

# The Overzealous Prosecutor

by Brian A. Sun

Justice Brandeis knew that lawyers are by nature intensely competitive and that occasionally the desire to win overcomes even the most well-intentioned and ethical attorney. He warned that “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding.” *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct. 564, 573 (1928).

In the criminal arena, defense practitioners inevitably face prosecutors whose aggressive pursuit of conviction leads them to cross the boundaries of ethics and fair play. Cloaking themselves in the flag and motherhood, these zealots come to believe that any tactic is justified by the pursuit of the holy grail—conviction.

In our adversarial system, the litigants can manipulate the facts and advance arguments that at times may seem inconsistent with the search for “truth and justice.” In representing a sovereign party, the prosecutor balances the duty to aggressively seek a conviction with the obligation to ensure that the innocent not suffer. Defense counsel, on the other hand, must use every means available to discredit (some might say distort) the prosecution’s case.

Because personal liberty as well as financial livelihood are often at stake in a criminal case, both sides are usually mindful that fundamental principles of due process and fairness draw their life through the attorneys’ conduct. Fortunately for our justice system, prosecutors and defense lawyers have historically done a remarkable job of litigating both aggressively and ethically within this sometimes fragile framework.

In recent years, however, criminal lawyers are discovering that collegiality and ethical responsibility are giving way to chilly, often hostile, relationships and a dramatic increase in complaints alleging prosecutorial overreaching.

One possible explanation for this changing climate may lie in the enactment of tough anticrime legislation. The advent of the war on drugs and increased prosecutorial

efforts in the white-collar area have also coincided with the increase in defense bar complaints that prosecutors will stop at nothing to obtain a conviction. Indeed, the creation of the federal sentencing guidelines—mandating lengthy prison terms for both white-collar crime and street crime—coupled with the expansion of state and local prosecution efforts suggest that aggressive prosecutorial practices may be with us for a while.

Notwithstanding these trends, most experienced criminal defense lawyers are pragmatic enough to realize that any prosecutor’s ethical breach or overzealous conduct affords the opportunity to put the prosecution on the defensive. Although the criminal defense lawyer does not usually have the ability to seek protective orders or obtain sanctions as in a civil matter, there are ways to turn the prosecutor’s malfeasance to your client’s advantage. Simply put, don’t wring your hands; do something about it.

Because they represent “the government,” prosecutors exercise a power and authority that few others hold in our society. The ultimate decision to initiate a prosecution carries the potential for enormous abuse if not exercised with great care and restraint. Arrest and conviction can destroy both professional and personal lives.

A significant number of prosecutors in this country are relatively young lawyers who treat their responsibilities seriously and execute them sensitively and compassionately. However, they are subject to the same frailties as everyone else. Although some prosecutors believe they “can do no wrong,” they can and do make serious mistakes. And when they do, people suffer and our system of justice is damaged.

## Guiding Prosecutors

How then do we guide our prosecutors as they respond to their weighty duties and responsibilities? Most prosecutors look to the Supreme Court’s opinion in *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629 (1935), which articulates the principles to which they should adhere and aspire:

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obli-

---

Mr. Sun is a partner in the Santa Monica, California, law firm O’Neill & Lysaght and is a former U.S. attorney.

gation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger v. United States*, 295 U.S. at 88, 55 S. Ct. at 633.

The unethical or overzealous prosecutor appears in many different guises. There are some who consistently overreach—totally unscrupulous prosecutors who will stop at nothing to obtain a conviction against your client. There are those who sometimes overreach in the heat of battle but for the most part are lawyers of integrity. There are yet others whom I like to call the true believers—prosecutors whose narrow-mindedness has rendered them incapable of distinguishing a hard blow from a foul one.

You can anticipate when a case has an increased potential for prosecutorial overreaching. As soon as a prosecutor with a reputed lack of integrity comes onto a case, be vigilant for unethical or inappropriate conduct.

Another red flag is the case that involves a particularly heinous crime such as child molestation or large-scale drug trafficking. Or a notorious defendant. Emotions on both sides are likely to run high when the stakes are high, and the pressure on the prosecutor to convict is never greater. The same is true of the high-profile, well-publicized case that becomes a prosecutor's "career case." In all these situations, even prosecutors with a reputation for fairness and integrity are susceptible to overreaching.

However, just because a prosecutor takes an unreasonable position about setting a client's bail or drafts an indictment that is heavier than a small phone book and reads like an opening statement does not necessarily mean your adversary is overreaching or unethical.

