The Role of Victims in Criminal Investigations and Prosecutions

By Kirk J. Nahra

I. INTRODUCTION AND SUMMARY

Throughout the criminal justice system, prosecutors have wide discretion to exercise their authority in determining what crimes should be prosecuted. This discretion has historic support through both constitutional separation of powers doctrines and public policy. This discretion is based on a variety of factors, including the severity of the crime, the extent of the evidence, prosecutorial resources and other facts involved in the specific case. Victim cooperation and participation in the investigation and prosecution of crime often is a key element in this analysis.

Historically, in the effective administration of the criminal justice system, the role of the victim in criminal prosecutions has been critical. Victim testimony often is the most important element of a successful prosecution. Moreover, a victim's cooperation in an investigation and prosecution often results in a prosecutor's exercise of discretion in favor of criminal prosecution. This participation is therefore both critical and desirable. Accordingly, public policy, as embodied in statutes and extensive case law, is designed to encourage and support the role of victims in the prosecution of crime. Within this basic framework, actions that limit the victim's role in the criminal process in a significant way will make the criminal process less effective. Moreover, the

broad discretion afforded to prosecutors in the criminal process allows prosecutors to make use of victim information and resources in whatever way the prosecutor deems appropriate.

As white collar crimes have become a more significant component of the law enforcement agenda, the insurance industry has played a leading role in assisting prosecutors in the investigation and prosecution of insurance fraud, involving health care providers, lawyers, bogus claimants and a vast array of participants in the endless schemes to defraud insurance companies and their customers. Throughout the country, insurers routinely cooperate with law enforcement officials that are investigating insurance fraud, providing information, specialized expertise and technical and administrative support for these complicated investigations. Cooperation can involve investigations prior to referrals to law enforcement, assistance with ongoing law enforcement investigations and the provision of expertise or financial assistance in the investigation of this complex crime. The recent federal health insurance fraud statute even requires cooperation between private insurers and law enforcement officials on fraud investigations.

Prosecutors have broad discretion to capitalize on this cooperation and expertise as they feel appropriate. In fact, any requirement that prosecutors distance themselves from victims - typically the most effective sources of information about crime - cannot be supported by constitutional or public policy considerations. The fact that some victim cooperation and assistance may make it easier for a prosecutor to exercise his or her responsibilities should be considered a positive factor in the administration of the criminal justice system.

Nonetheless, despite this historic cooperative relationship between victims and prosecutors and the effectiveness of this cooperation in the prosecution of crime, the California Supreme Court recently sent a message that may cause some inappropriate and unnecessary effects on the prosecution of insurance fraud and perhaps other white collar crimes as well. In *People v. Eubanks, 927 F.2d 310 (Cal. 1996),* the Court held that payment by a victim of investigative expenses incurred by the prosecutor's office in the course of a lawful criminal investigation may disqualify the prosecutor from pursuing a criminal case. This message runs counter to decades of court and legislature-sanctioned cooperation between victims of crime and prosecutors, which has proven to be critical to the effective prosecution of white collar crime. While this decision is exceedingly narrow in its holding, significant restrictions on the ability of victims to cooperate and assist in the investigation and prosecution of crime at the prosecutor's discretion are contrary to history, law and policy, and should be rejected by other courts around the country.

This memorandum describes the history and policy supporting the involvement of victims in criminal investigations, focusing on the insurance industry's historic and consistent support for these principles. This cooperation intersects with a prosecutor's broad discretion in evaluating what cases should be investigated and prosecuted. These bedrock principles demonstrate why

prosecutors should continue to rely on victim assistance as they feel appropriate, and why any further limitations on this cooperation should be rejected.

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II. PROSECUTORIAL DISCRETION

In the criminal justice system, the prosecutor bears responsibility for determining what crimes will be prosecuted. The "legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process." *Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980)*. The Government retains "broad discretion" as to whom to prosecute. *United States v. Goodwin, 457 U.S. 368, 380, n. 11 (1982)*. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).*

The basis for this discretion rests on the nature of the prosecutorial function.

