An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor

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"Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce and honest friendship with all nations, entangling alliances with none."2

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1. The term "unholy alliance" appears to have originated as the opposite of the Holy Alliance, which referred to the agreement between the emperor of Russia and Austria and the king of Prussia which was based on the idea that the signers would agree to conduct affairs of state according to the principals of Christian morality. See THE NEW shorter OXFORD ENGLISH DICTIONARY 1250 (1993). The term has been used throughout legal scholarship to refer to relationships within the law that are not based on the furtherance of justice, but on other principals which are damaging to the system. See, e.g., Lillian R. BeVier, Money and Politics: a Perspective on the First Amendment and Campaign Finance Reform, 73 CAL. L. REV. 1045, 1067 & n.110 (1985) (bemoaning the lack of power of citizens against the unholy alliance of big spending, special interests and election victory); Marci A. Hamilton, The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment, 16 CARDOZO L. REV. 357, 397 (1994) (noting the unholy alliance between Congress and the Courts in the area of religious issues); John Burritt McArthur, Cost Responsibility or Regulatory Indulgence for Electricity's Stranded Costs?, 47 AM. U. L. REV. 775, 921 (1998)(discussing the alliance between utility executives and environmentalists); Robert M. Pitler, Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking, 62 BROOK. L. REV. 1, 65 (1996)(calling the relationship between gangs, corrupt police, and Tammany Hall an unholy alliance). The term was applied to the judge and prosecutor in Rodney Thaxton & Lida Rodriguez-Taseff, Professionalism and Life in the Trenches: The Case of the Public Defender, 8 ST. THOMAS L. REV. 185, 191 (1995).

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I. INTRODUCTION

In his first inaugural address, Thomas Jefferson suggested that
the avoidance of entangling alliances was necessary for the success of
the young nation. For the criminal prosecutor and the trial judge,
avoiding an entangling alliance is essential to the functioning of the
adversary system. The adversary system is a dispute resolution
method characterized by resolving issues based on information provided by the
parties in conflict. See id.

3. See id.
4. “The term [adversary system] has no fixed and precise meaning . . . [yet] it is a
useful term for identifying a distinctive set of features and style of decision making
that is most fully developed in Anglo-American legal systems. . . .” Nancy
Amoury Combs, Comment, Understanding Kaye Scholer: The Autonomous Citizen,
The Managed Subject and The Role of the Lawyer, 82 CAL. L. REV. 663, 683
n.160 (1994)(omissions and alterations in original)(quoting Malcolm Feeley, The
Adversary System, in 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM, 753,
753 (Robert J. Janosik ed., 1987)). The adversary system is a dispute resolution
method characterized by resolving issues based on information provided by the
parties in conflict. See STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIP-
from that of the judge on the other hand.\textsuperscript{5} The American justice system, which utilizes the adversary system, is premised on the assumption that truth will emerge from two advocates presenting their version of the facts in a structured format to a neutral and detached decision-maker.\textsuperscript{6} The advocates in the adversary system bear the sole responsibility for the presentation of the facts. The decision-maker must sit as a passive participant to the proceeding and decide the truth based on the facts presented in court. The decision-maker has no role in the discovery, investigation, or presentation of the case. The adversary system is anchored on the principles that if the decision-maker becomes actively involved in the presentation of the facts, she\textsuperscript{7} risks becoming biased toward one version or the other.\textsuperscript{8} Additionally, the presence of a passive decision-maker appears more neutral than a judge,\textsuperscript{9} who is actively involved in the questioning and presentation.\textsuperscript{10}

Although the role of the prosecutor in the adversary system resembles in many respects that of a zealous advocate,\textsuperscript{11} the nature of the prosecutor’s practice requires constant contact and cooperation with the trial judge. This constant contact causes the relationship to take on characteristics that are different from the relationship between the judge and other lawyers. The creation of this interdependent relationship may produce a “team spirit” between the court and prosecutor, which is counter to the fundamental philosophy of the adversary system.\textsuperscript{12}

