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## CRIMINAL LAW

# AN UNHOLY ALLIANCE: PERCEPTIONS OF INFLUENCE IN INSURANCE FRAUD PROSECUTIONS AND THE NEED FOR REAL SAFEGUARDS

AVIVA ABRAMOVSKY\*

*This Article examines the working relationship between the insurance industry and prosecutors in the insurance fraud prosecution context. Both informal and legislatively mandated relationships are examined and funding schemes reviewed. The Article argues that specialized funding of investigators and prosecutors by industry assessment has led to perceptions of industry influence on the impartiality of the prosecutor. The Article then reviews the capacity of perceived influence to chill tort plaintiff lawyer activity. The Article concludes that the potential for conflict exists and is sufficient to warrant due process consideration. Additionally, the Article offers suggestions for potential prophylactic procedural safeguards in the course of prosecuting lawyers for their representative actions in the insurance fraud context.*

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## I. INTRODUCTION

For the past three decades, most state legislatures<sup>1</sup> have enacted<sup>2</sup> criminal statutes specifically targeted at deterring insurance fraud.<sup>3</sup> Unlike most criminal statutes, these insurance fraud laws not only delineate the unlawful conduct sought to be deterred, but also generally restrict the scope of potential victims to insurance carriers.<sup>4</sup> The expressed intent of the new

<sup>1</sup> Not coincidentally, insurance companies are a major lobbying presence in state capitals. See John Dunbar, Ctr. for Pub. Integrity, "Big Insurance" Industry Dominates State Legislatures, Oct. 12, 2000, <http://www.publicintegrity.org/report.aspx?aid=462> (reporting that there are 1972 insurance companies or associations that lobby state legislatures, or one lobbying interest per every three state lawmakers). Reflecting industry interest in insurance fraud prosecutions, industry organizations monitor the budgets, staffing, referral, and conviction rates of the various state Insurance Fraud Bureaus. See, e.g., COALITION AGAINST INSURANCE FRAUD, STATE INSURANCE FRAUD BUREAUS: A PROGRESS REPORT: 2001 TO 2006 (2007), available at [www.insurancefraud.org/downloads/fraudbureaureport06.pdf](http://www.insurancefraud.org/downloads/fraudbureaureport06.pdf).

<sup>2</sup> Forty-eight states and the District of Columbia have passed some form of criminal insurance fraud statute. See Insurance Information Institute, Issues Update, Feb. 2008, <http://www.iii.org/media/hottopics/insurance/fraud>. All forty-eight states with particularized insurance fraud statutes make the filing of a false claim with an insurance company a crime. See *id.* Only two states—Oregon and Virginia—have not. See *id.* Oregon has a criminal insurance fraud statute pending in its legislature. See H.R. 3162, 74th Sess. (Ore. 2007), available at [www.leg.state.or.us/07reg/measpdf/hb3100.dir/hb3162.intro.pdf](http://www.leg.state.or.us/07reg/measpdf/hb3100.dir/hb3162.intro.pdf).

Those forty-eight states with various criminal insurance fraud statutes likewise have various forms of immunity laws passed in relation to these fraud statutes which limit civil actions otherwise likely available to policyholders for actions based on the release of their claims information. See Insurance Information Institute, *supra*. The Insurance Information Institute explains the importance of immunity laws as follows:

Privacy laws protect the rights of policyholders and claimants against the release of information considered confidential. However, to successfully bring a case to trial, insurers must be able to provide information to prosecutors on individuals suspected of fraud. Immunity laws that allow insurance companies to report information without fear of criminal or civil prosecution now exist in all states, but . . . many are limited.

*Id.*

<sup>3</sup> See, e.g., FLA. STAT. § 817.234(1) (1987), which states in pertinent part,

(1)(a) A person commits insurance fraud . . . if that person, with the intent to injure, defraud or deceive any insurer . . . (2) Prepares or makes any written or oral statement that is intended to be presented to any insurance company in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim . . . is guilty of a felony in the third degree.

<sup>4</sup> Some statutes define the potential victim class slightly more broadly to include the state or local governments and self-insurance and other commercial programs. See, e.g., N.Y. PENAL LAW § 176.05 (Consol. 2007). Insurance fraud is defined as:

1. A fraudulent insurance act is committed by any person who, knowingly and with intent to defraud presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer, self insurer, or purported insurer, or purported self insurer, or any agent thereof, any written statement as part of, or in support of, an application for the issuance of, or the rating of a commercial insurance policy, or certificate or evidence of self insurance for

legislation was to provide a specific vehicle for the prosecution of those who attempted to or actually filed false, fraudulent, or exaggerated claims with their insurance companies.<sup>5</sup> In addition to deterring future offenders, legislators hoped that these statutes would result in a public benefit of smaller insurance premiums.<sup>6</sup>

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commercial insurance or commercial self insurance, or a claim for payment or other benefit pursuant to an insurance policy or self insurance program for commercial or personal insurance which he knows to: (i) contain materially false information concerning any fact material thereto; or (ii) conceal, for the purpose of misleading, information concerning any fact material thereto.

*Id.*

<sup>5</sup> Efficiency in the prosecution of insurance fraud crimes is among the avowed express interests of legislatures in enacting specific insurance fraud statutes. See, for example, Findings, Declarations Relative to Insurance Fraud, N.J. STAT. ANN. § 2C:21-4.4 (West 2008), which states:

[T]he Legislature finds and declares:

- a. Insurance fraud is inimical to public safety, welfare and order within the State of New Jersey. Insurance fraud is pervasive and expensive, costing consumers and businesses millions of dollars in direct and indirect losses each year. Insurance fraud increases insurance premiums, to the detriment of individual policyholders, small businesses, large corporations and governmental entities. All New Jerseyans ultimately bear the societal burdens and costs caused by those who commit insurance fraud.
- b. The problem of insurance fraud must be confronted aggressively by facilitating the detection, investigation and prosecution of such misconduct, as well as by reducing its occurrence and achieving deterrence through the implementation of measures that more precisely target specific conduct constituting insurance fraud.
- c. To enable more efficient prosecution of criminally culpable persons who knowingly commit or assist or conspire with others in committing fraud against insurance companies, it is necessary to establish a crime of “insurance fraud” to directly and comprehensively criminalize this type of harmful conduct, with substantial criminal penalties to punish wrongdoers and to appropriately deter others from such illicit activity.
- d. In addition to criminal penalties, in order to maintain the public trust and ensure the integrity of professional licensees and certificate-holders who by virtue of their professions are involved in insurance transactions, it is appropriate to provide civil remedial provisions governing license or certificate forfeiture and suspension tailored to this new crime of insurance fraud and other criminal insurance-related activities.
- e. To enhance the State’s ability to detect insurance fraud, which will lead to more productive investigations and, ultimately, more successful criminal prosecutions, it is appropriate to provide members of the public with significant incentives to come forward when they may have reasonable suspicions or knowledge of a person or persons committing insurance fraud. The establishment of an Insurance Fraud Detection Reward Program will enable the Insurance Fraud Prosecutor to obtain information which may lead to the arrest, prosecution and conviction of persons or entities who have committed insurance-related fraud.

<sup>6</sup> See *id.* The stakes are undoubtedly high: insurance is a multi-trillion-dollar industry. See *U.S. Securities and Insurance Industries: Keeping the Promise, Hearing of the House Fin. Serv. Comm.*, 107th Cong. 61 (2001) (quoting a release from the National Association of Insurance Commissioners stating that the industry “is an \$850 billion industry with assets of over \$3 trillion”). To put that number in perspective, in 2002, Swiss banks were estimated to have \$2.3 trillion under management. See David G. Stebing, *Insurance*

Financial fraud prosecutions are complex and frequently expensive, with all jurisdictions dedicating substantial resources to combating white collar crime. Unlike most other criminal prosecutions, insurance fraud prosecutions are increasingly being brought by prosecutors funded separately from the state's general revenues. These prosecutors' salaries are either entirely or in large part paid by monies obtained by direct assessments on the insurance industry.<sup>7</sup> The adoption of this prosecution

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*Regulation in Alaska: Healthy Exercise of a State Prerogative*, 10 ALASKA L. REV. 279, 281 (1993) ("Insurance companies and related service industries, including brokers, agents and adjusters, employ nearly 2.5 million persons. The insurance industry accounts for nearly \$100 billion of the gross national product ('GNP') of the United States, with insurance premiums alone accounting for more than seven percent of the GNP."). In addition to handling large sums of money, the insurance industry is extremely profitable. See Peter G. Gosselin, *Insurers Saw Record Gains in Year of Catastrophic Loss*, L.A. TIMES, Apr. 5, 2006, at A1 ("The companies that provide Americans with their homeowners and auto insurance made a record \$44.8 billion profit last year even after accounting for the claims of policyholders wiped out by Hurricane Katrina and the other big storms of 2005, according to the firms' filings with state regulators."). Moreover, insurance is ubiquitous. See Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 CONN. INS. L.J. 11, 26 (1999) ("The existence of insurance as a fundamental and ubiquitous aspect of both commercial and personal life means that an organized system of help is also something people take for granted, even if they do not think terribly hard about or even understand the way insurance is organized.").

<sup>7</sup> Insurance industry funding for different aspects of an insurance fraud investigation and prosecution occurs in a variety of different ways. Many states legislatively mandate an assessment on the insurance industry doing business in their states, using a variety of different formulae. Likewise, the proceeds of these assessments are distributed amongst investigators and prosecutors according to different state-specific systems. For example, Pennsylvania assesses insurance companies based on the amount of business they conduct in the state, and the proceeds are placed in a fund that is disbursed to prosecutors for use in insurance fraud prosecutions. See 40 PA. STAT. ANN. § 325.23(c) (2007). The assessed funds are kept separate from general revenue and their use is restricted to the Insurance Fraud Prevention authority. See *id.* § 325.23(b). Similarly, in Nevada, insurers are assessed in proportion to the premiums they charge in the state to support units established in the Office of the Attorney General that investigate and prosecute persons who commit insurance fraud. See NEV. REV. STAT. § 679B.700 (2007). The Nevada assessed funds, even if unused at the end of the fiscal year, never become part of the state's general funds. See *id.* In New Jersey, the Division of Insurance Fraud is empowered to investigate allegations of insurance fraud and refer any possible criminal activity to the Attorney General. See N.J. STAT. ANN. § 17:33A-1 to A-30 (2007). The cost of the Division is borne by the insurance companies themselves based on a proportion of the premiums received by each insurance company in the State. See N.J. STAT. ANN. § 17:33A-8(g).

Some states seem primarily interested in regulating automobile insurance fraud. California, for example, assesses all automobile insurance companies "doing business in that state." See CAL. INS. CODE § 1872.8(a) (2007). Fifty-one percent of those funds are then allocated for distribution to district attorneys for investigation and prosecution of automobile insurance fraud cases. *Id.* (stating that California assesses automobile insurers up to \$1.00 per insured vehicle per year). Likewise, Rhode Island has an Office of Automobile Theft and Insurance Fraud, which investigates and prosecutes all forms of automobile insurance

funding method allows insurance fraud prosecution programs to exhibit the most comprehensive presence of any private industry in the enforcement of relevant criminal laws.<sup>8</sup>

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fraud. R.I. GEN. LAWS § 31-50-1(b) (2007). The Office is funded by the insurance companies that do business in the State in the amount of \$1.00 per vehicle insured. *Id.* § 31-50-4.

Private, voluntary industry groups also offer financial support as investigators and have picked up various prosecutorial costs in specific cases. *See* discussion of the Informal Alliance *infra* Part III.B. In quite a few states, individual companies are frequently legislatively mandated to create and fund internal “special investigation units” to investigate possible frauds within their companies. *See* N.Y. INS. LAW § 409 (McKinney 2008).

Fraud prevention plans and special investigations units:

(a) Every insurer writing private or commercial automobile insurance, workers’ compensation insurance, or individual, group or blanket accident and health insurance policies issued or issued for delivery in this state, except for insurers that write less than three thousand of such policies, issued or issued for delivery in this state annually, and every entity licensed pursuant to article forty-four of the public health law except those entities with an enrolled population of less than sixty thousand persons in the aggregate and, except those entities licensed pursuant to sections forty-four hundred three-a, forty-four hundred three-c, forty-four hundred-d, forty-four hundred three-f and forty-four hundred eight-a of the public health law shall, within one hundred twenty days of the effective date of this amended section to be promulgated by the superintendent to implement this section, file with the superintendent a plan for the detection, investigation and prevention of fraudulent insurance activities in this state and those fraudulent insurance activities affecting policies issued or issued for delivery in this state. The superintendent may accept programs and processes implemented pursuant to section forty-four hundred fourteen of the public health law as satisfying the obligations of this section and regulations promulgated thereunder.

(b)(1) The plan shall provide the time and manner in which such plan shall be implemented, including provisions for a full-time special investigations unit and staffing levels within such unit. Such unit shall be separate from the underwriting or claims functions of an insurer, and shall be responsible for investigating information on or cases of suspected fraudulent activity and for effectively implementing fraud prevention and reduction activities pursuant to the plan filed with the superintendent. An insurer shall include in such plan staffing levels and allocations of resources in such full-time special investigations unit as may be necessary and appropriate for the proper implementation of the plan and approval of such plan pursuant to subsection (d) of this section.

(2) In lieu of a special investigations unit, an insurer may contract with a provider of services related to the investigation of information on or cases of suspected fraudulent activities; provided, however, that an insurer which opts for contracting with a separate provider of services, shall provide to the superintendent a detailed plan therefor, pursuant to requirements set forth in regulation by the superintendent.

*Id.*

<sup>8</sup> Private financing of aspects of a criminal prosecution, including assisting with investigations, has been subject to both judicial and scholarly criticism. *See* Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 687-707 (1997). Private financial assistance from insurance companies to assist in effectuating insurance fraud prosecutions seems to have occurred initially on a strictly voluntary basis. *See id.* at 668.

The enforcement of the criminal laws is a public trust.<sup>9</sup> It is generally accepted that criminal defendants are entitled to a certain amount of neutrality and disinterestedness on the part of the prosecutor, particularly as a part of defendant's right to a fair trial.<sup>10</sup> The prosecutor's office is seen as representing the people, and the office seeks justice within the confines of governmental impartiality.<sup>11</sup> As such, it is important to examine these new institutionalized structures and their entwinement with private interests as potential sources of risk to that notion of impartial justice.<sup>12</sup>

Moreover, the consequences of even a perception of improper influence on fraud prosecutions implicate other relevant policy considerations. The existence of statutory schemes which offer even the reasonable inference of injustice, such as perceptions of conflicts of interests, may themselves have undesirable consequences.<sup>13</sup> Attorneys have

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<sup>9</sup> See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) ("Prosecutors . . . must serve the public interest.").

<sup>10</sup> For an excellent and comprehensive discussion on the positive and normative concepts of prosecutorial neutrality, see Bruce Green & Fred Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 850-52 (2004).

<sup>11</sup> Frequently, neutrality is seen to require some sense of impartiality and sense that justice has been done. See *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."); *Jones v. Richards*, 776 F.2d 1244, 1247 (4th Cir. 1985) (noting that a criminal defendant is entitled "to an impartial prosecutor, who can make an unbiased use of all options available"); *People v. Eubanks*, 927 P.2d 310, 315 (Cal. 1996) (noting that "the nature of the impartiality required of the public prosecutor follows from the prosecutor's role as a representative of the People as a body, rather than as individuals"); MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008) ("[A] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice.").

Though the courts appear to recognize impermissible prosecutorial behavior when required, they have had trouble articulating a recognizable standard for its breach. See, e.g., *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) ("It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing defendants to justice with the respect to the crime with which he is charged.").

<sup>12</sup> In terms of Madisonian constitutionalism, all legitimacy of government is dependant upon freedom from interested factions. See Kennedy, *supra* note 8, at n.161 ("For Madisonians, the capture of government power by private interests destroys the legitimacy of government power.") (quoting *The Federalist* No. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961)).

<sup>13</sup> Trial attorney organizations have recognized the likelihood that the perception of improper influence may arise from prosecutions in these industry-funded prosecutor situations. See *infra* Part III.C (discussing ATLA Brief). Moreover, such systems implicate society's interest in equality of access to justice. Kennedy, *supra* note 8, at 707 ("To the extent that these additional prosecutions are the product of preferential access to justice for

been criminally prosecuted under these systems for actions undertaken during civil cases adverse to insurance industry financial interests.<sup>14</sup> Such prosecutions, without sufficient prophylactic safeguards, may result in chilling the representation available to claimants and implicate issues of zealous advocacy.<sup>15</sup>

It is well understood that the threat of criminal prosecution is an effective restriction on the bounds of zealousness. As Professor John C. Coffee has recognized, between the alternatives of engaged advocacy or self-preservation from criminal prosecution, the rational lawyer would not likely risk his liberty in favor of his aspirational duty of zealousness.<sup>16</sup> Fear of a non-neutral or otherwise influenced prosecutor implicates issues beyond the prosecution of any specific criminal defendant.<sup>17</sup> Even the mere appearance of influence and the concomitant perceived increased risk of triggering an unjust prosecution have the capacity to affect the availability and efficacy of legitimate advocacy adversely.<sup>18</sup>

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monied interests, society's interests in the equal treatment of all victims and of all defendants suffer.”).

<sup>14</sup> See, e.g., *State v. Mark Marks, P.A.*, 698 So. 2d 533 (Fla. 1997); see also discussion *infra* Part III.D.

<sup>15</sup> The criminal law plays an important role in the regulation of lawyers, and lawyers are not immune from criminal prosecution. See Bruce A. Green, *The Criminal Prosecution of Lawyers*, 67 *FORDHAM L. REV.* 327, 327 (1998) (noting that “[b]ecause lawyers as a class are neither exempt from the reach of the criminal law nor immune from criminal prosecution, the criminal law plays a significant role in regulating lawyers”). However, scholars have argued that, in prosecutions of lawyers for crimes alleged to have been conducted as part of their professional conduct, the courts “should take certain procedural steps to guard against possible prosecutorial misuse of the criminal law and against criminalizing socially desirable and professionally accepted lawyer conduct.” Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 *VAL. U. L. REV.* 73, 76 (2001). Wolfram concludes that a reasonable manner for alleviating some of the conflict of prosecution for professional conduct could be accomplished by “placing on the prosecution the burden of proving that the conduct of the lawyer-defendant in every such case was insupportable as a proper exercise of the lawyer’s function.” *Id.* at 76.

<sup>16</sup> See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 *YALE L.J.* 1875, 1879 (1992) (“[I]f ethical standards of bar associations and other private groups were regularly criminalized, it would not take long before these groups began to self-insure by adopting less aspirational standards.”).

<sup>17</sup> An unjust or unsuccessful criminal prosecution can, however, advance a victim’s interests. See Kennedy, *supra* note 8, at 702-03 (“To the degree that the mere filing of a criminal accusation by the government against an innocent party is enough to confer benefits on a victim, the victim’s interest in seeing the prosecution pressed can directly conflict with society’s interest in prosecuting only the guilty.”).

<sup>18</sup> The cost/benefit analysis of criminal prosecution frequently fails to take into account the cost of deterring legitimate activities. Professor John C. Coffee explained some elements for consideration when making this calculus:



Those familiar with the relationship between tort law and insurance<sup>19</sup> have long understood the insurance industry's financial interest in the cost of tort recoveries<sup>20</sup> and the relationship of those costs to claimants' legal representation. Plaintiffs' lawyer advocacy is strongly correlated with an adverse effect on insurance industry financial interests.<sup>21</sup> If lawyers are deterred from representing clients against the insurance industry, the implications for the tort system and clients are extensive. Moreover, as some members of the trial bar have recognized, the actual motivation of a prosecution is irrelevant to that prosecution's ability to chill advocacy.<sup>22</sup> To

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To be sure, some may justify pervasive use of criminal sanction based on simple cost/benefit reasoning: the loss to those imprisoned is less than the harm thereby averted through specific and general deterrence. Yet this analysis depends on a myopic social cost accounting. Even if the deterrent effect gained under such a system of enforcement exceeded the penalties actually imposed, additional costs need to be considered, including the fear and anxiety imposed on risk-averse individuals forced to live under the constant threat of draconian penalties. . . . Ultimately, if we measure the success of the criminal law exclusively in terms of the number of crimes prevented, we would wind up, in Herbert Packer's memorable phrase, "creating an environment in which all are safe but none are free."

Coffee, *supra* note 16, at 1881-82.

<sup>19</sup> Insurance industry groups have succeeded in obtaining legislative action through the political process on other financially consequential areas of law reform, such as with their success with "tort reform." See Thomas A. Eaton & Susette M. Talarico, *Testing Two Assumptions About Federalism and Tort Reform*, 14 YALE J. ON REG. 371, 397-98 (1996) (offering empirical evidence on insurance industry effect on legislation with a finding that, for example, "punitive damage-cap legislation is positively associated with insurance industry strength and the proportion of lawyers in the legislature, and negatively associated with the proportion of Democrats in the legislature [which] suggests that state lawmakers are responding more to the political demands of powerful interest groups than to objective assessments of particular local problems").

<sup>20</sup> For tort recovery purposes, there are generally two classes of defendants—those with insufficient assets or who are otherwise judgment proof as a matter of law, and those who are insured. See Stephen G. Gilles, *The Judgment Proof Society*, 63 WASH & LEE L. REV. 603, 613 (2006) ("Americans are the largest consumers of liability insurance . . . spending roughly 2% of GNP."); see also Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1640 n.37 (1994) ("Most individual defendants in common types of tort litigation—including automobile accident litigation—lack significant collectible assets other than their insurance policies.").

