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Cover Page Footnote
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PROSECUTORS WHO DISCLOSE PROSECUTORIAL INFORMATION FOR LITERARY OR MEDIA PURPOSES: WHAT ABOUT THE DUTY OF CONFIDENTIALITY?

RITA M. GLAVIN*

INTRODUCTION

The infiltration of television cameras into the courtroom, the fixation of the national media on high-profile prosecutions, and the public's insatiable appetite for the inside story on sensational criminal trials have created enormous temptations for the attorneys involved in such cases to "tell all" once the matter is closed. Apart from the money and fame such post-trial ventures as books and television movies can provide, attorneys who relay their behind-the-scenes accounts of famous cases certainly enhance public understanding of the American justice system. Indeed, many defense attorneys and prosecutors involved in heavily publicized criminal cases have detailed their roles in publications following representation.1

* I am grateful to Professors Bruce A. Green and Russell Pearce for their invaluable assistance throughout the writing of this Note. I would also like to thank the Stein Scholars Program for providing the academic climate in which I was able to explore these issues of legal ethics.

1. For example, defense attorney Alan Dershowitz chronicled the behind-the-scenes events of his successful appeal of Claus von Bulow's murder conviction. See State v. von Bulow, 475 A.2d 995 (R.I.), cert. denied, 469 U.S. 875 (1984). The book was later turned into a popular movie of the same title. Alan M. Dershowitz, Reversal of Fortune: Inside the von Bulow Case (1986). Claus von Bulow even appeared with Dershowitz on several radio and television shows to promote the book. See von Bulow v. von Bulow, 828 F.2d 94, 100-01 (2d Cir. 1987) (holding that where a client allowed publication of confidential communications in his attorney's book and joined his attorney in promoting the book on radio and television shows, the client waived the attorney-client privilege).


Leon Jaworski published books on two high-profile cases in which he served as lead prosecutor. In his first book, Jaworski discussed his observations and role as a prosecutor in the Nazi war crimes trials. Leon Jaworski, After Fifteen Years (1961). His second publication provided a detailed account of his experiences as the Watergate Special Prosecutor. Leon Jaworski, The Right and the Power: The Prosecution of Watergate (1976).

Mario Merola, the District Attorney of Bronx County in New York for 15 years, published Big City D.A., which chronicled the investigation and prosecution of his most notorious cases, including the Son of Sam affair and the reindeemment of former Secretary of Labor Raymond Donovan for alleged organized crime involvement. Mario Merola, Big City D.A. (1988).

Yet, when contemplating such post-trial publications, attorneys must consider the ethics rules that define a lawyer's duty of confidentiality and thus may limit an attorney's ability to speak about a case. Both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility, at least one of which is adopted in forty-nine states, prohibit the disclosure of information relating to representation without client consent. Model Rule 1.6(a) forbids the release of "information relating to representation of a client unless the client consents after consultation." Likewise, DR 4-101(B) of the Code provides that a lawyer may not reveal a confidence or secret of


Alice Vachss, former chief of the Special Victims Bureau in the Queens County District Attorney's office wrote a book that described the prosecutions of sex crimes and how the justice system treats the victims. Alice Vachss, *Sex Crimes* (1993).

This Note focuses solely on the ethical issues implicated when an attorney wishes to make such a disclosure. This Note does not address first amendment implications. For a discussion on the first amendment and attorney speech, see, e.g., Report of the Committee on Professional Responsibility, Association of the Bar of the City of New York, *The Need For Fair Trial Does Not Justify A Disciplinary Rule That Broadly Restricts An Attorney's Speech*, 20 Fordham Urb. L.J. 881, 886-88 (1993) (arguing that ethics rules restricting attorney speech during a criminal trial should be modified to more closely comport with the first amendment and a recent Supreme Court decision regarding the first amendment); Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 Fordham L. Rev. 865, 930 (1990) (arguing that "prosecutor speech is entitled to first amendment protection because the prosecutor retains a constitutional right to self-expression and because the speech informs the public about matters of public concern"); Fred. C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 354 (1989) (stating that "[f]orbidng lawyers to disclose information they feel morally obligated to reveal implicates serious free speech interests").

6. The American Bar Association originally adopted the Code in 1969, and subsequent amendments were made to it every year between 1974 and 1980. See Charles W. Wolfram, Modern Legal Ethics 56-57 (1986). Due to controversy over some of the Code's amendments, the practical applicability of the Code, and alleged deficiencies in the Code's provisions, the ABA appointed a committee to redraft the Code in 1977. Id. at 60-61. The product of that committee was the first draft of what is now the Model Rules of Professional Conduct. Id. The ABA adopted the Model Rules in 1983 to replace the Code, though many states still abide by the Code rather than the Model Rules. Id. at 62-63.
7. Model Rules, supra note 3, Rule 1.6(a).
his client "for the advantage of himself or of a third person, unless the
client consents after full disclosure." Not only does the violation of
an ethics rule expose an attorney to disciplinary action with sanctions
ranging from private reprimand to disbarment, but such violations
are detrimental to the legal profession. Thus, the attorney must
comply with these ethics rules and obtain the client's consent to dis-
close any information relating to representation prior to writing a
book or signing a movie contract about a case. It is at this stage that
prosecutors are confronted with a unique dilemma.

Because private attorneys have a readily identifiable client who can
consent to disclosure, they can comply with these confidentiality rules
by obtaining the client's consent before revealing any representational
information. Even attorneys who represent government agencies

8. Code, supra note 4, DR 4-101(B)(3). The Code contains Canons, Ethical Con-
siderations ("ECs"), and Disciplinary Rules ("DRs"). See Code, supra note 4, Prelim-
inary Statement. Their purposes are as follows:
The Canons are statements of axiomatic norms, expressing in general terms
the standards of professional conduct expected of lawyers in their relation-
ships with the public, with the legal system, and with the legal profession.
They embody the general concepts from which the Ethical Considerations
and the Disciplinary Rules are derived.
The Ethical Considerations are aspirational in character and represent the
objectives toward which every member of the profession should strive...
The Disciplinary Rules . . . are mandatory in character. [They] state the
minimum level of conduct below which no lawyer can fall without being sub-
ject to disciplinary action.

Id. at 101.

9. Wolfram, supra note 6, at 85.

10. The Preamble to the Model Rules states:
The (legal) profession has a responsibility to assure that its regulations are
conceived in the public interest and not in furtherance of parochial or self-
interested concerns of the bar. Every lawyer is responsible for observance of
the Rules of Professional Conduct. A lawyer should also aid in securing
their observance by other lawyers. Neglect of these responsibilities com-
promises the independence of the profession and the public interest which it
serves.

Model Rules, supra note 3, Preamble.

11. Claus von Bulow not only allowed his attorney, Alan Dershowitz, to write a
book about his case and reveal confidential communications, but he also appeared
with Dershowitz on several television and radio shows after the book's release to
promote it. See von Bulow v. von Bulow, 828 F.2d 94, 96 (2d Cir. 1987) ("After the
book was released, von Bulow and attorney Dershowitz appeared on several televi-
sion and radio shows to promote it."). As a result, the court found that von Bulow
had "consented to his attorney's disclosure of his confidences and effectively waived
his attorney-client privilege." Id. at 101.

In United States v. Hearst, 638 F.2d 1190, 1192 (9th Cir. 1980), aff'g 466 F. Supp.
1068 (N.D. Cal. 1978), cert. denied, 451 U.S. 938 (1981), defense attorney F. Lee Bai-
ley obtained the consent of his client, Patty Hearst, to write a book about her trial and
life story. Hearst had been arrested and convicted for armed bank robbery. Id. at 1191.

Throughout this Note, "representational information" refers to information that an
attorney learns in the course of representation and is protected by Model Rule 1.6
and DR 4-101.
and officials in civil suits have a client from whom to obtain consent to comply with confidentiality rules when revealing representational information. Because the prosecutor's well-recognized client, however, is the public, it is unclear who, if anyone, provides client consent to prosecutors who wish to disclose confidences for literary or media works. The ethics rules are devoid of advice as to who decides if and when a prosecutor may reveal representational information in such instances. A prosecutor's duty of confidentiality is not even mentioned in the ABA Standards Relating to the Administration of Criminal Justice, which are meant to provide more specific guidance to prosecutors for the unique situations confronting them that are not adequately addressed by the Code or Model Rules. The only limitation the ABA Prosecution Standards place upon prosecutors is found

12. A federal agency qualifies as a client and is protected by the attorney-client privilege. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) (recognizing that there are cases where "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors"); Towns of Norfolk and Walpole v. United States Army Corps of Eng'rs, 137 F.R.D. 183, 190 (D. Mass. 1991) (holding that the Corps is the client of the Department of Justice), aff'd sub nom. Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438 (1st Cir. 1992); United States v. AT&T, 86 F.R.D. 603, 617 (D.D.C. 1979) (holding that while the identity of the government attorney's client is unclear, it "clearly includes the attorney's own agency"); Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 138-39 (E.D. Wis. 1972) (finding that an attorney-client relationship existed between the Antitrust Division of the Justice Department and the SEC); see also Major Michael J. Davidson, Yes Virginia, There Is a Federal Agency Attorney-Client Privilege, 41 Fed. B. News & J. 51 (1994) (arguing that just as a corporation has client status, so does a federal agency); Lory A. Barsdate, Note, Attorney-Client Privilege for the Government Entity, 97 Yale L.J. 1725, 1733 (1988) ("Like corporations, government agencies are entity 'clients' that seek legal advice and are parties to litigation."). Because a government agency has an attorney-client privilege, it follows that the attorney owes the agency a duty of confidentiality, and only the agency may waive that duty. For purposes of ethics rules pertaining to confidentiality, the officers of the agency are the individuals who may waive that duty. See Professional Ethics Committee, Federal Bar Association, The Government Client and Confidentiality: Opinion 73-1, 32 Fed. B.J. 71, 72 (1973) (stating that the client of the government lawyer, for purposes of confidentiality, "is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business").

13. See infra notes 60-62 and accompanying text.

14. With regard to the purpose of these specific standards, Standard 3-1.1 provides:

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

ABA Standards Relating to the Administration of Criminal Justice Standard 3-1.1 (1992) [hereinafter ABA Prosecution Standards]. These standards are merely for the consideration of criminal lawyers in cases where they seek more specific guidance. Unlike the Code and Model Rules, under which an attorney's conduct may be judicially evaluated, these standards were never intended to hold such weight—only to provide additional guidance if needed.
in Standard 3-2.11, which states that "prior to conclusion of all aspects of a matter," a prosecutor should not "enter into any agreement or understanding by which the prosecutor acquires an interest in literary or media rights to a portrayal or account based in substantial part on information relating to that matter." Are prosecutors exempt from ethics rules requiring attorneys not to reveal confidences without client consent? After representation, does a prosecutor have unlimited authority to write a book about the case and to reveal information obtained in the course of representation?

This issue recently arose when a former associate counsel to Independent Counsel Lawrence Walsh wrote a book providing an inside account of Walsh's highly publicized investigation of the Iran-Contra scandal and prosecution of Lt. Colonel Oliver North. The associate, Jeffrey Toobin, wrote the book despite Walsh's objections, and it was published prior to North's appeal. The publication revealed nonpublic office discussions, memos, and strategies in the case. Because the account disclosed the inner workings of the office

15. ABA Prosecution Standards, supra note 14, Standard 3-2.11.
16. Id.
17. There is a difference between general information and specific information learned in the course of representation. This Note is concerned with prosecutorial disclosures of specific information about a case. General information is the knowledge about how an office works and handles certain cases that all lawyers gain from their employers. For instance, a former prosecutor who took part in over 20 murder cases would not be precluded from representing a defendant accused of murder simply because he will use his knowledge and experience gained from his previous employer to defend the accused. Comparatively, if the former prosecutor had played some role, however minimal, in the investigation of his client before leaving the prosecutor's office, he would be precluded from representing the client because the attorney would have specific information about the case obtained from his former employment. This distinction is also true with respect to prosecutors who want to disclose representational information for literary or media purposes. A prosecutor does not breach the duty of confidentiality by writing a mystery novel about a murder if he draws on his general knowledge and experience regarding murder investigations in telling the story. It is when the prosecutor wishes to disclose specific information about specific cases that the confidentiality rule is triggered. This is the issue addressed by this Note.
18. See infra notes 130-31 and accompanying text (discussing the appointment and purpose of an independent counsel).
21. 929 F.2d at 69-70.
22. 756 F. Supp. at 773. For example, one passage from Toobin's book states: It was a February morning in the New York office when Struve handed me a three-page memorandum. "We're trying not to make too many copies of this," he said, "so please give it back when you're finished looking it over." I think my eyes might literally have bulged when I saw the title: "Outline of Potential Charges." . . . The memo listed the "more likely charges" the OIC was considering bring, and it began with "Conduct of Covert Hostilities in Nicaragua." This first category was described as the "use of United States government funds and assets . . . to carry on covert hostilities in Nicaragua after the Boland Amendment prohibited such expenditures"—the Bo-
and many office confidences, Walsh took the author to court to prevent release of the book.\textsuperscript{23} One argument he advanced was that the associate violated DR 4-101(B) by revealing, without consent, information learned in the course of representation.\textsuperscript{24} The district court held that an alleged violation of a disciplinary rule does not generate a cause of action.\textsuperscript{25} Rather, a disciplinary violation must be brought before the proper disciplinary body for action against an attorney.\textsuperscript{26} The publisher released the book prior to Walsh's appeal, and the release rendered the subsequent appeal moot.\textsuperscript{27} To date, there is no public record of disciplinary proceedings brought against Toobin.

