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American
Prosecutors
Research Institute

*From the Courtroom
to the Community:*
Ethics and Liability Issues for
the Community Prosecutor

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INTRODUCTION

Crime is at its lowest rate in a generation, in part because local prosecutors across the nation realize that they can more effectively address crime if they deploy some of their attorneys in the community.

Community prosecution focuses on neighborhood livability issues and involves a long-term, proactive partnership among the prosecutor's office, law enforcement, the community and public and private organizations, whereby the authority of the prosecutor's office is used to solve problems, improve public safety and enhance the quality of life in the community. This community-oriented prosecution is not a new program, but rather a new strategy for prosecutors to do their jobs and obtain crime-prevention results.

Community prosecution has progressed significantly since its inception in the early 1990s. As recently as 1995, less than ten jurisdictions throughout the United States engaged in community prosecution, and then only in urban settings. In 2001, an estimated one-half of the nation's 2,800 prosecutor offices were developing community-oriented responses to livability issues, and that number is growing (Nugent & Rainville, 2001). City attorney offices are also beginning to see and believe in the value of working with law enforcement and the community to develop creative solutions to livability issues.

The creative solutions developed by prosecutors around the country range from minor changes in how their offices prioritize cases, to leading the way in re-defining for police, the community, and other criminal justice and local agencies how they can work together to solve livability issues in local neighborhoods. All share the common tenet of community prosecution — prosecutors transcending their traditional roles as case processors and forging partnerships with law enforcement, the community, and various public and private agencies to act as problem solvers. Community prosecution is actually a grassroots approach to law enforcement. It involves traditional and non-traditional initiatives and legal solutions to work within a community to prevent crime, thus reducing the number of arrests and prosecutions.

Notwithstanding the expanded role of other agencies and the general public in this redefined approach to crime prevention, it is imperative for the community prosecutor to retain ultimate responsibility for decision-making and the proper exercise of discretion. The primary responsibility of prosecution is to see that justice is accomplished, and the prosecutor's obligation to comply with the ethical code and rules of his or her jurisdiction is a fundamental and minimal requirement. Citizens in particular must understand these respective roles and be willing to operate within these limitations (National District Attorneys Association, 1991).

To best understand the ethical dilemmas that may arise in community prosecution, a brief examination of what constitutes an ethical prosecution function is in order. The conventional role of the prosecutor and the ethical principles that guide prosecutors in this traditional role are considered first. Challenges to these ethical principles that emerge in the evolving community-based prosecution role are then discussed.

THE CONVENTIONAL ROLE OF THE PROSECUTOR

The traditional domain of the prosecutor is the courtroom (McDonald, 1979). In this setting, the ethical dilemmas faced by prosecutors are set within the framework of an adversarial legal system. Within the adversarial framework, the prosecutor “is an administrator of justice, an advocate” for the state (American Bar Association, 1993).

The fundamental decision associated with this traditional advocacy function of prosecutors is simply whether to seek a conviction for any given case. To guide decisions about which convictions should be sought, the chief prosecutor generally establishes a standard that must be met before charges are filed in relation to a police complaint. Additionally, standards are normally established to guide decisions about plea offers and opting to take cases to trial.

The ethics of the conventional prosecutor are therefore relatively straightforward. Most of the decisions of prosecutors relate to case processing. To the extent that case processing standards focus solely on legally relevant factors and such standards are applied impartially, prosecutors act ethically.

As a local prosecutor moves beyond the conventional role of case processor to that of community-based prosecutor, however, a number of ethical issues may arise. The successful community prosecution initiative must be particularly mindful of the following concerns:

- Impartiality
- Treating similarly situated defendants similarly
- Due process liability and immunity
- Displacement
- Abuse of limited prosecutorial resources
- Political pandering

THE PROSECUTOR AS A LEADER IN PUBLIC SAFETY

A number of practical ethical issues relate to geographical specialization, a fundamental component of community prosecution, as illustrated by the experience of the Multnomah County District Attorney's Office (MCDA) in Portland, Oregon. The Portland location may be familiar as it served as one of the early community prosecution case studies (in Jacoby, 1995; Boland, 1998; Boland, 1996). The basic story is paraphrased here to preface an examination of key ethical dilemmas.