<sup>21</sup> See Michael Orey, *In Tough Hands at Allstate*, BUS. WEEK, May 1, 2006, available at [http://www.businessweek.com/magazine/content/06\\_18/b3982072.htm](http://www.businessweek.com/magazine/content/06_18/b3982072.htm). The article describes a McKinsey strategic analysis of attorney effect on claims costs designed for Allstate:

One of the key elements of McKinsey's plan was reducing the number of claimants who turn to attorneys after an accident for help in collecting their insurance. The consultants even forecast what the potential claims in this area would mean for Allstate stock. A 25% drop in attorneys appearing in several categories of cases could add \$1.60 to Allstate's share price.

<sup>22</sup> See, e.g., Brief of the Association of Trial Lawyers of America Amicus Curiae, 1998 WL 35018415 at \*4-5 [hereinafter ATLA Brief]; see also *infra* Part III.C (discussing the brief).

a very great extent, so long as the plaintiffs' bar *perceives* such prosecution as arising from the improper influence of private interests on the actions of a prosecutor, fear of biased prosecution could reasonably be predicted to restrict and inhibit the trial bar's activities.<sup>23</sup> In this context it might truly be said that even the appearance of impropriety is likely sufficient to inhibit advocacy.

This Article will explore the structure of the insurance industry-prosecution alliance ("The Alliance") as it is expressed in various states. Part II will give careful attention to how these institutionalized arrangements increase the risk of improper private influence on public law enforcement decision-making. Part III will explore how the Alliance system may chill legitimate claims and particularly affect the functioning of tort plaintiffs' lawyers in an inappropriate manner. Part IV will explore the Alliance in terms of both a prosecutor's ethical duty of independence as well as a potential due process threat. The final section of the Article will suggest certain prophylactic reforms to attorney prosecutions for professional conduct, since it is unlikely that the Alliance will be dismantled in the near future. The Article concludes with one such suggested procedure.

## II. THE ALLIANCE IN ACTION

The prosecution of criminal offenses requires substantial public funding, and municipalities are often reluctant to provide sufficient tax-funded revenues.<sup>24</sup> Historically, police departments and prosecutorial agencies have not received adequate tax funding to combat the volume of crime that exists in their areas of jurisdiction.<sup>25</sup> Despite a general understanding that insurance fraud is pervasive and costly,<sup>26</sup> insurance fraud

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<sup>23</sup> See ATLA Brief, *supra* note 22, at \*4-5.

<sup>24</sup> See Kennedy, *supra* note 8, at 668 ("Taxes, the traditional means of financing government prosecutions, are seen as politically unpopular.").

<sup>25</sup> See *id.* ("Prosecutors at all levels of government face budget cutbacks . . . . Allowing some sort of private financial contribution arguably helps to close the gap between supply and demand for the prosecution of crime.").

<sup>26</sup> Sociological research finds that the public views insurance fraud as rampant and more prevalent than insurance company denials of valid claims. See Valerie P. Hans & Juliet Dee, *Whiplash: Who's to Blame?*, 68 BROOKLYN L. REV. 1093, 1097 (2003) ("[T]he public believe[s] that . . . fraud among claimants is rampant. Respondents in one national poll estimated which was likely to be more frequent, an insurance company denying a valid claim or a person attempting to bring a fraudulent claim. Over half of the poll respondents thought that an individual was more likely to bring a fraudulent claim.").

cases would likely be an under-prosecuted crime without alternative funding programs.<sup>27</sup>

Insurance fraud is inarguably extremely costly. The losses to insurance companies from insurance fraud have been estimated at \$120 billion per year.<sup>28</sup> The industry estimates that these fraud losses cost the average American family \$300 annually in higher insurance premiums.<sup>29</sup> Hence, industry financing of insurance fraud bureaus is seen as a mutually beneficial investment. For example, the "Mission Statement" of the New Mexico Insurance Fraud Bureau remarks on the willingness of the insurance industry to fund their program, finding the industry "very willing to finance the bureaus, because of the potential return on investment: for every dollar an insurance company spends in support of a bureau, it retains ten dollars that would otherwise be lost to insurance fraud."<sup>30</sup>

#### A. THE ALLIANCE'S FORMS AND FUNDING

Currently, there are three basic models by which the insurance industry and government coordinate and integrate the investigation and prosecution of insurance fraud. The first model, unique to Massachusetts, creates a

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<sup>27</sup> See Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 U. MIAMI L. REV. 907, 910 (1992) (suggesting that in the absence of career prosecutors, most simply "lack the experience, knowledge, or interest to prosecute cases of insurance fraud aggressively").

<sup>28</sup> See Carrie Coolidge, *Dirty Rotten Scoundrels*, FORBES, Oct. 16, 2006 ("[The] National Association of Insurance Commissioners . . . guesses that insurance fraud costs \$120 billion a year in the U.S."); Peter Hull, *Fraud Awareness Week Gets Its Own Expo*, POST & COURIER (Charleston, S.C.), Nov. 6, 2006 ("Insurance fraud costs business and consumers nearly \$120 billion a year, including \$85 billion a year for health care fraud and \$30 billion a year for property and casualty insurance fraud, according to the Insurance Information Institute."); *Suspected Insurance Fraud Ringleader Turns Himself In*, U.S. STATES NEWS, Feb. 14, 2007 ("It is estimated that 80 to 120 billion dollars in the United States is lost to insurance fraud every year.").

<sup>29</sup> The National Insurance Crime Bureau estimates the average American household pays higher insurance rates as a result of company losses from insurance fraud. Insurance Fraud: Understanding the Basics, National Insurance Crime Bureau Fact Sheets, <https://www.nicb.org/cps/rde/xchg/nicb/hs.xml/83.htm> (select "Insurance Fraud") (last visited Mar. 2, 2008). Households likely suffer in other ways; empirical evidence suggests the insurance industry offers lower initial settlements for claims made in areas where the perception of policyholder claims exaggeration is strong. See Keith J. Crocker & Sharon Tennyson, *Insurance Fraud and Optimal Claims Settlement Strategies*, 45 J.L. & ECON. 469 (2002) (finding "convincing support for the notion that insurers adopt claims payment strategies designed to mitigate a claimant's incentives to invest resources in inflating injury claims").

<sup>30</sup> New Mexico Public Regulation Commission, <http://www.nmprc.state.nm.us/consumer.htm> (last visited Mar. 10, 2008).

quasi-governmental agency,<sup>31</sup> a majority of whose directors are appointed by insurance industry associations.<sup>32</sup> Massachusetts's model is also unique in that the two trade industry groups assessed have only a voluntary membership which may choose to contribute additional monies beyond the minimum legislatively assessed upon them.<sup>33</sup> The second model, followed by a majority of states, creates a specialized insurance fraud bureau within the state's Department of Insurance, the Attorney General's Office, or some other governmental agency.<sup>34</sup> The final model, which exists in eight states, consists of a less formalized interaction of the parties due to the nonexistence of a formal insurance fraud bureau. In these jurisdictions, insurance companies or trade organizations provide private investigators to work in tandem with public officials.

### 1. The Massachusetts Model

The Massachusetts legislature statutorily created an entity called the Insurance Fraud Bureau of Massachusetts ("IFB").<sup>35</sup> The IFB is considered

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<sup>31</sup> "Quasi-governmental" is a particularly unclear appellation. Even the United States Court of Appeals for the First Circuit is somewhat unclear about its status. *United States v. Pimental*, 380 F.3d 575, 594 (1st Cir. 2004) ("The IFB straddles the line between a government and a private entity, having attributes of each."). The District Court from which that appeal was taken was not as convinced of even the "quasi" public nature of the Massachusetts IFB. *See United States v. Pimental*, 199 F.R.D. 28, 33 (D. Mass. 2001) (concluding that "the IFB inhabits a region of the private/public spectrum that is much closer to a purely private agency"). The First Circuit, however, seemed to be swayed by its determination that IFB funding as more appropriately "akin to a state-mandated tax on insurance companies than a voluntary expenditure by private entities." *Pimental*, 380 F.3d at 593.

<sup>32</sup> The mixed nature of the Board of Directors along with the requirement that the IFB offer biannual reports sufficient for government oversight is undoubtedly part of the source of its "quasi-governmental" status. Review of the First Circuit's description of the agency in *Pimental* is useful. *See Pimental*, 380 F.3d at 592-94.

<sup>33</sup> *See MASS. GEN. LAWS ch. 427, § 13* (1996). The Massachusetts IFB is unique in that it only assesses two Massachusetts insurance associations with voluntary membership, the Automobile Insurance Bureau and the Workers' Compensation Rating and Inspection Bureau. *Id.* Also unique to the Massachusetts IFB, a minimum contribution of the two rating bureaus is mandated by statute, but the rating bureaus may increase their contribution at their discretion. *Id.* Portions of the assessments—and contributions, if any—fund the investigatory and prosecutorial actions of the Insurance Fraud Division of the Attorney General's Office. *Id.*

<sup>34</sup> Most states mandate assessments on all insurers doing a certain amount of business in the state. *See supra* note 7.

<sup>35</sup> *See MASS. GEN. LAWS ch. 427, § 13* (1996). The IFB website describes the agency as follows:

The Insurance Fraud Bureau of Massachusetts is a unique and multifaceted investigative agency dedicated to the systematic elimination of fraudulent insurance transactions. Authorized by an

by courts to be a “quasi-governmental” agency.<sup>36</sup> It employs approximately thirty full-time investigators.<sup>37</sup>

The IFB is not a pure governmental agency, in the sense that the majority of its Board of Directors are not public officials<sup>38</sup> and it is funded by a special assessment rather than general revenues.<sup>39</sup> IFB funds derive from the assessment on two insurance company trade associations in which membership is voluntary. These two associations each provide five of the IFB Board’s directors, for a total of ten of the fifteen members of the Board, with the remaining five being public officials. The IFB’s purpose is to investigate allegations of insurance fraud referred to it and, when appropriate, refer these allegations to various prosecutorial offices for further action.

The method through which the IFB receives its cases is also noteworthy. The vast majority of its cases are acquired by direct referral from insurance companies who are statutorily obligated to advise the IFB of their suspicions whenever they “have reason to believe” that an insurance transaction may be fraudulent.<sup>40</sup> Once the IFB receives a referral from

Act of the Massachusetts Legislature and signed into law in 1990, the Insurance Fraud Bureau undertakes cases for investigation and preparation for criminal prosecution.

The Bureau is wholly funded by the insurance industry in Massachusetts. In addition to investigators, the I.F.B. has a research division, a legal division and an administrative division.

Insurance Fraud Bureau personnel work with insurance companies’ claim and investigative staffs, local, state and federal police departments and agencies in other states to accomplish our mission of *prevention, investigation and prosecution* of fraudulent insurance activity.

Overview, Insurance Fraud Bureau, <http://www.ifb.org/overview.htm> (last visited Mar. 2, 2008) (emphasis in original).

<sup>36</sup> The United States Court of Appeals for the First Circuit has referred to the IFB as a “quasi-governmental” agency with sufficient government interest to allow their access to grand jury materials. *Pimental*, 380 F.3d at 596.

<sup>37</sup> See Overview, Insurance Fraud Bureau, <http://www.ifb.org/overview.htm> (last visited Mar. 2, 2008).

<sup>38</sup> *Pimental*, 380 F.3d at 592. The IFB is subject to state oversight. See *id.* at 593 (“Although only a third of the IFB’s board members are public officials, the IFB’s purpose, organizational scheme, and basic operations are all dictated by statute. And while the IFB’s day-to-day administration within the framework is, in large part, controlled by individuals who are not public officials, it is also subject to the constant oversight of the Massachusetts legislature, to which the IFB must submit a report every six months.”).

<sup>39</sup> See *supra* note 32.

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*Who Must Refer*: Insurance company personnel who have reason to believe that a Massachusetts insurance transaction may be fraudulent, or who have knowledge that a fraudulent transaction is about to take place, or has taken place in Massachusetts, are required by Massachusetts law to report the suspected fraud to the Insurance Fraud Bureau of Massachusetts (IFB).

The IFB Referral Process and Procedures, May 2004, <http://www.ifb.org/REFERRAL%20PROCESS/ref%20process%20internet%20updated.pdf> (last visited Mar. 10, 2008)

either an insurance company or from a call placed to its public “hotline,” it proceeds to investigate the cases under its statutory authority. Case files are created and reviewed, and when the IFB’s executive director “is satisfied that a material fraud, deceit, or intentional misrepresentation has been committed in an insurance transaction, he must refer the matter to the attorney general, the appropriate district attorney or the United States attorney.”<sup>41</sup> The Massachusetts IFB is unquestionably busy. In 2005, for example, it oversaw 3829 cases of suspected insurance fraud,<sup>42</sup> approximately 85% of which emanated directly from insurance companies.<sup>43</sup> Of the cases referred, prosecuting authorities subsequently were given 146 cases of suspected insurance fraud.<sup>44</sup>

In Massachusetts, like other states, the funds acquired by the assessment are not limited to the support of the IFB investigative agency; the statute additionally authorizes and requires that a certain portion of the industry assessment be available to the Massachusetts Attorney General’s Office.<sup>45</sup> According to the implementing legislation, if the Massachusetts Attorney General avails himself of these funds, he must use them on matters referred to his office by the IFB, and he must designate a total of at least thirteen assistant attorneys general to work full-time on these matters.<sup>46</sup> Moreover, the IFB has offered various types of “in-kind support” to these Fraud Division prosecutors<sup>47</sup>:

[W]hile the legislative scheme does not explicitly provide for the transfer of resources, monetary or otherwise, between the IFB and the Fraud Division, the IFB

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(emphasis in original); *see also* 1990 Mass. Acts 380, amended by § 99 of 1991 Mass. Acts 398, and § 13 of 1996 Mass. Acts 427.

<sup>41</sup> *Pimental*, 380 F.3d at 592.

<sup>42</sup> INSURANCE FRAUD BUREAU OF MASSACHUSETTS ANNUAL REPORT 2 (2006), available at [http://www.ifb.org/2006\\_IFB\\_Annual\\_Report.pdf](http://www.ifb.org/2006_IFB_Annual_Report.pdf).

<sup>43</sup> *Id.* at 15. This is a significant departure from the IFB’s first year of operations. *See Commonwealth v. Ellis*, 8 Mass. L. Rptr. 678, at \*13 (Super. Ct. 1998) (“Over the course of its first seven years, the IFB has received approximately 12,863 reports of insurance fraud: 6,566 of these reports came from insurance companies (51% of the total); 5,337 originated from the public (41% of the total).”).

<sup>44</sup> INSURANCE FRAUD BUREAU OF MASSACHUSETTS ANNUAL REPORT, *supra* note 42, at 1.

<sup>45</sup> *See* MASS. GEN. LAWS ch. 427, § 13 (1996); *see also Ellis*, 8 Mass. L. Rptr., at \*21 (explaining the process and noting that “[e]nclosed with the letter [from the Massachusetts Executive Office of Consumer Affairs and Business Regulation] is an invoice for the ‘AGO Assessment,’ to be remitted to the state Division of Insurance. On a quarterly basis, the AIB and WCRIB [the assessed trade organizations] each issue a check, payable to the Commonwealth of Massachusetts. The checks are deposited into the Office of the Attorney General’s subaccount of the General Fund, and are specifically designated for the Fraud Division. The Office of the Attorney General subsequently uses those funds to pay the salary, fringe benefits and indirect costs of the Fraud Division assistant attorneys general”).

<sup>46</sup> MASS. GEN. LAWS ch. 427, § 13 (1996).

<sup>47</sup> *Ellis*, 8 Mass. L. Rptr., at \*23.

has nevertheless provided in-kind support to the Fraud Division by assisting with the investigation of cases assigned for prosecution. This assistance has consisted of obtaining documents, interviewing witnesses, serving subpoenas, providing charts and photographs, and arranging for handwriting and accident reconstruction experts. On occasion, IFB investigators have provided airline tickets or other travel reimbursement for out-of-state witnesses, and the IFB has given the Fraud Division computer software (the "Excel" spreadsheet program) to assist it in tracking cases. As specifically relates to this case, the IFB has reimbursed an assistant attorney general for his purchase of a "Seagate" hard drive, has provided blank computer back-up tapes and an extension cord to assist the Fraud Division in its investigation and search of the computer system at the defendant's law firm, and has paid the bill of the computer expert who assisted in setting up the Ellis & Ellis computer system in preparation for the Commonwealth's search.<sup>48</sup>

Though the IFB may refer their cases to any prosecutor's office, including the United States Attorney or local District Attorney, they refer the vast majority of their cases to the Attorney General's funded prosecutors. In an amicus curiae brief submitted by the American Civil Liberties Union critiquing the Massachusetts IFB financial structure, the ACLU particularly pointed to the availability of restitution only in cases handled by the Attorney General in administrative hearings as an "incentive," which could partially explain the higher referral rate to the Attorney General's office.<sup>49</sup>

In any such novel funding scheme for a prosecutorial office, questions of propriety will inevitably arise. Arguably, a minimum annual assessment or any legislatively mandated scheme lessens the pressure on investigators or prosecutors to become partisans of their funding industry by infusing public authority into the funding program.<sup>50</sup> Clearly, the interests of an IFB office investigator or funded prosecutor are different from those of a purely private investigator or purely private prosecutor. However, a conclusion that public authorization *reduces* the amount of private influence in criminal prosecution vis-à-vis a purely private investigation or prosecution varies significantly from a determination that such system allows for *no influence* or no *improper* influence. Moreover, to determine the potential for prosecutorial bias, an analysis of the influence such funding has on IFB investigators, as well as prosecutors, must be included in any legitimate inquiry into the risks such system poses to prosecutorial neutrality and, importantly, the public perception of that risk.<sup>51</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> Brief of Amici Curiae Public Citizen, American Civil Liberties Union of Massachusetts, and Common Cause of Massachusetts, *Commonwealth v. Ellis*, No. SJC-07846 (Mass. Nov. 9, 1998) [hereinafter ACLU Brief].

<sup>50</sup> See Kennedy, *supra* note 8, at n.131.

<sup>51</sup> The Massachusetts IFB is not simply some form of complaint screener for the Attorney General's Office; rather, the IFB proactively assists in investigating and

The Alliance funding system in Massachusetts has undergone one significant challenge to date. In *Commonwealth v. Ellis*,<sup>52</sup> the Massachusetts system was challenged by attorney-defendants accused of insurance fraud. Objecting to the funding relationship between the insurance companies, the IFB, and the prosecution, the defendants filed a motion to dismiss the insurance fraud indictments, disqualify prosecuting counsel, or both.<sup>53</sup> In their motion, the defendants contended that the assistant attorneys general prosecuting their state criminal cases were impermissibly biased due to the novel statutory scheme<sup>54</sup> funding the IFB and the Insurance Fraud Division.<sup>55</sup>

After a nonevidentiary hearing, the motion to dismiss was denied by the trial court,<sup>56</sup> and the denial was later affirmed by the Massachusetts Supreme Judicial Court.<sup>57</sup> The latter court concluded that the prosecution had not deprived the defendants of any constitutional right, although a majority of the Court expressed concern that the close relationship between the IFB and the Insurance Fraud Division might be “difficult to justify on policy grounds.”<sup>58</sup>

Subsequently, the attorney-defendants filed a pretrial habeas corpus petition in the United States District Court for the District of Massachusetts.<sup>59</sup> The Federal District Court was markedly unsettled by the unusual relationship between the state and the insurance companies, as it ordered the Commonwealth of Massachusetts to respond to the defendant’s discovery requests and scheduled an evidentiary hearing to take place one month before the state court trial was scheduled to commence.<sup>60</sup> As a result, the Commonwealth filed two successive petitions for extraordinary relief with the First Circuit Court of Appeals, seeking to reverse the district

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prosecuting cases. For instance, the IFB has provided computers to the Attorney General’s office to assist in complex investigations and paid travel fees for accident reconstruction and medical expert witnesses. *Ellis*, 8 Mass. Rptr. at \*23.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Among other unique aspects to the Massachusetts system, the implementing legislation allows for the insurance industry associations to *voluntarily* increase their contributions to the system. *See supra* note 26.

<sup>55</sup> *Ellis*, 8 Mass. Rptr. at \*23

<sup>56</sup> *Id.*

<sup>57</sup> *Commonwealth v. Ellis*, 708 N.E.2d 644 (Mass. 1999).

<sup>58</sup> *Id.* at 654.

<sup>59</sup> *In re Justices of the Super. Ct. Dep’t of the Mass. Trial Ct.*, 218 F.3d 11 (1st Cir. 2000).

<sup>60</sup> *Id.* at 14. In a second order, the district court also denied motions by the IFB and the Commonwealth to quash defendant’s requests to depose four IFB board members. *Id.* at 15.



court's order and quash depositions of four IFB Board members.<sup>61</sup> The Commonwealth maintained that the pretrial habeas proceedings in federal court unduly interfered with the ongoing criminal proceeding in the state trial court. While the First Circuit abstained in favor of the pending state prosecution,<sup>62</sup> it took the extraordinary step of issuing a writ of advisory mandamus,<sup>63</sup> instructing the district court to dismiss the defendant's habeas petition without prejudice.<sup>64</sup>

Although the First Circuit denied a full discovery process allowing clarification of the IFB's relationship to the Massachusetts Attorney General's Office, this case reveals how this arrangement will engender concern throughout the country. As the First Circuit itself noted, even the concept of granting federal habeas relief for a "disinterested prosecutor" claim was an issue of first impression.<sup>65</sup> Inevitably, as each state expands its relationship with private industries as part of their ongoing prosecutorial process, these arrangements will come under varying forms of constitutional scrutiny.