\textsuperscript{5} LANDSMAN, supra note 4, at 1 (quoting Lon L. Fuller, The Adversary System, in Talks on American Law 34-35 (Harold Berman ed. 1961).
\textsuperscript{6} See infra text accompanying notes 33-98.
\textsuperscript{7} For purposes of simplicity the judge throughout this paper will be referred to with a female pronoun and the prosecutor and all other attorneys will be referred to using the male pronoun.
\textsuperscript{8} See LANDSMAN, supra note 4, at 3.
\textsuperscript{9} Although in most criminal cases the final judgment will be based on the findings of a lay jury, this article discusses the role of the judge as the decision-maker. For an interesting discussion of the merging of the role of the jury and the judge in the area of legal decision-making see Stanton D. Krauss, An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America, 89 J. of Crim. L. & Criminology 111 (1998).
\textsuperscript{10} See LANDSMAN, supra note 4, at 3.
\textsuperscript{12} See infra text accompanying notes 138-166.
One of the by-products of the cooperative relationship between a prosecutor and trial judge is the occurrence of impermissible ex parte communications. Improper ex parte communications occur when one side of a controversy is able to discuss or influence the decision-maker’s opinion and thereby receive a tactical or substantive advantage. Because ex parte communications allow the judge to make decisions before hearing both sides of the case, and may require her to undertake the job of an advocate, improper discussions obstruct the proper functioning of the adversary system.

This Article seeks to explain the relationship between the prosecutor and the trial judge and how that relationship must be closely monitored to avoid impeding the successful application of the adversary process. Part I explains the underlying premises of the adversary system. Part II describes the nature of the relationship between the prosecutor and the trial judge and how that relationship may impact the adversary process. Part III discusses improper ex parte communications as the antithesis of the adversary system. Finally, Part IV suggests safeguards that can help avoid the creation of the “team approach” to prosecution.

II. THE ADVERSARY SYSTEM AND THE NECESSITY OF A NEUTRAL INDEPENDENT COURT

A. History of the Adversary System

The adversary system is as integral a part of our American heritage as capitalism and sporting competitions. Although the Constitution does not mention the existence or creation of the adversary system, we have accepted it as a natural outgrowth of our political structure.

14. See infra text accompanying notes 266-289.
15. See infra text accompanying notes 19-115.
16. See infra text accompanying notes 116-166.
17. See infra text accompanying notes 167-289.
The adversary system has been the primary method of dispute resolution in America since the beginning of the republic. The courts have routinely mentioned the need for adherence to an adversary process. One commentator noted that the adversary process is "so basic that the Constitution does not even mention it." The adversary method of dispute resolution traces its origin to three methods of trial present in medieval Europe. These methods were trial by battle, trial by ordeal, and wager of law. Trial by battle, which was brought to England by William the Conqueror, required the accused to fight with the accuser. The underlying belief was that "heaven would give the victory to him who was in the right." Battle by ordeal resembled the trial by battle in that it invoked heavenly judgment. In the battle by ordeal, the litigant, after taking an oath that his cause was just, would subject himself to physical torture that might include carrying a hot bar, placing his arm in boiling water, or being totally immersed in water. If the litigant survived the ordeal then judgment was entered in his favor. Finally, wager of law was a method of establishing the justness of the litigant's cause by measuring his standing in the community. The litigant would produce a certain number of other people from the community who would join him in his oath as to the justness of his cause. Depending on how many people he could get to join him, his cause would be deemed proven.

20. The Supreme Court, however, has recognized that the adversary system has been "constitutionalized in the Sixth and Fourteenth Amendments." Herring v. New York, 422 U.S. 853, 857 (1975).
21. See LANDSMAN, supra note 4, at 1.
22. See, e.g., United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (noting that the requirement that issues not argued will not be decided by the court is an important distinction between the adversary system and the inquisitorial system); United States v. Cronic, 466 U.S. 648, 655-56 (1984) (recognizing that the adversary system gives meaning to the Sixth Amendment).
24. See LANDSMAN, supra note 4, at 8.
25. See id.
26. See id. at 3; JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT: LAW, PROCEDURE, FORMS 14 n.47 (2d ed. 1999).
27. LAWLESS, supra note 26, at 8 n.18; see Flowers, Code of Their Own, supra note 11 at 923.
29. See LANDSMAN, supra note 4, at 9.
30. See id. at 8-9.
Although each of these methods used a limited amount of evidence, each resembled the present adversary system in two important ways. Each of these methods required active participation by the advocates or parties and a limited participation by the judge. The judge's participation in these early forms of trial was limited to administering the oath to the litigants and then deciding which method of trial would be utilized in the case. Much like today's jurist, his medieval counterpart did not take part in the actual combat, but merely set the ground rules for the contest and then declared the judgment.