Case Study—Lloyd District (Portland OR)

District Attorney Michael D. Schrunk was elected in 1980 and took office in January 1981. In 1990 he received an unusual request from leaders of the Lloyd Business District Association to place one of his deputy district attorneys in their District, a major commercial and residential area, to strategize with the Business and Neighborhood Associations on dealing with crime-related issues. Funds were raised to cover the salary and operating expenses of a deputy district attorney who would “address the concern about the lack of consequences in the downtown courts for criminal activity that adversely affected businesses” (Boland, 1996).

The livability issues in the Lloyd District were not fundamentally ones of crime, but of social disorder. A sloping stretch of land at the intersection of two railroad lines known as Sullivan's Gulch had been a gathering place for transients and the homeless for over 50 years, and the city spent roughly \$40,000 per year in futile attempts to clean up the area. Though few serious felony crimes were typically committed (there were fewer than 60 arrests a year in the Gulch itself, primarily for illegal camping, a city code misdemeanor), the individuals residing there were responsible for a myriad of crimes in the neighboring Lloyd District, including shoplifting, public indecency and intoxication, and car prowling in adjacent parking lots.

Jacoby (1995) states, “The breakthrough came when all parties in the community successfully cleaned up the Gulch.” This was accomplished

by involving local residents, business owners, private security providers and the police in the use of a variety of techniques to signal to illegal campers that the Lloyd District would no longer tolerate their presence. This included posting multi-lingual signs warning that camping in the Gulch was illegal and providing a list of local homeless shelters, ensuring that these signs were immediately replaced when torn down, having private security companies in the area routinely patrol the Gulch to give the police extra eyes and ears in the area without actually intervening with the campers, and removing property illegally left or abandoned by campers to city owned storage areas located inconveniently far from the Gulch.

These techniques were coordinated primarily by the geographically assigned Neighborhood Based District Attorney (NBDA). Within one year, the Gulch was free of illegal campers, arrests there were reduced to an average of one per month, car prowls in the district were reduced by 65%, and the city was no longer forced to expend funds for cleanups. As a result of the successes of the Lloyd District NBDA, Multnomah County's NBDA program gradually expanded over the next ten years. Today, six additional areas of the city and county are covered by assigned NBDA's.

BUT IS IT ETHICAL?

Community prosecution differs from traditional, court-based prosecution in that certain types of crimes are selected for targeted prosecution. Community prosecution is further differentiated from other targeted prosecution programs in its geographic focus. Stone and Turner (1999) identified geographic specialization as a defining feature of community prosecution, noting that such a practice could be as minimal as assigning a prosecutor to a police station or as intricate as having prosecutors facilitate local alternative dispute resolution programs. Though geographic specialization may be a defining feature, it is potentially a problematic one.

The Lloyd District case study is a typical example of community-based prosecution initiatives around the country that focus upon a specific geographic region (Sullivan's Gulch) and target specific acts affecting livability (camping, theft and related activities) that occur regularly in the region. It also highlights ethical issues that would not necessarily arise in the prosecutor's traditional advocacy function.

Impartiality

Community prosecutors are expected to target specific community problems. When they do so in a specific neighborhood, ethical concerns may be raised related to partial treatment. One of the most immediate ethical questions faced in Multnomah County involved the way in which the district attorney's office was approached. Basically, a very organized group of citizens wanted specific problems solved by an agency with the statutory authority to do so and provided private funds to accomplish this goal. After accepting these funds, the Multnomah County District Attorney recognized that this funding might be presented to citizens in a negative light. For instance, the private funding of the first NBDA led to accusations by a local weekly newspaper that community prosecutors were "hired guns." Though the office was happy to have a new resource to achieve its mission, it quickly learned it was preferable to fund NBDAs from the general office budget or other governmental entity, and not by

private interests. The greatest political danger often lies in the appearance of impropriety, not any impropriety itself.