> *This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.*
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> *Wayte v. United States, 470 U.S. 598, 607-08 (1985).*

While this discretion is broad, it is not "'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." *United States v. Batchelder, 442 U.S. 114, 125 (1979)* (footnote omitted). In particular, the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," *Bordenkircher, 434 U.S. at 364* (citation omitted), including the exercise of protected statutory and constitutional rights. *Goodwin, 457 U.S. at 372; Wayte, 470 U.S. at 607*. Beyond these constitutional limitations, there is an "extreme deference the courts must give to prosecutorial charging decisions" and a trial judge "must accord a presumption of constitutionality to

prosecutorial decisions, and approach the inquiry with appropriate respect for the judgments exercised by officers of a coordinate branch of government." *United States v. Redondo-Lemos, 27 F.3d 439, 444 (9th Cir. 1994)*.

Within these boundaries, the Supreme Court's various pronouncements on these issues uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute. The reasons for judicial deference are well known. Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. See *Wayte, 470 U.S. at 607*. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge. Because these decisions "are not readily susceptible to the kind of analysis the courts are competent to undertake," the Supreme Court has been "properly hesitant to examine the decision whether to prosecute." *Id., at 607-608; see also Goodwin, 457 U.S. at 373; Town of Newton v. Rumery, 480 U.S. 386, 396 (1987)*.

Within this long-standing set of principles, prosecutors exercise their substantial discretion, and courts are loathe to interfere with prosecutors' judgments. This latitude often plays out in the context of a defendant's efforts to challenge a prosecutor's (or more broadly an entire prosecutor's office) participation in a particular criminal prosecution. The standard for prosecutorial disqualification is quite high, and efforts to disqualify prosecutors should not be allowed to interfere with the broad discretion afforded to prosecutors in the criminal process.

It is clear that disqualification of a criminal prosecutor "is a drastic measure which courts should hesitate to impose except when absolutely necessary." *In the Matter of Grand Jury Subpoena, 873 F.2d 170, 176 (7th Cir. 1989) (quoting Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982))*. Also, the relevant question for prosecutors is not the same as it is for the judicial functions. Prosecutors need not be entirely "neutral and detached," as judges are expected to be, as "[i]n an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." *Marshall, 446 U.S. at 248*.

> *Of course, a prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obligated, to be deeply interested in urging that view by any fair means. True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury not the prosecutor*.
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> *Wright v. United States, 732 F.2d 1048, 1056 (2d Cir. 1984) (citations omitted).*

To enforce a prosecutor's ability to exercise discretion, most courts require that any perceived conflict of interest be "actual." To succeed on a claim of conflict of interest, therefore, a defendant must "point to specific instances in the record to suggest an actual conflict or impairment of his or her own interests. . . ." *State v. Webb, 790 P.2d 65, 75 (Utah Ct. App. 1990)*. Defendants cannot claim error based on the mere appearance or hypothetical existence of conflict. *Id.; see also State v. Hoyt, 806 P.2d 204, 212 (Utah Ct. App. 1991); State v. Camacho, 406 S.E.2d 868 (N.C. 1991)* (prosecutor may not be disqualified "unless actual conflict of interest exists"). Disqualification is not required "whenever there exists a possible appearance problem. 'The courts, as a general rule, should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence . . . and the appearance of impropriety, standing alone, might not be grounds for disqualification. The objector should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored.'" *People v. Herr, 635 N.Y.S.2d 159, 160 (1995)* (citations omitted).

These disqualifications are tied to direct and personal issues, not broad assertions of general favoritism or other unsupported assertions about a lack of neutrality. A more broad claim of general prejudice by a prosecutor, or even generalized personal involvement, should be insufficient. See, e.g., State v. Burton, 751 S.W.2d 440, 452 (Tenn. Ct. Crim. App. 1988) (rejecting effort to disqualify prosecutor whose truck had been stolen by defendant after he escaped from jail; even if individual attorney could be disqualified, "certainly his entire staff was not disqualified").