## 2. The Majority Model

Most states do not follow the Massachusetts model of having a special private or minimally "quasi-public" insurance fraud bureau. Instead, the majority of states place their insurance fraud unit within existing governmental departments,<sup>66</sup> frequently either as a division of the state's regulatory Department of Insurance or within the Attorney General's Office.

Currently, there are forty-seven "majority model" fraud bureaus in thirty-nine states.<sup>67</sup> In these jurisdictions, just as in Massachusetts, the

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<sup>61</sup> *Id.* at 14-15.

<sup>62</sup> *Id.* at 21.

<sup>63</sup> *Id.* at 13-15 (discussing the distinction between supervisory and advisory mandamus and its appropriateness in this context). The First Circuit sought to express the extraordinary nature of its decision from the outset, stating that "we determine that this case poses an issue of such importance, and one so elemental to the proper role of the federal judiciary in our constitutional scheme, as to warrant the issuance of an advisory mandamus granting the requested relief." *Id.* at 13.

<sup>64</sup> *Id.* at 22.

<sup>65</sup> *Id.* at 16.

<sup>66</sup> Louisiana, for instance, integrated its insurance fraud unit within its state police force. Despite its unusual location, the office works much the same as those offices housed within Departments of Insurance or as in the Massachusetts model, with 62% of its referrals received from insurance carriers. LA. DEP'T OF INS., STATE OF LA., PLAN OF OPERATION FOR THE LOUISIANA AUTO THEFT AND INSURANCE FRAUD PREVENTION AUTHORITY (2004), available at [http://www.lidi.state.la.us/Documents/Legal\\_Services/LATIFPA/Plan\\_of\\_Operation\\_for\\_LATIFPA.pdf](http://www.lidi.state.la.us/Documents/Legal_Services/LATIFPA/Plan_of_Operation_for_LATIFPA.pdf).

<sup>67</sup> See COALITION AGAINST INSURANCE FRAUD, *supra* note 1, at 3, 10.

insurance companies refer suspected cases of insurance fraud to state insurance fraud bureaus, which in turn investigate the cases and refer a percentage to state prosecutorial authorities. Since these fraud bureaus typically function under the auspices of some state agency, they are often imbued with law enforcement powers and their agents may execute search warrants<sup>68</sup> and carry weapons.<sup>69</sup> In 2003, over 125,000 cases were referred by insurers to these various state bureaus for the investigation of potential insurance fraud.<sup>70</sup>

The large number of referrals is not surprising given most states have a legislatively mandated referral process. In New York, for example, just as in Massachusetts, insurance companies are required by law to submit any suspected cases of insurance fraud to the Bureau.<sup>71</sup> Moreover, New York law requires insurance companies that conduct business in the state to maintain Special Investigation Units internally for the purpose of investigating suspected fraudulent activity.<sup>72</sup> Thus, in 2006, the New York Insurance Fraud Bureau received 22,884 reports of suspected insurance fraud, of which 22,158 originated from insurance companies. In turn, the Bureau referred 274 cases to prosecutors.<sup>73</sup>

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<sup>68</sup> See *Commonwealth v. Ellis*, 8 Mass. L. Rptr. 678 (Super. Ct. 1998).

<sup>69</sup> The New York bureau, one of the pioneering agencies of its kind, was created when the state legislature in 1981 established “a team of investigators” to pursue “cases of suspected insurance fraud for criminal prosecutions and civil penalties.” See Frank Orlando, Welcome to the New York Insurance Fraud Bureau 2, <http://www.ins.state.ny.us/acrobat/fdbrch07.pdf> [hereinafter Orlando, Welcome] (last visited Apr. 19, 2008). Its staff investigators, which are required by statute to be “seasoned professionals with years of experience in law enforcement and insurance fraud investigation,” are designated as peace officers under New York law. *Id.* at 3. This authority gives them the ability to carry firearms and effectuate arrests. See N.Y. CRIM. PROC. LAW § 2.10 (McKinney 2007). Interestingly, recent iterations of the IFB have seen these investigators assisting other aspects of the New York Department of Insurance in their insurance *company* regulatory capacity. See Orlando, Welcome, *supra*, at 4 (“For the past several years, members of the Bureau have accompanied the Health Bureau in financial evaluations and the Property/Casualty Bureau on market conduct examinations. The purpose of this assignment is to evaluate insurer compliance with Department regulations and New York Insurance Law.”). New York, however, appears to be unusual in having its Frauds Bureau assist in its regulatory mission.

<sup>70</sup> This is an average of 2500 cases per insurance fraud bureau for 2003. This number is an overwhelming increase from even five years prior, when in 1998 Insurance Fraud Bureaus around the country received over 92,000 referrals about suspected insurance fraud. According to J. Joseph Cohen, director of the Kentucky Insurance Fraud Investigative Division and acting chairman of the National Association of Insurance Commissioners’ anti-fraud task force, 75% of these referrals came directly from insurance companies. See Amanda Levin, *Antifraud Activity Gets Results*, NAT’L UNDERWRITER, Sept. 13, 1999, at 16.

<sup>71</sup> N.Y. INS. LAW § 405 (Consol. 2007).

<sup>72</sup> *Id.* § 409.

<sup>73</sup> INS. DEP’T, STATE OF N.Y., THE ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF NEW YORK ON THE OPERATIONS OF THE INSURANCE FRAUDS

In these majority model jurisdictions, funding of these units by legislatively mandated assessment is common, with varying percentages of the assessed funds allocated to investigators and prosecutors according to the relevant state's statutory code. Some states, like New York, do not have insurance fraud-specific assessment legislation; rather assessments are a source of funding for the entire Department of Insurance, including its regulators.<sup>74</sup> Other states, like Pennsylvania, have their insurance fraud division prosecutors funded entirely by the assessment, with no money coming from the general funds.<sup>75</sup>

Arguably, any version of the majority model safeguards against institutional influence on the criminal justice process to a greater extent than the Massachusetts model, if for no other reason than that their Fraud Bureau directors are public officials. This is particularly so in jurisdictions such as New York which have industry-assessed funds intermingled within overall department budgets. It is tempting to read the likelihood of perceived influence as a direct correlation to the exclusivity of the funding scheme, particularly if our understanding of the public's perception of influence is connected to the overt use of private assets on prosecutorial decision-making. This understanding, however, may be overly simplistic. To the extent influence is the metric for propriety, funding is simply one

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PREVENTION ACT 6 (2006), available at <http://www.ins.state.ny.us/acrobat/fd06ar2g.pdf>. Another fifty-four cases were referred by the Bureau for civil settlement or sent to the Department of Insurance's Office of General Counsel for civil proceedings. *Id.* In a 2006 report, the New York Insurance Fraud Bureau delineated its relationship with state prosecutors as follows: "Under a program initiated in 2003, Frauds Bureau investigators are assigned to prosecutors' offices to work side-by-side with their investigative staff. During 2006 the Bureau had investigators in 11 prosecutors' offices across the State." *Id.* at 20. In addition, the report states that Fraud Bureau agents worked in tandem with the FBI and the U.S. Attorney's Office. *Id.* at 4. In 2001, then-Governor George Pataki appointed the Attorney General as Special Prosecutor for Insurance Fraud. *Id.*

A similar arrangement exists in Florida, where the Division of Insurance Fraud receives over 13,000 case referrals annually, mostly from insurance companies, resulting in approximately 800 arrests each year. In Virginia, insurance companies referred 1638 suspected insurance fraud cases to state authorities in 2005, up from just 200 in 2000. See Iris Taylor, *Fraud Called the "Dark Side" of Insurance*, RICHMOND TIMES DISPATCH (Va.), Mar. 19, 2006, at D1.

<sup>74</sup> Still, even in New York, insurance industry-assessed funds are relevant. New York's Department of Insurance is significantly, though not completely, funded by industry assessment. For example, New York's assessed funds account for a greater proportion of the Department's budget than general tax revenues, and the funding of insurance fraud prosecutors is included in the disbursement of assessed funds. Funding of this office is provided as a sub-allocation of resources from the general Insurance Department Budget. See ALAN HEVESI, N.Y. STATE INS. DEP'T, A REPORT BY THE NEW YORK STATE OFFICE OF THE STATE COMPTROLLER, 2004-S-73 (Mar. 31, 2004), available at <http://www.osc.state.ny.us/audits/allaudits/093005/04s73.pdf>.

<sup>75</sup> See *supra* note 7 and accompanying text.

avenue of inferring the degree of that influence.<sup>76</sup> These systems also create formalized relationships between industry and government personnel with varying levels of financial independence. These structured relationships likewise can be seen as a source of perceived risk on the independence of the prosecutor.

### 3. *The Informal Alliance*

In eight states, including Indiana and Illinois, no dedicated separate Insurance Fraud Bureau is present at the state level.<sup>77</sup> Nevertheless, the Alliance still exists, albeit in a less formal manner.

Where there are no dedicated insurance crime agencies, industry-wide advocacy groups such as the National Insurance Crime Bureau (“NICB”) often step in to fill the gap by conducting initial investigations, referring cases, and offering “expert” assistance to local police and prosecutors.<sup>78</sup> In cases where an NICB complaint results in prosecution, the investigator can often exercise substantial influence on the prosecution of the case.<sup>79</sup> Since the local district attorney and police are likely to lack specialized knowledge of the insurance industry, they may use an NICB liaison to supply that expertise.

## B. THE INFERENCE OF INFLUENCE

### 1. *Inferences of Industry Influence in the Formal Alliance*

The creation of a mandated Massachusetts Alliance has influenced<sup>80</sup> the character<sup>81</sup> and procedure of prosecuting units to a surprising extent.

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<sup>76</sup> This conception of analyzing the entire factual background, including, but not limited to, monies paid, is echoed by the California courts in their interpretation of the application of California’s prosecutorial disqualification standard. *See Hambarian v. Super. Ct. of Orange County*, 44 P.3d 102, 107 (Cal. 2002).

<sup>77</sup> *See COALITION AGAINST INSURANCE FRAUD*, *supra* note 1, at 4.

<sup>78</sup> *See Daniels v. Liberty Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 65896 (N.D. Ind. 2006).

<sup>79</sup> *See discussion of Daniels v. Liberty Mutual infra* Part II.B.2.

<sup>80</sup> When favoritism can reasonably be construed to have occurred as a result of influence on the prosecutor’s individual or office’s institutional decision-making, the notion of equality interests are also implicated. *See Kennedy, supra* note 8, at 674 (“Favoring one victim over another as a result of personal influence violates the other victim’s equality interests.”).

<sup>81</sup> Even in the absence of any other consideration or influence, the ability of an industry to finance prosecution of crimes affecting its financial interests creates an avenue for preferential access to justice. *See id.* at 706 (“Even if private financing does not diminish the access of justice to others, the privately financed victim will enjoy preferential access to justice by virtue of her wealth. A two-tier system of criminal justice would develop in which privately financed cases would enjoy the best experts and services while publicly financed

For instance, in several federal insurance fraud prosecutions arising from Massachusetts IFB investigations, attorneys from the United States Attorney's Office shared grand jury transcripts with IFB personnel.<sup>82</sup> A review of these cases reflects a changing understanding of the nature of these investigators and the application of the grand jury secrecy rule.<sup>83</sup> In one early case, where the Government sought a court order prior to disclosing the grand jury transcripts, the district court held that IFB investigators were private personnel who were not permitted to receive such confidential information.<sup>84</sup> Another district court reached a similar conclusion where prosecutors disclosed grand jury minutes *without* seeking permission and the disclosure was revealed during pretrial discovery.<sup>85</sup> In a subsequent decision, the First Circuit held that rather than being a purely private agency, the IFB was under sufficient state control to render it a hybrid "quasi-governmental" entity.<sup>86</sup> Consequently, depending on the facts of the case and the degree of IFB participation in the investigation, its personnel may be sufficiently "governmental" as to permit disclosure of confidential grand jury materials.<sup>87</sup> As can be seen by this progression of cases, at least Massachusetts courts are becoming more comfortable with expanding the definition of what had once been presumed to be a private investigator<sup>88</sup> to constitute a "public" agent permitted access to grand jury minutes in certain circumstances.<sup>89</sup>

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cases would be left to compete for their share of limited public funds. A rich victim might get a better prosecution than a poor victim. This threat to equality makes no assumption about influence or trade-offs between cases.").

<sup>82</sup> See *United States v. Pimental*, 380 F.3d 575, 596 (1st Cir. 2004); *United States v. McElroy*, 392 F. Supp. 2d 115, 116-17 (D. Mass. 2005); *In re Grand Jury Proceedings*, 158 F. Supp. 2d 96 (D. Mass. 2001).

<sup>83</sup> See FED. R. CRIM. P. 6(e). For an excellent examination of this topic, see Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1 (1996).

<sup>84</sup> *In re Grand Jury Proceedings*, 158 F. Supp. 2d at 118 (holding that the IFB are not "government personnel" and denying release of grand jury information to them).

<sup>85</sup> See *United States v. Pimental*, 199 F.R.D. 28, 34-36 (D. Mass. 2001).

<sup>86</sup> *Pimental*, 380 F.3d at 596-98; see also *McElroy*, 392 F. Supp. 2d at 116-17 ("It is clear that in certain circumstances, an employee or employees of the Massachusetts Insurance Fraud Bureau (IFB) can be granted access to grand jury material as 'government personnel' as provided in Rule 6(e)(3)(A)(ii), Fed. R. Crim. P., but the grant of access for IFB personnel is not automatic.").

<sup>87</sup> See *McElroy*, 392 F. Supp. 2d at 116-17.

<sup>88</sup> See *Pimental*, 199 F.R.D. at 33 ("It is quite obvious that the Supreme Judicial Court never doubted IFB's status as a private, non-governmental agency in *Ellis*. A close reading of *Ellis* discloses that the court presumed the private nature of the IFB throughout its opinion.").

<sup>89</sup> See FED. R. CRIM. P. 6(e).

Because of the confidential nature of grand jury information and the appearance of unfair influence or access, it is troubling that in Massachusetts the majority of the IFB Board consists of private appointees. Even more troubling, however, is that these Massachusetts prosecutors have demonstrably come to view the insurance carriers as sufficiently “client-like”<sup>90</sup> in their relationship with the prosecutor’s office to allow for the perception of inappropriate influence.<sup>91</sup> Phrases like “punish”<sup>92</sup> and “target”<sup>93</sup> were used by trial lawyers’ associations to reflect their perception of the Alliance’s capacity to influence prosecutorial charging to the lawyers’ presumptive detriment.<sup>94</sup>

Additionally, trial lawyers clearly perceive the prosecutors as inappropriately conflicted.<sup>95</sup> Such perception is fairly justified given that, during the *Ellis*<sup>96</sup> litigation, it became apparent that although the privately funded insurance fraud unit of the Attorney General’s office had a statutory mandate to prosecute frauds committed by, as well as against, insurance companies, it had never actually done so when the only victim was a claimant.<sup>97</sup> The Massachusetts Association of Trial Attorneys (“MATA”) specifically noted that the Fraud Division in fact *rejected* “insurer fraud” cases on the ground of perceived conflicts of interest.<sup>98</sup>

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<sup>90</sup> Arrangements such as the Massachusetts model, where prosecutors are funded but are not directly retained or employed by the insurance carriers, have not been established as creating a true attorney-client relationship. If, however, the Massachusetts prosecutors were purely private, their duty of loyalty to their insurance company financier-victims would be clear. A private prosecutor represents both the victim who pays for their services and society at large. See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 584 & n.322 (1994). As such, the private prosecutor is ethically precluded from acting against that individual’s interests or taking an adverse position to him in subsequent litigation. See *United States v. Young*, 481 U.S. 787, 805 (1987).

<sup>91</sup> See *Commonwealth v. Ellis*, 708 N.E.2d 644 (Mass. 1999); ACLU Brief, *supra* note 49, at 21.

<sup>92</sup> ATLA Brief, *supra* note 22, at \*4.

<sup>93</sup> *Id.* at 4-5.

<sup>94</sup> *Id.*

<sup>95</sup> See Brief of Amici Curiae The Massachusetts Academy of Trial Attorneys and The Massachusetts Bar Association, *Commonwealth v. Ellis*, No. SJC-07846 (Mass. December 2, 1998), 1998 WL 35031552, at \*5 [hereinafter MATA Brief] (“The legislation establishes in the Attorney General’s insurance fraud division an institutional conflict of interest which creates—at the very least—the appearance that the financial influence of private parties has permeated the law enforcement process.”).

<sup>96</sup> See *Commonwealth v. Ellis*, 8 Mass. L. Rptr. 678, n.39 (Super. Ct. 1998); see also ACLU Brief, *supra* note 49, at 21

<sup>97</sup> See ACLU Brief, *supra* note 49, at 21.

<sup>98</sup> See MATA Brief, *supra* note 95, at 38 & n.5.

[M]embers of MATA have presented evidence of fraudulent behavior *on behalf of insurers* to the Fraud Division. These MATA members were told by the Fraud Division that they would need to investigate the matter themselves because of a “potential conflict” for the Fraud Division to investigate the matter because of its ties with the IFB.<sup>99</sup>

In fact, when MATA offered evidence of a pattern of fraud committed against policyholders by medical professionals hired by insurance companies to conduct examinations of policyholders in relation to their claims, one of the prosecutors involved in the *Ellis* prosecution “declined to conduct an investigation on the grounds that such an investigation would present a ‘potential conflict.’”<sup>100</sup>

The Fraud Division prosecutors’ decision to decline to investigate allegations of insurer fraud similarly perturbed the Massachusetts ACLU, which noted in its amicus brief that

[a]lthough insurers themselves are listed as potential targets for prosecution, the Fraud Division has never prosecuted a single case against an insurer, or an agent of an insurer, when the only victim was a claimant. As long as insurers are funding the Fraud Division and the IFB, fraud by insurers will remain under, if ever, prosecuted.<sup>101</sup>

Such actions are certainly suggestive. The fact that a Massachusetts Insurance Fraud Division Assistant Attorney General perceived his relationship with the insurance industry as sufficiently close to preclude his investigation of a fraud case does augment the perception that the Massachusetts model creates an untenable conflict of interest situation. For this reason, it was not unreasonable for these trial lawyer associations to infer that such conflicting interest must also be implicated when a Fraud Division prosecutor exercises his discretion in claimant insurance fraud prosecutions. In other words, MATA, the ACLU, and the other *Ellis* amici clearly perceive these conflicting interests as so *systemic* to the institution that disqualification is appropriate even in the *absence* of an actual attorney-client relationship with an insurance carrier.<sup>102</sup> That any

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<sup>99</sup> *Id.* (emphasis in original). The grounds for the prosecutor’s determination of the potential conflict were not given.

<sup>100</sup> *Id.* at 38.

<sup>101</sup> ACLU Brief, *supra* note 49, at 21.

<sup>102</sup> The ethical rules governing prosecutors make it clear that they have a responsibility to the defendant. See MODEL RULES OF PROF’L CONDUCT R. 3.8 (2008) (“[A] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice.”). Moreover, prosecuting a case under such a conflict implicates serious due process concerns. See *Cantrell v. Commonwealth*, 329 S.E.2d 22 (Va. 1985) (“A conflict of interest on the part of the prosecution, in itself, constitutes a denial of defendant’s due process rights.”).

prosecutor would disqualify himself from investigating insurance company fraud as a potential conflict of interest supports such an inference.

An inference of conflicting interests' influence on a prosecutor in the charging phase is particularly problematic because this area of prosecutorial discretion is beyond the criminal justice system's capacity to meaningfully review.<sup>103</sup> Therefore, the Massachusetts prosecutor's refusal to investigate allegations of insurer fraud due to a potential conflict of interest would be particularly troubling to those lawyers most likely to be subjected to IFB scrutiny for their own representation of covered claimants.<sup>104</sup>

In any event, it seems logically inconsistent that circumstances could justify failing to bring fraud cases against insurance companies and yet allow for the recusal of a prosecutor on conflict-of-interest grounds without the obvious perception that some corollary diminution of that office's ability to remain properly impartial exists. Though the Massachusetts courts were unconvinced of this conclusion, it defies credulity that a public prosecutor would identify a potential conflict sufficient to prevent his office from investigating allegations of insurer fraud without at least some indicia of a potential conflict of loyalty existing for the prosecutor when investigating allegations of policyholder insurance fraud.

Though other legislative funding schemes for insurance fraud cases differ among the various states, some analogous inferences could be drawn. Fully "governmental" model states like Pennsylvania are funded in a manner very similar to Massachusetts's.<sup>105</sup> The implementing legislation for the Pennsylvania Insurance Fraud Prevention Authority is specifically designed to keep the assessed monies completely separate from the state's

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<sup>103</sup> See Kennedy, *supra* note 8, at 674 ("The criminal justice system is not structured to protect against partiality of the prosecutor to some private interest because the prosecutor's decisions about whom to prosecute and to what extent to prosecute are not subject to meaningful review.").

<sup>104</sup> The noted lack of disciplinary enforcement of prosecutorial ethics violations may contribute to the urgency of this perception. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001) (reviewing the plethora of applicable ethical and regulatory prosecutorial disciplinary rules and determining that they appear underutilized); see also Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 930-34 (1996) (discussing the role of the prosecutor as "an advocate without a singular client" and "without a singular purpose"); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 626 n.84 (1999) (arguing that a prosecutor's singular client is the state, rather than the victims, police, or any other constituency); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 57 (1991) [hereinafter Zacharias, *Can Prosecutors Do Justice?*] (discussing prosecutors' various constituencies).