Even though the nature of the request seemed reasonable and was intended to lead to a greater good, some consideration of the remainder of the community tempered the desire to impose grave consequences on individuals who were ushered from the Gulch. It is difficult to consider the needs of community members who do not articulate clear problems and who lack the organization necessary to seek help in addressing their problems. However, the disorganized interest remains, very much, a part of the larger community. This aspect can often be overlooked—nearly to the point that it may be believed that “*all* parties in the community successfully cleaned up the Gulch” and supplied the long-term strategy, while, in fact, some of the parties were those that were ushered away or did not support the strategy. Remaining impartial can be difficult when part of the community simply asks for order and wants a problem to be solved and a second part of the community represents the problem. One of the keys to doing community prosecution ethically is to regard the interests of all members of the affected community as equal, even—and especially—when some of the community is not able to organize and present its interests (see Thacer, 2001 for a similar ethical problem in community *policing*).

Treating Similarly Situated Defendants Similarly

What may be done with defendants whose acts warrant some degree of coercive force? To avoid ethical difficulties, community prosecutors should take the following approach—when the offense is not grave, as in the case of Sullivan’s Gulch, it should be met with only enough coercive force to prevent it and no more. Defendants who offend in the affected area are not singled out for *disproportionate treatment*, but for *deterrence*. The goal of community prosecutors is simply to reduce an impediment to livability by restoring some semblance of order in their districts—sending a message to those who might choose to commit crime in the area that such behavior will not be tolerated.

An approach that mobilizes the entire community to address livability

problems with a minimum of coercion is paramount. Neighborhood clean-ups, formation of block watches and foot patrols, and turning porch lights on at night are all tools utilized by community prosecutors to actually prevent crime. As such, there is no focus on criminal convictions at all, and offenders in the neighborhood therefore cannot be treated more harshly than their counterparts in the conventional prosecution scenario. The rationale behind this non-punitive approach is that increased punishment for less harmful offenses does not promote the growth of the community. Rather, it is antithetical to the community-building goals of community prosecution. Community prosecution, done properly, does not seek to widen the net. A community prosecution initiative does alter the prosecutorial decision-making process, but the shift is towards less, not more, coercion via the courts.

Although the minimization of harm is one ethical guidepost, a second problem that may be illustrated by the Multnomah County case study revolves around the degree to which any social good, be it in terms of punishment or deterrence, results. First, punishment was never considered the goal in the Lloyd District, as the traditional sanctions for the types of primarily misdemeanor offenses occurring in the Gulch and nearby areas were typically *de minimis*, and obviously ineffective, over the past 50 years. But what about deterrence? A distinct possibility arises in community prosecution programs that jurisdiction-wide deterrence may be undercut to some degree because geographic-based deterrence fails to treat like cases alike.

As discussed earlier, impartiality (treating like cases alike) is crucial for the traditional sanctioning function of the prosecutor to be effective. However, the fact that one community prioritizes a certain act as the root of local problems, may justify a different approach to that act in the community than the approach taken elsewhere in the jurisdiction. The problem with treating the same act differently across any two communities is that it may make the act a relative “bargain” in one of the areas. General deterrence may result under a traditional prosecution regime where the same price is imposed on a crime across a jurisdiction, i.e. where like cases are treated alike. However, community prosecution, to

the extent that its practices allow the costs associated with an action to vary in unpredictable ways, fails to treat like cases alike. Chief prosecutors can avoid this unintended consequence by expanding their community prosecution initiative jurisdiction-wide, similar to what was done in Portland.