Dealing with prosecutors who misstate the evidence or play fast and loose with discovery is part of being a defense lawyer. That the prosecutor deliberately engages in such tactics should hardly shock the experienced defense attorney. Moreover, during the heat of a highly contested proceeding, it is simply impractical to document or make an issue of every prosecutorial transgression.

But don't roll over and play dead, either. A defense lawyer must know when to cry foul and when not to. I generally try not to express outrage at every turn. I want to avoid a reputation as an overreacting whiner. When I do come into a prosecutor's office on some critical issue, I want credibility. A chronic complainer's protests are summarily dismissed. I know that from being on the other side. When I was still a prosecutor, a defense lawyer once accused me of improperly attempting to influence one of his witnesses. In my office, that attorney had already earned a reputation of complaining about everything, so his complaint did not earn the credence it probably should have.

Sometimes prosecutorial misconduct or unethical behavior can be traced to the case investigator or the law enforcement agency. Often the prosecutor has unknowingly

withheld key exculpatory evidence due to the investigator's misconduct. When that happens, make every effort to distinguish the prosecutor's conduct from the investigator's. You're more likely to strike a better deal for your client that way. When someone else is at fault, the prosecutor can compromise without personally losing face.

Personal attacks generally make no sense and may chill your professional relationship with the prosecutor.

The dynamics of your personal relationship with a prosecutor may shape your response to an issue involving an unethical practice. For instance, I often try to reason with prosecutors and schmooze my way through difficult issues by capitalizing on my own background as a prosecutor. Other defense attorneys may be more confrontational; they have developed an effective, hard-nosed, take-no-prisoners approach.

Irrespective of your personality or philosophy, no one says you have to personally like the prosecutor or sacrifice your ethical principles in seeking some quid pro quo from a prosecutor. Simply focus on the most effective way of educating the prosecution that a particular unethical practice will not benefit its case-in-chief and that you, the defense counsel, will do everything possible to create an appellate issue and turn the tables on the prosecutor for overreaching.

No matter how incensed you are by some prosecutorial practice, don't allow your ego to get in the way of good judgment and your client's best interests. Blasting a prosecutor without assessing the potential long-range impact on your defense could cause you great regret much later in the proceeding. A calculated, considered response (with controlled escalation) is generally the more prudent course.

Once I encountered a prosecutor who had authorized his investigators to directly contact one of my clients—even though I had previously advised the prosecutor that I was representing that individual and wanted all communications to go through my office. When I first heard of the unauthorized contact, I burned with rage. I heated up my word processor, ready to file court motions and to raise a ruckus about the incident. After some calming reflection, however, I concluded it was in my client's best interest not to overreact. We



were likely to have extensive dealings with this prosecutor, and a chilly relationship would not be to our advantage. So I requested a meeting with the erring prosecutor. He resolved my concerns satisfactorily, and my client's interests were protected without resort to either nasty litigation or heated personal exchanges. It could easily have gone the other way had I followed my first hot impulse. Pick your fights carefully.

There are no hard-and-fast rules, just common sense. Try it when you spot trouble—when a major piece of exculpatory evidence is withheld from a grand jury, for instance, or when a witness was sent to make secret tape-recordings of defense counsel and another witness's conversations.

Documenting every communication with the prosecutor may make defense lawyers think of their civil litigation colleagues, but it is vitally important to create a record of a prosecutor's misconduct, particularly at the preindictment stage.

Whether you send a confirming letter, dictate a memorandum to the file, or interview witnesses who can affirm some prosecutorial transgression, it is essential to have the requisite supporting evidence to bring before a court or a prosecutor's supervisor. Having your evidence in hand can also give you the bargaining leverage to obtain favorable evidentiary concessions or jury instructions or, in some instances, to cause significant movement in plea discussions. It can even result in case dismissal.

Being in trial or lacking support resources may hamper your ability to document an unethical act as much as you would like. Even so, pin the prosecutor down as much as possible. Confront the prosecutor on the issue (preferably in the presence of a witness—another lawyer or co-counsel) so that you can attest later that the prosecutor admitted the overreaching or unsavory conduct. Confrontation also puts the prosecutor on notice that the misconduct may have jeopardized the entire case. In essence, let the prosecutor know that you intend to turn that excessive zeal into a weapon for the defendant.