The issues raised by Walsh demonstrate the grave interests implicated when prosecutors disclose representational information for literary or media purposes. Prosecutors have greater access to information than does perhaps any other attorney. They have access to law enforcement personnel, witnesses, the government's evidence, social service agencies, and interested citizens.\textsuperscript{28} If prosecutors were free to disclose such information indiscriminately, the prosecution function might be jeopardized: pending investigations and cases could be prejudiced,\textsuperscript{29} the reputations of innocent parties might be irreparably damaged,\textsuperscript{30} a relationship of trust between prosecutors within the office could break down,\textsuperscript{31} and the physical safety of others might be endangered.\textsuperscript{32} Rather than conducting cases to seek justice,\textsuperscript{33} prosecutors might make decisions in a prosecution that would maximize the

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\item[23.] 756 F. Supp. at 772.
\item[24.] Id. at 783. Walsh raised two other arguments, in addition to an alleged violation of DR 4-101(B), to prevent the release of the book. Those arguments were: (1) that Toobin violated several regulations forbidding the disclosure of nonpublic information relating to the work of the Office of Independent Counsel ("OIC") without OIC authorization and (2) that Toobin breached his fiduciary and contractual obligations to the OIC because he signed a Non-Disclosure Agreement when he left the employ of the OIC. Id. at 783-86. The court ruled against Walsh on every point. Id. at 783-88.
\item[25.] Id. at 783.
\item[26.] Id. In this case, the court held that "[t]he proper forum for such a complaint is . . . the Appellate Division of the Supreme Court of the State of New York, which is authorized to deal with such matters [under New York law]." Id.
\item[27.] 929 F.2d 69, 74 (2d Cir. 1991) (vacating the district court opinion as moot because the book at issue had been released by the time of the appeal).
\item[28.] See infra note 194 and accompanying text.
\item[29.] See discussion infra part III.B.
\item[30.] Id.
\item[31.] Id.
\item[32.] Id.
\item[33.] See infra note 63 and accompanying text.
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publication value of the account after representation. The potentially devastating effects of such disclosures by prosecutors demand more specific ethical guidance on a prosecutor’s ability to disclose representational information.

This Note argues that prosecutors wishing to disclose information learned in the course of representation for literary or media purposes are subject to the same ethics rules governing confidentiality as are other lawyers. Because those rules require client consent for disclosure but are silent on who provides consent to a prosecutor, this Note proposes an ethical standard for inclusion in the ABA Prosecution Standards, which focus specifically on prosecutors. The proposed standard provides a process by which a prosecutor may obtain permission to reveal information learned in the course of representation. Additionally, the standard specifies what factors a decision maker should consider when entertaining such a request for disclosure. Both this Note and the proposed standard recognize the importance of ethical limitations on an attorney’s ability to disclose representational information and seek to remedy the fact that the current ethical rules do not fit the prosecutor’s role.

Part I examines the prosecutor’s duty of confidentiality. This part focuses on his unique position with regard to that duty—because the public is his client—and the extent to which the prosecutor may reveal information learned in the course of representation.

Part II argues that a prosecutor’s authority to disclose representational information is limited to the prosecutorial context. This part argues further that prosecutors who wish to disclose information learned in the course of employment for literary or media purposes may not do so without consent from the chief prosecutor, because the disclosure is outside the context of a pending prosecution. Part II also addresses the situation where a chief prosecutor wants to make a disclosure for media or literary purposes. Reasoning that the chief prosecutor cannot objectively decide whether to allow the disclosure when he has a personal interest in the decision, this part concludes that he must delegate the decision to an impartial decision maker.

Part III sets out certain considerations that must guide a decision to allow such disclosures for literary or media works. Those considerations derive from an examination of the special purposes of the duty of confidentiality as it pertains to the prosecutor, in light of the public interest in knowing how prosecutors perform their public duties.

Part IV proposes an ethical standard to be included in the ABA Prosecution Standards. The proposed standard identifies the proper decision maker to authorize a prosecutorial disclosure for literary or

34. See discussion infra part II.A.
35. See supra note 14.
media purposes and the factors that the decision maker should consider when entertaining such a disclosure request.

This Note concludes that the proposed standard will provide an orderly process by which prosecutors can obtain permission to reveal representational confidences for literary or media works, whereby the public interest in knowing about a criminal case and the need for confidentiality in a prosecutor’s office are adequately balanced. This standard will guide prosecutors where current ethics rules are silent and will help to minimize the potential for compromising the integrity of the prosecutorial function.

I. THE PROSECUTOR’S UNIQUE POSITION AND THE DUTY OF CONFIDENTIALITY

The attorney-client privilege and the ethical duty of confidentiality serve to protect information an attorney learns during representation.36 This part first distinguishes the ethical duty of confidentiality from the attorney-client privilege to demonstrate that the ethical obligation is much broader than the evidentiary privilege. It then discusses the applicability of the confidentiality rules to prosecutors and argues that prosecutors must abide by the ethical duty of confidentiality. Because both the Code and Model Rules provisions pertaining to confidentiality require client consent before an attorney may disclose representational information, they fail to address the special concerns of prosecutors, who have difficulty complying with these provisions.

A. Distinguishing the Ethical Duty of Confidentiality from the Attorney-Client Privilege

The ethical obligation to maintain confidences gained in the professional relationship is distinct from the attorney-client privilege. The attorney-client privilege extends only to a client’s confidential communications made to his attorney during legal representation for the purpose of seeking legal advice.37 Under that privilege, disclosure cannot be compelled and all such communications are inadmissible in

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36. See Model Rules, supra note 3, Rule 1.6 cmt. (discussing an attorney’s confidentiality obligations, as embodied in the attorney-client privilege and ethical duty of confidentiality, and their necessity in encouraging clients to communicate with their attorneys).

37. See 8 Wigmore, Evidence §§ 2291-92 (3d ed. 1940). Wigmore summarized the privilege in the following terms:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

Id. § 2292 (emphasis omitted).
DUTY OF CONFIDENTIALITY

The broader ethical duty of confidentiality, "unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge." The Model Rules specify that "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Consequently, an attorney has an ethical duty not to reveal any information learned in the course of representation, regardless of whether the client communicated it to him, whether the information may already be known by other people, or whether the information is not confidential.

The attorney-client privilege is inapplicable to the prosecutor because no particular client reveals information to him for the purpose of obtaining legal advice. By contrast, the broader ethical obligation not to reveal representational information without client consent applies to the prosecutor with full force because that duty attaches to any communication "acquired in the course of his professional employment."41

B. The Duty of Confidentiality As Applied to Prosecutors

The notion that prosecutors must abide by ethics rules, including the duty of confidentiality, is obvious from the language of the Code and Model Rules and is accepted by the National District Attorneys

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38. Id. If the client waives the privilege, then such communications can be used in court. Id.

39. Code, supra note 4, EC 4-4. Additionally, in contrast to confidences protected by the attorney-client evidentiary privilege, a lawyer may have to divulge information protected by the ethical duty of confidentiality when required by law or a court order requires it. See id. DR 4-101(C)(2) (indicating that a lawyer may disclose "[c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order"). So, unlike the attorney-client privilege, information protected by the duty of confidentiality may be divulged and is admissible in court under certain conditions.

40. Model Rules, supra note 3, Rule 1.6 cmt.; see also Code, supra note 4, EC 4-5 ("A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.").

41. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 202 (1940). This opinion interprets Canon 37 of the ABA Canons of Professional Ethics (1908), which was the precursor to the Code. See Canon 37, in Morgan & Rotunda, supra note 5, at 593 ("It is the duty of a lawyer to preserve his client's confidences... [a lawyer] should [not] accept employment which involves or may involve the disclosure... of these confidences... without [the client's] knowledge and consent, and even though there are other available sources of such information."). The Canons were applied until the adoption of the Code in 1970. Id. at 583 (annotation). DR 4-101 supplanted Canon 37, which originally governed client confidences. DR 4-101 specifically refers to Canon 37 as authority in footnotes throughout the Ethical Considerations for DR 4-101. In fact, DR 4-101 refers both to ABA Canon 37 and to ABA Comm. on Ethics and Professional Responsibility Formal Op. 202 as interpretative authority for the Disciplinary Rule. See Code, supra note 4, Canon 4 nn.6-8, 10, 14, 17, 19.
Association.\textsuperscript{42} The Preliminary Statement to the Code announces that "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities."\textsuperscript{43} Neither the Code nor the Model Rules make any exception for prosecutors. Indeed, the Model Rules state that "[t]he requirement of maintaining confidentiality of information relating to representation applies to government lawyers."\textsuperscript{44} Additionally, the National District Attorneys Association declares that "[t]he prosecutor's obligation to comply with the ethical code and rules of his jurisdiction is a fundamental and minimal requirement."\textsuperscript{45} Thus, prosecutors must comply with the Code and Model Rules.\textsuperscript{46}

\textsuperscript{42} The National District Attorneys Association is "the national service organization for all prosecutors throughout the country." National Prosecution Standards i (Nat'l District Att'ys Ass'n 1st ed. 1977).

\textsuperscript{43} Code, supra note 4, Preliminary Statement (footnotes omitted).

\textsuperscript{44} Model Rules, supra note 3, Rule 1.6 cmt.

In addition, the general law of agency, which served as a source for the confidentiality rules in the Code and Model Rules, prohibits lawyers—as agents—from revealing information learned during the course of representation. See Wolfram, supra note 6, at 299. The Restatement of Agency states that an agent has a duty not to reveal information given to him "during the course of or on account of his agency . . . although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge." Restatement (Second) of Agency § 395 (1957). The Restatement further provides that "[u]nless other wise agreed, after the termination of the agency," the agent has a duty "not to use or to disclose to third persons . . . confidential matters given to him only for the principal's use or acquired by the agent in violation of that duty". Id. § 396(b). The Comment to § 396 specifically states that this agency duty applies to attorneys. Id. § 396 cmt. e. Thus, even without the Code and Model Rules, prosecutors are still subject to agency law and may not reveal any information learned in the course of representation in the absence of consent.

\textsuperscript{45} National Prosecution Standards § 6 commentary at 21 (Nat'l District Attorneys Ass'n 2d. ed. 1991); see also id. § 6.2. The National Prosecution Standards are "standards written for prosecutors by prosecutors." National Prosecution Standards at 1. The National District Attorneys Association ("NDAA") promulgated the standards to address the problems of the prosecution function . . .

. . . . .

. . . While each standard is viewed by NDAA as a necessary part of an optimal system of justice, it is not the intent of NDAA that these standards serve in any way as a basis to sanction a prosecutor who has deemed it more appropriate to vary his practice from the standards. Id. at 3-5. The NDAA urges "the adoption of the concepts found in the standards by all reasonable methods." Id. at 7.