B. Principals of the Adversary System

The adversary system of today is premised on three basic principles. First, the system requires a dispute between two or more parties, who will themselves or through zealous advocates present their view of the dispute. Second, the facts will be presented in a structured format. Finally, the system requires that a neutral and passive decision-maker render the ultimate judgment.

1. Contentious Presentation of the Evidence

The basic premise of the system is that at least two individuals have a factual dispute upon which they cannot agree. Therefore,

32. See id. at 718-19 (noting that the court's role was limited to determining the form of the trial and deciding which party would bear the burden of proof); see also STRIER & GREENE, supra note 19, at 41.
33. Several justifications have been asserted for the adversary system. The system relies in part on the belief that truth can be found through a method of legal combat. See Luban, Excuse, supra note 23, at 95 (noting that some argue that "facts are best discovered by a battle between two conflicting points of view"); Meese, supra note 19, at 271 (asserting that truth is the basic mission of the criminal justice system). Additional justifications for the system include the rational that the adversary process protects individual rights and dignity. See MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 8 (1975)(noting the system "preserves the dignity of the individual"). Some justify this system as being the "only effective means for combating [sic] this natural tendency to judge too swiftly in terms of the familiar which is not yet fully known." FRANKLIN STRIER, RECONSTRUCTING JUSTICE, AN AGENDA FOR TRIAL REFORM 36 (1996)(quoting Fuller, supra note 5, at 43-44)(hereinafter STRIER, JUSTICE). Others have assailed the adversary system as ineffective and a "relic of a primitive way of seeing and thinking about the world." STRICK, supra note 28, at 21. Justice Rehnquist stated, "I think we must be aware of the societal interests being sacrificed in pursuit of providing an adversary forum for the vindication of claims of individual rights." STRIER & GREENE, supra note 19, at 1 (citation omitted).
34. See STRIER, JUSTICE, supra note 33, at 13.
they must turn to a third party for resolution.\textsuperscript{35} The assumption is that each party believes its version of the facts to be correct, and are therefore unable to resolve the issue. This premise requires individuals to "choose sides," to take a position for the adversary process to be necessary. The entire process calls for the contentious presentation of evidence from beginning to end.\textsuperscript{36} The rules of the process may call for reciprocation, but never cooperation.\textsuperscript{37} As Robert Kutak explained, "a fundamental premise of the adversary system of jurisprudence is that a competitive, rather than cooperative, presentation and analysis of the facts underlying a dispute will produce a greater number of correct results."\textsuperscript{38}

In believing in the rightness of its position, each party is ultimately responsible for presenting his case. The parties in the adversary system initiate and control the definition of the dispute.\textsuperscript{39} The advocate's responsibility is to present its side, not an even-handed assessment of the facts, thus leaving the opponent with the responsibility of presenting its version.\textsuperscript{40} Each party, either alone or through legal representation, seeks to "put its best foot forward."\textsuperscript{41} The adversary system presupposes that each side bears the obligation not only to present evidence supporting its case, but also to ferret out all evidence that supports his case and contradicts the opponent's case.\textsuperscript{42} As the court recognized in \textit{United States v. Gomez-Gallardo},\textsuperscript{43} "[t]he adversarial system breaks down when the defendant is prevented from defining and presenting his own case. . . ."\textsuperscript{44}

In most criminal cases, a lawyer represents the party. Interested parties usually do not participate directly, except as witnesses.\textsuperscript{45} In

\textsuperscript{35} See Murray L. Schwartz, \textit{The Zeal of the Civil Advocate}, in \textit{The Good Lawyer}, supra note 19, at 150, 153.

\textsuperscript{36} See Charles W. Wolfram, \textit{Modern Legal Ethics} 564 (1986); United States v. Segal, 549 F.2d 1293, 1300 (9th Cir. 1977)(noting that the adversary process continues even into the sentencing phase of the criminal trial).

\textsuperscript{37} See Kutak, supra note 19, at 174.

\textsuperscript{38} Id.

\textsuperscript{39} See Wolfram, supra note 36, at 564. In a criminal prosecution, the government must initiate the dispute by the filing of a charging document. See id.