<sup>105</sup> See 40 PA. STAT. ANN. § 325.23 (2007).



general revenues.<sup>106</sup> Those monies are held in a restricted trust and are not considered “general revenue of the Commonwealth.”<sup>107</sup> Use of the funds is restricted to “effectuate” only the purposes of the Insurance Fraud Prevention Authority’s implementing legislation.<sup>108</sup> Additionally, in the event of IFPA’s dissolution, such funds remaining in the trust would be returned to the assessed insurance companies, after deducting only the costs to the state in closing down the office.<sup>109</sup> If funding is pertinent to a determination of loyalties,<sup>110</sup> there seems little difference in the Pennsylvania funding system (the restricted funds of which may create a sense of obligation) and the Massachusetts system.

## 2. Industry Influence in the Informal Alliance

Though it is tempting to conclude that the legislative mandate creating formal insurance fraud bureaus is itself the sole source of perceptions of improper influence on the prosecutorial process, the informal Alliance structure suggests otherwise. This is illustrated in *Daniels v. Liberty Mutual Insurance Co.*,<sup>111</sup> which involves a district court’s determination of whether a “NICB” investigator could be considered an “employee of the government” for purposes of the Federal Tort Claims Act.<sup>112</sup> After having been acquitted of criminal charges stemming from alleged insurance fraud, Rick Daniels, a Liberty Mutual policyholder, sued his insurance company and various allied parties for malicious prosecution.<sup>113</sup> Among the lead figures in the underlying prosecution was Joseph Jaskolski, an investigator for the NICB.<sup>114</sup>

The NICB and Jaskolski asked the district court to certify that Jaskolski was acting as an “employee for the government”<sup>115</sup> at the time of the *Daniels* prosecution and hence was entitled to immunity pursuant to the

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<sup>106</sup> The funds are kept in a special trust fund administered by the State Treasurer. *Id.* § 325.23(a). All interest earned from the investment or deposit of monies accumulated in the fund are deposited in the fund for the same use. *Id.*

<sup>107</sup> *Id.* § 325.23(b).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* § 325.23(g).

<sup>110</sup> See *People v. Eubanks*, 927 P.2d 310, 320 (Cal. 1996) (recognizing the ability of financing to create a sense of institutional obligation to the funding party).

<sup>111</sup> *Daniels v. Liberty Mut. Ins. Co.*, No. 2:06CV213, 2006 WL 3239994 (N.D. Ind. 2006).

<sup>112</sup> *Id.* at \*1.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

Federal Employee Litigation Reform and Tort Compensation Act.<sup>116</sup> The evidence proffered by Jaskolski and the NICB in support of this motion revealed that Jaskolski was the primary moving force behind Daniels's investigation and prosecution.<sup>117</sup> Not only did he refer the *Daniels* case to the FBI,<sup>118</sup> but he assisted the FBI agent assigned to the case in conducting the investigation<sup>119</sup> and had access to grand jury information.<sup>120</sup> The government's identification with Jaskolski was so strong that when Daniels sought discovery of grand jury materials, "the Government actually argued that Jaskolski was Government personnel,"<sup>121</sup> who, as such, "must not disclose a matter occurring before the grand jury."<sup>122</sup>

In his affidavit, Jaskolski further attested that he had accompanied FBI Agent Campbell on interviews of witnesses<sup>123</sup> and on-site inspections,<sup>124</sup> assisted in reviewing documents,<sup>125</sup> escorted witnesses at the grand jury proceeding,<sup>126</sup> and assisted the United States Attorney at trial.<sup>127</sup> He further maintained that he acted "under the direct supervision and control"<sup>128</sup> of either the FBI or the United States Attorney in conducting these activities, and hence "did only what [he] was told to do by either Agent Campbell or

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<sup>116</sup> *Id.* at \*11-12. The Federal Employee Litigation Reform and Tort Compensation Act, known as the Westfall Act, amended the Federal Tort Claims Act to extend governmental immunity from liability to federal employees sued for tortious conduct occurring within the scope of their employment. *Id.*

<sup>117</sup> *Id.* at \*4 (explaining that "[t]he NICB received a request from Liberty Mutual Insurance Company to investigate a claim made by Liberty Mutual's insureds, the Daniels. Jaskolski opened a case file, gathered information for three or four weeks, then contacted the Federal Bureau of Investigation ('FBI')").

<sup>118</sup> *Id.* at \*4.

<sup>119</sup> *Id.* at \*4-5 ("Jaskolski described the relationship as a joint investigation with the FBI.").

<sup>120</sup> *Id.* at \*5 (noting the government's relationship with Jaskolski was so close that "the United States Attorney's Office treated Jaskolski as if he fell within the provision of Rule 6(e)(3)(A)(ii) that permits disclosure of grand jury matters to government personnel").

<sup>121</sup> *Id.* at \*16.

<sup>122</sup> *Id.* at \*6 (citing FED. R. CRIM. P. 6(e)(2)(B)). When Daniels requested that grand jury information disclosed to Jaskolski be divulged, Jaskolski opposed the motion, contending that he was "government personnel" for the purposes of Rule 6(e). Although the United States Court of Appeals for the Seventh Circuit declined to decide whether he was or was not "government personnel" for this purpose, the court held that, even if he was not, the government erred in good faith by treating him as such and the information should not be divulged. *Jaskolski v. Daniels*, No. 2:03CV479, 2006 WL 2927593, at \*6 & n.2 (N.D. Ind. Oct. 12, 2006), *aff'd* *Jaskolski v. Daniels*, 427 F.3d 456 (7th Cir. 2005).

<sup>123</sup> *Daniels*, 2006 WL 3239994, at \*8.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at \*9.

<sup>128</sup> *Id.* at \*8.

AUSA Butler, or other FBI agents and U.S. Attorneys.”<sup>129</sup> Regardless of who was nominally controlling whom, however, it is clear that Jaskolski at least had an unusually symbiotic relationship with the FBI and the United States Attorney. For instance, at Daniels’s trial, even though introduced as a representative of the NICB, *he sat at the prosecution table*,<sup>130</sup> retrieved documents for the government,<sup>131</sup> and “considered himself part of the prosecution team.”<sup>132</sup>

Despite Jaskolski’s contentions of FBI and prosecutorial control of his actions, the court concluded he was not entitled to governmental immunity and allowed the suit for malicious prosecution to go forward.<sup>133</sup> In this case, the scope of interaction between the NICB and the prosecution was striking, particularly given there was no formal, legislatively mandated relationship between the NICB and the United States Attorney’s office for the Northern District of Indiana. Thus, inferences of influence can be found even in the absence of a legislatively mandated scheme and any proper conflicts analysis should allow for inquiry and review of non-monetary interactions as part of its appraisal.

### III. THE BIG CHILL: HOW THE ALLIANCE CHILLS THE RIGHTS OF POLICYHOLDERS AND INHIBITS THE LAWYERS WHO REPRESENT THEM

The intertwining of private interests with public functions, as represented by the various forms of the Alliance, requires an examination of its consequences for legitimate claimants and access of those claimants to legal representation.

#### A. A CHILL IS IN THE AIR

Arguably, success for these fraud bureaus should most correctly be measured by their avowed purpose: specific deterrence of fraudulent claims. Massachusetts IFB newsletters, however, seem to reflect that little effort is being made to gauge whether its initiatives have successfully reduced *fraudulent* claims, as opposed to having succeeded in generally deterring all claims-making. Instead, success appears to be measured solely by the

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at \*9. In his affidavit, Jaskolski said that he did not report to anyone at the NICB any information regarding the Daniels investigation or prosecution. *Id.* However, during the time of the Daniels case he did concurrently work on other cases “assigned to him by his supervisor at the NICB.” *Id.* at \*10.

<sup>131</sup> *Id.* at \*9.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at \*21.

metric of reduced claims dollars generally.<sup>134</sup> For example, the Massachusetts IFB published a newsletter entitled *focusFraud* which offered some insights as to its stated and inferred goals. In November 2006, the newsletter contained a story headlined *Good News! Effects of CIFI [Community Insurance Fraud Initiatives] Continue to Impress*, which stated,

The 2005 numbers are in—and the formulation of Community Insurance Fraud Initiatives (CIFI) in eight Massachusetts urban communities continue to have a positive effect on the fight against insurance fraud. For the second year, *available statistics show a major reduction of total claim dollars* and the number of injury claims reported since the initiation of the first CIFI program.<sup>135</sup>

Nor is the IFB unaware that their presence, along with heightened penalties and greater focus on attorneys, is likely responsible for some of this claim level. Among reasons cited by the newsletter for this reduction in claims activity was newly enacted legislation making insurance fraud chargeable as a felony and the passage of an “anti-runner bill” focused on attorney conduct in acquiring clients.<sup>136</sup>

Prosecutors’ statements make it clear that prosecution of attorneys is within the specific purview of these attempts to deter fraud through prosecution, and the possibility of an overbroad deterrent result is given little consideration. For example, highly regarded Philadelphia District Attorney Lynne Abraham stated at a symposium that shortly after the Pennsylvania Insurance Fraud Prevention Authority was created, she had informed the plaintiffs’ bar in her jurisdiction<sup>137</sup> that, though her office was “not interested in prosecuting attorneys,”<sup>138</sup> it *was* interested in “detering attorneys from considering taking any case which has that faint, but unmistakable, odor of fraud, which gets stronger and stronger the closer one digs.”<sup>139</sup>

Abraham also explained that insurance company referrals to the new IFPA could be a benefit to the referring company, as that office represented

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<sup>134</sup> See 13 FOCUSFRAUD 2, Nov. 2006, at 1, *available at* <http://www.ifb.org/FOCUS%20FRAUD/ff%20nov06%20upd.pdf> (“The presence of CIFIs [Community Insurance Fraud Initiatives] in these major urban areas, combined with other contributing factors, have resulted in a decrease in claims of over \$192 million over the past two years. These communities make up only 8% of the population, but represent 55% of the statewide reduction in claims.”).

<sup>135</sup> *See id.* (emphasis added).

<sup>136</sup> *Id.*

<sup>137</sup> Lynne Abraham, *Prosecution of Insurance Fraud in Philadelphia—A New Paradigm*, 41 N.Y.L. SCH. L. REV. 501 (1997).

<sup>138</sup> *Id.* at 505.

<sup>139</sup> *Id.*

“the best opportunity for a company to make a financial recovery.”<sup>140</sup> She pointed out that her office “use[s] not only our own criminal capacities, which are unavailable to insurance companies—for example, court ordered wiretap and electronic surveillance,”<sup>141</sup> but also the “the possibility of asset forfeiture, civil in rem and criminal in personam proceedings.”<sup>142</sup>

District Attorney Abraham’s sentiments, while legitimate, are somewhat problematic in their unmistakable implications for the trial bar. While attorneys are by no means immune from criminal prosecution, nor should they be, the tone of this speech offered implications beyond a reminder that lawyers are also subject to the law. A case that has the “unmistakable odor of fraud” to an insurance investigator or prosecutor might in fact be perfectly legitimate. By informing plaintiffs’ attorneys that they should avoid “considering” cases that bear even a “faint” odor of fraud or even, for that matter, seek to deter lawyers from considering taking a case with a strong odor of fraud, there is the clear implication that their judgments as to the credibility of their client’s claim must be made in consideration of heightened personal criminal consequence. Though such prosecutorial consequence always existed if a lawyer were to engage in criminal conduct, what warrants concern is the fact that such statements could easily be construed as prosecutorial comfort with over-deterrence.<sup>143</sup> Though an attorney’s innocence might well be determined by the end of investigation or trial, in the absence of other safeguards, a reasonable attorney could well be inhibited from taking cases which would fall within the purview of the IFPA office as a sheer exercise in personal prudence. When such decision is weighed alongside cases like *Ellis* or the infamous *Marks* case, discussed *infra*, such prudence, though detrimental to client access to representation, appears quite justified.

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<sup>140</sup> *Id.* at 503.

<sup>141</sup> *Id.* at 504.

<sup>142</sup> *Id.*

<sup>143</sup> It is important to remember that the prosecutor’s power is immense. Justice Jackson, perhaps the most famous prosecutor at Nuremberg, explained as follows:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated . . . [H]e can order arrests, present cases to the grand jury in secret session, and on the basis of his one sided representation of the facts, can cause citizens to be indicted and held for trial . . . While the prosecutor at his best is one of the most beneficent forces in society, when he acts from malice or other base motives, he is one of the worst.

Robert H. Jackson, *The Federal Prosecutor*, in *ETHICAL CONSIDERATIONS IN PROSECUTION* 4 (John J. Douglass ed., 1977).

## B. CHILLED POLICYHOLDERS

Upon review of the criteria which the insurance industry uses to identify potentially fraudulent claims, it becomes apparent that many non-fraudulent claimants would be disinclined to seek indemnity for fear of triggering a criminal investigation. In effect, a sufficiently expansive standard for identifying fraudulent claims creates a chilling effect on claims-making.

“The concept of a ‘chilling effect’ . . . describes the situation where persons whose expression is protected are deterred from exercising their rights by the existence of an overly broad statute.”<sup>144</sup> Although the “chilling effect” doctrine is most often applied in the context of free speech, there is a recognized equal danger that a “perceived alliance between business and the district attorney’s office” could chill other legitimate rights, such as the making of insurance claims.<sup>145</sup> Scholars have noted that even the *perception* of an alliance may result in not only fraudulent claims being deterred, but in deterrence of legitimate claims as well.<sup>146</sup> Additionally, if such perception results in chilling the making of legitimate claims, the funding industry “derives an additional benefit from not having to pay these claims.”<sup>147</sup> Such benefit is specific to the allied private industry and does not necessarily comport with society’s interest in punishing only the guilty.

The potential scope of this chilling effect is illustrated by the NICB’s list of indicators to be used by investigators in determining whether a claim might “involv[e] medical fraud claim inflation.”<sup>148</sup> Among the pertinent items on this twelve-factor list are:

1. Three or more occupants in the claimant’s vehicle; all of whom report similar injuries.
2. All injuries are subjectively diagnosed, such as headaches, muscle spasms, traumas and inability to sleep.
- ...
4. All of the claimants submit medical bills from the same doctor or medical facility.
- ...

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<sup>144</sup> Kidd v. Cox, No. 1:06CV0997BBM, 2006 WL 1341302, at \*55 (N.D. Ga. May 16, 2006).

<sup>145</sup> See Kennedy, *supra* note 8, at 703.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See Louis J. Papa & Anthony Basile, *No-Fault Insurance Fraud: An Overview*, 17 *TOURO L. REV.* 611, 622 (2001).

7. Vehicle driven by claimant is an old clunker with minimal coverage.

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9. Claimants retain legal representation immediately after the accident is reported.<sup>149</sup>

These factors encompass a plethora of legitimate claims. Consider, for instance, a working-class family of five involved in an accident while on an outing in the old family station wagon. After the accident, the five victims go to their family doctor and are diagnosed with soft tissue injuries. Believing they need legal representation in order to navigate the insurance claims process, the mother asks her union to recommend an attorney. These are perfectly innocuous facts, yet an investigator using the NICB's criteria would find no fewer than five indicators of insurance fraud and would likely pursue the case as a potentially fraudulent claim.<sup>150</sup> This decision may lead to the hypothetical family experiencing great difficulty in getting their medical bills paid.<sup>151</sup> Given the existence of the Alliance, the potential risk to them is much greater, since the insurance companies'

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<sup>149</sup> *Id.* at 622-23.

<sup>150</sup> Likewise, the prosecution is aware of the import of the evidence collected by their investigators, both to the prosecution and the defense. In a Massachusetts IFB *focusFraud* newsletter, Glenn Cunha, Chief of the Insurance and Unemployment Fraud Division of the Office of the Attorney General, wrote a message to IFB investigators reminding them that "[t]he investigation portion of insurance fraud cases is just one step in the criminal prosecution." Ins. Fraud Bureau of Mass., *Message from Glen Cunha*, 12 FOCUSFRAUD 1, May 2005, available at <http://www.ifb.org/FOCUS%20FRAUD/ffmay05.pdf>. In answer to his rhetorical question, "How can we fight fraud and develop more viable cases using the resources already at our disposal?", he answered, "The best way is to start thinking of the criminal prosecution from the onset." *Id.* at 2. Other advice for investigators includes the reminder that "[d]ocumentary evidence can be a powerful tool in criminal cases. *But keep in mind that documents can also be used by the defense.* The target and his attorney will see all the documents that an investigator collects, including internal memos." *Id.* (emphasis added). He concluded with the caution that "[f]or evidence to assist in the prosecution of a case it must tell a story that is consistent with the theory of the case. Photographs need to show damage or lack thereof. . . . All of this evidence is a tool that will provide the foundation for a criminal prosecution." *Id.*

<sup>151</sup> Sociological research suggests that the common perception of civil juries' sympathy to injured plaintiffs is incorrect, especially in the personal injury scenario. *See* Hans & Dee, *supra* note 26, at 1097. Particularly regarding soft-tissue claims, the researchers found jurors likely to question the credibility of the claimant, with significant results to the amount awarded. *See id.* at 1099 ("A scenario experiment in a national poll conducted by Hans and Nicole Vadino varied according to whether a hypothetical plaintiff in an accident experienced a broken bone or a connective tissue injury, both of which a doctor confirmed. Respondents were significantly more likely to believe plaintiff claims of the broken bone. They saw the broken bone as more serious than the connective tissue injury, even though the consequences of the injury were held constant.").

already-deep suspicion of soft tissue injuries<sup>152</sup> may now result in criminal investigation.<sup>153</sup> Awareness of these criteria, or even awareness of frequent insurance fraud prosecutions, forces the family to include the potential for criminal investigation alongside the denial of claim benefits when determining whether to go forward on a contested claim. Under such circumstances, they might well decide not to file a claim at all, thus relieving the insurance company of its promise to pay made in exchange for collected premiums. In the wake of a highly publicized Long Island indictment, Professor Evan Schwartz described the potential effect as follows: "There will be good people swept up in these indictments and it will have a seriously chilling effect on the number of no-fault claims, which improves the bottom line of these companies, and a lot of people who need [medical] treatment, won't get it."<sup>154</sup>

Moreover, the fact that the NICB's list of fraud indicators includes early retention of legal representation is particularly ominous. If early retention of an attorney is viewed as a manifestation of fraud, then policyholders will not only be deterred from filing claims but also from obtaining counsel to represent them on the claims they do file. This secondary deterrent has the potential to greatly advantage insurance companies in the claims adjustment process.

In cases where claimants fail to retain counsel, insurance adjusters are able to settle claims for a fraction of their true value.<sup>155</sup> Claimants are often unaware of the full extent of the benefits contained in their policies, and may not be able to marshal their medical records and make an adequate presentation of their prognosis and future treatment needs. In contrast, an experienced plaintiffs' attorney has both the skills and resources to assess the full extent of the claimant's loss and negotiate a larger settlement.<sup>156</sup> Hence, if insurance carriers can discourage injured policyholders from

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<sup>152</sup> See Drew Griffin & Kathleen Johnston, *Auto Insurers Play Hardball in Minor-Crash Claims*, CNN.COM (Feb. 9, 2007), <http://www.cnn.com/2007/US/02/09/insurance.hardball/index.html>.

<sup>153</sup> The fact that a claim is denied by an insurance company does not mean that the claim was meritless, let alone fraudulent. A recent report profiled by the *New York Post* revealed that health insurance companies wrongly denied coverage to ill patients in half the cases reviewed by an outside panel of doctors. See Susan Edelman, *Insurer Doom Machine*, N.Y. POST, July 8, 2007, at 6, available at [http://www.nypost.com/seven/07082007/news/regionalnews/insurer\\_doom\\_machine\\_regionalnews\\_susan\\_edelman.htm?page=0](http://www.nypost.com/seven/07082007/news/regionalnews/insurer_doom_machine_regionalnews_susan_edelman.htm?page=0).

<sup>154</sup> Robin Topping, *DA Finds Lawyers In Middle of Scam*, NEWSDAY (N.Y.), Aug. 20, 2003, at A20.

<sup>155</sup> See discussion of attorney representation *infra* Part III.B.

<sup>156</sup> *Id.*



retaining counsel, they stand to significantly benefit in terms of reduced claim settlements.<sup>157</sup>

There have already been documented instances of insurance companies using ethically dubious tactics to prevent claimants from retaining attorneys. In 1994, for example, Allstate began distributing a controversial flyer entitled *Do I Need an Attorney?* to policyholders who filed accident reports.<sup>158</sup> The flyer suggested financial benefits to those who did not retain counsel.<sup>159</sup> The campaign succeeded in reducing the number of claimants who hired attorneys by more than 10%<sup>160</sup> before being halted by regulators in several states.<sup>161</sup> Since then, according to documents produced in connection with a bad-faith action, Allstate has made a deliberate internal switch from a “good hands” to “boxing gloves” policy when handling represented claims. According to a report by CNN, a company insider stated that management consultant company McKinsey suggested Allstate put on “boxing gloves” when handling represented claims and engage in a “three-D” strategy: deny the claim, delay the settlement, and defend in court.<sup>162</sup> According to *Business Week*, the consultants even included a

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<sup>157</sup> *Id.*

<sup>158</sup> See Unauthorized Practice of Law Complaint v. Allstate Ins. Co., No. 001-97 (W. Va. State Bar Comm. on Unlawful Practice Sept. 22, 1997), available at <http://www.wvbar.org/barinfo/announce/Haden.pdf>. The West Virginia State Bar Committee on Unlawful Practice concluded:

In reality, the Allstate document, when read as a whole, is clearly and unequivocally an attempt by Allstate to convince individuals to not hire an attorney but, instead, deal directly with Allstate. The document is further an attempt by Allstate to convince individuals who have been injured by an Allstate insured that they will be able to obtain larger and faster settlements if they do not retain counsel.