Indeed, "prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question." *Nicholas v. Sammons, 363 S.E.2d 517 (W. Va. 1987) (syllabus point 1); State v. James R., 422 S.E.2d 521, 522 (W.Va. 1992) (syllabus point 1) (same).*

The primary basis for "conflict of interest" disqualifications of criminal prosecutors therefore is distinctly personal, a financial or personal motive that distorts a prosecutor's ability to make reasonable judgments. See, e.g., *Shaw v. Garrison, 467 F.2d 113 (5th Cir. 1972)* (where prosecutor had a "significant financial interest in the continued prosecution" because of a book contract, prosecution brought for harassment purposes could be enjoined); *Lewis v. Superior Court, 62 Cal. Rptr. 2d 331 (Ct. App. 1997)* (where prosecutor's office was direct victim of crime, prosecutor was potentially implicated in crime and prosecutor had been involved in efforts to repair political and financial damage from crime, prosecutor could be disqualified); *State v. Bell, 370 P.2d 508 (Idaho 1962)* (special prosecutor should be appointed where prosecutor was

close personal friend of defendant); *City of Maple Heights v. Redi Car Wash, 554 N.E.2d 929 (Ohio Ct. App. 1988)* (individual prosecutor disqualified where there was deep personal animosity between prosecutor and defendant, and prosecutor had filed a personal libel suit against defendant); *Parkerson v. Norris, 529 So.2d 1392 (La. Ct. App. 1988)* (prosecutor could not participate because he was the victim of the crime being investigated). None of these categories remotely encompasses obtaining the cooperation or support of the victim of crime.

These similar concepts of bias and neutrality have been analyzed extensively in the context of "private prosecutors." Many states allow private citizens to act as public prosecutors, with the consent of local law enforcement. In jurisdictions where private prosecutors are allowed, so long as the private prosecutor is not "in control" of the prosecution, courts have approved of their use. In these cases, private prosecutors are allowed to proceed unless they have a distinctly personal interest in the case that makes this participation improper. In these cases, it is not the perception of a potential taint that is relevant, but a direct and personal conflict between a private responsibility to a client and the public obligations imposed on a prosecutor that provides the only significant limitation.

For example, in a situation where a prosecutor's office was insufficiently staffed, it was appropriate for the victims to provide financial support for retention of a private prosecutor, and this prosecutor was allowed to proceed with the case as long as the "control" rested with the public prosecutor. See *Woods v. Linahan, 648 F.2d 973 (5th Cir. 1981)* (where prosecution staff was "inundated" with cases and needed help, sheriff's office could solicit victim's family and friends to hire a private attorney to assist in the investigation, interview witnesses, and even file motions, so long as private attorney remained under ultimate control of the District Attorney); see also *Hughes v. Bowers, 711 F. Supp. 1574 (N.D. Ga. 1989)*.

The only significant limitation in this area has involved situations where the "private prosecutor" also represented the victim in a separate civil action. In those cases, combining the prosecutor's function with the private litigant's obligations created inconsistent responsibilities and this "dual representation" has generally been held to violate a defendant's due process rights. See *Wright v. United States, 732 F.2d 1048 (2nd Cir. 1984); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); State v. Eldridge, 1997 WL 230200 (Tenn. Crim. App. May 7, 1997) (slip op)*. However, in those cases, the private prosecutor has generally had important control over the criminal prosecution, including sitting in on plea bargaining sessions, participation in court and making other key decisions. In the typical situation where the victim provides assistance to an investigation, there is no combination of the prosecutor function with private obligations. Instead, the public prosecutor is obligated to fulfill his or her responsibilities to the State, which may include seeking information from victims, but there is no abandonment of control or responsibility. The victims cannot dictate how the prosecutor's office exercises its responsibilities. Further, the prosecutor bears the responsibility for all decisionmaking in the area where he or she has

discretion - whether to charge, what charges to bring and how the case should be prosecuted.

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III. THE ROLE OF VICTIMS IN THE CRIMINAL PROCESS

These principles mandate that prosecutors have broad discretion in determining what cases will be prosecuted, and that the primary (and often exclusive) basis for challenging a prosecutor's decision to prosecute or participation in a prosecution involves personal bias in the prosecution, based on personal financial interest or other self-interested motives.