\textsuperscript{40} See Joseph Kelner & Francis E. McGovern, \textit{Successful Litigation Techniques: Student Edition} § 8.01 at 8-1 (1981)(defining the work of the advocate in the adversary system as presenting "the client's case in the most favorable possible manner within the bounds of the law and the code of ethics").

\textsuperscript{41} Schwartz, supra note 35, at 153; see also \textit{In re Larsen}, 616 A.2d 529, 597 (Pa. 1992)(stressing the importance of the advocate's role "to breathe life, meaning and measure into the spirit and value of . . . constitutional guarantee[s] . . . .")


\textsuperscript{43} 915 F.2d 553 (9th Cir. 1990).

\textsuperscript{44} Id. at 556.

\textsuperscript{45} See Wolfram, supra note 36, at 564. One is reminded of the old saying, "An attorney who represents himself has a fool for a client."
putting forth his best case, the advocate will zealously advocate its position. As Lord Brougham claimed in his defense of Queen Caroline before the House of Lords in 1820:

An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save that client by all expedient means – to protect that client at all hazards and costs, to all others and amongst others to himself – is the highest and most unquestioned of his duties. . . . 46

At its very core, the adversary system requires one-sided loyalty. 47

The system, in essence, requires a sense of "equal competence." 48 Each advocate must be similarly qualified in skill and zeal. At the center of this competitive model of dispute resolution is the assumption that neither side is responsible for the competence of the other, 49 and is not required to share in any way with the other side. 50 In the adversary process, the advocate is required to be partisan, the initia-


47. In discussing Lord Brougham's declaration, Judge Marvin Frankel lamented that "Lord Brougham was wrong; we should be less willing to fight the world and . . . more concerned to save our own souls. As ministers of justice, we should find ourselves more positively concerned than we now are with the pursuit of truth." Marvin E. Frankel, Washington Post, May 7, 1978, available in Elizabeth Frost-Knappman & David S. Shrage, The Quotable Lawyer (revised ed. 1998); see also In re Hawaiian Flour Mills, Inc., 888 P.2d 419, 437 (Haw. 1994)(Levinson, J., concurring)(citing Frankel's quote).


49. See Kutak, supra note 19, at 174; United States v. Watson, 171 F.3d 695 (D.C. Cir. 1999)(indicating that the system contemplates the opportunity in trial to challenge opposing counsel's misstatements).

50. In voicing his opposition to the adoption of Federal Rule of Civil Procedure 26, Justice Scalia observed that [b]y placing upon lawyers the obligation to disclose information damaging to their clients – on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment – the new Rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side.

tor and presenter of the evidence, and in control of his side of the story.\textsuperscript{51}

2. \textit{A Structured Set of Rules of Presentation}

Although many see the contest between advocates as "legal combat,"\textsuperscript{52} the battle is fought under a strict set of rules. The adversary system contemplates that the controversy will be decided in a forum with a structured set of rules.\textsuperscript{53} The rules include rules of procedure, evidence, and ethics.\textsuperscript{54}

These rules have several purposes: facilitating the search for truth, giving the reality and appearance of a level playing field, and controlling the advocates' behavior.\textsuperscript{55} Specifically, the rules of procedure control the pre-trial, trial and post-trial phases of the case.\textsuperscript{56} Their purpose is to assure that the evidence will be presented during one trial and therefore the decision-maker will decide the case based on the confrontation of the two sides in one forum.\textsuperscript{57} Additionally, the rules defining discovery, prohibiting frivolous lawsuits and claims, and limiting delay tactics "mitigate adversarial excess."\textsuperscript{58} Finally, the rules of procedure modify the adversary system's principles regarding the parties' control of their information.\textsuperscript{59}

\textsuperscript{51} See Olds v. Donnelly, 696 A.2d 633 (N.J. 1997); District of Columbia v. WICAL Ltd. Partnership, 630 A.2d 174, 185 (D.C. 1992)(noting that courts rely on counsel to "try their own case").


\textsuperscript{53} See Zacharias, Justice, supra note 48, at 60; Nijboer, supra note 19, at 94 (noting that the adversary system is sometimes used as a basis for explaining the need for these rules).

\textsuperscript{54} See LANDSMA, supra note 4, at 4-5.