*Id.* at 7.

<sup>159</sup> See Opinion Letter of Connecticut Attorney General Richard Blumenthal, Sept. 28, 1998, available at <http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=281700> (“We believe that an objectively reasonable person would conclude that the flyer, read as a whole, ‘advises against the need for or discourages the retention of’ an attorney. In fact, an objectively reasonable person could conclude that *the avoidance of attorneys was the flyer’s sole intent.*”) (emphasis added); see also Angela Wissman, *Before You Decide to See an Attorney . . .*, ILL. LEGAL TIMES, June 1999, at 1 (“Since at least 1994 Allstate Insurance Co. has carried out a nationwide strategy to keep people injured by their insureds away from attorneys, say plaintiffs’ attorneys and consumer advocates. The strategy included contacting claimants soon after the accident, sending them written documents with Allstate’s pledge to treat them like a ‘customer’ and providing information about the costs of hiring an attorney.”).

<sup>160</sup> See Brigid McMenamin, *A Holy War*, FORBES, June 16, 1997, at 48.

<sup>161</sup> See Allstate Ins. Co. v. West Virginia State Bar, 233 F.3d 813, 815 (4th Cir. 2000) (“On September 22, 1997, the full [state bar] committee issued its written opinion and decision that Allstate’s dissemination of the pamphlet constituted the unauthorized practice of law.”).

<sup>162</sup> See Griffin & Johnston, *supra* note 152.

forecast on the amount of stock price appreciation available from reduced attorney representation, predicting that a 25% reduction in attorney-represented claims in certain categories could add \$1.60 to each share of Allstate stock.<sup>163</sup> Given such documented<sup>164</sup> hostility to policyholders who are represented by counsel, and given the NICB's inclusion of claimants who "retain legal representation immediately" on its list of suspect indicators of fraud, it is entirely plausible that unethical carriers who have an effective alliance with prosecutors would single out counseled claims for aggressive investigation and referral for prosecution. Even more importantly, it is entirely plausible for the plaintiffs' bar to *perceive* that being the case and subsequently restrict their choice of clients to avoid such a risk.

### C. CHILLING THE PLAINTIFFS' BAR

Hence, in cases where policyholders retain counsel, another and possibly even greater potential chilling effect exists. Personal injury attorneys may become unwilling to take cases. This chilling effect on attorneys, just as with claimants, is twofold. In addition to the potential reluctance to accept cases, lawyers may experience inhibition in negotiating, advocating, and settling on behalf of their clients.

The Association of Trial Lawyers of America ("ATLA"), in its amicus curiae brief in *Ellis*,<sup>165</sup> argues that trial lawyers could perceive criminal prosecutions brought under an Alliance system as a method of intimidation:

The ability to influence the investigation and prosecution of individuals raises the potential abuse of [the] power to "punish" an attorney who has been particularly successful against an insurer or to exert pressure on an attorney or client to withdraw or reduce a liability claim. Similarly, the potential exists for targeting individuals who oppose the insurers' legislative position.<sup>166</sup>

As the ATLA amici noted, the actual intent of the prosecution in such system is nearly secondary in importance to a *perception* of persecution and manipulation. According to ATLA, the public will *feel* that the lawyers were targeted for opposing industry interests:

Regardless of whether a particular investigation or prosecution is actually motivated by such considerations, when an attorney who has opposed an insurer is *targeted*, the

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<sup>163</sup> See Orey, *supra* note 21.

<sup>164</sup> The relative frequency of news stories trumpeting insurance company antipathy to represented claimants leads credence to the proposition that average policyholders are aware of the risks retaining counsel might pose to an expeditious resolution of their insurance claims. However, the pervasiveness of this understanding would best be served by empirical research currently unavailable.

<sup>165</sup> *Commonwealth v. Ellis*, 708 N.E.2d 644 (Mass. 1999).

<sup>166</sup> ATLA Brief, *supra* note 22, at \*4.

public perception that the criminal justice system is being manipulated by private interests is inevitable.<sup>167</sup>

Moreover, in such a system, it is extremely difficult for outside observers to differentiate between a prosecution brought in good faith in order to punish insurance fraud and a prosecution brought in bad faith to punish zealous advocacy.<sup>168</sup>

The potential of becoming the target of a criminal prosecution will undoubtedly affect an attorney's actions in a variety of different ways. When the prosecution commences a grand jury investigation, they often subpoena a law firm's or single practitioner's records of clients suspected of participating in fraudulent behavior. Knowing that the standard for obtaining a subpoena is low,<sup>169</sup> a lawyer may restrict his interaction with his client so as to maintain case files for his own future defense.<sup>170</sup> Most likely, lawyers would simply restrict the scope of actions likely to trigger insurance company scrutiny, so as to avoid coming to their attention at all.

#### D. *STATE V. MARK MARKS, P.A.*: THE PROSECUTION OF LITIGATION TACTICS AS FRAUD

To understand the full effect even an initial investigation of insurance fraud can have on a law firm, it is necessary to understand how such cases typically work in practice. A particularly stark example of the implications inherent to attorney prosecution is the Florida case of *State v. Mark Marks, P.A.*<sup>171</sup> The gravamen of the prosecution in *Marks* was the insurance industry's dissatisfaction with plaintiffs' attorneys who, in their view, withheld unfavorable medical information during pre-settlement negotiations. The prosecution regarded anything short of absolute candor

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<sup>167</sup> *Id.* at 4-5 (emphasis added).

<sup>168</sup> The majority of prosecutorial decision-making is discretionary and beyond the scope of review by either courts or the public. See Kennedy, *supra* note 8, at 703.

<sup>169</sup> *Hirschfeld v. City of New York*, 253 A.D. 2d 53, 58 (N.Y. Sup. Ct. 1999) ("When the district attorney, on his own initiative, issues and serves . . . a subpoena in good faith, a proceeding is instituted in the grand jury, just as, in an analogous situation, a civil action is commenced by the service of a summons. There is no requirement that the people open a grand jury proceeding, prior to the return date of a grand jury subpoena, or that the subpoena's validity depends on the existence of a particular grand jury at any specific time. What is required is that the grand jury be convened . . . on the return date of the subpoena so that the witness has access, if he chooses, to prompt judicial resolution of any challenge to the scope or propriety of his examination.") (citations omitted).

<sup>170</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.") (emphasis added).

<sup>171</sup> *State v. Mark Marks, P.A.*, 698 So. 2d 533 (Fla. 1997).

on the part of plaintiffs' attorneys as tantamount to fraud,<sup>172</sup> regardless of the existence of governing rules of civil discovery.<sup>173</sup>

On March 10, 1989, led by Florida Insurance Commissioner Tom Gallagher,<sup>174</sup> investigators from the Florida Insurance Department staged a dramatic, high-profile raid on the North Miami and other offices of Mark Marks, P.A.<sup>175</sup> The raid culminated in the seizure of 253 client files<sup>176</sup> including "correspondence, doctors' reports, medical bills and financial records."<sup>177</sup> The state bar association then petitioned for an immediate

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<sup>172</sup> See Cross-Reply Brief of Marvin Marks at 1, *State v. Mark Marks, P.A.*, No. 85,920, 1995 WL 17016002 (Fla. Nov. 17, 1995). The brief gives a synopsis of the trial transcripts as follows:

The Court: Well, do you think that they have to hand in a report that says someone is only two percent disabled when five reports say he is 45 percent disabled?

[The Prosecutor]: *Absolutely*. If it's not privileged and it's relevant and material to the claim.

The Court: What if it's one of four doctors' reports where one finds a two percent and the others 45?

[The Prosecutor]: If those are treating physicians where there is no question about privilege I think that it's incomplete and *fraudulent* to exclude those.

*Id.* (emphasis in original).

<sup>173</sup> The Florida Appellate District Court did recognize that the rules of civil discovery might be relevant to the determination of the nature of the "incomplete" claim subject to fraud prosecution by statute:

Attorneys are guided by numerous different rules, laws, and cases dealing with the atypical obligations of an attorney in an advocate role. Attorneys and their clients enjoy a confidential relationship, which includes constraints upon information that can be disclosed to others. Once a suit is initiated, rules of discovery provide for an exchange of information between adversaries. Even then, some items do not have to be disclosed to an adversary absent special findings by a trial court. Specifically, the identities and/or opinions of a non-witness work product expert are not discoverable absent a showing of exceptional circumstances under rule 1.280(b)(4)(B). Medical reports based on an examination requested by a party do not need to be delivered absent a request for such. In personal injury protection claims, a party must turn over all medical records concerning a specific condition only after requesting and receiving a copy of medical reports from a medical examination requested by the insurer. Finally, the confidentiality of medical records is statutorily protected from disclosure in most circumstances until a proper subpoena has been issued.

*Marks*, 654 So. 2d at 1187 (internal citations omitted).

<sup>174</sup> Mr. Gallagher was a candidate for Governor at the time of the raid and gave a press conference concerning this case in front of the Marks law office. See Answer Brief of Respondent at 8, *State v. Mark Marks, P.A.*, No. 85,920, 1995 WL 17016464 (Fla. Sept. 19, 1995).

<sup>175</sup> See Joe Starita & Fred Grimm, *Law Firm's Records Seized*, MIAMI HERALD, Mar. 11, 1989, at 1-1.

<sup>176</sup> See *Marks*, 698 So. 2d at 535.

<sup>177</sup> *Id.*; Starita & Grimm, *supra* note 175.

suspension of the Marks firm attorneys from the practice of law.<sup>178</sup> By March 14, the Florida Supreme Court had suspended the firm's principal attorneys Marvin Mark Marks and his son Gary from the practice of law.<sup>179</sup> Within months, the state attorney general's office sought to confiscate and shutter the firm's law office under the forfeiture provisions of Florida's version of the Racketeer-Influenced Corrupt Organizations Act ("RICO").<sup>180</sup>

On December 22, the attorney general's office and the insurance department jointly announced a thirty-two-count indictment<sup>181</sup> against the Marks firm, three of its attorneys, and two doctors who often performed medical examinations of the firm's clients.<sup>182</sup> The charges included state criminal RICO violations, insurance fraud, grand larceny, and perjury. If convicted, Marvin Marks, age fifty-four, faced up to one hundred years in jail for the twenty-six criminal counts lodged against him.<sup>183</sup> Press coverage touted the raid as the culmination "of the most extensive criminal investigations ever [conducted] by the Florida Department of Insurance."<sup>184</sup> The state insurance commissioner accused the defendants of perpetrating an "outrageous . . . criminal conspiracy in which attorneys . . . set up an operation designed to cheat insurance companies out of millions of dollars."<sup>185</sup>

The indictment against Marks and his firm focused on the tactics used during pre-settlement negotiations. In particular, the firm was accused of concealing unfavorable medical reports in an attempt to achieve enhanced settlement of no-fault insurance claims. The prosecution contended<sup>186</sup> that

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<sup>178</sup> See Joe Starita, *Court Suspends Mark Marks Law Practice*, MIAMI HERALD, Mar. 14, 1989, at 1-1.

<sup>179</sup> *Id.*

<sup>180</sup> See Joe Starita, *State Seeks Seizure of Lawyer's Office, Using Rackets Law*, MIAMI HERALD, Sept. 13, 1989, at 1-1.

<sup>181</sup> See *Gallagher Announces Arrests Today in Mark Marks Fraud Operation*, PR NEWSWIRE, Dec. 22, 1989 [hereinafter *Gallagher*]; see also David Conn, *Fla. Doctor-Lawyer Ring Indicted for Theft, Fraud*, J. OF COMMERCE, Dec. 26, 1989, at 9A.

<sup>182</sup> *Gallagher*, *supra* note 181; see also *State v. Mark Marks, P.A.*, 698 So. 2d 533, 535 (Fla. 1997).

<sup>183</sup> See Conn, *supra* note 181, at 9A.

<sup>184</sup> *Gallagher*, *supra* note 181.

<sup>185</sup> *Id.*

<sup>186</sup> See *Marks*, 698 So. 2d at 535:

In summary, the information charged the eight defendants with engaging in various illegal activities including but not limited to:

Preparation and submission of false and fraudulent medical tests and procedures for the purpose of enhancing the settlement value of insurance claims;

Soliciting clients to undergo unnecessary and dangerous medical tests and procedures for the purpose of enhancing the settlement value of insurance claims;

submissions to the insurance carriers that did not include all available medical information constituted an “incomplete” claim, which, when coupled with an intent to defraud, was an impermissible fraudulent concealment, the making of which violated recently enacted Section 817.234 of the Florida General Statutes on insurance fraud.<sup>187</sup>

The attorney general’s office likely viewed the Marks prosecution as a test case of the insurance fraud statute, which had only recently been enacted. The broadly worded statute not only contained a vague provision criminalizing deceptive “incomplete” claims,<sup>188</sup> but also included a section that specifically penalized attorneys.<sup>189</sup> In particular, the statute provided that “any attorney who knowingly and willfully assists, conspires with, or urges any claimant to fraudulently violate any of the provisions of this section . . . or any person who, due to such assistance, conspiracy, or urging on such attorney’s part, knowingly and willfully benefits from the proceeds derived from the use of such fraud, commits insurance fraud.”<sup>190</sup> Notably, no similar legislation was enacted to punish fraud by insurance carriers or their employees.<sup>191</sup>

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Altering, forging and concealing medical reports, medical test results and medical bills to enhance the settlement value of insurance claims;

Subornation of false, fraudulent and perjured testimony by clients and other witnesses regarding material matters in order to enhance the settlement value of insurance claims; and

Theft of monies from various insurance companies by means of the foregoing acts.

Many of the charges were based on actions undertaken by the lawyers in the course of their representation. *See id.* (“A large number of the counts in both informations were based on the attorneys’ actions in representing various clients in insurance claims during pre-suit settlement negotiations.”).

<sup>187</sup> *Id.* at 535-36; *see also* State v. Mark Marks, P.A., 654 So. 2d 1184, 1189 (Fla. Dist. Ct. App. 1995) (“As far as can be ascertained, the state can not specifically identify when an omission of information by an attorney in an adversarial context is fraudulent, other than to say that an omission is fraudulent when there is an intent to defraud.”).

<sup>188</sup> FLA. STAT. § 817.234(1) (1987) provided in pertinent parts:

[Any person who,] with the intent to injure, defraud or deceive any insurer: . . . (2) Prepares or makes any written or oral statement that is intended to be presented to any insurance company in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy . . . knowing that such statement contains any false, *incomplete*, or misleading information concerning any fact or thing material to such claim . . . is guilty of a felony in the third degree.

(emphasis added).

<sup>189</sup> *See* FLA. STAT. § 817.234(3)(3).

<sup>190</sup> FLA. STAT. § 817.234(3)(4). The statute also references fraudulent violations of Part XI of Chapter 627 of the Florida statutes as inclusive to a violation of Fla. Stat. § 817.234 (3).

<sup>191</sup> In response to Marks’s equal protection argument addressing the absence of insurance companies from the insurance fraud statute, the prosecution in part argued that civil and regulatory remedies were sufficient with regards to the insurance companies.

During the early stages of the case, the prosecution contended that attorneys had both an ethical and legal duty of absolute candor in conducting settlement negotiations. Part of this obligation included an affirmative duty to disclose all information “arguably material” to the insurance claim in the lawyer’s pre-suit “offer to settle” letter<sup>192</sup> or the letter was to be considered fraudulently incomplete.<sup>193</sup> The prosecution maintained that this was the standard even in a situation where four doctors had certified the client as 45% disabled and only one doctor had found her disability to be minor.<sup>194</sup> In essence, the prosecution contended that attorneys conducting pre-lawsuit<sup>195</sup> settlement negotiations with insurers were required, on pain of prosecution, to provide the carriers with the equivalent of full civil discovery<sup>196</sup> and to undermine their own clients’ claims, despite the adversarial nature of the proceeding.

It is interesting to note, however, that neither the prosecution nor the insurance department regarded this duty to disclose as reciprocal. During discovery, it was revealed that in one of the underlying cases, the insurance

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[C]laimants and insurance companies occupy substantially different legal provisions. Insurance companies are heavily regulated by the State. Unfair trade practices and unfair settlement practices are prohibited. Fraudulent acts by insurers could result in the loss of licenses to conduct business in the State. If insurers fail to settle a legitimate claim, they can be held liable for excess verdicts for bad faith.

Reply Brief of Petitioner at 14, *State v. Mark Marks, P.A.*, No. 85,920, 1995 WL 17016004 (Fla. Oct. 16, 1995). They even contended that “claimants and their attorneys are not subject to these regulations.” *Id.* The fact that lawyers are a similarly regulated group subject to similar and extensive civil and regulatory sanctions for fraudulent conduct was not discussed.

<sup>192</sup> The lower court found that the fraud statute created no such affirmative duty of disclosure. *See Marks*, 654 So. 2d at 1184.

<sup>193</sup> Answer Brief of Respondent, *supra* note 174, at 8.

<sup>194</sup> *Id.*

<sup>195</sup> Defendant Marks in his answer stated that after initiation of suit, in response to subpoena, the reports underlying the alleged fraudulent omission were disclosed. Amended Answer Brief of Mark Marks at 5, No. 85,920, 1995 WL 17016463 (Fla. Sept. 25, 1995) (“When the rules of discovery became operable, all reports were provided.”).

<sup>196</sup> The Supreme Court of Florida in its review of the statute for vagueness recognized that many of the rules of disclosure are governed by existing rules of civil procedure. *See State v. Mark Marks, P.A.*, 698 So. 2d 533, 538 (Fla. 1997) (“Once a suit is initiated, rules of discovery provide for an exchange of information between adversaries. Even then, some items do not have to be disclosed to an adversary absent special finding by a trial court. Specifically, the identities and/or opinions of a non-witness work product expert are not discoverable absent a showing of exceptional circumstances. . . . In personal injury protection claims, a party must turn over all medical records concerning a specific condition only after requesting and receiving a copy of medical reports from a medical examination requested by the insurer. . . . [T]he confidentiality of medical records is statutorily protected from disclosure in most circumstances until a proper subpoena has been issued.”) (internal citations omitted).

company had concealed a report prepared by its adjuster suggesting that the gas station owner who had allegedly caused the injury was negligent.<sup>197</sup> When this was brought to the attention of the prosecutor, he declined to file charges against the carrier or its employees.<sup>198</sup>

The trial court dismissed many of the insurance fraud charges on the theory that the statute was unconstitutionally vague as to what would constitute fraudulently “incomplete” insurance claims, given the nature of the attorney-client relationship.<sup>199</sup> The Florida Supreme Court upheld the dismissal of these charges in part because they recognized that an attorney has a special role in society, that of an advocate. They explained that

it is an attorney’s unique obligations [sic] when viewed in conjunction with the term “incomplete” that renders this particular statute vague as applied to attorneys [b]ecause attorneys, pursuant to statute, case law, procedural rules, and rules of professional regulation, are customarily required to withhold certain types of information throughout the representation.<sup>200</sup>

The Court recognized that the “unique obligation” of the lawyer and the nature of legal representation encompasses “less than complete disclosure” and is “considered acceptable practice.”<sup>201</sup> The Court noted that the statute did not “indicate, in terms that a person of common intelligence would understand, in what instances less than complete disclosure by an attorney becomes a criminal offense.”<sup>202</sup> Consequently, the Court concluded the statute was void for vagueness since it did “not provide adequate notice of the conduct by attorneys that it proscribes.”<sup>203</sup>

Upon remand, the trial court dismissed the remaining charges against the Mark Marks firm due to “egregious” and “substantial” ex parte communications made by the prosecution to a judge who was later disqualified.<sup>204</sup> The Florida Court of Appeals affirmed the dismissal.<sup>205</sup> Significantly, while affirming the decision on due process grounds, the appellate court based its decision not only on the unfairness of the ex parte conduct but also on the unique role of attorneys as advocates for their clients:

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<sup>197</sup> Amended Answer Brief of Mark Marks, *supra* note 195, at 6-7.

<sup>198</sup> *Id.*

<sup>199</sup> *See Marks*, 698 So. 2d at 537 (“The court found that as applied to attorneys representing their clients, the statute failed to provide sufficient notice and was susceptible to arbitrary enforcement.”).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 538.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *State v. Mark Marks, P.A.*, 758 So. 2d 1131, 1134 (Fl. Dist. Ct. App. 2000).

<sup>205</sup> *Id.* at 1137.



It is thus possible to advocate a very close case, one where the issue of negligence is cloudy or injuries are not indisputably related to the injury, yet not misrepresent anything to the insurer. In this circumstance, counsel can lawfully seek to advocate the client's position to achieve the maximum recovery available. Again we stress, counsel cannot commit a fraud on the insurer by misrepresenting facts counsel knows to be untrue. The problem is locating the demarcation between acceptable advocacy—a tolerable adversarial, hyperbolic presentation of inferences, implications and conclusions about symptoms, causes and effects—and unacceptable fraud by outright lying. The point at which advocacy passes from the one to the other may well be exceedingly beclouded in a given case, as where the facts point in both directions.<sup>206</sup>

In 2002, the Florida Supreme Court denied a review of the Court of Appeals' decision, finally bringing the *Marks* prosecution to an end. By that time, the firm and the indicted attorney-defendants had spent thirteen years and millions of dollars in an effort to stay out of jail.<sup>207</sup> Although a court ultimately awarded them partial recovery of their legal fees,<sup>208</sup> their reputations had been irreparably tarnished and the Marks firm was unable to reopen. Although one can argue that the Marks firm and its lawyers ultimately won, a foreboding message had been sent to other Florida personal injury attorneys that state prosecutors were prepared to regulate insurance claim litigation practices through criminal prosecution.