Within this exercise of discretion, prosecutors often rely on crime victims as crucial sources of information and may choose to make use of victim information and resources in making prosecutorial decisions. Indeed, while prosecutors represent the government, not the crime victims per se, prosecutors are encouraged and often required to consider the victim's interests as well. Any efforts to require a wall of separation between prosecutors and victims should be rejected, as counterproductive and unnecessary for any public policy or constitutional reason.

In all kinds of cases, ranging from the most serious to the "smallest," law enforcement relies on cooperation from the public. In a typical assault case, a victim must first contact the police to report the crime, relay the details of the incident, often participate in perpetrator identification (through police line-ups), testify at trial and, if the defendant is convicted, make a victim impact statement at sentencing. Costs involved in this process are ordinarily incurred by the victim, even though the benefit of the victim's participation accrues to the State.

Cooperation from an assault victim usually only entails small costs that do not appear to directly benefit law enforcement officials or relieve them of any budget burdens. However, consider the cooperation store owners give to police in routine shoplifting cases. Shoplifters are caught almost exclusively by private security officers working for the victimized retailer. The private security officers must observe the crime, investigate it if necessary, apprehend and detain the suspect, report it to the local law enforcement authority, and then testify at the defendant's trial. All of these costs are directly underwritten by the victimized corporation. If this cooperation was not allowed between these crime victims and law enforcement, shoplifters could either steal with impunity, or law enforcement would be forced to shift resources away from higher-priority areas to combat shoplifting. Either of these scenarios clearly undermines sound public policy.

Embezzlement cases present another typical example. Embezzlement victims are best situated to know their own finances, and know what expenditures should raise "red flags" and which are legitimate. Thus, it is logical, expedient and cost-effective for them to pay for accountings and investigations into possible embezzlement, and then cooperate with law enforcement authorities, if circumstances warrant that. Under this system, corporations can meet their confidentiality

needs in the preliminary stages of an investigation. Also, law enforcement is not forced into a complex field they have little experience with, an arrangement that virtually guarantees a mutually beneficial relationship for both the victim and law enforcement.

Victim participation therefore is critical to an effective law enforcement process. The law enforcement system often depends on the voluntary participation of crime victims in order to investigate and prosecute criminals successfully. See *R. Elias, The Politics of Victimization 134 (1986)* (estimating that approximately 95% of all reported crimes involving specific victims are discovered from citizen complaints, usually from the victims themselves). The willingness of victims to come forward is vital to the successful prosecution of criminals. Without this assistance in reporting crime, more crime effectively will go unpunished, as the criminal justice system is "absolutely dependent" on victim cooperation. *Karen L. Kennard, The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions, 77 Cal. L. Rev. 417, 425 n.42 (1989) (quoting President's Task Force on Victims of Crime, Final Report V (Dec. 1982)).*

And while this cooperation is desirable, the Supreme Court also has stated that victim concerns must be considered in the criminal process.

> *[I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts.*
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> *Morris v. Slappy, 461 U.S. 1, 14-15 (1983).*

Therefore, prosecutors are required to consider the victim's rights and interests, and are not in any way required to keep the victim at arm's length in investigating and prosecuting victim-related crimes.

The role of victims today is very different than in our earlier history. The crime victim once had a more prominent part in directing the progress of the criminal justice system. Today, participation in the contemporary criminal process imposes numerous burdens on victims; many feel victimized not only by the crime, but by the process as well, so that they increasingly fail to assist law enforcement agencies, to the detriment of the public at large. As one scholar has stressed:

> *[t]he criminal justice system's current response to the interests of beleaguered crime*