\textsuperscript{46} Not only must a prosecutor abide by professional ethics rules, but he is held to a higher standard of professional conduct than are other attorneys. The Code and Model Rules give public prosecutors additional ethical obligations, rather than exceptions. For example, DR 7-103(A) prohibits a public prosecutor from instituting charges not supported by probable cause. Code, supra note 4, DR 7-103(A). Model Rule 3.8 delineates the "Special Responsibilities of a Prosecutor," which include, among others, making reasonable efforts to assure that the accused has been advised of his right to counsel and not seeking to obtain a waiver of pretrial rights from an unrepresented defendant. Model Rules, supra note 3, Rule 3.8. In addition, the court in United States v. Judge not only stated that "prosecuting attorneys [are] . . . expected
Opinions of professional ethics committees specifically support the notion that prosecutors must abide by confidentiality rules. The ABA Committee on Ethics and Professional Responsibility states that DR 4-101(B), which forbids a lawyer from revealing confidences, "applies to a government lawyer as well as to private practitioners." The Committee on Professional Ethics of the New York State Bar Association also opined on this issue when an assistant district attorney who prosecuted a highly publicized criminal case inquired as to whether she could sell her media rights to the case and assist in the development of her character for a screenplay. The Committee stated that while it "[knew] of no reason under the Code . . . why an assistant district attorney may not sell her life rights with respect to the subject matter of a completed representation," the prosecutor must follow certain safeguards and "must be certain to continue to protect the confidences and secrets of the client." Relying on DR 4-101(B), the Committee made clear that prosecutors have a duty of confidentiality that "exists without regard to whether others share the information or whether it is part of the public record or available from another source . . . [and the duty] survives the termination of the representation.

Courts also widely accept the principle that prosecutors must abide by the confidentiality rules in the Code and Model Rules. For example, in United States v. Ostrer, the court disqualified a former federal prosecutor from representing a defendant in a matter on which he worked during his tenure as prosecutor. The court specifically applied DR 4-101(B) to the former prosecutor in holding that a "danger exist[ed] that the [former prosecutor] may breach a confidence by divulging or unfairly utilizing information obtained in the course of his former employment" in violation of Canon 4 of the Code. In United States v. Úzzi, the court applied Canon 4 to a prosecutor and disqualified the law firm of a former assistant United States Attorney from representing a defendant in a case in which the former assistant

to uphold the standards of the general profession," but also found that prosecutors are "held to standards of conduct more stringent than those applied to private lawyers." 625 F. Supp. 901, 902 (D. Haw. 1986); see also Stewart v. United States Postal Serv., 649 F. Supp. 1531, 1534 (S.D.N.Y. 1986) (stating that "a prosecutor . . . is held to a higher [ethical] standard than a private advocate").

49. Id.
50. Id.
51. 597 F.2d 337 (2d Cir. 1979). In Ostrer, the former prosecutor had participated in criminal investigations and prosecutions closely related to the case on which he was currently employed as a defense attorney. Id. at 338-39.
52. Id.
53. Id. at 340. Canon 4 requires a lawyer to preserve the confidences and secrets of his client. Code, supra note 4, Canon 4.
prosecutor played a minimal role in the investigatory phase.\textsuperscript{55} The court found that there was a risk that specific information that the former prosecutor learned from his previous job might be disclosed.\textsuperscript{56} Similarly, the court in\textit{Allied Realty, Inc. v. Exchange National Bank}\textsuperscript{57} found that prosecutors were subject to ethical obligations concerning the preservation of confidences learned in the course of representation unless the prosecutor’s office consented to disclosure.\textsuperscript{58} These cases demonstrate that prosecutors must abide by the duty of confidentiality and that this duty survives the termination of government employment.

C. The Prosecutor’s Dilemma in Obtaining Consent Under Confidentiality Rules and the Need For Prosecutorial Discretion

Although the American Bar Association, ethics committees, and courts apply the duty of confidentiality to prosecutors, it is unclear exactly who the prosecutor should consider his client for purposes of obtaining consent to disclose under the Code and Model Rules. Model Rule 1.6(a) and DR 4-101(B)(3) both prohibit disclosure of confidences “unless the client consents.”\textsuperscript{59} The prosecutor’s client, however, is the public.\textsuperscript{60} He does not represent an individual client, a victim, the police officer, a government agency, or a particular govern-

\textsuperscript{55} Id. at 982-83.
\textsuperscript{56} Id. at 984-85. The court stated that it “presumes that the attorney received confidences and secrets based on the prior representation. This standard applies even in criminal cases,” \textit{Id.} at 982 (citations omitted).
\textsuperscript{57} 283 F. Supp. 464 (D. Minn. 1968), aff’d, 408 F.2d 1099 (8th Cir.), cert. denied, 396 U.S. 823 (1969).
\textsuperscript{58} \textit{Id.} at 466. Canon 37, which previously governed the preservation of secrets and confidences obtained during representation, was held not to be an issue here because the prosecutor’s office consented to disclosure of confidential information by the former prosecutor. \textit{Id.; see supra} note 41 (discussing Canon 37); see also \textit{State v. Martinez}, 673 P.2d 509, 513-14 (N.M. Ct. App. 1983) (holding that where the State waives any breach of its confidences by a former assistant district attorney, those confidences and possible disqualification of defense counsel are not an issue).
\textsuperscript{59} Model Rules, \textit{supra} note 3, Rule 1.6(a); Code, \textit{supra} note 4, DR 4-101(B)(3).
\textsuperscript{60} \textit{See} Cal. Gov’t Code § 100(b) (West 1980) (“The style of all process shall be ‘The People of the State of California’ and all prosecutions shall be conducted in their name and by their authority.”); New York Crim. Proc. Law § 1.20(31) (McKinney 1992) (“‘Prosecutor’ means a district attorney or any other public servant who represents the people in a criminal action.”) (emphasis added); see also Griffin B. Bell, \textit{The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?}, 46 Fordham L. Rev. 1049, 1069 (1978) (the former United States Attorney General observed, “Although our client is the government, in the end we serve a more important constituency: the American people”); Matheson, \textit{supra} note 2, at 885 (stating that the prosecutor “represents the community”); Beth Nolan, \textit{Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act}, 79 Geo. L.J. 1, 43 (1990) (asserting that an independent counsel and a prosecutor represent the public).
ment official. The prosecutor represents "society as a whole" and the decisions he makes within his official capacity must serve the public interest. As the United States Supreme Court declared, "[The prosecutor's] interest in a criminal prosecution is not that [he] shall win a case, but that justice shall be done." Yet, it is impracticable for the public to make decisions in the way an ordinary client would. One commentator observed that for a government lawyer, the "public interest or community at large . . . is a vague and meaningless abstraction, useless in practice. It is impossible to represent the [public] which is always divided."

Appreciating this dilemma, the Code delineates an exception to the general rule for the prosecutor: EC 7-7 requires that the authority to make decisions in the course of representation that affect the merits of the case or may prejudice the client's rights "is exclusively that of the client and . . . such decisions are binding on his lawyer." Those decisions reserved exclusively to the client include accepting a plea or settlement offer, proceeding to trial, and appealing a judgment. Yet, because a prosecutor does not have a client capable of making these decisions, the Code recognizes the need for prosecutorial discretion. EC 7-13 states that "the prosecutor is not only an advocate but he also may make decisions normally made by an individual client."

The prosecutor is thus given specific authority, by virtue of his office and its goals, to make decisions normally reserved for the client when such decisions are intended to advance the prosecution.

In every case, the prosecutor decides what is in the public's best interest, because it is the people "who give over to the prosecutor the authority to seek a just result in their name." The prosecutor de-
cides who is to be charged and the nature of the charge, which offenses will be prosecuted and which will be dismissed, and whether a plea will be offered or accepted. The prosecutor has exclusive control to act for his client—the public—in a prosecution.

The prosecutor's ability to make client decisions includes the power to disclose information obtained in the course of representation. Therefore, the prohibition against revealing information learned in the course of representation unless the client consents, as stated in Model Rule 1.6 and DR 4-101(B), is inapplicable to a prosecutor when he discloses such information for the purpose of advancing the prosecution. The prosecutor does not need permission under Model Rule 1.6 or DR 4-101(B) in that situation because he is authorized to make that "client decision" as to whether to disclose. During plea negotiations, a prosecutor may reveal critical aspects of the prosecution's case or strategies of which the defense may be unaware to encourage an agreement. For instance, a prosecutor may disclose that a possible witness is particularly strong under cross-examination, that the police are presently pursuing several reliable tips as to where the murder weapon is hidden, or that indictments of conspirators are expected within a certain amount of time. What is revealed and the extent of the revelation are within the prosecutor's discretion, and


72. See id. at 80 (stating that the prosecutor "can dismiss the action once it has been filed...[and the decision] in many jurisdictions is his alone").

73. See id. (discussing the prosecutor's discretion and his power to bargain for pleas with the accused).

74. EC 7-13 states:

The responsibility of a public prosecutor differs from that of the usual advocate... the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute;... during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all.

Code, supra note 4, EC 7-13; see also ABA Prosecution Standards, supra note 14, Standard 3-2.1 ("The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.").

75. See supra notes 7-8 and accompanying text.

76. Standard 3-4.1(c) of the ABA Prosecution Standards states that "[a] prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused." ABA Prosecution Standards, supra note 14, Standard 3-4.1(c). The very existence of this standard makes clear that a prosecutor is allowed to make disclosures within the context of plea discussions.

77. Other attorneys may also make these types of disclosures but are subject to any limitations the client may place upon disclosure. The Comment to Model Rule 1.6 states:

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that can-
only internal office policies limit that discretion. Additional support for the notion that prosecutors may disclose information protected by confidentiality rules when the disclosure advances the prosecution is found in ABA Prosecution Standards Standard 3-1.4(a), DR 7-107, and Model Rule 3.6. Standard 3-1.4(a) prohibits a prosecutor from making "extrajudicial statement[s]" that he knows might have a "substantial likelihood of prejudicing a criminal proceeding." DR 7-107 and Model Rule 3.6 provide similar guidance as to what a prosecutor may publicly disclose during a pending prosecution. These rules imply that prosecutors do have authority to disclose information in the context of a pending prosecution. Within these confines, therefore, the prosecutor already has some authority to reveal information otherwise protected by Model Rule 1.6 and DR 4-101(B).

Thus, a prosecutor may disclose representational information when the disclosure is to advance the prosecution. These rules, however, do not authorize the disclosure of representational information for any other purpose. Therefore, as required by DR 4-101(B) and Model Rule 1.6, the prosecutor must obtain permission to disclose representational information for purposes unrelated to his professional duties. From whom a prosecutor may obtain permission for such disclosures is the issue addressed in the next part.

II. LIMITATIONS ON A PROSECUTOR'S ABILITY TO DISCLOSE INFORMATION LEARNED IN THE COURSE OF REPRESENTATION

The Code and Model Rules authorize a prosecutor to disclose information learned in the course of representation to advance the prosecution. A prosecutor, however, is not authorized to disclose representational information for purposes unrelated to his professional duties, such as for literary or media purposes, and he must ob-

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78. For example, federal regulations for the Department of Justice set out specific guidelines for the release of information relating to criminal and civil proceedings. See 28 C.F.R. § 50.2 (1994). Those guidelines prohibit Department of Justice attorneys from making public statements that include, among other things, observations about a defendant's character or references to a defendant's refusal to submit to polygraph tests. Id. § 50.2(b)(6)(i)-(vi).

79. ABA Prosecution Standards, supra note 14, Standard 3-1.4(a).

80. Code, supra note 4, DR 7-107 (addressing trial publicity and limiting the extent to which a prosecutor may make extrajudicial statements in order to prevent any prejudice to a defendant's right to a fair trial); Model Rules, supra note 3, Rule 3.6 (same).

81. See supra notes 47-58 and accompanying text; see also discussion infra part II.A.

82. See discussion supra part I.C.
tain consent, as required by confidentiality rules, to do so.\textsuperscript{83} This part asserts that to whom a prosecutor should turn for permission to disclose depends upon whether the prosecutor is an assistant or a chief prosecutor.

A. \textit{The Supervisor Approach: When the Assistant Prosecutor Wants to Write a Book}

As discussed earlier, an assistant prosecutor only has the limited authority to disclose representational information within the confines of a prosecution.\textsuperscript{84} Once he seeks to disclose for reasons unrelated to a pending prosecution, the requirement of obtaining client consent for disclosure under the Code and Model Rules applies, and the chief prosecutor, as head of that office, should be the sole authority to grant or deny this consent.\textsuperscript{85}

Requiring the chief prosecutor's consent to disclosures outside the context of a pending prosecution complies with the cases discussed earlier where a former prosecutor wishes to represent a defendant in a

\textsuperscript{83} See discussion \textit{supra} part I.B-C.

\textsuperscript{84} See \textit{id}.