In some ways, it matters little whether prosecutions such as Marks's result in the ultimate vindication of the indicted attorneys. Even if prosecutions based on litigation practices do not result in convictions, the harm suffered by attorneys and law firms is incalculable both in terms of financial loss and loss of reputations. A rational lawyer would likely go a long way to avoid this type of scrutiny. This may include stepping away from overly zealous settlement negotiations and substantially lowering the settlement amount that had heretofore been justifiably sought. Lawyer-client relationships are disrupted because a lawyer, whose fiduciary duty is to his client, must now ascertain whether or not his performance will incur the ire of his insurance adversary and result in his referral for criminal prosecution. If such considerations by attorneys become systemic, the practice of personal injury law will be substantially restricted since lawyers will be less likely to aggressively litigate or pursue novel causes of action on behalf of clients. The net effect is that injured persons, particularly the poor, lose some portion of their access to the legal system.

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<sup>206</sup> *Id.* at 1136.

<sup>207</sup> *Marks v. Dep't of Legal Affairs*, 937 So. 2d 1211, 1213 (Fla. Dist. Ct. App. 2006).

<sup>208</sup> *Id.*

IV. PRESERVING THE ADVERSARIAL SYSTEM: PROTECTING THE  
PLAINTIFFS' BAR AND INSURANCE CLAIMANTS FROM THE ALLIANCE'S  
CHILL

A. DUE PROCESS AND EQUITY CONCERNS: THE NEED FOR  
SAFEGUARDS

In its most rational reduction, the argument for using funds assessed from an industry to finance the investigation and prosecution of crimes against that industry's interests is based on the concept that such funding advances society's interest to the extent that those prosecutions had been foregone solely due to a lack of funds.<sup>209</sup> As such, providing a mechanism for funding is a public good as it allows for the prosecution of these crimes and the punishment of the guilty.<sup>210</sup> The infusion of a payer independent from the state's general revenues, however, requires, at a minimum, recognition of the potential for improper conflicting interests influencing the prosecutor's discretion.<sup>211</sup>

Moreover, the Alliance structures as implemented by various states, described above, are not even simple funding mechanisms. They come with restrictions on use, creations of special bureaus, and formalized institutional engagement between the prosecutor's offices, investigators (public, private, and "quasi-public"), and the funding industry (both as the victim and as a trade group). These structures have also led to perceptions of conflict. Therefore, it behooves us to further explore the constitutional considerations implicated by these processes in recognition of their relative recentness of inclusion in the criminal justice process.

*1. Conflicting Interests and Their Due Process Implications for Prosecutors*

It is fairly well accepted<sup>212</sup> that prosecutors must be, at least in some sense, impartial in their pursuit of justice.<sup>213</sup> This unique responsibility,

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<sup>209</sup> See Kennedy, *supra* note 8, at 704.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 698.

<sup>212</sup> Delineating the exact nature of the impartial prosecutor has been a favorite preoccupation of the courts. See *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) ("It is a bit easier to say what a disinterested prosecutor is not than what he is."). It has also been the subject of much excellent scholarship. See, e.g., Green & Zacharias, *supra* note 10, at 850; Zacharias, *Can Prosecutors Do Justice?*, *supra* note 104, at 57.

<sup>213</sup> The idea of the impartial prosecutor is linked to the requirement of a fair trial. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing the role of the prosecutor in the context of his representation of the governing people); *Jones v. Richards*, 776 F.2d 1244, 1247 (4th Cir. 1985) (noting that a criminal defendant is entitled "to an impartial prosecutor, who can make an unbiased use of all options available"); *People v. Eubanks*, 927 P.2d 310,

which sets prosecutors apart from all other attorneys laboring within our adversarial system, was recognized by courts as early as 1935. In *Berger v. United States*,<sup>214</sup> the Supreme Court articulated the often-quoted principle that the state's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."<sup>215</sup> Accordingly, a prosecutor "is in a peculiar and very definite sense the servant of the law," and "[it] is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."<sup>216</sup> Thus, the Court identifies within our system of laws a unique role and responsibility for the prosecutor because "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."<sup>217</sup>

To say that there is a requirement of an impartial prosecutor is not to say that the prosecutor does not have immense discretion in the undertaking of his duties,<sup>218</sup> nor that he is not entitled to prosecute his action with zeal.<sup>219</sup> In no area is his discretion greater, for instance, than in the determination of whom to charge and how to conduct the case.<sup>220</sup> In fact,

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315 (Cal. 1996) (noting "the nature of the impartiality required of the public prosecutor follows from the prosecutor's role as a representative of the People as a body, rather than as individuals"); MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008) ("[A] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice."). In Massachusetts, the *Ellis* Court likewise did not dispute that the insurance fraud defendants had a right to "a fair trial, conducted by an impartial, disinterested prosecutor." *Commonwealth v. Ellis*, 8 Mass. L. Rptr. 678, at \*11 (Super. Ct. 1998).

<sup>214</sup> 295 U.S. at 78.

<sup>215</sup> Zacharias, *Can Prosecutors Do Justice?*, *supra* note 104, at 88.

<sup>216</sup> *Id.*

<sup>217</sup> *Berger*, 295 U.S. at 78.

<sup>218</sup> The Supreme Court has granted great deference as to a prosecutor's determination of whom to prosecute. *See Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (identifying the obligation of deference "to prosecutorial decisions as to whom to prosecute" in the normal course). This discretion is, of course, bound by the requirement that the prosecutor must have "probable cause to believe that the accused committed an offense defined by statute." *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

<sup>219</sup> *See Green & Zacharias*, *supra* note 10, at 850-52.

<sup>220</sup> Generally, a motion for dismissal based on a claim of selective prosecution is the only mechanism whereby a defendant may challenge a charging determination. *See Rumery*, 480 U.S. at 396; *Leeke v. Timmerman*, 454 U.S. 83, 86-87 (1981) (stating that charging is within prosecutor's discretion alone). *But see In re Justices of the Super. Ct. Dep't of the Mass. Trial Ct.*, 218 F.3d 11 (1st Cir. 2000) (entertaining the notion of habeas relief). Nor is there a procedural mechanism by which a private citizen can challenge a prosecutor's refusal to bring charges against another. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (finding no judicially cognizable interest of an individual person in the prosecution of another).

the courts are generally so deferential to this exercise of discretion that the only real check on prosecutors' power is the motion to dismiss based on the claim of selective prosecution, which is both extraordinarily limited in its scope and in its chances for success.<sup>221</sup>

Such remarkable deference to prosecutorial discretion, however, can be seen as justified only in relation to the prosecutor's appropriate independence.<sup>222</sup> Traditionally, prosecutorial independence inherently relies on the prosecutor's freedom from impermissible conflicts.<sup>223</sup> In the event of identification of such an impermissible conflict, disqualification of the prosecutor is a potential remedy.<sup>224</sup> Thus, while selective prosecution motions struggle under a relatively high burden, the courts seem more willing to support the disqualification of a conflicted prosecutor.<sup>225</sup>

In any event, courts have looked to the ethical conflict rules to assist in their determination of improper prosecutorial conduct. The leading Supreme Court precedent on point is *Young v. United States ex. rel. Louis Vuitton et Fils S.A.*,<sup>226</sup> which considered the allowability of appointing private attorneys to prosecute a criminal contempt proceeding when those attorneys also represented the civil plaintiff who would benefit from the contempt proceeding.<sup>227</sup> This was a true "private prosecutor" case, where the district court had appointed the civil plaintiff's lawyers as special

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<sup>221</sup> Claims of selective prosecution require a showing not only of discriminatory effect in charging determinations, but also that the charge was deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification. See *United States v. Wayte*, 470 U.S. 598, 608-10 (1985); *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Discriminatory purpose is a high burden to meet, and has been held to imply "more than . . . awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayne*, 470 U.S. at 610; see also *Kennedy*, *supra* note 8, at 667-78 (discussing selective prosecution motions and finding them to "require a virtual admission of discriminatory intent on the part of the prosecutorial agency").

<sup>222</sup> Prosecutorial freedom of action can be seen as supported by a parallel freedom from influence. See *Kennedy*, *supra* note 8, at 679 (characterizing trust in prosecutorial discretion as predicated on independence from any discrete private or governmental interest).

<sup>223</sup> *Id.*

<sup>224</sup> See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (disqualification of a prosecutor warranted due to personal interest). Penal codes may also incorporate the ability to disqualify a prosecutor for conflicts of interest. See, e.g., CAL. PENAL CODE § 1424 (West 2007) (stating that disqualification may be granted if the evidence shows that a conflict of interests exists that would render it unlikely that the defendant would receive a fair trial).

<sup>225</sup> *Bordenkircher*, 434 U.S. 357.

<sup>226</sup> 481 U.S. 787 (1987).

<sup>227</sup> The *Young* review arose from a challenge to a criminal contempt action brought for violation of a civil injunction prohibiting the making of counterfeit products by the civil defendant. *Id.* at 789-90.

counsel to prosecute the criminal contempt action.<sup>228</sup> The Supreme Court held that “counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order.”<sup>229</sup>

While declining to embrace a per se rule prohibiting all private prosecutorial involvement in criminal cases, the *Young* Court recognized both the importance of potential conflicts of interests on the role of the prosecutor and the continued relevance of even the appearance of impropriety. The Court explained that regardless of whether the appointment of private counsel in that case had resulted in any actual prosecutorial impropriety, an issue on which they gave no opinion, that such an “appointment illustrates the potential for private interest to influence the discharge of public duty.”<sup>230</sup> Further, the court identified the ability of the criminal contempt case to act as improper leverage on the other party in the resolution of their other civil claims:

These claims theoretically could have created temptation to use the criminal investigation to gather information of use in those suits, and could have served as bargaining leverage in obtaining pleas in the criminal prosecution. In short, as will generally be the case, the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety.<sup>231</sup>

Many of the Justices were well aware of the extreme disadvantage to the defendant which results from the appointment of an interested prosecutor. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, noted in concurrence that “[w]e have held that some errors ‘are so

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<sup>228</sup> *Id.* at 791.

<sup>229</sup> *Id.* at 790. *Young* is a particularly difficult case to parse as a result of the numerous different points of concurrence and dissent among the justices. The majority agreed that private attorneys may not prosecute contempt charges when their client is a beneficiary of that court order. *Id.* at 790. However, the justices split on the issue of the appropriate remedy for that violation; Justice Brennan, writing for the majority, was joined by Justices Stevens, Marshall, and Blackmun in concluding the error as sufficiently fundamental so as to require a per se reversal. *Id.* at 809-14. Justice Powell, joined by Chief Justice Rehnquist and Justice O’Connor, dissented from both the judgment and the fundamental error analysis, concluding that the case should have been remanded for a determination on the appointment as under harmless error analysis. *See id.* at 825-27. It was only as a result of Justice Scalia’s separate concurring opinion that per se reversal was granted. *Id.* at 815. This concurrence, however, was grounded in his opinion that the appointment of a contempt prosecutor by a federal district court constituted a violation of the separation of powers between the judiciary and the executive branch. *Id.* at 815.

<sup>230</sup> *Young*, 481 U.S. at 805. A conflict of interest can also be seen to effect objectivity. *See Vasquez v. Hillary*, 474 U.S. 254, 263 (1986) (noting that prosecution by an attorney with conflicting interests “calls into question the objectivity of those charged with bringing a defendant to judgment”).

<sup>231</sup> *Young*, 481 U.S. at 806.

fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case.”<sup>232</sup> Those Justices then concluded “that the appointment of an interested prosecutor is such an error.”<sup>233</sup>

The *Young* decision is also useful in helping us distinguish between two types of interests that are often conjoined when discussing prosecutorial neutrality. The majority reiterated the distinction between finding an arrangement that creates an actual conflict of interest and finding the existence of actual misconduct. They noted that “[a]n arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable. The determination whether there is an actual conflict of interest is therefore distinct from the determination of whether there was actual misconduct.”<sup>234</sup>

The Court also appears to have sought to distinguish between two distinct scenarios where a prosecutor’s required impartiality may be impaired—situations of overzealousness by the prosecutor and situations of divided loyalty:

It is true that prosecutors may on occasion be overzealous and become overly committed to obtaining conviction. That problem, however, is personal, not structural . . . [S]uch overzealousness “does not have its roots in a conflict of interest. When it manifests itself the court deals with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction.”<sup>235</sup>

We can discern from *Young* that situations of impaired loyalty can be seen to be substantially graver than the case of mere overzealousness.<sup>236</sup> To conclude that a relationship creates a structural “problem” is very close to determining that it is the type of situation warranting the appellation of a

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<sup>232</sup> *Id.* at 809-10 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

<sup>233</sup> *Id.* at 810.

<sup>234</sup> *Id.* at 808 & n.18.

<sup>235</sup> *Id.*

<sup>236</sup> Overzealousness can best be understood as focusing on the prosecutor’s personal motivations. See Kennedy, *supra* note 8, at 683 (describing issues of overzealousness as concerning threats to impartiality “posed by the prosecutor’s *own* interests in the outcome of the case”) (emphasis in original). The Supreme Court’s handling of the issue of zealousness as a personal conflict is best illustrated by its analysis in *Marshall v. Jerrico*, 446 U.S. 238 (1980). In that case, the Court rejected a defendant’s contention that the government agency performing certain prosecutorial functions violated his due process rights as a result of their interest in collecting the money penalties allowed under the statute. *Id.* at 251-52. The Court noted that its due process evaluation might have been significantly different if the alleged over-prosecution had singled out any specific groups. *Id.* at n.12.

“structural defect in the trial mechanism,” and, as such, would support those Justices who concurred in finding the appointment per se reversible.<sup>237</sup>

Although the *Young* decision rested on the Supreme Court’s inherent supervisory power and considerations of prosecutorial ethics rather than constitutional due process, the Court often uses its supervisory authority to strike down an unlawful procedure as a precursor to finding that such practice amounts to a due process violation.<sup>238</sup> The Tennessee courts, construing the right to prosecutorial impartiality in light of *Young*, have concluded that it “does not preclude and probably only foreshadows a constitutional bar” with respect to the involvement of private prosecutors in criminal cases.<sup>239</sup>

In subsequent cases, other courts interpreting *Young* have held that the Due Process Clause mandates substantial restrictions on the activities of private prosecutors. The judicially imposed restrictions include requirements that private attorneys work under the direction of public prosecutors and that they not be permitted to “effectively control critical prosecutorial decisions . . . [such as] whether to prosecute, what targets of prosecution to select, what investigative powers to utilize [and] what sanctions to seek.”<sup>240</sup> Other jurisdictions have held that private prosecutors with certain interests, such as representing victims who also have civil

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<sup>237</sup> See *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (finding that “structural defects in the trial mechanism . . . defy harmless error standards”).

<sup>238</sup> See *Bessler*, *supra* note 90, at 572 (noting that, in *United States v. Hale*, 422 U.S. 13 (1975), the Supreme Court exercised its supervisory power in reversing a conviction based on a defendant’s silence after being given *Miranda* warnings). A year after *Hale*, in *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court enshrined the right to remain silent as a due process right. Similarly, in *Offutt v. United States*, 388 U.S. 11 (1954), the Supreme Court, pursuant to its supervisory authority, reversed a criminal contempt conviction because of judicial bias. Subsequently, in *In re Murchison*, 349 U.S. 133 (1955), the Supreme Court ruled that conducting a criminal contempt trial before a personally affronted judge violated due process. For a general discussion of the Court’s supervisory power, see Aviva Abramovsky, *Traitors in Our Midst: Attorneys Who Inform on Their Clients*, 2 U. PA. J. CONST’L L. 676, 703-05 (2000).

<sup>239</sup> See *State v. Eldridge*, 951 S.W.2d 775, 782 (Tenn. App. 1997) (citing *Bessler*, *supra* note 90, at 571). Indeed, other commentators have simply described the decision as essentially employing a due process analysis while using supervisory authority. See *Kennedy*, *supra* note 8, at 681-82.

<sup>240</sup> See *Erikson v. Pawnee County Bd. of County Comm’rs*, 263 F.3d 1151, 1154 (10th Cir. 2001); see also *Stumbo v. Seabold*, 704 F.2d 910, 911 (6th Cir. 1983) (finding that Kentucky law allowing private prosecutors to assist in litigating criminal cases did not create a per se due process violation because the statute required public prosecutors to retain full control of the trial); *State v. Imperiale*, 773 F. Supp. 747, 750-51 (D.N.J. 1991) (finding that use of private prosecutors implicates a defendant’s “due process right to a fundamentally fair trial” and that a town attorney with potential civil interests in the outcome of the criminal proceeding was disqualified from acting as prosecutor).

claims against the defendant, are disqualified per se from taking part in the criminal litigation.<sup>241</sup> Moreover, Justice Blackmun, concurring in *Young*, simply concluded that the private prosecution in that case was “a violation of due process.”<sup>242</sup> He further stated that due process “requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered.”<sup>243</sup>

The progeny of *Young* generally pertain to direct participation of private prosecutors in the criminal justice system, with a concomitant review of their personal loyalty or financial interests, rather than indirect funding of public prosecutors by private financial benefactors.<sup>244</sup> The non-existence of a formalized attorney-client relationship, however, does not preclude the arising of conflicts of interest; nor is the interest or obligation causing a conflict necessarily restricted to an individual, rather than institutional, analysis.<sup>245</sup> The Supreme Court of California, determining the propriety of a prosecutorial disqualification under their state’s recusal statute, has already recognized that the “tie that binds the prosecutor to an interested person may be compelling though it derives from the prosecutor’s institutional objectives or obligations.”<sup>246</sup> The need for a prosecutor free from the potential conflict of loyalties implicated by these Alliance systems seems sufficient to mitigate in favor of a broadening of the due process protections afforded a criminal defendant by many states in the conflicted private prosecutor scenario. As Justice Frankfurter expressed, due process is a living doctrine:

Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.<sup>247</sup>

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<sup>241</sup> See, e.g., *Cantrell v. State*, 329 S.E.2d 22, 26 (Va. 1985) (finding a per se due process violation where “the position of a private prosecutor having a civil interest in the case . . . infects the prosecution with the possibility that private vengeance has been substituted for impartial application of the criminal law”).

<sup>242</sup> 481 U.S. 787, 815 (1987) (Blackmun, J., concurring).

<sup>243</sup> *Id.*

<sup>244</sup> *But see* *People v. Eubanks*, 927 P.2d 310, 319-320 (Cal. 1996) (“No reason is apparent why a public prosecutor’s impartiality could not be impaired by institutional interests, as by personal ones.”).

<sup>245</sup> *Id.* at 320.

<sup>246</sup> *Id.*

<sup>247</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 173-74 (1951).



## 2. *Institutional Bias as Threat to Prosecutorial Neutrality*

As described above, Massachusetts and many of the majority model states institutionalize the use of a specific industry's funds for the prosecution of a crime—insurance fraud—which specifically benefits the financial interests of a specific group—insurance companies. Let us consider a state which requires the assessed funds be kept in a distinct trust account and that those funds be used exclusively to advance the purposes of that state's insurance fraud prevention act. Could this arrangement alone be sufficient to implicate the question of divided loyalties at issue in cases like *Young*? In other words, could the structure of that arrangement be such that the assessed party's interests conceivably could result in the prosecutors' systemic identification with the funding industry to the point of potential conflict?

Reasonably, that question seems to suggest an affirmative response. As discussed earlier, at least one prosecutor has recognized that the Alliance structure he labored under created a sufficient potential conflict of interest such that he chose to recuse himself from prosecuting insurance company-retained medical professionals, and such that the Massachusetts IFB routinely turned away investigating cases of insurer fraud based on perceived potential conflicts.<sup>248</sup> Thus, the absence of a formal attorney-client relationship already has not precluded self-identification of a conflict. Hence, there should be little discomfort with addressing the existence of that conflict systemically. Nor is this type of conflict best seen as extant in only those cases adverse to insurance-funded interests. If such conflict is recognized, it can only continue to exist in prosecutions favoring the funding interest. As has been argued in the context of Virginia private prosecutions, “[r]estricting the scope of participation of the private prosecutor cannot alter the nature of the conflict . . . because the private [party's] interests remain a factor” in prosecutorial decision-making.<sup>249</sup>

Moreover, there is precedent for concluding that the influence of non-client financial backers can corrupt criminal advocacy. Courts have repeatedly recognized, in the criminal *defense* context, that “benefactor payments” by third parties with an interest in the outcome of the proceeding can create a practical conflict of loyalties.<sup>250</sup> In particular, such payments “may subject an attorney to undesirable outside influence and raise[] an

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<sup>248</sup> See *supra* notes 110-12 and accompanying text.

<sup>249</sup> Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279, 294 (2001).