> *victims is no better than timely, and possibly very late. A sense of alienation with the criminal justice system has reached such heights that many pieces of literature now discuss the problem in terms descriptive of a crisis. Surveys of crime victims reveal intense displeasure with the criminal justice system. Victims often do not report to the police the crimes that have been committed against them, prompting [one commentator] to blame the "decline of faith" in the criminal justice system for this corrosive effect: "Victims report few crimes to the authorities because they do not expect them to be responsive."*
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> *Cardenas, The Crime Victim in the Prosecutorial Process, 9 Harv. L.J. & Pub. Pol'y 357, 357-58 (1986) (citations and footnotes omitted).*

So while this role has changed over time, public policy across the country consistently and strongly encourages private actions to support public law enforcement efforts. Moreover, the encouragement of victim participation in the criminal process is also reflected in the public policy across the country which places significant burdens on tort actions against those who assist in the prosecution of crime. "[P]ublic policy has developed an immunity to protect those who act in a reasonable manner in bringing to justice those they believe are criminals. That immunity cannot be broken down upon a mere allegation of negligence or even gross negligence." No cause of action can arise for any such alleged negligence because "to allow an action in negligence against a citizen who makes an honest mistake in reporting to the police would stifle citizen cooperation." Claims against those who provide information about suspected crime have "never been regarded with any favor by the courts, and [are] hedged with restrictions which make [them] very difficult to maintain." *W. Keeton, Prosser and Keeton on Torts § 119 at 876 (5th Ed. 1984).* "This disfavor of [these] actions represents a value choice based on public policy considerations. Sound public policy and the aims of justice require the uncovering of crime and the prosecution of criminals." *Williams v. Ryder/P.I.E. Nationwide, Inc., 786 F.2d 854, 857 (8th Cir. 1986)* (citation omitted). Generally, these actions are disfavored because "[t]hey have an undesirable tendency to unduly discourage citizens from seeking redress in the courts," *Chittenden Trust Co. v. Marshall, 146 Vt. 543, 507 A.2d 965, 969-70 (1986),* and because they tend to discourage prosecution of crime. *Kimbley v. City of Green River, 663 P.2d 871, 882 (Wyo. 1983).* As one court noted, "[t]here is almost universal agreement that sound public policy dictates that the law should encourage the uncovering and prosecution of crime. Any 'policy that discourages citizens from reporting crime or aiding in prosecution would be undesirable and detrimental to society in general.'" *Sanders v. Daniel Int'l Corp., 682 S.W.2d 803, 806 (Mo. 1984)* (citation omitted).

Following the desirability of victim cooperation and the public policy protection and support for

active victim participation in the criminal process, the insurance industry has been particularly focused on assisting law enforcement with criminal investigations. Insurance fraud is an enormous financial problem across the United States. According to the Coalition Against Insurance Fraud, insurance claims fraud amounted to $85.3 billion in 1995, resulting in a cost of more than $1,030 to each American family in the form of higher insurance premiums, taxes and the increase in the cost of goods and services affected by this fraud. Organizations like the Coalition, the National Insurance Crime Bureau and the National Health Care Anti-Fraud Association exist primarily to assist law enforcement in the detection, investigation and prosecution of insurance-related crimes and to encourage cooperation between fraud victims and law enforcement.

This private sector participation is crucial to the effective prosecution of these crimes. In addition to the staggering amounts at issue, the nature of insurance fraud demonstrates why cooperation between public and private entities is so critical. For example, most of the nation's total health care bill - 56% - is paid with private-sector dollars (37% by insurers and 19% by consumer out-of-pocket payments). Second, experience clearly shows that the health care provider who is defrauding Medicare, Medicaid, CHAMPUS or other government programs in all likelihood is also defrauding private payers - and vice-versa. According to the Department of Justice, "[p]erpetrators of health care fraud rarely infiltrate just one health care system or limit their fraud solely to public health care programs. Fraudulent schemes often cut across health care systems." *1994 Department of Justice Annual Report, at 2.*

Next, although insurers and the government may be the immediate targets of health care fraud, the general public is the ultimate victim of insurance fraud - as consumers and patients who pay health insurance premiums, co-payments and deductibles; as employers who purchase health coverage for their employees; and as taxpayers, where we are doubly victimized when public payment programs are defrauded.