\textsuperscript{85} While it can be argued that a prosecutor who wants to expose office corruption in a book or movie production would be prevented from doing so if he needed permission from his boss, these "whistleblowing" concerns are inapplicable to the release of information for literary or media purposes. First, there are normally internal mechanisms if an assistant prosecutor is concerned about possible wrongdoing by his office in a specific case. See, e.g., 5 U.S.C. §§ 1212-1214 (1994) (delineating the duties of the Office of Special Counsel, which receives and investigates allegations of government corruption, and identifying the Office of Special Counsel as the appropriate entity for federal employees to make reports of suspected government corruption). Second, the purpose of "whistleblowing" is to seek an immediate remedy for wrongdoing. If a prosecutor suspects corruption, he must report it immediately to the disciplinary committee of the office or Bar. Model Rule 8.3(a) states that "[a] lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." Model Rules, \textit{supra} note 3, Rule 8.3(a). Additionally, DR 1-103(A) states that a lawyer possessing knowledge of a violation of the Code "shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." Code, \textit{supra} note 4, DR 1-103(A).

Disclosing office confidences regarding office corruption for a book or movie is contrary to Model Rule 8.3(a) and DR 1-103(A). Because books are not published for months after they are written, a prosecutor who exposes office corruption by writing a book does nothing to redress a wrong that may have occurred months or years earlier. The same is true for a movie. Also, a prosecutor who chooses such a forum as a book or movie to expose wrongdoing often hurts his own credibility and the chances for redress because he has much to gain personally from the venture. Consequently, a prosecutor who claims to write a book or aid in a movie production about a case to expose office corruption is not "whistleblowing." \textit{But see} Malcolm Bell, \textit{The Turkey Shoot: Tracking the Attica Cover-Up} (1985) (chronicling Bell's role as the special prosecutor for the Attica prison riots and his subsequent resignation in protest because he was unable to penetrate the stonewalling of the New York State government officials who had engaged themselves in a massive cover-up and prevented Bell from doing his job).
matter on which he gained specific knowledge as a prosecutor.86 Implicit in the court’s opinion in United States v. Ostrer87 is the notion that once an assistant prosecutor acts for purposes other than the advancement of a criminal prosecution, he lacks the authority to reveal confidences or divulge information obtained in the course of representation.88 Similarly, Allied Realty, Inc. v. Exchange National Bank89 stands for the proposition that an assistant United States Attorney does not have the authority to make nonprosecutorial disclosures absent consent by the United States Attorney.90 In State v. Martinez,91 the court found that there was no breach of confidentiality by a former prosecutor representing a defendant where the district attorney’s office “waived any breach of its confidences.”92

These cases, or “revolving door” scenarios—where a former prosecutor wishes to represent a defendant in a case in which he gained some specific knowledge from his former employment—require assistant prosecutors to obtain consent from the chief prosecutor to reveal representational information for nonprosecutorial purposes. This need for permission to disclose stems from the recognition that an assistant prosecutor does not have the authority to disclose such information beyond the confines of a pending prosecution.93 In addition to clarifying the assistant prosecutor’s limited authority to make disclosures, these cases also clarify that the chief prosecutor is logically the appropriate authority to consent to disclosures by an assistant prosecutor that are outside the scope of the prosecutorial function.94

An assistant prosecutor who wishes to disclose information for literary or media purposes directly parallels former prosecutors involved in “revolving door” cases. First, the focus in both situations is on an

86. See supra notes 51-58 and accompanying text.
87. 597 F.2d 337 (2d Cir. 1979); see supra notes 51-53 and accompanying text.
88. Id. The issue in this case was the representation of a defendant by a former prosecutor in a case in which the former prosecutor played some role during his former employment. Id.
89. 283 F. Supp. 464 (D. Minn. 1968), aff’d, 408 F.2d 1099 (8th Cir.), cert. denied, 396 U.S. 823 (1969); see supra notes 57-58 and accompanying text.
90. Id.
92. Id. at 514. The New Mexico Court of Appeals held that because the State “expressly stated on the record that it did not care whether counsel was allowed to withdraw or not,” this operated as a waiver of any possible breach of the State’s confidences. Id. at 513; see supra note 58.
93. See discussion supra part I.B.
94. The Department of Justice regulations state that the head of the office—the attorney general—is the individual who can consent to disclosures not addressed in the Department’s disclosure regulations. The regulation provides: If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.
assistant prosecutor who wants to make, or may possibly make, a disclosure of representational information. Second, the purpose for the disclosure in each case is unrelated to a pending prosecution. Instead, the disclosure is for a purpose completely outside of his duties and, thus, outside his authority. Accordingly, an assistant prosecutor lacks the authority to disclose representational information for literary or media purposes. As in the "revolving cases," if the assistant prosecutor wishes to make such a disclosure, he must obtain the permission of the chief prosecutor.\(^5\)

The relative intra-office authority of chief prosecutors and assistant prosecutors supports the argument that an assistant prosecutor should be required to obtain the chief prosecutor's permission before revealing representational information for nonprosecutorial purposes. Although an assistant prosecutor represents the public and may make "client" decisions for the public, he derives his authority from the individual who appointed him. The district attorney, the United States attorney general, and the special prosecutor are the individuals given the authority to conduct criminal litigation on behalf of the people and to make decisions that are in the public's best interest.\(^6\) Not only do these chief prosecutors conduct prosecutions, but they also set office policies, hire assistant prosecutors, define investigative priorities,

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\(^5\) See William Josephson & Russell Pearce, To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?, 29 How. L.J. 539, 566 (1986) (arguing that a government lawyer facing a conflict of interest where she is asked to represent a government agency with interests adverse to a former government agency client cannot decide for herself what interest to represent, but must "refer the dispute to the policy superior of both her clients for resolution").

\(^6\) For example, with regards to the district attorney, New York State law provides, "[i]t shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed." N.Y. County Law § 700(1) (McKinney Supp. 1995). By statute, the United States attorney general is designated as the head of the Department of Justice. 28 U.S.C. § 503 (1988). In delineating the attorney general's duties, the statute provides that the "conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to... the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516 (1988).

The special prosecutor is typically given, by statute, all the powers of a chief prosecutor during the period of his appointment. See, e.g., Colo. Rev. Stat. § 20-1-109 (1986) (stating that a special prosecutor shall posses the same powers in prosecuting a case as the district attorney he replaces); N.Y. County Law § 701(4) (McKinney Supp. 1995) ("The special [prosecutor] so appointed shall possess the powers and discharge the duties of the district attorney during the period for which he or she shall be appointed."). The scope of a special prosecutor's authority, however, is limited to the specific job to which he has been assigned by the authority who appointed him. See, e.g., United States v. Weiner, 392 F. Supp. 81, 85-86 (N.D. Ill. 1975) (holding that a special prosecutor may not exceed the scope of his authority as defined by the attorney general who appointed him); People v. Leahy, 72 N.Y.2d 510 (1988) (holding that where a special prosecutor exceeds the limited scope of his authority as defined by the authority who appointed him, the resulting indictment must be dismissed).
and make all other decisions affecting their offices. Although the most visible of these tasks is conducting criminal prosecutions,

The [chief] prosecutor in America wears three hats. He is a lawyer, an administrator, and a public official with policy-making responsibilities. Within an office . . . he is likely to become less involved in prosecution as a lawyer and more involved in administration and policy-making. The chief prosecutor in the large office seldom enters the courtroom. The cases are in the hands of his assistants, who appear day after day in court to represent the State.

Because of the enormous tasks many chief prosecutors face, they often delegate authority to assistant prosecutors. While an assistant prosecutor has the delegated authority to make prosecutorial decisions, he may not set office policy or act beyond the limited authority delegated to him by the chief prosecutor. Thus, an assistant prosecutor who wants to write a book or cooperate on a movie about a case he has handled can only do so with the permission of the chief prosecutor. Disclosure of information for literary or media purposes is both beyond the professional duties of an assistant prosecutor and is a matter of office policy to be made by the head of the office.

97. Telephone Interview with Wayne Brison, Spokesperson for the New York County District Attorney's Office (February 15, 1995) (discussing the authority of the chief prosecutor).
99. See, e.g., 28 U.S.C. § 510 (1988) ("The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.").
100. See, e.g., N.Y. County Law § 702(2) (McKinney 1991) ("The assistant [prosecutor] shall perform such duties pertaining to the office as may be directed by the district attorney.").
101. Some offices may simply forbid the release of certain information for literary or media purposes. For instance, the Department of Justice allows the release of nonpublic information if it is in the interest of justice, but will not allow it for personal financial gain:

No employee shall use for financial gain for himself or for another person, or make any other improper use of, whether by direct action on his part or by counsel, recommendation, or suggestion to another person, information which comes to the employee by reason of his status as a Department of Justice employee and which has not become part of the body of public information.

28 C.F.R. § 45.735-10 (1994); see supra note 94 (stating the Department of Justice regulation concerning the procedure for disclosures which are deemed to be in the public interest). While this regulation only covers the release of nonpublic information for personal financial gain, the confidentiality rules, DR 4-101 and Rule 1.6, govern any information obtained in the course of representation even where it is available from other sources. See supra notes 39-41 and accompanying text.
102. John K. Carlock, who served over 20 years in the federal government as a lawyer in the Treasury Department, commented on the authority of department heads in comparison to the lawyers they supervise:

I do not believe that the ritual of becoming a member of the bar invests a government lawyer with a power of life and death over the agency he serves.
the chief prosecutor may choose to delegate that decision, in the absence of any such delegation, he is the only person with the authority to allow such a disclosure.

Sound public policy also supports limiting the authority of assistant prosecutors to make such disclosures. The assistant prosecutor's duty to the public and to the office is to prosecute cases and to see that justice is done. An assistant prosecutor having unlimited authority to disclose representational information would have an enormous temptation to conduct prosecutions with future book and movie contracts in mind. His loyalties would then be divided and he might make professional decisions that are not in the public's interest, but rather in his personal interest. Even this appearance of conflicting interests would compromise the integrity of the prosecutor's office. Noting the importance of the prosecutor's function and the need to maintain a "primary loyalty" to the public, one commentator remarked, "Because of the nature of the [prosecutor's] office and the responsibilities of the job, it goes without saying that the office should be run in such a manner that all appearances of professional impropriety are notably absent." Clearly, an assistant prosecutor with unlimited disclosure authority would have a conflict of interest when he is handling a high-profile murder trial and forthcoming movie offers are likely. Actions consistent with zealously advancing the prosecution are not always consistent with maintaining the publication or media value of the case. Recognizing such a potential conflict, EC 5-4 provides:

If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain.... [The lawyer] may be influenced... to a course of conduct that will enhance the value of his publication rights to the prejudice of his client.

To prevent such a conflict, the Code and Model Rules prohibit lawyers from obtaining such an interest in a case until the matter is concluded. Once the representation has been completed, the client

The agency head takes his own oath of office, and he is also subject to the inscrutable forces of public opinion. In carrying out his responsibility to decide policy, the agency head looks to his lawyer's counseling as one of his strongest supports; but the lawyer's counsel can never usurp the decision which must be made by the responsible head of the agency.


103. ABA Prosecution Standards, supra note 14, Standard 3-1.2(c) (stating that "[t]he duty of the prosecutor is to seek justice").
105. Id.
106. Code, supra note 4, EC 5-4.
107. Id.
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decides whether to allow the attorney to make any disclosures relating to the representation, pursuant to confidentiality rules.\textsuperscript{108} If an assistant prosecutor had unlimited disclosure authority, he might be tempted throughout the prosecution of a high-profile case to make decisions that would enhance the marketability of the case for media purposes. Such unlimited authority to disclose confidences may result in inadequate legal representation in criminal prosecutions. The prosecutor may seek only to win a case and handle the case in a way that generates the most publicity rather than to see "that justice shall be done."\textsuperscript{109} The assistant prosecutor cannot make a decision in the public interest when his personal interest in the decision is so overwhelming. The strong public interest in minimizing such temptations for the assistant prosecutor demands that an assistant prosecutor's power to disclose be limited.

The hierarchical structure of representative government further supports limiting the assistant prosecutor's power to disclose representational information.\textsuperscript{110} Only the highest ranking officer of the department or office has the authority of the people, by statutory directive or by popular election, to conduct all prosecutions and oversee the office.\textsuperscript{111} The district attorney is responsible to the people who elect him,\textsuperscript{112} the special prosecutor is accountable to the authority who appoints him,\textsuperscript{113} and the attorney general answers to the president.\textsuperscript{114} Appointed assistants act in the name of the public, only with

\textsuperscript{108} See supra notes 7-8 and accompanying text.


\textsuperscript{110} Cf., Josephson & Pearce, supra note 95, at 568-69 (arguing that a government must be run by laws and not lawyers to function effectively).