<sup>250</sup> See, e.g., *United States v. Locascio*, 6 F.3d 924, 932 (2d Cir. 1993) (describing a traditional “house counsel” scenario where certain attorneys were retained on an ongoing basis to represent members of the same alleged mafia crime family).

ethical question as to whether the attorney's loyalties are with the client or the payor."<sup>251</sup>

Courts in such circumstances have thus looked beyond the technical nonexistence of an attorney-client relationship between the defense lawyer and the third party to find a conflict of interest, and indeed occasionally concluded that such a conflict is unwaivable.<sup>252</sup> The same reasoning would dictate that ongoing benefactor payments by insurance carriers to public prosecutors create a similar de facto conflict, regardless of whether those payments are sanctioned by the legislature. It is the impermissible conflict of loyalties, not merely the fear of lost future earnings, which caused the court to rule such arrangements impermissible in the defense context. Mandatory as opposed to voluntary payments, therefore, should not be seen to diminish the risk of impermissible prosecutor loyalty to the insurance industry. The identification of even a systemic *risk* that a prosecutor would view his funding industry as sufficiently "client-like" or otherwise sufficiently influential so as to require his recusal—as occurred in Massachusetts—supports recognition of at least the existence of potential conflicts of interest in the Alliance system.<sup>253</sup>

The right to prosecutorial impartiality and Massachusetts Alliance-initiated prosecutions' potential infringement of that right were both at issue in the *Ellis* prosecution. Though the Supreme Judicial Court of Massachusetts did not find the Alliance relationship impermissible, the court did reiterate that the Massachusetts constitution guarantees an impartial prosecutor, "in the sense that the prosecutor must not be nor appear to be influenced . . . either by his or her personal interests or by a person or entity to whom the prosecution of a criminal case will or may bring significant benefits."<sup>254</sup> The court held the Massachusetts scheme, however, did not sufficiently influence prosecutorial decision-making so as to be deemed improper. The court determined "the only obligation of the division [was] to review each IFB report" and "[t]he statute le[ft] further investigation and any decision to prosecute exclusively in the division's control."<sup>255</sup>

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<sup>251</sup> *Id.* (quoting *In re Grand Jury Subpoena Served upon John Doe*, 781 F.2d 238, 248 n.6 (2d Cir. 1985) (en banc)).

<sup>252</sup> *See id.*; *see also* Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the Tripartite Insurance Defense Relationship*, 27 *CARDOZO L. REV.* 193 (2005).

<sup>253</sup> *See* *Arizona v. Fulminante*, 499 US 279, 308 (1991) ("[S]tructural defects . . . defy analysis by harmless error standards."); *see also* *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) ("[T]he practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice.").

<sup>254</sup> *Commonwealth v. Ellis*, 708 N.E.2d 644, 650 (Mass. 1999).

<sup>255</sup> *Id.* at 652.

The question of “control,” however, somewhat misstates the nature of the conflict implicated. As an ethical consideration it is not simply a question of whether the interest implicated requires the prosecutor to act in a specific way, but rather whether the nature of the relationship increases the likelihood that, as a result of some other obligation or interest, the right to a fair trial is implicated.<sup>256</sup> The consequence of financing to create some sense of obligation has been recognized by other courts when considering disqualification of a prosecutor.<sup>257</sup>

The court in *Ellis* emphasized the fact that the relationship between the prosecution and the insurance industry had been legislatively mandated. Specifically, the court stated:

If we were confronted with a challenge to an arrangement between insurers and the Attorney General of the sort involved here that was not endorsed by statute, *the appearance of the possibility of improper influence would be far clearer*. Although statutory endorsement of an unconstitutional plan cannot make it constitutional, where the question is whether the appearance of an arrangement may support a determination of unconstitutionality, the fact that the Legislature has endorsed the plan, has supervisory authority over it, and appropriates funds for it substantially changes appearances.<sup>258</sup>

Moreover, legislative mandate arguably should be insufficient in isolation to remove the “appearance of impropriety” inherent to the Alliance structure, particularly when it is the legislative creation of the relationship which is the *cause* of the perception of impropriety. Simply, a legislative mandate does not reduce the potential for prejudice to prosecutorial neutrality, particularly if the prejudice is seen as arising naturally from the structure of the relationship itself. In this respect, it is obvious that an industry responsible, voluntarily or not, for an office’s funding has more than the mere appearance of influence.<sup>259</sup> The appearance of influence may be *reinforced* by the enabling legislation, which requires the IFB and its funded prosecutors to investigate and prosecute insurance fraud cases referred largely by the insurance companies themselves. Further, the appearance of influence is buttressed in Massachusetts by the legislative assessments being placed on two associations of insurance companies whose continued existence is determined solely by the member insurance companies. It seems apparent that a prosecutor might try to curry favor

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<sup>256</sup> The concept of significant risk has always been central to the identification of a conflict of interest. See MODEL RULES OF PROF’L CONDUCT R. 1.7 (2008) (“A concurrent conflict of interest exists if . . . (2) there is a *significant risk* that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”) (emphasis added).

<sup>257</sup> See *People v. Eubanks*, 927 P.2d 310, 319-20 (Cal. 1996).

<sup>258</sup> *Ellis*, 708 N.E.2d at 652 (emphasis added).

<sup>259</sup> See MATA Brief, *supra* note 95, at 38.

with the insurance industry out of fear that the industry would withdraw funding by simply dissolving the organizations.<sup>260</sup> If the industry organizations ceased to exist, there could be no assessment and those attorney general positions could foreseeably be terminated. Economic self-interest is the greatest of motivators and a long-recognized source of conflicting interests.

The *Ellis* court dismissed possible insurance industry dissolution of the assessed organizations as speculative because the legislature could amend the statute to mandatorily assess the insurance companies based on the amount of business they transact.<sup>261</sup> This position is flawed in a variety of respects. Principally, such a legislative response is itself merely speculative and does little to cure any current problem of inappropriate influence. Moreover, it ignores both the vagaries of the political system as well as the lobbying power of the insurance industry, both of which make it unlikely that the legislature would enact laws contravening the insurance industry's perceived interests in the prosecution of insurance fraud. Furthermore, the court's holding ignores the greater issue of the manner in which the Alliance scheme permits insurance companies to be the initiators of *mandatory* investigations, thereby abrogating a portion of executive discretion. Insurance fraud department employees and the prosecutors who work with them reasonably internalize this shift of initiating authority. As a shift in interest also implicates the likelihood of influence on prosecutorial neutrality, legislative mandate cannot salvage such a defect regardless of the particular funding system legislatively imposed.

*Ellis* relied on yet another particularly dubious ground in validating the Massachusetts scheme: the fact that the bureau and its related prosecutorial office were funded by the insurance industry *collectively* rather than by individual companies. The "dilution" of influence cited by the *Ellis* court is largely fictitious, particularly in the insurance industry. Although individual insurance carriers have varying interests in particular fraud cases, the industry is united in several material respects, including a general benefit to be acquired from reduced claims and a chilled plaintiffs' bar.<sup>262</sup> Moreover, insurance companies, as a result of their unique regulatory system, have great experience working together on industry-wide goals and projects. Accordingly, even though the cost of the various assessments may be distributed among many companies doing business in any given

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<sup>260</sup> See Rebecca A. Pinto, *The Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L.Q. 1343, 1367 n.130 (1999).

<sup>261</sup> See *Ellis*, 708 N.E.2d at 651.

<sup>262</sup> See Kennedy, *supra* note 8, at 622-23.

jurisdiction, such “dilution” is insignificant when the goals of and benefits to the industry from fraud prosecutions are so uniform.

*Ellis* therefore seems to interpret unreasonably the requirement of a “disinterested prosecutor” as mandated by the Supreme Court in *Young*. Although *Young* dealt with the narrower circumstance of the appointment of special counsel in a criminal contempt proceeding, the same principles of prosecutorial impartiality should preclude continuation of the Massachusetts IFB program. Simply put, the indirect involvement of insurance carriers through benefactor-type payments to criminal investigators and offices of attorneys general creates a de facto conflict of interest that damages prosecutorial impartiality.

Indeed, such a conflict can rationally be expected to occur in *any* situation where the insulation of an investigator or prosecutor as true public servants working with public funds is replaced by a scheme in the particular interest of the funding party. As evidenced by the Massachusetts prosecutors’ own recusal, prosecutors can easily come to see their funding industry in a quasi-client (or some other equally impermissible) fashion.<sup>263</sup> Such a scenario unreasonably decreases the likelihood a defendant will receive a neutral prosecutor.

Fundamental equality concerns are likewise implicated in the Alliance system and left unaddressed by the *Ellis* court. Among its corrupting features is that institutionalized entrance into the Alliance is restricted to insurance companies. As Professor Joseph E. Kennedy warned, “preferential access to justice for monied interests . . . threatens the defendant’s distinct interest in equality.”<sup>264</sup> Although he sardonically noted that “no defendant has a right to a fiscally strapped prosecutor,” he emphasized that “the prospect of defendants facing disproportionate prosecution by the government based on the wealth of their accusers is troubling.”<sup>265</sup> This conclusion was echoed by the Supreme Court of California regarding the use of private third-party funds for investigative purposes when it stated, “A system in which affluent victims, including prosperous corporations, were assured of prompt attention from the district

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<sup>263</sup> See *supra* notes 110-12 and accompanying text.

<sup>264</sup> Kennedy, *supra* note 8, at 707.

<sup>265</sup> *Id.* Nor should the ability of wealth to increase the negative treatment of those already politically disempowered as a function of wealth be ignored. See *id.* (“The powers wielded by government are considerable, as is the cost of merely being accused by the government of criminal conduct. To the degree that the wealthy would enjoy a superior ability to unleash these forces on those who offend their interests, inequalities of political power that already exist as a function of wealth would be exacerbated.”).

attorney's office, while crimes against the poor went unprosecuted, would neither deserve nor receive the confidence of the public."<sup>266</sup>

#### B. SAFEGUARDING THE PLAINTIFFS' BAR: A NECESSARY AND CONSTITUTIONAL REMEDY

A persuasive argument can be made that the Alliance system creates a substantive threat to any insurance fraud defendant's due process rights and that such a problem is so systemic as to require its elimination. However, since no court as of yet has found the Alliance system to be constitutionally defective, its particular implications to the plaintiffs' bar may be ameliorated in the interim by some lesser prophylactic administrative remedy. As lawyers prosecuted for insurance fraud are charged as a result of actions undertaken in their capacity as lawyers, the "buffer" proposal, discussed in the next section, contends that their behavior most appropriately should first be reviewed by the agencies charged with determining the correctness of attorney conduct as a question of professional responsibility.

It may legitimately be asked why the prosecution of an attorney for insurance fraud should require such regulatory review as part of a criminal proceeding. The regulation of the legal profession has frequently been deemed not only a legitimate government interest, but a compelling one.<sup>267</sup> As such, despite possible equal protection concerns, a legislative scheme that treats attorneys differently from other criminal defendants can be justified if a rational basis exists for providing them with added protection.<sup>268</sup>

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<sup>266</sup> See *People v. Eubanks*, 927 P.2d 310, 318 (Cal. 1996).

<sup>267</sup> See *Goldfarb v. Va. State Bar Assn.*, 421 U.S. 773, 792 (1975).

<sup>268</sup> The Equal Protection Clause of the Constitution ensures that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When state action implicates a fundamental right or involves a suspect classification, such as race, a classification will "receive the strictest scrutiny under the Equal Protection Clause." *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004). However, where state action does not concern a suspect classification or a fundamental right, even intentionally unequal treatment will be upheld unless "there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court addressed the question of how rational basis review is to be applied to similarly situated persons:

The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the states. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the state to remedy every ill. In applying the equal protection clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

The New Hampshire Supreme Court's discussion in *In re Grimme* of the public's ongoing interest in the protection of lawyers from, among other things, frivolous or retaliatory litigation is particularly relevant to our discussion.<sup>269</sup> That court upheld a statute allowing licensed psychologists to be subject to a lesser standard of proof than attorneys in license revocation proceedings. The court held that applying a preponderance of the evidence standard for psychologists, as opposed to the stricter clear and convincing evidence standard the state used in attorney proceedings, was not a violation of psychologists' right to equal protection, despite the added protection it afforded attorneys. The court stated that "the State is free to treat professions differently according to the needs of the public in relation to each," and reasoned that there existed a reasonable basis for the distinction based on the inherent differences in the nature of the two professions.<sup>270</sup>

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*Id.* at 216.

Similar principles have been used to justify differential treatment of various professions under the criminal law in order to safeguard legitimate regulatory or societal interests. In *Davila v. Yates*, No. C05-4614SI, 2006 WL 1867635 (N.D. Cal. Jul. 5, 2006), the defendant, a contractor, asserted that a California criminal statute violated his right to equal protection under the law since it punished contracting without a license as a felony, while similar criminal statutes penalized other licensing crimes as misdemeanors. Applying rational basis review, the court held it was "left with no other choice than to conclude that the classification of fraudulent use of a contractor's license as a felony is rationally related to a legitimate government purpose." *Id.* at \*25. Other statutes that differentiate on the basis of professional classification have similarly been upheld under the rational basis review standard. *See, e.g.,* Pushkin v. Califano, 600 F.2d 486 (5th Cir. 1979); *see also* Bussey v. Harris, 611 F.2d 1001 (5th Cir. 1980) (denial of Medicare reimbursement to physician assistants found rational). Moreover, a regulation allowing different treatment of architects and engineers (as opposed to other persons) to streamline the building permit process was found to have a rational basis. *Levine v. City of New York*, No. 01 Civ. 3119, 2002 WL 5588 (S.D.N.Y. Jan. 2, 2002). In Georgia, a statute setting forth attorney fee arbitration rules were found to be constitutional. *Nodvin v. State Bar of Ga.*, 544 S.E.2d 142 (Ga. 2001). That court ruled that attorneys were not a suspect class and requiring attorneys to justify their fees in front of an arbitration panel was rationally related to the legitimate goal of maintaining confidence in the legal system. *Id.* at 560.

<sup>269</sup> 635 A.2d 461 (N.H. 1993).

<sup>270</sup> Particularly, the court noted that the legal profession is distinct in that attorneys are involved in an adversarial process and a higher standard of proof may discourage frivolous claims by disgruntled losing parties. As an adversarial relationship is uncharacteristic in the psychological profession, the court found a higher standard was not necessary in psychologist disciplinary proceedings. Moreover, the court reasoned that the nature of an attorney's work is more public than the work of a psychologist since it creates an inevitable paper trail. In psychology, sessions are held in private without the presence of third party witnesses. Consequently, misconduct on the part of a psychologist is more difficult to prove. Because of these inherent differences in the nature of the professions, the court determined that the lower burden of proof survived rational basis review and did not violate equal protection. *Id.* at 462.

Given that a vigorous plaintiffs' bar is necessary to the integrity of the tort justice system, there is clearly a legitimate societal interest in offering protection to attorneys against unfounded or premature criminal charges. Even medical professionals are not subject to the same degree of disruption should they come under criminal investigation in the course of their practice. Doctors can continue to treat their patients if their files are subpoenaed, but the files of law firms are at the very heart of the representation process and any premature compromise of such records' confidentiality can severely damage the attorney-client relationship. It can thus be argued that the unique effect of insurance fraud charges on the legal profession merits a greater degree of procedural protection for accused lawyers than for others indicted for similar crimes. The disruption that such charges cause to the plaintiffs' bar, and to the clients themselves, is different in both degree and kind from the effect on other professional relationships. For this reason, a variety of legislative approaches are possible. However, in the interim, the next Part suggests a procedural judicial response.

#### C. AN ADMINISTRATIVE BUFFER: BALANCING THE INTERESTS OF CRIME PREVENTION AND EFFECTIVE CIVIL JUSTICE

The judiciary, to its credit, has been aware of the problematic aspects of the Alliance, and has in some instances been willing to mitigate attorney harm resulting from insurance fraud investigations.<sup>271</sup> For instance, the California courts have offered protections relating to attorney-client privilege and work product doctrine when attorneys' files are seized pursuant to a search warrant issued as part of a criminal investigation of alleged insurance fraud.<sup>272</sup> In *People v. Superior Court of Los Angeles (Laff)*,<sup>273</sup> the Supreme Court of California upheld the right of attorneys who were under investigation for automobile insurance fraud to have a special master, appointed by the trial court, determine which of the seized documents were subject to either attorney-client privilege or the work product doctrine.<sup>274</sup> The court held that, even though the matter had not

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<sup>271</sup> *People v. Super. Ct. of Los Angeles*, 23 P.3d 563 (2001) (authorizing appointment of a special master to review seized documents to determine privilege).

<sup>272</sup> *Id.* at 735-37.

<sup>273</sup> *Id.*

<sup>274</sup> In a subsequent case, *People ex rel. Allstate Ins. Co. v. Weitzman*, 132 Cal. Rptr. 2d 165 (Ct. App. 2003), a *qui tam* civil action eventually lost by Allstate in order to recover funds on behalf of the state allegedly defrauded by the Laff scheme, the court included a letter to a Los Angeles newspaper describing the aggressive nature of the search:

An October 9, 1996, letter published in the Los Angeles Daily Journal responded to the October 1 article. It described the execution of the search warrant at Mr. Laff's office as follows:



been referred to a criminal court proceeding at the time, both mandates of the privilege and its inherent authority authorized the trial court's use of the special master.<sup>275</sup>

Remedies such as those created by the *Laff* court, however, are at best incomplete. Although the court was willing to appoint a special master for determinations of privilege, the evaluation of attorney professional conduct as part of the fraud is generally left to the trial mechanism alone.<sup>276</sup> To the extent that attorneys may limit their actions as a result of their perceptions of potential conflicts or other perceptions of influence, a more comprehensive safeguard is justified to protect the crucial role of the plaintiffs' bar in insurance fraud litigation.<sup>277</sup>

Obviously, the most comprehensive remedy against the dangers of the Alliance would be to strike down all private insurance industry financing of criminal investigations and prosecutions, and remove the special status granted the insurance industry in triggering investigations as part of the current Alliance system. This, however, would require either legislative reform or judicial interpretation opposite of that announced in *Ellis*. It is unrealistic to conclude that either of these eventualities will occur in the near future.

One potential remedy for the Alliance's distortion of the criminal justice system was, ironically, suggested by the *prosecution* in the *Marks* case.<sup>278</sup> In that case, Marks's counsel had argued to the Florida Supreme Court that the statute under which the law firm was being prosecuted

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"Approximately 30 flak-jacketed 'officers,' with guns drawn, came running down office hallways and barged into Mr. Laff's offices to serve the search warrant. What Mr. Kass [Financial's attorney] was overseeing was, in effect, 'discovery' by Gestapo tactics. [¶] I hav[e] nothing to do with Mr. Laff or any of the issues or subject matter of the underlying case. However, it may well be prophetic for all in society when, as one of the officers was leaving at the end of the day, he said to me in the hall as the elevator door closed, 'We're coming for you next.'"

*Id.* at 170 (citing Letters to the Editor, "*Gestapo Tactics*" Used in Law Office Search, L.A. DAILY J., Oct. 9, 1996, at 7).

<sup>275</sup> *Super. Ct. of Los Angeles*, 25 Cal. 4th at 735-37. This reflects Supreme Court jurisprudence regarding the importance of the attorney-client privilege. See *United States v. Zolin*, 491 U.S. 554, 568-75 (1989) (holding that before documents claimed to be covered by this privilege may be subjected to an in camera review by the judge to ascertain if the crime-fraud exception may be validly invoked, the state must make an evidentiary showing plausibly implicating the possible application of the crime-fraud exception to attorney-client privilege).

<sup>276</sup> See *United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994).

<sup>277</sup> The use of procedural reforms in the prosecution of lawyers is one manner by which "possible prosecutorial misuse of the criminal law" and the "criminalizing [of] socially desirable and professionally accepted lawyer conduct" may be guarded against. See Wolfram, *supra* note 15, at 76.

<sup>278</sup> Reply Brief of Petitioner, *supra* note 191, at 10.

violated the equal protection clauses of the United States and Florida constitutions since it penalized nondisclosures by attorneys and insurance claimants but not by insurance carriers.<sup>279</sup> In response, the prosecutor argued that, although prevention of fraud and bad faith by insurance companies was as worthy a goal as preventing fraud by claimants, the insurance carriers could be effectively regulated via civil and administrative means.<sup>280</sup> The Marks firm's response was that the distinction drawn by the prosecution was specious, since attorneys were also subject to a similar regulatory system.<sup>281</sup>

The Florida Supreme Court did not resolve this equal protection issue, since it decided in favor of the Marks firm on vagueness grounds.<sup>282</sup> The interplay of the prosecution and defense briefs, however, suggests a method by which a buffer may be placed between the insurance industry and financially motivated prosecutions of plaintiffs' attorneys. Attorneys are officers of the court and are subject to discipline by the judicial system and its designees.<sup>283</sup> Moreover, as the *Marks* prosecution argued, administrative regulation by expert bodies can be an effective method of policing an

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<sup>279</sup> Cross-Reply Brief of Marvin Marks, *supra* note 172, at 7.

<sup>280</sup> Reply Brief of Petitioner, *supra* note 191, at 10 (“[C]laimants and insurance companies occupy substantially different legal positions. Insurance companies are heavily regulated by the State. Unfair trade practices and unfair settlement practices are prohibited. Fraudulent acts by insurers could result in the loss of licenses to conduct business in the State. If insurers fail to settle a legitimate claim, they can be held liable for excess verdicts for bad faith. Claimants and their attorneys are not subject to these regulations.”).

<sup>281</sup> Cross-Reply Brief of Marvin Marks, *supra* note 172, at 9 (“The State also argues that the insurance fraud statute need not apply equally to insurance companies because insurance companies are regulated by the State . . . . The conduct of attorneys, physicians and operators of hospitals are similarly regulated by appropriate licensing authorities and they all bear the same risk of losing their licenses. In fact, the [Florida] insurance fraud statute itself provides that in addition to criminal penalties . . . [a]ttorneys who commit fraud are . . . subject to disciplinary proceedings and risk the loss of their license to practice law, under the jurisdiction of the Supreme Court. Thus, the State’s urged distinction is nonexistent.”).