With these financial implications, insurance fraud represents an area where there is a unique public/private victimization at the hands of corrupt health care providers and other insurance fraud perpetrators. In addition, unlike many criminal areas, the private sector plays an active and aggressive role in fighting fraud. Insurers have active anti-fraud programs and work extensively with a wide range of public law enforcement officials to ferret out fraud. Accordingly, private payers are an important line of defense in the fight against fraud.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) takes this practice of cooperation one step further, by requiring that private insurers and law enforcement officials cooperate in the investigation and prosecution of health care fraud. In organizing its anti-fraud activities, federal law enforcement officials must "consult with, and arrange for the sharing of data with representatives of health plans" in their efforts to fight fraud. As a supplement to this

legislative mandate, the Department of Justice and the Department of Health and Human Services recently issued guidelines mandating the sharing of a wide range of investigative information between public law enforcement and private payers. Accordingly, the practice and mandate in insurance fraud efforts is to encourage and even require broader cooperation between crime victims and law enforcement.

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IV. VICTIM PARTICIPATION IN LAW ENFORCEMENT INVESTIGATIONS

Within this context, victim participation is an important part of the criminal process, resulting in enhanced enforcement of the criminal laws and a more effective use of prosecutorial resources. This cooperation is routine, useful and effective.

One recent case demonstrates how effective this cooperation can be. In *Int'l Bus. Machs. Corp. v. Brown, 857 F. Supp. 1384 (N.D. Cal. 1994)*, IBM brought suit against individual and corporate defendants accused of defrauding the company. Suspicious of some of its employees, IBM had cooperated with local police in a successful sting operation. At the time of the civil suit, a criminal prosecution arising from the sting was ongoing. The civil defendants sought a stay in the civil proceedings pending the outcome of the criminal trial, arguing that by participating in the sting, IBM and the police engaged in misconduct. *Id. at 1387.*

The court characterized the defendant's argument as suggesting "that there is something inherently outrageous in the fact that plaintiff, having discovered circumstances [indicating] it was being defrauded, first complained to the LAPD, triggering a criminal investigation, and then proceeded to bring a civil suit, which resulted in sharing information between LAPD and plaintiff." The court, on the other hand, found nothing at all "inherently outrageous" in the arrangement. *Id. at 1388*. Because the defendants could not make showings of prosecutorial misconduct or impropriety, their request for a stay was rejected.

In fact, the court went out of its way to highlight the problems corporations have in obtaining justice from the criminal system. *Id*. It noted that "often it is difficult and virtually impossible for large corporate victims to secure prosecution of crimes committed against them," and that prosecutors and police were unlikely to have sufficient resources to rectify that problem. Id.

However, the court did not think that businesses were hamstrung to fix this problem. "Large corporate victims . . . have resources, if they choose, to help law enforcement agencies pursue and apprehend the criminals who victimize them." *Id*. The court felt this was especially appropriate in the fraud context, where "very large expenditures of funds and resources are often necessary before a bona fide suspicion can be affirmed." *Id. at 1389*. Where a private investigation unearthed criminal fraud, the court held that the government was not barred from

using that information as a basis for prosecution just because it had not paid for it. *Id.* "If the ultimate result of such private investigation is that criminals can be brought to justice with a minimum diversion of public resources, the interests of society are irrefutably served." *Id.*

The logic of Brown is irrefutable. There are no constitutional or statutory provisions that require prosecutors to fight crime with one hand tied behind their back - by avoiding contact or cooperation from those with perhaps the most information about a suspected crime and the most ability to advance an effective criminal investigation.

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V. THE LIMITATIONS OF EUBANKS

In *People v. Eubanks, 927 P.2d 310 (Cal. 1996)*, the California Supreme Court addressed a challenge by a criminal defendant to the prosecutor's neutrality in a case where the crime victim paid significant expenses already incurred by the prosecutor in connection with the investigation. The Court held that this victim's assistance to the prosecution could warrant the prosecutor's disqualification if the involvement was so grave as to render fair treatment of the defendant unlikely, and that a victim's financial assistance to an investigation may create a conflict of interest sufficient to warrant disqualification. The ruling is strong and problematic, but quite limited.