\textsuperscript{111} See, e.g., 28 U.S.C. § 503 (1988) (stating that the United States attorney general is the head of the Department of Justice); 28 U.S.C. § 518 (1988) (stating that the United States attorney general's authority supersedes everyone else's in the Department of Justice when it comes to conducting civil or criminal cases).

\textsuperscript{112} In all but five states (Alaska, Connecticut, Delaware, New Jersey, and Rhode Island), the district attorney is elected. Joan E. Jacoby, The Charging Policies of Prosecutors, in The Prosecutor 75, 95 n.2 (William F. McDonald ed., 1979).

\textsuperscript{113} If the special prosecutor is to serve the federal government, a three-judge panel or the attorney general appoints the prosecutor, depending upon the circumstances. See 28 U.S.C. §§ 591-599 (1988) (three-judge panel appoints an independent counsel upon request of attorney general); 28 U.S.C. § 515(a) (1988) (allowing the attorney general to appoint a special prosecutor and delineate the special prosecutor's authority). If the special prosecutor is to serve a locality, local appointment procedures would be followed. See, e.g., N.Y. Exec. Law § 63(2) (McKinney 1993) (authorizing the governor to appoint the attorney general or one of his deputies to head a criminal prosecution and "exercise all the powers and perform all the duties . . . which the district attorney would otherwise be authorized or required to exercise or perform"); N.Y. County Law § 701 (McKinney 1995) (authorizing a superior criminal court to appoint a special prosecutor when the district attorney is disqualified for any reason); see also supra note 96 (discussing the powers of the special prosecutor and the limits placed on his power by the authority that appointed him).

the limited authority given to them by the chief prosecutor.\textsuperscript{115} Granting an assistant prosecutor unlimited power to disclose would undermine this framework by sending the public conflicting signals as to the status of prosecutions, actual office policies and priorities, and even who the public official in charge really is. Rather than the department head having unparalleled authority to speak for the office and publicly disclose office information as he deems appropriate, any assistant prosecutor would be able to do this on any issue, thus undermining the credibility of the chief prosecutor. The public would question the capability of the office and the authority of the chief prosecutor in representing its interests. As chief prosecutor and the recognized head of the office, he must be viewed as the final voice on all matters and his words must be credible. Absent disclosure limitations, assistant prosecutors might undermine this role of the chief prosecutor.

The effective functioning of the prosecutor's office also requires that the assistant prosecutor's power to disclose office confidences be limited. In the absence of limits, office confidences may be disclosed at the whim of an assistant prosecutor with a financial interest in doing so. Should such a disclosure occur, an office atmosphere of mistrust and suspicion might prevail. Discussions may be chilled and investigations possibly thwarted.\textsuperscript{116}

Thus, because of the need to prevent conflicts of interest, maintain the hierarchical structure of the office, and ensure the effective functioning of the office, an assistant prosecutor with an intention of writing a book or cooperating on a movie production following a prosecution must first obtain the permission of the head of the office.\textsuperscript{117}

\textsuperscript{115} See supra notes 99-100 and accompanying text.

\textsuperscript{116} See discussion infra part III.B.

\textsuperscript{117} As with other decisions made by prosecutors, there is a presumption that the chief prosecutor will decide whether to grant or deny a request for disclosure in good faith. See, e.g., United States v. Bassford, 812 F.2d 16, 19 (1st Cir.) ("[T]he courts should presume that the prosecution was pursued in good faith execution of the law. . . . To overcome the presumption of good faith, a defendant must establish that his prosecution results from 'intentional and purposeful discrimination.' " ), cert. denied, 481 U.S. 1022 (1987).

In addition to the good faith presumption, if the chief prosecutor feels that he cannot make an objective decision in the public's best interest as to disclosure for media or literary purposes, he has an ethical duty to submit that decision to an impartial decision maker. See Model Rules, supra note 3, Rule 1.7(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 . . . ." (emphasis added)); see also infra notes 126-32 (discussing the prosecutor's duty to recuse himself from cases where his personal interests may influence his professional decisions). This may occur in cases in which the subject of the proposed book will have a strong effect on the chief prosecutor's personal interests. For example, if a district attorney is up for re-election and the book's publication may ensure a victory or cause certain defeat, the decision should be delegated to an impartial party.
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B. The Delegation Approach: When the Chief Prosecutor Wants to Write a Book

The chief prosecutor has the complete authority of the people to make all decisions on their behalf in performing the prosecution function. The chief prosecutor sets office policy in the manner he deems will best serve the public interest of pursuing justice. As one court noted, "A district attorney cannot treat that office as his selfish affair. It is a public trust. The office is not private property, but is to be held and administered wholly in the interests of the people at large and with an eye single to their welfare." The chief prosecutor must therefore conduct the prosecutor’s office in an impartial manner to best serve the public.

A chief prosecutor has the authority to allow disclosures regarding the office that he believes to be in the public interest. Such disclosures need not even be within the context of a pending prosecution. As the ranking public official in the prosecutor’s office, "he has a responsibility to advise the press and the public of the status of the criminal justice system." For example, the chief prosecutor may release office statistics relating to prosecutions, hold press conferences about the status of cases, or allow assistant prosecutors to disclose representational information for news purposes. While he makes all office decisions, the chief prosecutor is precluded from taking action where his personal interests are directly affected.

A chief prosecutor has a conflict of interest when he wants to write a book that will disclose information learned in the course of representing the public. Even though he may believe that writing a book is in the public interest and that he can objectively decide whether disclosure is appropriate, there is still a conflict-of-interest issue. As one commentator keenly noted, "In conflict-of-interest theory, it is not only the reality of a conflict of interest, but also the appearance of

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118. Attorney General v. Tufts, 132 N.E. 322, 326 (Mass. 1921) (finding that the state attorney general had shown sufficient cause for the removal of a district attorney for corruption while in office).
120. See National Prosecution Standards § 13 commentary at 47 (Nat’l District Att’y’s Ass’n 2d ed. 1991) ("The prosecutor should utilize office statistics to keep the community informed of the trends in local crime and with the efforts of the prosecutor’s office to combat crime."); Telephone Interview with Wayne Brison, Spokesperson for New York County District Attorney’s Office (February 15, 1995) (discussing the chief prosecutor’s broad discretion).
121. See Matheson, supra note 2, at 866-67 (discussing press conferences by prosecutors regarding a pending case). However, prosecutorial disclosures regarding pending cases must be within the bounds of DR 7-107, which governs trial publicity and attorney comments in light of the prejudicial effects such extrajudicial speech may have on a trial. See Code, supra note 4, DR 7-107.
122. Telephone Interview with Wayne Brison, New York County District Attorney’s Office (February 15, 1995).
123. See infra notes 126-32 and accompanying text.
one, that is considered undesirable."\textsuperscript{124} The Code likewise states that "care should be taken by the lawyer to avoid even the appearance of impropriety."\textsuperscript{125}

Because the "prosecutor must strive to conduct his office and his duties in a completely professional and non-partisan way, exercising his powers and authority of his position for the interest of the People and not for any private or personal concern,"\textsuperscript{126} the chief prosecutor must recuse himself from any decisions in which his personal or financial gain is directly affected.\textsuperscript{127} When the chief prosecutor wants to write a book or aid in a movie production, his personal interest and his duty to make impartial decisions in the public interest collide. Therefore, he must delegate the decision to an impartial decision maker who can decide whether such a disclosure will serve the public interest.

A chief prosecutor must recuse himself in other situations where he has a conflict, or even the appearance of conflict. For example, there may be prosecutions or investigations where the target is somehow associated with or related to the chief prosecutor.\textsuperscript{128} In such instances, a special prosecutor from outside the office "may be appointed to handle the investigation and to make all prosecutorial decisions."\textsuperscript{129} The independent counsel provisions of the Ethics in

\begin{footnotes}
\item[124] Nolan, \textit{supra} note 60, at 55 (footnote omitted). Nolan also observed that "[j]ustice requires the appearance of justice for the same reason that conflict-free representation requires the appearance of conflict-free representation: in both cases, those outside the process must believe that the process is fair. It is a question of confidence in government." \textit{Id.} at 55-56; see also Young v. United States ex \textit{rel.} Vuitton et Fils, 481 U.S. 787, 806 (1987) (plurality) ("[T]he appointment of counsel for an interested party to bring a contempt prosecution in this case at a minimum created opportunities for conflicts to arise, and created at least the appearance of impropriety."); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976) ("[A]n attorney must avoid not only the fact, but even the appearance, of representing conflicting interests."); National Prosecution Standards § 7.1 (Nat'l District Att'y's Ass'n 1st ed., 1977); United States v. Nixon, 418 U.S. 683, 694 n.8 (1974) (discussing the appointment of the special prosecutor and his need to stay independent of the Department of Justice because of its close relationship to the president).
\item[125] Code, \textit{supra} note 4, EC 5-6.
\item[126] National Prosecution Standards § 1 commentary at 14 (Nat'l District Att'y's Ass'n 1st ed., 1977).
\item[127] \textit{See infra} note 132 and accompanying text.
\item[128] When White House officials and other presidential supporters were alleged to have violated the law during the Watergate scandal, a special prosecutor was appointed because the Attorney General and Department of Justice were subordinate to the President and closely associated with him. \textit{See United States v. Nixon, 418 U.S. 683, 694 n.8 (1974) (discussing the appointment of the special prosecutor and his need to stay independent of the Department of Justice because of its close relationship to the president).}
\end{footnotes}
Government Act authorize the replacement of "Justice Department officials tainted by a potential conflict of interest in a specific case with individuals who have no disabling relationship with the President, the Attorney General, the Department of Justice, or the targets of the investigations." Additionally, "[i]n any case in which the prosecutor's interest can be said to be adverse or prejudicial to the state's interest, the prosecutor should disqualify himself and see to it that a special prosecutor is appointed." Therefore, where the chief prosecutor wants to reveal office confidences pursuant to a literary or media agreement, he must recuse himself from deciding if the disclosure is appropriate because he has a conflict of interest. The chief prosecutor must then delegate that decision-making authority to an impartial party, just as he would delegate prosecutorial authority to a special prosecutor should he have a conflict of interest in prosecuting a case. A district attorney who is elected and answers to no appointing authority should follow the local appointment procedures governing situations where he has a conflict of interest, and a special prosecutor must be appointed. A United States attorney general, special prosecutor, or independent counsel interested in writing a book should turn to the party who appointed him to decide if disclosing office confidences would be in the public interest. This is necessary because unlike the popularly elected district attorney, each of these individuals must answer to a superior. Consequently, they have a duty to report the conflict of interest to


132. Nissman & Hagen, supra note 62, at 11; see also Young v. State, 177 So. 2d 345, 346 (Fla. Dist. Ct. App. 1965) (stating that a special prosecutor should be appointed in any case where a prosecutor has a personal interest to avoid the appearance of impropriety); Hendricks v. State, 196 N.E. 2d 66, 67 (Ind. 1964) (stating that if prosecutor's interest is adverse to the state's, the prosecutor should recuse himself and a special prosecutor be appointed); National Prosecution Standards § 7.4(a) (Nat'l District Att'ys Ass'n 2d ed. 1991) ("The prosecutor should have discretion to appoint or to petition the court for an appointment of a special prosecutor in cases where actual or potential conflicts of interest exist.").

133. See, e.g., Cal. Gov't Code § 12553 (West 1992) ("If a district attorney is disqualified to conduct any criminal prosecution within the county, the Attorney General may employ special counsel to conduct the prosecution."); N.Y. County Law § 701 (McKinney 1995) (authorizing a superior criminal court to appoint a special prosecutor when the district attorney is disqualified for any reason).

134. See supra note 112.

135. See supra notes 113-14 and accompanying text.
their superior and let the superior make the decision, as is consistent with the hierarchical structure of government.\textsuperscript{136}

\section*{III. Considerations in Deciding if Disclosure is Appropriate}

Once it is clear who is the appropriate individual to decide whether to allow the disclosure of prosecutorial information pursuant to a literary or media agreement, certain factors must be considered to decide whether such a disclosure is in the public interest. Just as a private client weighs certain elements to determine what is in his best interest before waiving confidentiality rights to his defense counsel, the same should be done when the client is the public. The private client may consider his own financial gain from the lawyer's intended literary pursuit, the effect of disclosures on his reputation, the chances of further reprisal by the prosecution, and even the possibility that civil litigation may be instituted against him because of the disclosures in a "tell all" book.\textsuperscript{137} The client will balance what benefits he may receive by such a disclosure against the detriments. The private client can then ultimately determine what is in his best interest. This type of balancing should also be done for the public client to decide if such a disclosure is truly in the public interest. An individual client's personal considerations, however, are not the same factors relevant in determining whether a prosecutorial waiver of confidentiality is in the general public's best interest. The specific factors to be analyzed in the case of the public client become apparent only after examining the unique purposes served by confidentiality in a prosecutor's office and then balancing those factors against the public interest in knowing how prosecutors perform their duties.