Due Process, Liability and Immunity

The potential violation of due process rights is also a significant concern. Though not determined to be problematic in Sullivan’s Gulch because there was little need for criminal prosecution to solve neighborhood livability issues, due process concerns can be a problem in situations where information gleaned by prosecutors in a problem-solving capacity may be subsequently used to maximize convictions. This practice certainly raises issues related to *Miranda*, the determination of when formal custody begins, and other questions related to permissible investigative tactics. Community-based efforts by prosecutors that focus exclusively on arrest and conviction may face serious legal challenges on due process grounds.

As mentioned above, the Multnomah County District Attorney’s Office did not use the local information gathered by the community prosecutor in Sullivan’s Gulch to increase criminal convictions and sanctions. However, where this practice is adopted within a community prosecution model, it raises a major legal constraint—the limited protection of prosecutors who allow themselves to function in an investigative role. Specifically, when prosecutors act outside the domain of the courtroom, they may not enjoy the absolute prosecutorial immunity which they customarily possess (Foltz, 1994; see also *Burns v. Reed*, 500 U.S. 478 (1991), *Wiley v. Doory*, 14 F.2d 993 (1994)). On a related point, community prosecutors may be asked by their communities to provide legal advice or to spot actionable legal issues to be pursued in civil courts. As the U.S. Supreme Court held in *Imbler v. Pachtman*, 424 U.S. 408 (1976), prosecutors do not enjoy absolute immunity from civil actions when acting beyond the scope of their traditional case-processing duties. Giving advice to private parties about civil matters is truly beyond the scope of prosecutors’ traditional duties.

Displacement

Community prosecutors assigned to a particular geographic area work hard to eliminate a problem from their assigned neighborhoods, but the problem may simply move somewhere else. This phenomenon, known as displacement, can undeniably occur in a fledgling community prosecution initiative. It may become virtually impossible for the community prosecutor to ignore pleas for assistance from community members who are sick of prostitutes and street-level drug dealers committing crimes in their neighborhood, especially when the residents are working with the authorities to organize block watches and foot patrols. In fact, to deny these citizens the services of their community prosecutor simply because of a fear of possible displacement might seem unethical to some, in and of itself.

If the difference in treatment is severe, it can lead to a simple displacement of the problem. For example, to the Sullivan's Gulch campers, the illegal camping became relatively costly in the Lloyd District, thanks to some vigilant business and neighborhood committees and a sympathetic prosecutor. However, right down the road in a neighboring district, there is no such program or sanction, and the camper may simply relocate. In this circumstance, would the prosecutor's actions in Sullivan Gulch have a general deterrent effect on illegal camping? The answer most certainly is "No," but it is a problematic answer.

Revisiting the Multnomah County experience, however, once community prosecution was extended to relatively complete geographic coverage of those neighborhoods that had problems related to disorder, displacement between these neighborhoods was minimized. Displacement into non-targeted neighborhoods was also unlikely, as these neighborhoods were already inhospitable to disorderly conduct—they policed themselves quite effectively. For example, when community prosecutors targeted tagging in one area, the offenders may have planned to move to an adjacent area that was seemingly permissive of their activity. However, community groups, police and community prosecutors in this second area were already on the scene and actively monitoring the array of activities associated with disorder. As such, areas that would seem hospitable for disorderly acts were actually quite vigilant in preventing such acts.

Multnomah County had expanded its NBDA program from one that addressed a single crime of disorder in a single neighborhood to one that monitored disorder, in general, in every neighborhood that was susceptible to disorder. Active monitoring of individual crimes of disorderly activity, coupled with swift and decisive action on encroachment, helped to prevent displacement.

Abuse of Limited Prosecutorial Resources

Much has been made of the community prosecutor's work to improve the quality of life for citizens, shifting the emphasis from serious offenses to low-level acts often associated with urban disorder. Numerous scholars argue that dealing with crimes of this sort is just as important as dealing with the more violent, self-evidently criminal acts, as conditions of disorder lead to significant fear among the public (Skogan, 1990; Coles & Kelling, 1999; Kelling & Coles, 1996).