\textsuperscript{55} See Meese, supra note 19, at 280 (suggesting that some of our rules are based on our mistrust of juries); Nathan M. Crystal, Limitations on Zealous Representation in an Adversarial System, 32 WAKE FOREST L. REV. 671, 673 (1997)(arguing that procedural rules in an adversary system should be "designed to maximize the likelihood of truthful results").

\textsuperscript{56} See LANDSMA, supra note 4, at 4-5.

\textsuperscript{57} See United States v. Watson, 171 F.3d 695 (D.C. Cir. 1999)(Garland, J., dissenting). Justice Garland observed that our adversary system relies on the "opportunity each side has to challenge the other's misstatements before a jury." \textit{Id.} at 704.

\textsuperscript{58} David Luban, Heroic Judging in an Anitheroic Age, 97 COLUM. L. REV. 2064, 2078 (1997)(indicating that the rules of procedure and ethics make the adversary system bearable)[hereinafter Luban, Hero].

\textsuperscript{59} See Crystal, supra note 55, at 674-675.
The rules of evidence attempt to control the kind of evidence submitted to the decision-maker. The rules promote the ascertainment of truth, and proceedings that are fair and just. These rules "protect the integrity of the testimonial segment of adversary proceedings" by prohibiting the use of unreliable, misleading, or highly emotional evidence. The evidence rules contemplate that the parties will control what evidence they present. The rules controlling the examination of witnesses, presentation of evidence, and objections all give the "initiative to the parties."

Judge Frankel noted that the judge's ability to maintain the courtroom is limited by the procedural rules which give the lawyers the functions of "initiating, organizing, and conducting" the presentation of the evidence. In addition to controlling the admissibility of evidence, the rules of evidence also control the judge's discretion. The rules of evidence define the court's discretion in determining what evidence will reach the trier of fact.

Finally, the rules of ethics attempt to keep the zealousness of the advocates in check. These rules are necessary because the lawyer is a "gladiator" who uses weapons in the courtroom not "crusading after truth but seeking to win." The Rules of Professional Conduct control

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60. See Landsman, supra note 4, at 5.
61. But see Meese, supra note 19, at 277 (asserting that many constitutionally created exclusionary rules are truth-defeating).
62. See Fed. R. Evid. 102, which states, "[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."
63. Landsman, supra note 4, at 5.
64. See Nijboer, supra note 19, at 94.
65. Id. (noting that the party who wishes to present certain evidence has the burden of laying the proper foundation under the rules).
66. Frankel, supra note 52, at 39.
67. See Landsman, supra note 4, at 5; Vanemmerik v. Ground Round Inc., No. Civ.A.97-5923, 1998 WL 474106, at *1 (E.D. Pa. July 16, 1998)(recognizing that Fed. R. Evid. 611(a) assures that the judge is ultimately responsible for the effective working of the adversary system); Cox v. State, 843 S.W.2d 750, 756 (Tex. 1992)(acknowledging that the trial judge is the best situated to decide what evidence is relevant).
68. See Gable v. Kroger Co., which found that detailed rules governing the admissibility of evidence are neither "desirable nor feasible." 410 S.E.2d 701, 703 (W. Va. 1991)(quoting Fed. R. Evid. 611(a) advisory committee's note). Rather, "The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain." Id. (quoting Fed. R. Evid. 611(a) advisory committee's note).
69. See Landsman, supra note 4, at 5; Luban, Hero, supra note 58, at 2078 (conceding that "[g]iven enough procedural tinkering to mitigate adversarial excess, adversarial litigation does a creditable job of ensuring that plausible arguments are not overlooked.").
the advocate's "natural tendencies" to seek to win at all costs and by all means.\textsuperscript{71} Rules prohibiting misleading or harassing the opponent or third parties\textsuperscript{72} attempt to limit the advocate to behavior that assures the "integrity of the system."\textsuperscript{73} On the other hand, the rules define the role of the advocates to represent their clients zealously.\textsuperscript{74} The rules attempt to define and maintain the role of the professional advocate in order to further the ends of the adversary system.\textsuperscript{75}

3. An Impartial Tribunal Will Decide the Outcome

Finally, the adversary process assumes that both sides will present their case to a neutral, passive tribunal.\textsuperscript{76} One author calls this assumption the adversary system's "first and most essential element."\textsuperscript{77} The principle is that the fact-finder, whether judge or jury, is neutral.\textsuperscript{78} The fact-finder begins the process without demonstrable bias or knowledge of the facts.\textsuperscript{79} Although the judge may have some