This part first examines the general purposes of confidentiality rules for all attorneys. The focus then shifts to the unique purposes served by confidentiality rules in the prosecutor's office. Those purposes reveal what considerations will weigh into the disclosure balancing test. Finally, this part discusses the public interests that are served by a prosecutor's disclosures for literary or media works.

\textsuperscript{136} See Josephson & Pearce, supra note 95, at 566. These commentators observed: Obviously, the highest elected government official should generally be the highest policy dispute resolution authority, superior even as to issues of law to the ranking government lawyer, especially if she appoints that lawyer, . . . The first duty of the government lawyer, when confronted by a conflict [of interest], is to refer the dispute to the policy superior . . . for resolution.

\textit{Id.}

\textsuperscript{137} Claus von Bulow's cooperation for a book by his attorney on his appeal from a murder conviction eventually worked against him in a civil matter. A court held that von Bulow's consent to the book constituted a waiver of the attorney-client privilege, and thus the material discussed in the book was discoverable in a related civil case. See von Bulow v. von Bulow, 828 F.2d 94, 101 (2d Cir. 1987); see also supra note 11 (discussing von Bulow's actions which were found to constitute a waiver of confidentiality).
A. General Purposes of Confidentiality

The duty of confidentiality serves general purposes for all clients—private or public. First, the duty of confidentiality fosters a belief that the lawyer can be trusted so that he may obtain all relevant information from the client and potential witnesses, thus enhancing the quality of representation. In addition, the duty of confidentiality "encourages people to seek early legal assistance." Because the duty to maintain professional confidences survives termination of the case, and the right to waive confidentiality is exclusively that of the client, that duty precludes a lawyer from switching sides on a case or later using information learned in the course of representation to benefit himself or a third party. Clients feel more comfortable revealing information when they know that their attorneys cannot reveal those confidences without permission. While a prosecutor does not give legal advice to individual clients in the same way as other attorneys do, he does need to develop completely the relevant facts to seek a just result and provide the best possible representation. To obtain the essential facts, the prosecutor must assure informants or victims of some level of confidentiality. Certainly some facts will be disclosed at trial, turned over to the defense pursuant to discovery rules, or even revealed to comply with a court order. Yet, a person with relevant information is more willing to come forward sooner when she feels that she will not be exploited and will be protected to the fullest extent possible. The confidentiality rule, and the disciplinary action that may be imposed for breaches of the rule, deter attorney exploitation of confidences and thus encourages the

138. The Comment to Model Rule 1.6 states, "The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client . . . facilitates the full development of facts essential to proper representation. . . ." Model Rules, supra note 3, Rule 1.6 cmt.

139. Id.

140. See id. Rule 1.6 cmt. ("The duty of confidentiality continues after the client-lawyer relationship has terminated.").

141. The ABA Committee on Ethics and Professional Responsibility has opined that the confidentiality canon and the conflict of interest canons "reinforce the same ethical precepts." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).

142. One commentator noted:

Unless the client is assured that his confidences will be kept, he will not communicate all of the pertinent facts with full freedom and honesty, and therefore the social good which is commonly recognized to be derived from the proper performance of the functions of lawyers for their clients will be impaired.


143. See infra note 169.
flow of information to attorneys, thereby enhancing the quality of legal representation. 144

As with defense attorneys, the need to prevent both actual and apparent conflicts of interest 145 is necessary to maintain the prosecutor's loyalty to the client. Prosecutors, like other attorneys, would otherwise be subject to the same temptations to reveal confidences for financial gain or to advance opportunities for future employment in the absence of any confidentiality rule. 146 Also, as noted earlier, courts will disqualify former prosecutors from cases where there is any risk that specific confidences learned from their previous employment may be disclosed to advance the interests of their private clients in related matters. 147 Confidentiality rules thus foster the necessary relationship of trust and loyalty between lawyers and the persons with whom they interact professionally.

B. Purposes of Confidentiality Unique to the Prosecutor

Most of the general purposes of confidentiality apply to all attorney-client relationships regardless of whether the attorney is a prosecutor, private attorney, or government-agency attorney. 148 Yet, there are purposes of confidentiality unique to prosecutors. Underlying these special functions of confidentiality is the notion that the public's overriding interest in prosecutions is to see "that justice shall be done." 149 Accordingly, the prosecutor's office must function in the

144. See Code, supra note 4, EC 4-1 ("The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."). But see Zacharias, supra note 2, at 366-67 (arguing that confidentiality rules may have little effect on client forthrightness).

145. See supra note 124 and accompanying text.

146. The ABA Committee on Professional Ethics and Grievances stated: "The duty of an attorney to his clients is one of great delicacy and responsibility and sometimes of apparent hardship. Every consideration of personal advantage or profit must be subordinated to the interest and welfare of the client, and information derived from the close and intimate relationship necessarily existing should not be used to promote personal interests or for personal gain." ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943) (quoting Healy v. Gray, 168 N.W. 222 (Iowa 1969)).

147. See supra notes 51-58 and accompanying text.

148. The only general purposes of the confidentiality rules that do not apply to prosecutors are those that specifically apply to the attorney-client relationship. Yet, the need to foster a relationship of trust with other persons, such as witnesses, whom an attorney will encounter during representation applies to the prosecutor.

149. See Berger v. United States, 295 U.S. 78, 88 (1935); see also Corrigan, supra note 61, at 539 (stating that citizens "give over to the prosecutor the authority to seek a just result in their name"); George T. Felkenes, The Criminal Justice System: Its Functions and Personnel, in The Prosecutor in America 19 (John Jay Douglass ed., 1977) ("[T]he primary responsibility of the prosecuting attorney is . . . to see that justice is achieved.").
way most effective to render justice, and that requires some level of confidentiality within the office.

The unique purposes of confidentiality are recognized by case law and government regulations—primarily, the Freedom of Information Act ("FOIA"). The FOIA contains regulations for all federal agencies regarding public access to documents, and delineates what records "[e]ach agency . . . shall make available for public inspection and copying." The FOIA mandates that federal agencies must turn over all government documents to the public, subject to limited exceptions. By delineating exemptions to the mandatory disclosure policy, Congress recognized certain purposes of confidentiality. Many of the special purposes of confidentiality as specified in the FOIA exemptions also serve the prosecutorial function through attorney confidentiality rules. An examination of the special needs for confidentiality in the prosecutorial setting reveals what must be considered in a decision on whether to waive a prosecutor's duty of confidentiality.

1. Potential Prejudice to Pending Investigations

Investigations related to a prosecution may be compromised absent confidentiality within a prosecutor's office. For example, suppose a prosecutor were about to expose a major drug ring and had obtained the relevant search and arrest warrants. If other prosecutors were free to reveal information on the impending arrests to the public, the investigation would be frustrated because the criminals would undoubtedly destroy the evidence. A prosecutor's duty of confidentiality protects pending investigations from such damaging disclosures.

Congress explicitly recognized the need for confidentiality where disclosure may impede pending investigations. Exemption 7(A) of the FOIA exempts from mandatory public disclosure any records or information compiled by federal agencies for law enforcement pur-

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151. Id. § 552(a)(2).
152. The FOIA delineates nine exemptions to the mandatory disclosure policy. See id. § 552(b)(1)-(9). With regard to those exemptions, the FOIA simply states: "This section does not apply." Id. § 552(b). For those exemptions, the agency has the discretion, subject to its own internal policies, as to whether to release the exempted information.
153. S. Rep. No. 813, 89th Cong., 1st Sess. 6 (1965) (stating that "[t]here is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically [in the FOIA]").
154. In addition to the duty of confidentiality, a prosecutor is also bound by law from disclosing investigatory information in some circumstances. For instance, the Federal Rules of Criminal Procedure prohibit a prosecutor from disclosing "matter occurring before the grand jury" to maintain the secrecy of grand jury proceedings. Fed. R. Crim. P. 6(e)(2).
poses that could reasonably be expected to "interfere with enforce-
ment proceedings."\textsuperscript{155}

Additionally, in United States v. Snepp,\textsuperscript{156} the United States Supreme Court recognized a need for confidentiality during investigations. The Court stated that the "Government has a compelling inter-
est in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."\textsuperscript{157} While this case dealt with foreign intelligence operations, the general prin-
ciples dealing with the need for confidentiality in investigations are just as applicable to operations conducted by a local district attorney's office. Thus, confidentiality is imperative for public offices with investig-
gatory functions.

2. Potential Prejudice to Pending Cases

Confidentiality rules also ensure that legal proceedings are not dis-
rupted by extrajudicial disclosures by prosecutors. For instance, if a former assistant prosecutor released a book or gave inside inform-
ation to movie producers about the investigation of a highly publicized case prior to the trial of individuals indicted as a result of that investig-
ation, the potential jury pool could be prejudiced.\textsuperscript{158} This behavior might deny the defendants a fair trial by keeping the jurors from ren-
dering a verdict based only upon the evidence. Indeed, such a disclo-
sure could also prejudice pending appeals. The prosecutor's ethical duty of confidentiality removes such concerns.

In the FOIA, Congress addressed this need for confidentiality by exempting from mandatory public disclosure any information compiled for federal law enforcement purposes that would "deprive a per-
son of a right to a fair trial."\textsuperscript{159} DR 7-107 of the Code also emphasizes this need for confidentiality by limiting the extrajudicial statements an attorney may make prior to trial, during a trial, and prior to sentenc-


\textsuperscript{156} 444 U.S. 507 (1980) (holding that where a former Central Intelligence Agency employee who published a book about certain Agency activities, without first submit-
ting the book for prepublication review, breached a fiduciary obligation because he had agreed not to divulge classified information relating to his former employment without prepublication clearance). See Frank W. Snepp, III, Decent Interval (1977) (documenting CIA involvement in Indochina during the 1960s-70s).

\textsuperscript{157} 444 U.S. at 509 n.3.

\textsuperscript{158} See Sheppard v. Maxwell, 384 U.S. 333 (1966) (holding that a defendant was denied his right to a fair trial where: the massive publicity attending his prosecution permeated the jury pool prior to jury selection; a newspaper published the names and addresses of prospective jurors; and because the jurors were not sequestered once the trial began, and there was a sufficient probability they may have been improperly influenced by news reports during the trial).

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ing to ensure that such comments do not improperly affect legal proceedings.\textsuperscript{160}

3. Protection of Confidential Informants

Confidentiality rules protect, maintain, and cultivate relationships with confidential informants who provide vital information to the prosecution. In \textit{McCray v. Illinois},\textsuperscript{161} the Supreme Court endorsed a lower court's assertion that "the informer is a vital part of society's defensive arsenal. The basic rule protecting his identity rests upon that belief."\textsuperscript{162} The Supreme Court similarly declared that the continued availability of confidential informants "depends upon the [government's] ability to guarantee the security of information that might compromise them."\textsuperscript{163} Thus, confidential informants are invaluable to prosecutors, and those informants will not come forward unless prosecutors are bound by some obligation to keep their relationship confidential.

Under exemption 7(D) of the FOIA, Congress also specifically recognized the necessity of protecting confidential informants by exempting from mandatory public disclosure any federal records compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source."\textsuperscript{164} The Court of Appeals for the District of Columbia has stated that this exemption prevents the "‘drying up' of sources of information in criminal investigations"\textsuperscript{165} and that its "purpose will not be achieved unless the person providing information under the assurance that it will not be disclosed can rely upon the fact that his disclosure will not result in further publication."\textsuperscript{166} The Second Circuit reiterated this, declaring that the purpose of confidentiality with regard to informants is "to encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential."\textsuperscript{167}

The importance of protecting confidential informants is also implicit in federal discovery rules. In a federal criminal prosecution, the government is required to turn over to the defense only those statements or reports made by witnesses \textit{who have testified at trial}.\textsuperscript{168}

\textsuperscript{160} See Code, supra note 4, DR 7-107; see also Model Rules, supra note 3, Rule 3.6(a) (stating that a lawyer may not make an extrajudicial statement that he reasonably knows "will have a substantial likelihood of materially prejudicing an adjudicative proceeding").

\textsuperscript{161} 386 U.S. 300 (1967).