The Eubanks case involved an alleged theft of computer trade secrets and the retention by the prosecutor of a computer expert to assist with an investigation of the alleged theft. In Eubanks, one defendant (Wang) was a former employee of Borland International, while the other (Eubanks) was president of one of Borland's chief competitors. After Wang's resignation, Borland found various electronic mail messages from Wang to Eubanks, which raised the suspicion of a loss of confidential data. After reporting their suspicions about a loss of trade secrets to law enforcement, Borland officials worked with law enforcement to prepare warrant affidavits. The District Attorney's chief investigator asked Borland if it could provide technically competent employees to assist in the search. The Borland representatives declined to participate in the search, and suggested that independent consultants be used. Two computer specialists were located and retained by law enforcement. At the request of the District Attorney's office, Borland agreed to pay for the services provided by these consultants in support of law enforcement.

The Defendants challenged the participation of the District Attorney's office in this prosecution, based on an alleged conflict of interest in that office by accepting this payment from the alleged victim. The California Supreme Court held that because the victim agreed to pay for these expert fees that had already been incurred by the prosecutor, the prosecutor could be perceived as owing a debt of some kind to the victim that could result in unfair treatment of the defendant. The

decision appears to find that prosecutors are unable to exercise their responsibilities if they receive a certain kind of assistance from victims. Allowing this generalized presumption of bias to control a decision on a prosecutor's continued participation in a prosecution runs counter to disqualification case law across the country and to the deference accorded to prosecutorial decisions by the separation of powers doctrine. It also challenges prosecutorial integrity at its core, by equating this assistance with a complete loss of independent judgment by a prosecutor. There is no constitutional basis whatsoever for distinguishing between perceived bias arising from financial support of an investigation and a prosecutor's attitude in a case with a particularly sympathetic victim or a case in which media or political attention focuses additional resources, which routinely proceed without challenge.

If analyzed closely, Eubanks turned on several specific facts, most critically that the costs at issue were significant, the prosecutor acknowledged that his office had limited funds to pay expenses itself, and the prosecutor already was under an obligation to pay these costs before the victim was approached to pay for them. This precise set of facts may not happen often. And the court was careful to distinguish the situation where the insurance industry, for example, pays an across the board assessment to fund a fraud bureau, because that payment was general to an overall law enforcement effort, not specific to a particular investigation. Even on the facts of Eubanks, the Court did not require disqualification, but instead remanded the decision for additional review, to determine whether this financial assistance "is of such character and magnitude 'as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceeding.'" *927 P.2d at 312*. In the context of broad prosecutorial discretion, this kind of generalized allegation of bias should be rejected.

Despite these limits, Eubanks raises several important issues about how public/private cooperation will be affected in the future. The case is limited enough that it should not raise concerns for most prosecutors, in the most typical situation where victims are cooperating in a investigation, by conducting their own investigation, responding to inquiries or providing information to law enforcement. These situations should not change.

In the situation where direct financial assistance is provided by a victim to a prosecutor on a specific case, insurers and prosecutors should be aware of the boundaries provided by Eubanks, but these should not present undue concerns. In fact, even the Eubanks court made clear that a "district attorney is not disqualified [from a case] simply because, in an effort to overcome budgetary restraints, he or she has accepted assistance from the public in investigating or prosecuting a crime." *Eubanks, 927 P.2d at 320*. In particular, if a prosecutor needs certain information that only an independent expert can provide, the victim, if it is inclined to support this expert financially, should retain the expert directly to provide the information. If it is clear that certain information will be needed before a case can be prosecuted, victims should include this information in the case presentation. These are precautionary measures, but prosecutors

should be prepared to challenge Eubanks directly in their states, because it is bad law and bad policy, so that even these relatively minor limits are not imposed in other jurisdictions and do not become an undue impediment to effective prosecution of insurance crimes.