Even as community prosecutors address reports of disorder, however, they should not be drawn into the business of resolving neighbor disputes, muzzling barking dogs and picksticking curbside trash. Goldstock (1992) claims that the legal authority of the prosecutor to impose punishment makes the assistant prosecutor, even in a community-based setting, a more formidable character to wrongdoers than police on the beat. Humoring the most petty neighborhood concerns will undermine this authority. It will also be an unwise use of prosecutorial resources.

Offices practicing community prosecution should strike a balance between community-based problem-solving activities and court-based sanctioning activities. For one reason, extensive community-based practices by community prosecutors could be duplicative of police efforts (Forst, in Glaser, 2000: 1017). A second reason is that the prosecutor's authority could be undermined if an office completely abandons its sanctioning function for a problem-solving function (Goldstock, 1992).

Furthermore, Forst (2000) questions whether prosecutors are better situated than the police to address the types of problems that residents identify. Other theorists argue that prosecutors are uniquely situated to effec-

tively address such problems (see Goldstock, 1992). These observations suggest that devoting prosecutorial resources to quality-of-life issues may be less efficacious than (or pose a necessary trade-off to) devoting resources to deterring crime. The elected prosecutor must recognize the tension between the goals of traditional and community-based prosecution approaches and consider how best to assign prosecutors within a jurisdiction and toward what end.

The Multnomah County experience suggests that it is possible to achieve greater results by strategically assigning assistant prosecutors to the community. Initially, only a single prosecutor was assigned to a geographic area. Over time, the number of NBDAs increased to cover an additional eight geographic regions. The trial workload of individual neighborhood-based prosecutors dipped appreciably, but there were also changes in the trial workload office-wide. Several types of cases involving disorder crimes were no longer referred to screening attorneys, as their community prosecution peers had negotiated informal solutions to these crimes in several neighborhoods. Arguably, this decrease in low-level criminal complaints may have allowed trial attorneys to concentrate on more serious crimes, although this effect has not been demonstrated empirically. To a limited extent, the office reallocated attorney resources from securing convictions to solving community problems. This may have had some bearing on reducing the trial attorneys' workload as well.

Recognizing that there was a qualitative difference between crimes associated with disorder and crimes of a more self-evidently harmful nature, the Multnomah County District Attorney's Office chose to continue to address the more serious types of crimes formally, across the entire jurisdiction. District Attorney Michael Schrunk calls this "Taking Care of Business," what prosecutors can and must do as their first priority. For the less serious offenses, MCDA focused on those few neighborhoods where disorderly conduct warranted a concentrated intervention. Not every neighborhood had the same disorder problems, such as illegal camping. Some faced issues with prostitution, or low-level street drug dealing, or graffiti, or illegal dumping. The NBDAs discerned the unique nature of disorder activities in their respective geographic regions and worked with their communities to develop appropriate solutions. The net

effect of this approach minimized some of the losses to general deterrence. Until the achievements of a community prosecution initiative can be effectively measured, however, allocating limited prosecutorial resources for this purpose cannot be validated.

Obviously, measuring deterrence under a community prosecution model is a challenge, in that a crime averted is difficult to observe. Other presumed benefits of community prosecution—reduced fear, community empowerment and revitalized neighborhoods—are equally elusive. The absence of benchmarks of success leads to a final ethical issue related to community prosecution—it is potentially a political ploy and not a public service function.

Political Pandering

Though some have argued that, by repeatedly placing representatives from the prosecutor's office in community meetings and granting entrée to community leaders in guiding enforcement approaches, community prosecution actually *increases* the accountability of prosecutors (see, for example, Coles & Kelling, 1999), the potential for community prosecution efforts to devolve into political pandering is quite clear. Ultimately, increased visibility of prosecutors is a necessary (and probably desired) by-product of such an approach.