\textsuperscript{162} \textit{Id.} at 307 (quoting State v. Burnett, 201 A.2d 39, 44 (N.J. 1964)).

\textsuperscript{163} Snepp v. United States, 444 U.S. 507, 512 (1980).


\textsuperscript{165} Shaw v. Federal Bureau of Investigation, 749 F.2d 58, 61 (D.C. Cir. 1984).

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} United Technologies Corp. v. Nat'l Labor Relations Bd., 777 F.2d 90, 94 (2d Cir. 1985).

tial informants are more apt to provide crucial investigatory information when they are assured that they will not have to testify at trial so as to keep their identity secret.\textsuperscript{169} The discovery rules recognize the role informants play and seek to accommodate their reluctance to come forward.

4. Protection of Law Enforcement Strategies

The confidentiality rules also preserve the effectiveness of law enforcement strategies by ensuring that investigatory tactics will not be revealed. For example, a prosecutor's office would not want to reveal how relationships with informants are cultivated or the steps investigators typically take to infiltrate drug rings. Such public revelations would frustrate those tactics and allow easier circumvention of the law, thus rendering the task of pursuing justice and protecting society more difficult.

Congress, under the FOIA, also recognized the importance of preserving the secrecy of law enforcement strategies. Congress exempted from public disclosure any investigatory records that "would disclose techniques and procedures for law enforcement investigations or prosecutions . . . if such disclosure could reasonably be expected to risk circumvention of the law."\textsuperscript{170}

5. Endangerment of the Lives, Physical Safety, or Reputations of Others

Confidentiality rules protect the lives and physical safety of undercover agents, individuals who may have provided crucial help on a case and are under protection at an undisclosed location, and others who may have played a key role in an investigation or prosecution. For instance, without confidentiality obligations, if a prosecutor writes a book about an organized crime prosecution, he may inadvertently reveal facts tending to expose undercover agents operating in similar investigations. Agents and other key individuals in an investigation would be jeopardized. Additionally, confidentiality rules protect the reputations of innocent people who may be investigated but subsequently cleared as a result of the investigation. If a prosecutor was free to reveal the name of anyone who was investigated or whose name was tangentially related to an investigation, despite the fact that

\textsuperscript{169} As Professor Wigmore stated in his treatise on evidence:

\begin{verbatim}
Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution accusations against him. . . . Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities.
\end{verbatim}

\textsuperscript{8} Wigmore, Evidence § 2374 (McNaughton rev. 1961).

she may never have been brought to trial, her reputation would suffer irreparably. A public revelation that an individual was somehow named in an investigation, regardless of the fact that the evidence did not support an indictment or any substantial allegation of wrongdoing, would cause some people to believe the individual is guilty of some crime. Reckless disclosures may very well harm innocent people. Imposing a duty of confidentiality on prosecutors alleviates these types of dangers.

The FOIA also recognizes this importance of confidentiality. Exemptions 7(B), (C), and (F) allow agencies to withhold from public disclosure any investigatory records that could "endanger the life or physical safety of any individual,"\textsuperscript{171} may "deprive a person of a right to a fair trial or an impartial adjudication,"\textsuperscript{172} or "could reasonably be expected to constitute an unwarranted invasion of personal privacy."\textsuperscript{173} The prosecutor's duty of confidentiality protects the lives, physical safety, and reputations of persons somehow involved in sensitive investigations.

6. Encouraging Candid Office Exchanges

Within the office, prosecutors discuss investigatory tactics or litigation strategies amongst themselves in an effort to pursue the best alternative.\textsuperscript{174} These exchanges are quite beneficial because the more ideas that are considered, the better the quality of representation. Yet, candid office discussions are best fostered in an atmosphere where participants are free to speak their innermost thoughts without the fear of leaks or public disclosure. A prosecutor's duty of confidentiality encourages the type of environment where ideas and comments flow freely.

The importance of such an office environment was recognized in the United States Senate report amending the FOIA and exempting inter-agency letters or intra-agency memoranda or letters from the public disclosure requirements:\textsuperscript{175}

\textsuperscript{171} Id. § 552(b)(7)(F).
\textsuperscript{172} Id. § 552(b)(7)(B).
\textsuperscript{173} Id. § 552(b)(7)(C).

It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Govern-

\textsuperscript{174} President's Commission on Law Enforcement, Task Force Report: The Courts, in The Prosecutor in America 90, 91-92 (John Jay Douglass ed., 1977) ("Whatever training a new assistant prosecutor receives in addition to his experience on the job usually is limited to informal discussions with senior assistants or the heads of departments to which he is assigned.").
\textsuperscript{175} 5 U.S.C. § 552(b)(5) (1988). This exemption is limited only to those papers that "would not be available by law to a party other than an agency in litigation with the agency." \textit{Id.}
ment would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to “operate in a fishbowl.”

The recognized public policy interest in protecting “from inhibition . . . the free flow of information and free discussion within the agency” demands a certain level of confidentiality.

The free exchange of ideas that is so crucial to the effective operation of a prosecutor’s office would be inhibited if prosecutors feared that coworkers might later reveal the private conversations among members of the prosecution team. As the Supreme Court recognized, there are certain “close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.” Due to the sensitive nature of many investigations and prosecutions, and the fact that several prosecutors may be assigned to work together on a case, a prosecutor’s office clearly falls within this category of relationships. Members of the prosecution team must be free to discuss ideas without fear of reprisal, leaks, or members of the team excoriating them in books after the fact.

7. Preserving the Trust of Law Enforcement Agencies

The President’s Commission on Law Enforcement and Administration of Justice observed that “the prosecutor is often an investigator and initiator of the criminal process. Prosecutors work closely with the police on important investigations.” Trust between the relevant parties is necessary for cooperation among various government offices in a prosecution. If the police or FBI had concerns that a prosecutor could not be trusted with information or had ulterior motives in an investigation, the relationship between those individuals might break down, compromising both pending and future investigations. In *Snepp v. United States*, the Supreme Court recognized the need for confidentiality in intelligence operations because cooperation among various agencies and the sharing of information depends upon a relationship of trust. While *Snepp* concerned foreign intelligence oper-

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178. Pickering v. Board of Educ., 391 U.S. 563, 570 (1968) (stating that when assessing the propriety of a teacher’s dismissal for making comments critical of the Board of Education, courts must balance the teacher’s interest as a citizen in making public comments against the State’s interest in promoting the efficient operation of its schools).
181. See id. at 512-13.
ations, the same trust issues are implicated with prosecutor's offices because they also rely on other agencies and organizations for information during investigations. The effectiveness of investigations would be impaired if prosecutors indiscriminately wrote books, assisted in movie productions, or otherwise publicly disclosed investigation secrets. Police and other cooperating offices would become suspicious of prosecutors. Individuals who gather evidence or do investigatory footwork may not be as apt to share their "hunches" with the prosecutor. A strained relationship between the necessary players in law enforcement ultimately works against the public interest. A prosecutor's duty of confidentiality reassures cooperating offices that the prosecutor can be trusted and will remain loyal to the pursuit of justice above all else.

C. The Public Interest in Prosecutorial Disclosures for Literary or Media Purposes

The functions served by confidentiality must be balanced against the public's interest in knowing how officials perform their tasks. The public interest in understanding how its government and representatives operate is a basic tenet of our democracy. As James Madison declared: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." The New York State Commission on Government Integrity similarly commented:

DEMOCRACY DEMANDS PUBLIC PARTICIPATION in public issues. . . . Back-room decision making lends itself too readily to self-dealing and disregard of the public's interest. Private discussion and resolution of public issues breeds cynicism; cynicism breeds ap-

182. Principally, prosecutors rely on the police. See supra note 179 and accompanying text.

183. 444 U.S. at 512 ("The continued availability of . . . foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents."). In Snepp, a former CIA agent published a book without first submitting it to the Agency for pre-publication review. Id. at 507-08. In attesting as to how the book impaired intelligence operations, the Director of the CIA stated, "[W]e have had a number of sources discontinue work with us. . . . We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us, for fear it will not remain secret." Id. at 512.

184. Letter from James Madison to W. T. Barry (August 4, 1822), in 9 The Writings Of James Madison, 1819-1836, at 103 (Gaillard Hunt ed., 1910); see also Thomas I. Emerson, Legal Foundations of the Right to Know, 1976 Wash. U. L.Q. 1, 14 (1976) ("The public, as sovereign, must have all information available in order to instruct its servants, the government.").
both undermine the accountability of elected officials and erode confidence in the integrity of government.\textsuperscript{185} In adopting a "broad philosophy of 'freedom of information'"\textsuperscript{186} by expanding public access to government documents, the United States Senate declared that "an informed electorate is vital to the proper operation of a democracy."\textsuperscript{187}

Yet, the people, by granting to prosecutors "the authority to seek a just result in their name,"\textsuperscript{188} implicitly consent to the withholding of certain information from the public domain where the release of information would hinder the prosecutorial function.\textsuperscript{189} Recognizing both the need for confidentiality and the public's right to know, the United States Senate placed certain limits on its policy of "freedom of information" and observed that "[i]t is also necessary for the very operation of our Government to allow it to keep confidential certain material."\textsuperscript{190} When the government function outweighs the public's right to be informed, a policy of confidentiality is preferable.\textsuperscript{191}

A chief prosecutor confronted with an assistant prosecutor's request to write a book about a case must carefully balance the office's need for confidentiality against the public's interest in understanding how their representatives operate. The public is the client of the prosecutor,\textsuperscript{192} and it is the public to whom the prosecutor, as a public official, is ultimately responsible. Thus, the prosecutor has some duty to inform the public about the function of the office with regard to criminal prosecutions.\textsuperscript{193} Literary or media works about cases enhance

\textsuperscript{185} Government Ethics Reform For the 1990s: The Collected Reports of the New York State Commission on Government Integrity 320-21 (Bruce A. Green ed., 1991).
\textsuperscript{187} Id.
\textsuperscript{188} Corrigan, supra note 61, at 539.
\textsuperscript{189} Other public officials who have authority to act the public's name have certain needs for confidentiality in order to effectively serve the public. For example, the president of the United States possesses a "generalized interest in confidentiality... to the extent this interest relates to the effective discharge of a President's powers." United States v. Nixon, 418 U.S. 683, 711 (1974). In addition, under the FOIA, federal agencies may keep information secret to effectively serve the public. See supra notes 150-53 and accompanying text.
\textsuperscript{190} S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).
\textsuperscript{191} See Fredrick Downey Palmer, Arizona Fair Trial—Free Press Dilemma at the Preliminary Hearing Stage, 9 Ariz. L. Rev. 466, 471 (1968) ("[W]hen the policy compelling secrecy is deemed sufficient, the public's right to know is not of paramount importance.").
\textsuperscript{192} See supra notes 60-62 and accompanying text.
\textsuperscript{193} See National College of District Attorneys, The Prosecutor in America 4 (John Jay Douglass ed., 1977) (stating that the prosecutor "has a responsibility to advise the press and the public of the status of the criminal justice system"); Hazel B. Kerper, Introduction To The Criminal Justice System, in The Prosecutor in America 79, 81 (John Jay Douglass ed., 1977) ("Prosecutors... have many public relations duties."); Matheson, supra note 2, at 888 ("[I]t is generally accepted that elected prosecutors have an obligation to inform the community about the functioning of their offices.").
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awareness of the prosecutor's function. While others outside the prosecutor's office might attempt to chronicle a high-profile prosecution,

The prosecutor can be the best source of information concerning a criminal investigation and prosecution. He has access to the government's evidence, including witnesses. He is trained and experienced in explaining the steps in the process and putting issues in context. . . . The prosecutor interacts with law enforcement personnel, judges, court employees, defense counsel, corrections officials, social service agencies, and interested citizens. These contacts put the prosecutor in a unique position to comment on the case. 194

Accordingly, the prosecutor's perspective about a case is invaluable to ensuring an adequately informed public.