## Go to the Top

Another option to consider is talking with the prosecutor's supervisor. Prosecutors with a propensity toward unethical behavior generally earn a bad reputation quickly and are likely to have received complaints from others who have opposed them. Although a prosecutor's misconduct will rarely lead to her office's dismissal of a case, her superiors are nevertheless likely to be sensitive to the office image and may therefore be willing to sit down with a defense attorney who makes a responsible assertion of misconduct. Your swift reaction to an unethical practice, particularly when it is well documented, may lead to a serious examination of the issue by both parties, without the need for judicial intervention.

Remember that asking a supervisor to review a prosecutor's conduct can hurt your client in the long run, particularly if the trial prosecutor is vindictive. But even if the prosecution "front office" is likely to support a prosecutor's behavior for policy reasons, it is still good practice to make a record, identify specific factual and legal issues, and at least attempt to reason with the prosecutor and the supervisors before you seek judicial intervention.

In some instances, going straight to a trial court with evidence of prosecutorial abuse is the best course, but it is still generally advisable to try to work things out informally first. There is no guarantee that a court will side with you. You

may be better off with concessions from a supervisor.

For instance, I knew a prosecutor who had a reputation for consistently withholding discovery and misleading the court about the prosecution's evidence. Even within his own office, this lawyer was reputed to be "out of control" and an embarrassment to his colleagues. Approximately three days before I was scheduled to begin a trial against this prosecutor, I learned of a tape recording with statements made by my client that had not been turned over as required under the criminal discovery rules.

Even before this incident, I had complained informally about the prosecutor's conduct to other lawyers in that prosecutor's office and to a supervisor. After learning of this tape recording, I erupted like a rocket. I obeyed the first rule of combat and calmed down first. Then, cool and collected, I protested the prosecutor's conduct vigorously to his superiors and specifically outlined the lengthy protest I intended to make to the judge. The prosecutor's office decided to dismiss the case against my client with the warning that it would reindict the matter "after further review of the case." Fortunately, this promised review did not occur, and my client became a beneficiary of the prosecutor's serious error in judgment.

Candid discussions without the usual posturing are generally more effective than ranting and raving about miscarriage of justice. Having your motion already prepared shows the prosecutor that you are serious. Because of the politically charged nature of some prosecutions, supervisors may be willing to look for alternative resolutions.

Sometimes, however, calm discussions will not work. The only solution is asking the court to act.

The growing public concern about the ethics of lawyers has not escaped the judiciary. At a minimum, defense attorneys are obligated to educate judges and urge them to deal firmly with overzealous prosecutors who may be influenced by personal political agendas.

Judicial supervision of a prosecutor's overzealousness derives from the court's inherent supervisory powers, which include the power to dismiss an indictment on the ground of prosecutorial misconduct. These powers allow the court to question the discretion of a prosecutor who acts in an arbitrary and capricious manner that violates due process. *See United States v. Samango*, 607 F.2d 877, 881 (9th Cir. 1979); *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir. ), *cert. denied*, 439 U.S. 842, 99 S. Ct. 133 (1978).

Whether the court's supervisory power extends to criminal investigations—overriding the prosecutor's broad discretion in determining what is a proper investigatory technique—is still an open question. *See United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988); *United States v. Lopez*, 765 F. Supp. 1433 (N.D. Cal. 1991).

Of particular current interest among defense lawyers is how the courts will view the controversial Justice Department memorandum issued by then Attorney General Richard Thornburgh decreeing that federal prosecutors are not to be bound by certain time-honored legal canons. Critics of this government policy suggest that such aggressive law enforcement procedures are creating an unlevel playing field, allowing the government an unfair advantage.

When you move for sanctions or dismissal of a case due to prosecutorial misconduct, avoid invective and focus on factual issues. Also avoid ad hominem attacks on the oppos-

(please turn to page 55)

'and I can do you to a frazzle. Put up your hands.' I smiled, but with that, biff biff, he struck me, knocking me down and spilling my flowers. The language he used was frightful. It was an unprovoked and brutal assault. Look at my cheek. Look at my nose. I could not understand it. He must have been drunk. Before I recovered from my surprise he had administered this beating. I was in danger of my life and was compelled to defend myself. That is all, your Honor, though I must say, in conclusion, that I cannot get over my perplexity. Why did he say he was the Dodo? Why did he so wantonly attack me?"

And thus was Sol Witberg given a liberal education in the art of perjury. Often, from his high seat, he had listened indulgently to police court perjuries in cooked-up cases; but for the first time perjury was directed against him, and he no longer sat above the court, with the bailiffs, the policemen's clubs, and the prison cells behind him.

"Your Honor," he cried, "never have I heard such a pack of lies told by so bare-faced a liar—"

Watson here sprang to his feet.