It may not be possible to resolve the tension between political and public service motives in each jurisdiction:

Community prosecution is not merely influenced by politics; it is politics. The prosecutors who advance it are engaged in the delicate, simultaneous pursuit of electoral politics, public service, and the advancement of the legal profession (Stone and Turner, 1999).

The intent of community prosecution should simply be to get assistant prosecutors out in the community and allow them to think on their feet about neighborhood problems and the degree to which they are situated or legally permitted to address such problems. The concern should be for *the assistant prosecutor's* visibility to grow in the community, not necessarily

the elected prosecutor's own visibility.

One note of caution is in order relevant to the increased visibility and accountability of assistant prosecutors in the community. While the community-based assistants *do* benefit from the cooperation of community members, they should not make promises to the community that they may not be able to deliver. For instance, community members may want to exercise control over sentencing recommendations in exchange for their cooperation in a case. The assistant should be explicit in explaining that prosecutors are constrained by the preexisting legal culture within their jurisdiction—that is, each type of criminal case has a fairly well established price that judges will impose. Community members should not be enabled to commandeer case outcomes or recommendations from the prosecutor's office. Unless state law recognizes community members as victims of crimes of disorder and allows them to make impact statements, for example, the role of the community should be limited to the *initiation* of legal cases and serving as observers at subsequent court proceedings.

CONCLUSION

The key ethical principles in prosecution are legal relevance and impartiality. By focusing on certain crimes in specific geographic regions, community prosecution has the potential to undercut general deterrence and run afoul of these basic ethical principles. However, using the case study of the Multnomah County District Attorney's Neighborhood Based District Attorney Program, a number of ethical dilemmas were illustrated and subsequently resolved. The core strategy involved providing complete geographic coverage of neighborhoods that are susceptible to disorder crimes, monitoring and proactively addressing the complete array of disorder crimes (as opposed to targeting a single crime such as illegal camping), and utilizing the least intrusive measures to achieve the desired results. At the same time, the office continued to apply its traditional sanctioning function to the more serious criminal offenses. As such, separate approaches to low-level and serious offenses were employed. Low-level crimes were addressed proactively by encouraging offenders to behave lawfully. Serious offenses were addressed as they had always been—reactively, with an aim toward deterring future crimes.

Though the Multnomah County initiative had its share of hurdles to overcome, its success in avoiding ethical complaints can be attributed to two factors. First, the aim of the elected prosecutor was not primarily political; he was fairly secure in his office and had a long-established reputation as a public servant. Second, the District Attorney's Office did not seek to use its community prosecution function as an investigative tool. By maintaining legal relevance and impartiality, and by adhering to strict due process considerations, all prosecutors' offices choosing to engage in community-based prosecution can maintain the highest ethical standards that are required when representing the people and seeking justice.

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RESOURCES AND WEB SITES

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Room 600

Portland, OR 97204

(503) 988-3369

<http://www2.co.multnomah.or.us/da/ndap/>

The following National Center for Community Prosecution publications are available at www.ndaa-apri.org:

Community Prosecution Implementation Manual

Community Prosecution Planning and Implementation Workbook

The Changing Nature of Prosecution: Community Prosecution vs. Traditional Prosecution Approaches

What Does it Mean to Practice Community Prosecution? Organizational, Functional and Philosophical Changes

Juvenile Delinquency and Community Prosecution: New Strategies for Old Problems

Web Sites

National Center for Community Prosecution

[http://www.ndaa-](http://www.ndaa-apri.org)

[apri.org/apri/programs/community_pros/cp_home.html](http://www.ndaa-apri.org/apri/programs/community_pros/cp_home.html)

National Institute of Justice

<http://www.ojp.usdoj.gov/nij/>

Bureau of Justice Assistance

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