In addition to the people's general democratic interest in knowing how their representatives perform their public duties, there is a public interest in publications by prosecutors because of the historical value of such works. For example, a prosecutor who decided to aid in producing a literary or media work on Watergate, the Rosenberg trial, or the Scopes trial would certainly have added to the historical record. 195 A National Law Journal editorial even stated that with respect to the ethics rule of confidentiality, "[T]he legal system ought to recognize the value of history. Amending the ethics code to accommodate history is an idea whose time has come." 196

While the confidentiality rules operate at odds with the public interest in knowing how government investigations and prosecutions operate and in adding to the historical record through books by prosecutors, the special needs for prosecutorial confidentiality may disappear over time in a given case. For instance, the effect of disclosure on pending investigations or prosecutions may be inconsequential once a case is closed. Law enforcement strategies may become outdated to the point that revealing tactics used in the case at issue will not cause many of the previously discussed problems. 197 Further, the subject matter of a book or media production may not even implicate confidentiality concerns relating to candid office discussions, confidential informants, or preserving the trust of law enforcement agencies. In such instances, the public interest in disclosure may outweigh the policies compelling confidentiality by prosecutors. The individual who decides whether to waive the prosecutor's duty of confidentiality must be guided by the purposes of confidentiality and

194. Matheson, supra note 2, at 890 (footnotes omitted).
195. One commentator noted that "[t]he interest of society in obtaining new information for the reinterpretation and analysis of history is great, and lawyers, more than any other group, have played an important role in forming and shaping history through their involvement in events and with persons in the forefront of historical movements." Bonnie Hobbs, Note, Lawyers' Papers: Confidentiality Versus The Claims of History, 49 Wash. & Lee L. Rev. 179, 211 (1992).
197. See supra note 170 and accompanying text.
their importance, in light of the timing of the request and the subject matter of the proposed literary or media work. Those considerations must then be balanced against the public interest in disclosure, because the public is the client and any final decision must be made with its best interests in mind.

IV. A Proposed Ethics Standard to Govern Prosecutorial Disclosures for Literary or Media Purposes

There is no ethical standard governing prosecutorial disclosures for media or literary agreements other than a prohibition against prosecutors entering such agreements “prior to [the] conclusion of all aspects of a matter.”\(^\text{198}\) A standard is necessary to provide guidance as to who may waive the prosecutor’s duty of confidentiality and what factors that individual should consider when confronted with a request for a waiver.\(^\text{199}\) Balancing the unique purposes served by the prosecutor’s duty of confidentiality against the value of such a disclosure to the public interest in knowing how the office functions is central to such a standard. This part proposes a ethics standard to address these concerns and demonstrates its application.

A. The Proposed Ethics Standard

Because the ABA Prosecution Standards contain specific ethics guidelines for prosecutors, which “are intended to be used as a guide to professional conduct and performance”\(^\text{200}\) for the unique dilemmas that confront prosecutors, this Note proposes to include the following rule within those Standards. The text of the proposed standard provides:

(a) An assistant prosecutor, or any former prosecutor, who wishes to disclose for literary or media purposes information learned in the course of representation should obtain consent for such a disclosure from the current chief prosecutor of the office or department.

(b) An elected prosecutor who is the head of an office or department and wishes to disclose information learned in the course of representation for literary or media purposes should delegate the

\(^{198}\) ABA Prosecution Standards, supra note 14, Standard 3-2.11; see also Model Rules, supra note 3, Rule 1.8(d) (forbidding a lawyer from acquiring literary or media rights to an account based upon information learned in the course of representation prior to the conclusion of the representation); Code, supra note 4, DR 5-104(B) (same).

\(^{199}\) There are other ethics standards that provide guidance to prosecutors in other contexts and call for consideration of certain factors to help guide these decisions. For example, Standard 3-3.9 of the ABA Prosecution Standards lists seven factors a prosecutor should consider in exercising his discretion in the charging decision. ABA Prosecution Standards, supra note 14, Standard 3-3.9.

\(^{200}\) Id. Standard 3-1.1.
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decision to disclose to an independent attorney who will objectively
decide if a waiver of the duty of confidentiality is appropriate.

(c) An appointed prosecutor, who is head of an office or depart-
ment and wishes to disclose information learned in the course of
representation for literary or media purposes, should turn to the in-
dividual(s) who appointed him for an objective decision as to
whether disclosure is appropriate.

(d) The individual responsible for deciding whether waiving the
prosecutor's duty of confidentiality is in the public interest should
consider the subject matter of the proposed disclosure in light of the
following factors, which are not exclusive, in the totality of
circumstances:

(i) the possible effects of the disclosure on any pending
investigations;
(ii) the possible effects of the disclosure on any pending
litigation;
(iii) any possible chilling effects of the disclosure on confiden-
tial informants;
(iv) whether the disclosure may compromise law enforcement
strategies and thus allow easier circumvention of the law;
(v) whether the disclosure may endanger the lives, physical
safety, or reputations of others;
(vi) any possible chilling effects from the disclosure on candid
office discussions;
(vii) the effects of such disclosure on the relationship be-
tween the prosecutor's office and other law enforcement agencies;
(viii) the public interest in the disclosure; and
(ix) the appropriateness of a partial waiver.

This proposed standard provides a process by which consent can be
obtained for prosecutorial disclosures relating to literary and media
works. Presently, there is no such process. The proposed rule also
gives decision makers needed guidance to ensure that an appropriate
decision is made on a case-by-case basis, noting the varying impor-
tance of each factor in different circumstances. The proposed rule ac-
counts for the timing of the request, the unique aspects of the request,
and the purpose of the request.

The standard also accounts for the interests served by confidential-
ity in several respects. First, it minimizes the incentive for prosecutors
to conduct cases with an eye toward maximizing the marketability of
the subject matter for future book and movie contracts.201 The fact
that a prosecutor knows prior to litigation that such a decision will
appropriately be made by an individual removed from the situation
and that certain delineated factors are considered make clear that it
will be difficult to get a waiver for a substantial length of time after the
matter is concluded, if at all. Second, the standard ensures that each

201. See discussion supra part II.A.
function of confidentiality receives individual consideration before any waiver is given. Third, the rule allows for partial waivers. Thus, a prosecutor may receive permission to disclose only information that does not relate to informants, investigative tactics, or certain office discussions. Such flexibility will preserve confidentiality in certain matters while recognizing the public interest in knowing about other aspects of a case. The discretion given to the decision maker in this proposed standard mirrors the discretion afforded to prosecutors for many other decisions: charging decisions, plea negotiations, and sentencing recommendations.

B. Application of the Proposed Ethics Standard

The following hypotheticals demonstrate how the proposed standard is be applied:

1. An assistant United States Attorney recently worked on the successful prosecution of several organized crime figures. He has received some offers to write a book about his role and cooperate in the movie production of his character. He requests permission to disclose one year after the convictions.

In this first hypothetical, the request would be made to the head of the department—the attorney general. Because that case involved

202. Partial waivers of the prosecutor's duty of confidentiality should be considered carefully. Some district courts have held that "clients who partially disclose privileged communications for their own benefit have waived privilege protection for all related communications." Theodore Harman, Note, Fairness and the Doctrine of Subject Matter Waiver of the Attorney-Client Privilege In Extrajudicial Disclosure Situations, 1988 U. Ill. L. Rev. 999, 1009 (citing United States v. Cote, 456 F.2d 142, 144-45 (8th Cir. 1972); Nye v. Sage Prods. Inc., 98 F.R.D. 452, 453 (N.D. Ill. 1982); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976)). Harman pointed out that the reasoning for this is that "[c]ourts do not allow the client to pick and choose among privileged communications, disclosing the favorable communications while protecting the unfavorable communications." Id. However, "when the selective disclosure is not made to the trier of fact, the unfairness is much harder to find." Id. at 1009-10.

203. ABA Prosecution Standards, supra note 14, Standard 3-3.9 (listing factors a prosecutor should consider in deciding whether to charge).

204. Id. Standard 3-4.1 (discussing how prosecutors should conduct plea discussions).

205. Id. Standard 3-6.1 (discussing the prosecutor's role in the sentencing process and in offering a sentencing recommendation).

206. Most likely, the attorney general will delegate the decision to the United States Attorney in that district. See supra note 99 and accompanying text.

207. A chief prosecutor confronted with a request for a waiver of confidentiality is still subject to the ethics rules pertaining to conflict of interest. Because the chief prosecutor must be an impartial decision maker who acts only for the public interest, if he had a role in the issue at hand or has a strong personal interest in the waiver decision, he must disqualify himself from making the decision on a waiver. See Code, supra note 4, EC 5-1 ("The professional judgment of a lawyer should be exercised,
organized crime figures, informants may have played a significant role in
the prosecution. If informants did provide information crucial to
apprehending the organized crime figures, any disclosures about what
was said or how they met with prosecutors may put lives in danger and
deter others from becoming informants. Additionally, death threats
may have been sent to the prosecutors on a regular basis. This would
be a heavily weighted factor in the decision because the disclosure of
office discussions so soon after a case, where participants' lives may be
endangered, could cause future exchanges in similar cases to be chil-
led. The role of unique investigative tactics also may be a factor. New
strategies may have been developed to combat organized crime, and if
they are exposed, circumvention of the law may be easier. Finally, a
disclosure so soon after the convictions may prejudice other pending
cases or investigations involving organized crime figures. Further, the
appeal process may have just begun and a disclosure could jeopardize
the fairness both of that process and of habeas corpus. Balancing all
of these justifications for maintaining confidentiality against the public
interest in knowing weighs against granting a waiver of confidentiality
in this scenario.

2. A former district attorney wishes to write a book about the twenty
years during which she held office and the various issues she encoun-
tered. Three years after she left office, this former district attorney
requests a waiver of confidentiality from the current district attorney.

In this situation, the request would properly be made to the current
district attorney because he has the present authority of the people to
set office policy on their behalf. Because the book's subject matter
deals with the memoirs of the former district attorney and some issues
may still be fairly recent, the current district attorney should be cer-
tain that there are no disclosures in areas that may affect pending in-
vestigations or prosecutions. Weight should be given to the fact that
the book will span the former prosecutor's entire career with the of-
lice and some cases that will be discussed may be years old. Because
the book would deal with numerous cases over a lengthy period of
time, there would probably be little concern that candid office discus-
sions may be chilled by the disclosures, because little detail would be
given to such discussions. In addition, many prosecution and law en-
forcement strategies may be outdated by the time the book is written.
Strong consideration also would be given to the historical value of the
book, which would discuss prosecutorial changes over a period of time
in terms of cases, tactics, and politics. The book also would add to the
public's understanding of the district attorney's office. Weighing all of
the factors, a partial waiver seems appropriate with the condition that

within the bounds of the law, solely for the benefit of his client and free of compro-
mising influences and loyalties." (footnote omitted)); see also supra notes 126-32 and
accompanying text.
informants, current law enforcement strategies, and any pending matters are not discussed.

3. The head of the sex crimes unit in an metropolitan district attorney's office wishes to write a book on date-rape prosecutions, based upon his experiences in the unit. He requests the consent of the district attorney to write the book while he is still head of the unit.

This hypothetical is a waiver request on an issue that is the subject of much debate and of which there is a great deal of public interest. The book would not focus on any individual prosecution, but rather would discuss how the office investigates and prosecutes date-rape complaints. Because the focus is not on a particular case, the risk of chilling office discussions, deterring the cooperation of future informants, and damaging the reputations of innocent parties are not issues. There would be a strong public interest in the disclosure because it would enhance understanding of the office and how it handles a sensitive issue in the criminal justice system. A waiver is appropriate in this case because of the strong public interest and minimal confidentiality concerns.

Conclusion

Literary and media works about prosecutions can educate the public about the legal system and can add to the historical record. When a prosecutor involved in a depicted case discloses prosecutorial information, it is particularly valuable to the public—the prosecutor's client. Prosecutors have a unique first-hand perspective about a case, can offer inside information unobtainable from other sources, and are able to provide invaluable insights into the criminal justice system. But like any other attorney, the prosecutor must abide by the ethical duty of confidentiality and obtain permission before making such disclosures, to prevent conflicts of interest and frustration of the prosecution function. While other attorneys can obtain client waivers to release them from the ethical duty of confidentiality, prosecutors are in a difficult position because their client is the public. Present ethics rules are devoid of advice as to a prosecutor's duty of confidentiality and under what circumstances a prosecutor may disclose prosecutorial information for books and movies on publicized cases.

This Note has proposed an ethical standard and a process by which a prosecutor may obtain office permission to disclose prosecutorial confidences for media and literary purposes. The proposed standard specifies who should decide if such a disclosure is appropriate and requires the decision maker to balance the unique purposes served by the prosecutor's duty of confidentiality, as well as public interest in knowing how prosecutors perform their tasks. The standard provides the decision maker with the needed flexibility to address specific disclosure requests. Adoption of the proposed standard will offer the
necessary guidance in an area where ethics rules are silent, recognize the value of prosecutorial disclosures for literary or media works, and minimize the potential for frustration and private exploitation of the prosecution function by inappropriate disclosures.