"Your Honor, I protest. It is for your Honor to decide truth or falsehood. The witness is on the stand to testify to actual events that have transpired. His personal opinion upon things in general, and upon me, has no bearing on the case whatever."

The Justice scratched his head and waxed phlegmatically indigent.

"The point is well taken," he decided. "I am surprised at you, Mr. Witberg, claiming to be a judge and skilled in the practice of the law, and yet being guilty of such unlaywerlike conduct. Your manner, sir, and your methods, remind me of a shyster. This is a simple case of assault and battery. We are here to determine who struck the first blow, and we are not interested in your estimates of Mr. Watson's personal character. Proceed with your story."

Sol Witberg would have bitten his bruised and swollen lip in chagrin had it not hurt so much. But he contained himself and told a simple, straightforward, truthful story.

"Your Honor," Watson said, "I would suggest that you ask him what he was doing on my premises."

"A very good question. What were you doing, sir, on Mr. Watson's premises?"

"I did not know they were his premises."

"It was a trespass, your Honor," Watson cried. "The warnings are posted conspicuously."

"I saw no warnings," said Sol Witberg.

"I have seen them myself," snapped the Justice. "They are very conspicuous. And I would warn you, sir, that if you palter with the truth in such little matters you may darken your more important statements with suspicion. Why did you strike Mr. Watson?"

"Your Honor, as I have testified, I did not strike a blow."

The Justice looked at Carter Watson's bruised and swollen visage, and turned to glare at Sol Witberg.

"Look at that man's cheek!" he thundered. "If you did not strike a blow how come it that he is so disfigured and injured?"

"As I testified—"

"Be careful," the Justice warned.

"I will be careful, sir. I will say nothing but the truth. He struck himself with a rock. He struck himself with two different rocks."

"Does it stand to reason that a man, any man not a lunatic, would so injure himself, and continue to injure himself, by striking the soft and sensitive parts of his face with a stone?" Carter Watson demanded.

"It sounds like a fairy story," was the Justice's comment. "Mr. Witberg, had you been drinking?"

"No, sir."

"Do you never drink?"

"On occasion."

The Justice meditated on this answer with an air of astute profundity.

Watson took advantage of the opportunity to wink at Sol Witberg, but that much-abused gentleman saw nothing humorous in the situation.

"A very peculiar case, a very peculiar case," the Justice announced, as he began his verdict. "The evidence of the two parties is flatly contradictory. There are no witnesses outside the two principals. Each claims the other committed the assault, and I have no legal way of determining the truth. But I have my private opinion, Mr. Witberg, and I would recommend that henceforth you keep off of Mr. Watson's premises and keep away from this section of the country—"

"This is an outrage!" Sol Witberg blurted out.

"Sit down, sir!" was the Justice's

thundered command. "If you interrupt the Court in this manner again, I shall fine you for contempt. And I warn you I shall fine you heavily—you, a judge yourself, who should be conversant with the courtesy and dignity of courts. I shall now give my verdict:

"It is a rule of law that the defendant shall be given the benefit of the doubt. As I have said, and I repeat, there is no legal way for me to determine who struck the first blow. Therefore, and much to my regret,"—here he paused and glared at Sol Witberg—"in each of these cases I am compelled to give the defendant the benefit of the doubt. Gentlemen, you are both dismissed."

"Let us have a nip on it," Watson said to Witberg, as they left the courtroom; but that outraged person refused to lock arms and amble to the nearest saloon. □

---

## Prosecutor

---

(continued from page 40)

ing lawyer—particularly if the prosecutor is known to the judge and well regarded. Remember that the prosecutor may be only following office policy in committing a questioned act. Be flexible and sensitive to these concerns and emphasize that the ethical violation or misconduct undermines the integrity of the judicial process. Write your brief with the appellate court in mind. Even if your arguments do not prevail, the prosecutor may think carefully before creating another issue for the defense to seize upon.

If gentle direct persuasion or discussions with supervisors or the court do not work, consider referring a prosecutor to the appropriate local bar association for disciplinary sanctions. The problem with this approach is that it is likely to have little direct benefit for your client, and your complaint probably will be stuffed into a drawer and ignored. A bar complaint may ultimately backfire or earn the prosecutor's enmity. It does warn the prosecutor, however, that complaints attract notice and could affect progress up the career ladder or even future attempts to obtain a judgeship or a political appointment.