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VI. CONCLUSION

Prosecutors correctly have substantial discretion to exercise their responsibilities in determining what crimes should be prosecuted and to what extent. The law allows prosecutors to evaluate the broad range of factors at issue in the prosecutorial decision without significant interference from the judicial branch. Prosecutors must review a range of factors that include the strength of the evidence, the seriousness of the crime, the resources of law enforcement and the effects of the crime on victims, the public and the law enforcement agenda.

These choices often are made based on how effective a prosecution will be. If there is an eyewitness to the crime, the prosecution will be easier and more straightforward, typically resulting in the exercise of discretion in favor of prosecution and a reduced use of law enforcement resources to develop evidence. A crime that generates public outrage may result in increased use of prosecutorial resources. A particularly sympathetic victim may receive more aggressive attention. None of these decisions will be subject to constitutional challenge.

Receiving financial assistance from a victim in conducting an investigation should not be any different. Certain victims will be able to assist a prosecutor, because they have paid attention to the case, documented their losses, or otherwise. Certain victims, particularly in white collar crimes, will have the resources and diligence to compile investigative information and present a completed case investigation to a prosecutor. These victims have a better chance of having sophisticated white collar crimes prosecuted. Whether these resources are utilized before or after a prosecutor is involved should have no constitutional implications. Moreover, if a victim (or anyone else) can make a prosecutor's job easier, that should be viewed as a positive element in the administration of the criminal justice system. Precluding or limiting effective victim assistance is not required for any constitutional reason and makes no sense from a policy perspective.

Endnotes

1. Kirk J. Nahra is a partner with the law firm of Wiley, Rein & Fielding in Washington, D.C. and serves as general counsel for the National Health Care Anti-Fraud Association.

2. See also State v. Harris, 939 S.W.2d 915, 920 (Mo. Ct. App. 1996) (prosecutor that was

named as defendant in civil rights lawsuit by criminal defendant would not be disqualified. Court stated that there would be "public policy concerns . . . if a criminal defendant could disqualify a prosecutor . . . merely by filing a lawsuit"); State v. Dahms, 825 P.2d 1214 (Mont. 1992) (same).

3. The National Prosecution Standards set forth by the National District Attorneys Association make the same points. While prosecutors must avoid situations in which they developed confidential information from a defendant through a prior relationship or otherwise had some financial or personal tie to a particular case, only direct and personal conflicts are sufficient to require a change in the designated prosecutor.

4. "The practice of allowing crime victims to initiate private prosecutions is a long-held English tradition, based on the common belief that the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family." Cardenas, The Crime Victim in the Prosecutorial Process, 9 Harv. J.L. & Pub. Pol'y 357, 359 (1986). During the American colonial period, victims of crime were personally responsible for apprehending and punishing criminals. In particular, the victims made arrests themselves, paid sheriffs to apprehend criminals, and paid private attorneys to prosecute cases. See Kennard, The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions, 77 Cal. L. Rev. 417, 419-20 (1989); Cardenas at 366-371. "When government took over the prosecution of criminal offenses, the victim of the crime became a forgotten entity in the criminal justice system." Note, The Victim and Witness Protection Act of 1982: Who are the Victims of Which Offenses?, 20 Val. U.L. Rev. 109, 109 (1985).

5. "The victims of crime are truly the forgotten people in the American criminal justice system and are all too often victimized twice first by the crime and then by the system." Gittler, Expanding The Role of The Victim in a Criminal Action: An Overview of Issues and Problems, 11 Pepp. L. Rev. 117 (1984). "The failure to grant crime victims a prominent role in the dispensation of criminal justice is particularly shortsighted because the continued functioning of the criminal justice system depends on victim cooperation both in reporting offenses and in assisting the prosecution of crimes." Kennard, 77 Cal. L. Rev. at 417.

6. See Hickingbottom v. Easley, 494 F. Supp. 980 (E.D. Ark. 1980) (duty of all citizens to communicate information on crime to proper officials).

7. Jestic v. Long Island Sav. Bank, 440 N.Y.S.2d 278, 281 (App. Div. 1981).

8. Zamora v. Creamland Dairies, Inc., 747 P.2d 923, 930 (N.M. Ct. App. 1987).

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