<sup>282</sup> See *State v. Mark Marks*, P.A., 698 So. 2d 533, 538 (Fla. 1997).

<sup>283</sup> See *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 490-92 (N.Y. 1928) (expressing the role of attorneys as officers of the court and reiterating the long tradition of attorney discipline as the proper province of the judiciary). In that decision, Benjamin Cardozo reviews the regulatory authority of courts in the disciplining of lawyers within the common law system from the Middle Ages in Britain to the modern era in New York. *Id.* at 490-92. For an excellent analysis of attorney discipline systems, see Lawrence H. Averill, Jr., *The Revised Lawyer Discipline Process in Arkansas: A Primer and Analysis*, 21 U. ARK. LITTLE ROCK L. REV. 13 (1998); Jennifer M. Kraus, *Attorney Discipline Systems: Improving Public Perception and Increasing Efficacy*, 84 MARQ. L. REV. 273 (2000); Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007); Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003).

industry's ethics.<sup>284</sup> Consequently, just as the *Marks* prosecutor urged that state regulatory agencies are useful in determining alleged malfeasance by insurance carriers, the attorney disciplinary board of each state could be an option for initial review of allegations that the *professional conduct* of lawyers constituted insurance fraud.

The proposed "buffer" system would involve offering the appropriate disciplinary agency the opportunity to first review the lawyer's conduct as a regulatory matter.<sup>285</sup> Though this system would be best effectuated by legislation, the courts could potentially use their inherent authority<sup>286</sup> to seek guidance from these disciplinary committees as a sort of special master to assist in their inquiries. Since attorneys' conduct is regulated by an existing, comprehensive professional disciplinary scheme generally constituted under the judiciary's supervisory powers, the criminal courts could incorporate these disciplinary boards as a source of initial inquiry when vetting allegations of insurance fraud.

In effect, the court would stay the criminal proceedings at a very early stage and refer the case to the appropriate disciplinary agency which would effectively play the role of a special master in determining whether there were sufficient indicia of fraudulent conduct to warrant criminal penalties.<sup>287</sup> Where allegedly fraudulent conduct committed by attorneys implicates common litigation practices of the plaintiffs' bar, as in *Marks*,

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<sup>284</sup> See Reply Brief of Petitioner, *supra* note 191, at 10.

<sup>285</sup> This could be accomplished under a procedure analogous to abstention in federal courts. See generally Lewis Yelin, *Burford Abstention in Federal Actions for Damages*, 99 COLUM. L. REV. 1871 (1999) (providing an overview of the abstention doctrine). While most federal abstention doctrines are grounded in comity between federal and state governments, others are based on prudential considerations such as efficient administration of justice and avoidance of unnecessary constitutional litigation. See *id.* Among the grounds upon which federal courts may utilize their discretion to abstain is where exercise of jurisdiction might impair state regulatory systems. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). "*Burford* abstention" is appropriate where

the particular regulatory scheme involves a matter of substantial public concern[,] . . . is "the sort of complex, technical regulatory scheme to which the *Burford* abstention doctrine usually is applied," and [where] review of a party's claims would interfere with the state's efforts to establish and maintain a coherent regulatory policy.

*Chiropractic Am. v. LaVecchia*, 180 F.3d 99, 105 (3d Cir. 1999).

<sup>286</sup> A court has the "inherent power to control and prevent the abuse of its process." See *People v. Super. Ct. of Los Angeles*, 23 P.3d 563, 570 (2001). This authority "extends to appointing special masters to perform subordinate judicial duties." *Id.* at 585.

<sup>287</sup> Although special masters are usually used in the civil context, they are also used in criminal cases for such purposes as determining whether materials seized from attorneys' offices are privileged. FED. R. CIV. P. 53; *Super. Ct. of Los Angeles*, 23 P.3d at 586. Moreover, it has long been held that a court may instigate an inquiry as part of any "quasi-administrative remedy whereby the court is given information that may move it to other acts thereafter." *Culkin*, 162 N.E. at 492.

considerations similar to those at stake in other regulatory offenses militate in favor of preliminary vetting by disciplinary tribunals.<sup>288</sup>

Attorney disciplinary systems, rather than prosecutors in alliance with insurance companies, are better suited to determine the line between lawyer fraud and aggressive, though ethical, legal tactics.<sup>289</sup> Disciplinary boards have extensive experience resolving disputes in this area.<sup>290</sup> Disciplinary committees, whether appointed by a court or by a state bar association, are composed primarily of attorneys and encounter questions of unethical conduct on a daily basis.<sup>291</sup> In addition, they employ specialized investigative staff who are conversant with ethical matters.<sup>292</sup> The

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<sup>288</sup> That in some jurisdictions violations of attorney discipline rules are prohibited as grounds for another cause of action in tort does not preclude this buffer system. Generally, such rules simply reflect the idea that ethical violations do not create private causes of actions in the clients or third parties. See Criton A. Constantinides, Note, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions*, 25 GA. L. REV. 1327, 1356 (1991). There is no prohibition that the judiciary may not use information or decisions acquired from its own inquiries to assist it in other determinations.

<sup>289</sup> The evaluation of the professional conduct of lawyers has long been considered the proper domain of the courts and their various delegates. See *Culkin*, 162 N.E. at 493 (“If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.”)

<sup>290</sup> See Levin, *supra* note 283, at 1 (stating that “[e]ach year state disciplinary agencies receive more than 125,000 lawyer discipline complaints against the 1.3 million lawyers in the United States”).

<sup>291</sup> See Zacharias, *supra* note 283, at 690 (noting that the actors implementing the disciplinary process—the rulemakers, the prosecutors, and the reviewing judges—are ordinarily are all lawyers). Lay participation in attorney discipline is, however, on the rise. *Id.* at n.54.

<sup>292</sup> See Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Standards*, 48 AM. U. L. REV. 1, 4 (1998) (noting that “[m]ost state discipline agencies have full-time professional disciplinary counsel and investigators”). The most recent ABA comprehensive report on the state of disciplinary committees is known as the McKay Commission Report. See AMERICAN BAR ASSOCIATION, COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992). The McKay Commission Report found that “almost without exception, disciplinary systems [were now] staffed by full-time professional disciplinary counsel having statewide jurisdiction.” *Id.*

The New York attorney discipline system, for instance, is typical of states that do not delegate disciplinary matters to bar associations. In New York, each of the four departments of the Appellate Division maintains a disciplinary committee that acts as an arm of the court. Each committee has a full-time staff of attorneys, investigators, and clerical personnel who receive complaints, “make an initial judgment whether a sufficient basis exists on whether to proceed with an investigation,” and determine upon full investigation whether to commence formal or informal disciplinary proceedings. New York State Bar Association Legal Handbook, ch. 21, Attorney Discipline (2005), available at [http://www.nysba.org/Content/NavigationMenu/PublicResources/UnhappywithaNYAttorney/Unhappy\\_with\\_a\\_NY\\_At.htm](http://www.nysba.org/Content/NavigationMenu/PublicResources/UnhappywithaNYAttorney/Unhappy_with_a_NY_At.htm). Pursuant to Section 90 of the New York State Judiciary Law, formal

committees are intimately familiar with both the relevant disciplinary rules and the customs and practices of the legal profession.<sup>293</sup> Hence, they are uniquely suited to distinguish acceptable professional practice from fraudulent conduct.

This is critical because courts have repeatedly recognized that the ethical obligations of attorneys accused of criminal conduct are key to determining whether they in fact acted with a criminal mental state.<sup>294</sup> Accordingly, courts have held that attorneys accused of insurance fraud are entitled to present evidence concerning the rules of professional ethics to support their claims that they acted in good faith and thereby lacked the necessary mental state to be guilty of an offense.<sup>295</sup>

In a criminal court, where the jury is typically unfamiliar with legal ethics, expert testimony is used to prove adherence to the relevant professional rules. In *United States v. Kelly*,<sup>296</sup> for instance, the Eleventh Circuit held that it was error to preclude an attorney charged with participating in a narcotics conspiracy from presenting expert proof regarding "his professional obligations as an attorney."<sup>297</sup> Specifically, the court held that the rules governing protection of client confidentiality as well as the duty of an attorney to counsel his clients against committing further crimes were relevant to the attorney's state of mind in conducting certain conversations in which he advised his clients not to consummate drug deals.<sup>298</sup> He was, therefore, entitled to present proof on these issues as a "basis for his primary defense: that he acted not with criminal intent but within the legitimate bounds of legal representation."<sup>299</sup>

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disciplinary proceedings are heard by one or more referees and are subject to review by the Appellate Division.

<sup>293</sup> The determinations of a disciplinary board are generally considered sufficiently expert that state courts will typically rely on the findings of the hearing panel when considering the disciplinary board's recommendation of sanctions. See Levin, *supra* note 292, at 19.

<sup>294</sup> See *United States v. Cavin*, 39 F.3d 1299, 1308-10 (5th Cir. 1994) (noting that where "a lawyer's responsibility to the client collides with other rules of law," a complex "interplay of conflicting duties" is created, and there are often conflicting opinions about how the attorney should proceed). Thus, where professional standards "guide [the] conduct" of a lawyer who is accused of committing fraud in collusion with a client, "they are directly relevant to his intent." *Id.*

<sup>295</sup> *Id.* at 1309; see also *United States v. Kellington*, 217 F.3d 1084, 1099-1100 (9th Cir. 2000); *United States v. Kelly*, 888 F.2d 732, 743-44 (11th Cir. 1989).

<sup>296</sup> 888 F.2d at 732.

<sup>297</sup> *Id.* at 743.

<sup>298</sup> See *id.*

<sup>299</sup> *Id.*

This principle was developed to an even greater extent in *United States v. Cavin*,<sup>300</sup> which involved questions of tax and insurance fraud.<sup>301</sup> As in *Kelly*, the court held that the exclusion of expert proof concerning the defendant attorneys' ethical obligations was reversible error.<sup>302</sup> It went further by noting that "[e]xpert testimony may be particularly appropriate when specialized areas of law, such as the insurance and financial matters relevant herein, are at issue."<sup>303</sup> Likewise, in *United States v. Kellington*,<sup>304</sup> where an attorney was accused of obstructing justice by helping his client destroy certain documents, the court held he had a duty of loyalty to the client as long as he "[did] not affirmatively know his client's objectives to be illegal."<sup>305</sup> Given Kellington's defense was based on his ethical obligations, the Ninth Circuit concluded that the trial court erred in instructing the jury that the testimony of his expert on legal ethics was "merely background information."<sup>306</sup>

In practice, the principles outlined in cases such as *Cavin* and *Kellington* can lead both to procedural and substantive confusion. Needless to say, the defendant's ethical expert will be opposed by a prosecution expert who will present a competing view of the relevant ethical obligations.<sup>307</sup> Since courts in many jurisdictions are wary of expert testimony that might pertain to the ultimate issue before the jury, the use of expert testimony in nearly all American jurisdictions is typically subject to a threshold showing of acceptance or reliability.<sup>308</sup> This can lead to a

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<sup>300</sup> 39 F.3d 1299 (5th Cir. 1994).

<sup>301</sup> *Id.* at 1302-04.

<sup>302</sup> *Id.* at 1309.

<sup>303</sup> *Id.* The court also noted that the relevant state disciplinary rules and American Bar Association opinions were in conflict regarding attorneys' obligations to disclose financial frauds by their clients, and thus expert testimony could help guide the trier of fact through the process of determining the defendants' mental state. *Id.* The court noted, for instance, that attorneys are required to disclose material facts "when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client," but that an exception to this rule occurred where "disclosure is prohibited by the rule against revealing client confidences." Given "most such disclosures would consist of client confidences" and the parameters of the relevant ethical rules depend in part on the lawyer's role in the reporting process, the defendants are entitled to present evidence of how the interplay of the ethical and legal obligations influenced their behavior. *See id.*

<sup>304</sup> 217 F.3d 1084 (9th Cir. 2000).

<sup>305</sup> *Id.* at 1099.

<sup>306</sup> *Id.*

<sup>307</sup> *See id.* at 743 (discussing cases in which the prosecution had introduced expert testimony on professional ethics as proof of guilt); *see also* State v. Larsen, 828 P.2d 487, 492 (Utah Ct. App. 1992) (holding that the trial court did not abuse its discretion in permitting the prosecutor to present expert testimony on professional ethics).

<sup>308</sup> A majority of American jurisdictions, including the federal courts, now follow the multifactor test established in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), and

remarkable amount of preliminary litigation in recognition of the effect that legal ethics could have on the potential jury.<sup>309</sup>

Even in bench trials and pretrial proceedings before a judge, such expert testimony has proven troublesome. For instance, in *Marks* the trial court heard expert testimony and the appellate courts accepted amicus curiae arguments concerning the ethical standards to which attorneys are held during pre-suit negotiations.<sup>310</sup> The issue of proper negotiating behavior was hotly contested during the pretrial proceedings, with the Florida Trial Lawyers' Association contending that in pretrial negotiations "puffing was the norm,"<sup>311</sup> and the State Attorney's office arguing that failure to exercise complete candor was unethical and fraudulent.<sup>312</sup> The state courts wrestled with this issue to an uncertain conclusion, determining that the line between zealous advocacy and fraud was not easy to draw but declining to enumerate the particular types of conduct that might fall on either side of that line.<sup>313</sup>

An attorney disciplinary committee would be familiar with the relevant ethical rules, precedents, and opinions, not only in its own state, but also in other American jurisdictions. As with other specialized tribunals such as workers' compensation boards, civil service boards, or zoning boards of appeal, lawyer grievance committees are experts in the area of law they administer.<sup>314</sup> They would not require guidance from potentially partisan outside experts to determine the dividing line between legitimate advocacy and insurance fraud, and they would have the expertise and resources to determine what attorneys may or may not do.

The need for a disciplinary buffer is strongest where, as in *Marks* and similar cases, the alleged fraudulent conduct consists of overzealous advocacy or withholding of information rather than fabricated claims. Advocacy-based charges implicate lawyering practices and are thus targeted

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*Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). A minority of states still follow the *Frye* standard, which requires that expert opinion be generally accepted within the relevant professional field. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Both standards, however, require the party proffering the testimony to make a threshold showing.

<sup>309</sup> See *United States v. Naegele*, 471 F. Supp. 2d 152, 157 (D.D.C. 2007) (both sides proffered the testimony of legal ethics experts, which led to extensive preliminary litigation concerning whether their testimony was sufficiently reliable to admit and whether testimony on certain topics should be precluded as invading the province of the jury).

<sup>310</sup> See *State v. Mark Marks, P.A.*, 698 So. 2d 533, 537-38 (Fla. 1997).

<sup>311</sup> *Id.* at 8.

<sup>312</sup> See Brief of Petitioner on the Merits at 5, No. 85,920, 1995 WL 17016003 (Fla. Jul. 20, 1995).

<sup>313</sup> See *State v. Mark Marks, P.A.*, 758 So. 2d 1131, 1137 (Fla. Dist. Ct. App. 2000).

<sup>314</sup> See *Zacharias*, *supra* note 283, at 690 (noting the expertise of disciplinary boards and recognizing that ethical evaluators are usually attorneys).

at the very activities the Alliance improperly seeks to chill, while classic frauds such as staged accidents do not. For prudential reasons, however, it would be advisable to extend the buffer system to all insurance fraud charges against attorneys, no matter what the underlying alleged conduct, when the charges implicate any in-role conduct. If only certain alleged attorney-fraud cases were subject to a buffer, then there would be a risk of endless preliminary litigation over whether or not the buffer system applied to a particular case or whether it applied to all counts against a specific defendant. This would prolong rather than expedite the legal proceedings against the attorney, which is itself one of the harms caused by Alliance-inspired criminal charges,<sup>315</sup> and thus would defeat one of the central purposes of the proposed buffer.

There are other and more generalized reasons why disciplinary bodies should be permitted to vet insurance fraud charges against lawyers. One such reason is that disciplinary tribunals are quasi-judicial rather than prosecutorial organs, and thus have no financial or political connection to the insurance industry. As has been discussed above, prosecutorial agencies are subject to influence by the insurance industry, and even when not directly funded by the industry, are often prone to adopt the industry's positions on contentious issues. The very essence of the Alliance is that, along with preferential legislatively granted access and authority, the insurance industry's attitudes and opinions permeate the investigative and prosecutorial branches of the criminal justice system, and police and prosecutors are tainted with at least the appearance, and often the actuality, of advocating for the economic interests of insurance carriers.

An attorney grievance committee, in contrast, is a body infused with impartiality. Instead of using the criminal justice system as a heavy-handed method<sup>316</sup> of policing litigation tactics, a disciplinary committee would focus on the real issue: whether the attorney's conduct, in light of relevant statutes and ethical rules, constituted proper practice. A grievance committee is uniquely suited to take an impartial first look at insurance companies' allegations against lawyers, investigate such allegations without the appearance or reality of financial influence, and serve as expert advisor

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<sup>315</sup> See *supra* notes 190-219 and accompanying text.

<sup>316</sup> The regulation of lawyers by criminal prosecution, in the absence of the opportunity to be handled administratively, significantly shifts the power of such regulation from the judiciary, ever cognizant of the lawyer's role within the legal process, to the legislature's more democratic but potentially more reactionary domain. See Zacharias, *supra* note 283, at 726 ("[M]any situations addressed by the professional rules demand flexibility in regulation that is not possible under a criminal law model. . . . [B]y leaving the regulation of the legal system in the hands of politicians, society would risk dramatic changes in professional rules geared to what is popular rather than what is systemically justified.").



to the courts as it considers dismissal of some or all charges based on the lawyers' professional conduct.

In addition, in the majority of jurisdictions, attorney disciplinary complaints are private and the information revealed therein is made public only after a finding of probable cause.<sup>317</sup> A minority of jurisdictions holds even the hearings private from the public.<sup>318</sup> Thus, if suspected cases of insurance fraud are initially handled within the disciplinary system or by a process analogous to it, confidentiality could be used to preclude the type of high-profile press releases commonly associated with criminal charges against lawyers. Even if the rules of adjudication do not currently hold the investigations private, the use of the disciplinary agent for this "special master" purpose could be done *in camera* with the transcriptions sealed.<sup>319</sup> The investigation will be conducted in a private and dignified manner with respect for the rights of all parties rather than being made the subject of damaging media exposure before the charges are levied. In any event, even if confidentiality were not maintained, the opportunity for expert evaluation of professional conduct alone is useful.

Moreover, many of the ancillary charges that accompany insurance fraud prosecutions are fundamentally ethical or administrative in nature. Allegations related to record-keeping or illicit solicitation of clients are primarily concerned with the public image of the legal profession and the administration of the courts.<sup>320</sup> Consequently, they are more appropriately weighed by the very agencies charged with policing professional ethics. In the American legal system, this is traditionally the role of disciplinary committees, whether operated as an arm of the courts or by state bar associations under legislative authority.

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<sup>317</sup> The fact that these proceedings are not public does not mean they are not available to the court. Since disciplinary proceedings are usually seen as a procedure *by* the court, then any ruling they make, would be available *to* the court.

<sup>318</sup> See Levin, *supra* note 283, at 1 (noting that "in many jurisdictions, discipline complaints, discipline files, and even many discipline sanctions are private"). The level of privacy varies state to state, with Florida, New Hampshire, Oregon, and West Virginia keeping all or most professional complaints as a part of the public record. *Id.* at 19. In the majority of jurisdictions, the complaint only becomes public record once there has been a finding of probable cause. *Id.* A minority of jurisdictions prohibit the public from attending the disciplinary hearings, even after a finding of probable cause, with information about complaints only made public once there has been a finding of wrongdoing and the imposition of a public sanction. *Id.* at 19-20.

<sup>319</sup> Hearings may be held *in camera* so as not to prejudice a criminal defendant or in the interest of attorney-client confidentiality. In California, for example, courts hold the hearing on replacement of counsel *in camera* with the resulting transcripts sealed. See CAL. RULE OF CT. 33.5; *People v. Mardsen*, 465 P.2d 44 (1970).

<sup>320</sup> See *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 490-92 (N.Y. 1928).

It should be noted that, in the event evidence actually does demonstrate fraud, the legitimate rights of prosecutors and insurance carriers will be safeguarded. In fraud cases, disciplinary authorities will lose little time in making findings against the accused attorneys, and any statute of limitations concerns can be addressed by tolling the applicable statute for the duration of the disciplinary process. Indeed, where a disciplinary board has issued a finding of unethical practice, prosecutors will likely face far less difficulty in obtaining guilty pleas or restitution from the attorneys at issue.

#### V. CONCLUSION

The assessment of private funds on the insurance industry to assist in the prosecution of crimes primarily affecting that industry's interests requires that the potential of conflicting interests arising under such a system be addressed. Such a system increases the risk that lawyers representing interests adverse to the funding industry will come within the purview of those funded prosecutorial agencies to their perceived, and perhaps actual, detriment. To alleviate fears of "targeting," inappropriate influence, and special access, some form of prophylactic measure is appropriate.

The regulation of lawyers *as* lawyers has long been the traditional domain of ethics regulators. By requiring the initial judgment of litigation techniques to be assessed by these bodies, or some similar expert hearing officer, the risk of chilled advocacy is reduced, if not eliminated. While lawyers are not, and should not be, immune from criminal prosecution, the nature of their role as advocate should also not be discounted. In the absence of such measures, the regulation of lawyers will increasingly become the domain of the criminal law and lawyers' tactical judgments subject to the scrutiny of the prosecution. Even in the absence of a biased prosecutor, such shift in governance is possibly unwise. Given the existence of risks to prosecutorial neutrality in the insurance fraud context, such a result is most definitely unsound.