If you are fortunate enough to have the prosecution hand you an issue involving questionable prosecutorial conduct, play it to the jury. Particularly when an unethical practice will not result in reversible error but can be exposed at trial, you can wreak havoc with the prosecution's case.

Prosecutors have historically used the media to further political agendas or to respond to public outcries for action. There are situations in which putting the prosecution on trial in the media may be in your client's best interest. At the very least, a defense lawyer can throw a prosecutor off-balance by focusing on the prosecution's conduct rather than the defendant's.

Whether an issue involves withholding of key exculpatory evidence or distorting or manipulating witness testimony, prosecutors are exceedingly uncomfortable when their conduct finds its way into the substantive aspects of the case. The prosecutor's self-image as the good guy wearing the white hat may be punctured. The prosecutor may do some rethinking, particularly if the media has now put the prosecution's conduct under a microscope.

In *Olmstead*, Justice Brandeis urged that the courts should ensure that governmental overreaching be firmly dealt with:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

*Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 575 (1928).

The prosecutor wields awesome power in our system of justice. Only the combined willingness of the courts, defense lawyers, and prosecutors to vigorously challenge prosecutorial misconduct can prevent abuse of that power. □

---

## Legal Lore

---

(continued from page 42)

The case of *Neff v. Pennoyer*, 17 F. Cas. at 1280, was filed in federal court on September 10, 1874, before Judge Matthew Deady. There is no question that by the time of *Neff v. Pennoyer*, Deady knew of Mitchell's lack of scruples. Deady was not only a distinguished jurist and long-time resident of Oregon, he was also an acute observer of life and politics in Oregon. He kept extensive diaries in which he referred to the events and prominent people of the day. By the time *Neff v. Pennoyer* arose, Mitchell's prior activities in Pennsylvania and his bigamous marriage had received wide public attention in Oregon, and Deady had closely followed the scandal.

By June of 1873, Deady thought all the scandals would be the end of Mitchell. As he explained: "I think he [Mitchell] must go down. Seduction, desertion, theft, clandestine change of name and absconding and bigamy are too much for a man to carry in the Senate, though he is making a desparate [*sic*] fight of it." Mitchell nonetheless survived and even flourished. As time went by, Deady's diary entries displayed an increasing contempt for the man. After 1873, Deady generally referred to Mitchell by his born name, Hipple. On election day in 1876, Deady stated in disgust: "Have not voted for Congressman since the Republicans put Hipple in the platform in 1873 and don't think I will until they take him out . . ."

Deady also had further reason to doubt Mitchell's integrity. In 1873, allegations of bribery by Mitchell and others surfaced in connection with a

Senate election. Deady recorded in his diary that Ben Holliday, a political ally of Mitchell's, had reportedly spent \$20,000 in bribes to buy the votes necessary to ensure Mitchell's election. Deady, along with the U.S. attorney in Oregon, pushed for a prompt and thorough investigation of the matter. When one grand jury refused to return an indictment, Deady ordered a new grand jury.

It looked as if indictments might be returned until Mitchell managed to use further bribery to bring the investigation to a halt. The attorney general at that time, George H. Williams, also from Oregon, had recently been nominated to the U.S. Supreme Court, but his confirmation was in doubt. Senator Mitchell approached Williams and offered to vote for confirmation if, in exchange, Williams would halt the grand jury. Williams agreed and ordered the Oregon U.S. attorney to drop the matter. When he refused, Williams fired him. Commenting on this incident, Deady called the removal of the U.S. attorney "[a]n atrocious act for which W[illiams] & M[itche]ll deserve severe punishment."

Neff apparently had prospered in California. He had settled in San Joaquin with a wife and family as well as servants, property, and livestock. He was prepared, however, to leave his home in California and move himself, his wife, and his daughter to Oregon for a year to pursue his various legal actions.

The opening salvo between Neff and Pennoyer was fired when Neff sued to evict Pennoyer, but the war did not end there. After Pennoyer lost the eviction suit and costs were awarded against him, he battled bitterly over the amount of those costs. Neff was again the winner, and adding insult to injury, he proceeded to sue Pennoyer again—this time to recover money damages sustained as a result of Pennoyer's cutting down timber on the property. Pennoyer counterclaimed to collect property taxes that he had paid from 1866 to 1875. The counterclaim was dismissed, and Pennoyer's defense of the damage action proved to be the closest he got to a victory: The jury found for Neff but awarded only nominal damages.

When the dust had settled, Pennoyer, who the Supreme Court assumed was a bona fide purchaser for value, was left holding the bag. Pennoyer had pur-