

Date approved by PAAM: February 10, 2017