\textsuperscript{71} LANDS\textsuperscript{m}AN, supra note 4, at 5.
\textsuperscript{72} See generally GILLERS, supra note 50 (providing descriptions of the ABA Model Rules).
\textsuperscript{73} LANDS\textsuperscript{m}AN, supra note 4, at 5. But see FREEDMAN, supra note 33, at 15 (criticizing Chief Justice Burger's attacks on "adrenaline[sic]-fueled" lawyers, as not being accurate). Freedman asserts that the real danger is not the over-zealous lawyers, but the attempts to restrict the advocacy of lawyers in search of civility.
\textsuperscript{74} See LANDS\textsuperscript{m}AN, supra note 4, at 5; MODEL RULE OF PROFESSIONAL CONDUCT 1.3 (cmt.) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").
\textsuperscript{75} See Virgin Islands Housing Authority v. David, 823 F.2d 764, 767 n.7 (3d Cir. 1987) ("Zealous advocacy should not mean unbounded advocacy. Counsel's role must to some extent be defined to reflect the basic purpose of the adversary system as a means of promoting the discovery of truth. . . .") (quoting Meese, supra note 19, at 280-81).)
\textsuperscript{76} See Zacharias, Justice, supra note 48, at 85; Mack v. United States, 570 A.2d 777, 782 (D.C. App. 1990) (noting that the court should act as an "impartial arbiter.").
\textsuperscript{77} STRICK, supra note 28, at 145.
\textsuperscript{78} See WOLFRAM, supra note 36, at 566. In most American criminal cases, the impartial tribunal is made up of lay jurors. See JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 6 (1993).
\textsuperscript{79} See Commonwealth v. Stewart, 295 A.2d 303, 307 (Pa. 1972) (Roberts, J. concurring) (emphasising prosecutor's duty to disclose juror's relationship to the victim); MODEL CODE OF JUDICIAL CONDUCT CANON 3(B)(1)(a) (1989) (requiring judge to recuse himself when he has "personal knowledge of disputed evidentiary facts concerning the proceeding."); STANDARDS, supra note 11, at 642. But see VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 23-24 (1986) (stating that early jurors were required to know either the parties or the facts to qualify for jury service).
knowledge of a case from pretrial motions, any independent knowledge of the facts would usually disqualify her.

In order to insure impartiality, the tribunal has no responsibility to investigate or present any evidence. "Under our system of laws, a judge is not an investigator; the investigative function belongs to the parties and their agents." The judge takes on the role of umpire rather than participant. The parties explore the issues. The fact-finder takes no initiative to define the issues in the case, to elicit any evidence or to investigate any uncharted avenues of defense. The

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80. See United States v. Phillips, 664 F.2d 971, 1002 (5th Cir. 1981) (holding potential bias insufficient to warrant recusal when judge obtained information from non-prosecuting government attorneys); United States v. Jackson, 430 F.2d 1113, 1115 (9th Cir. 1970) (noting that the fact that the trial judge issued an order revoking appellants' bail bonds not a "disqualifying fact" under circumstances where judge knew of alleged threats to witnesses).

81. See Model Code of Judicial Conduct Canon 2(B) (1990) (prohibiting judges from allowing relationships to influence judicial conduct); Standards, supra note 11, at 635; see generally Tumey v. Ohio, 273 U.S. 510 (1927) (finding that a judge with a financial interest in the case cannot render a fair and impartial decision).

82. See Ryan v. Comm'n on Judicial Performance, 754 P.2d 724, 733 (Cal. 1986).

83. In re A.R., 679 A.2d 470, 475 (D.C. App. 1996); see also Ryan, 754 P.2d at 773 (finding the judge acted improperly in conducting his own investigation into a hit-and-run accident and then calling to a witness during a criminal defendant's case to rebut the defendant's claims); Wenger v. Comm'n on Judicial Performance, 630 P.2d 954, 962-63 (Cal. 1981) (noting that the court improperly conducted an investigation into the accuracy of statements in the pleadings); Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444, 446-47 (6th Cir. 1980) (holding that the court acted improperly in sending his law clerk to investigate the scene of the litigation).

84. See Strick, supra note 28, at 142 (quoting one judge as lamenting that "the State has been relegated largely to the function of furnishing the stadium and the referees; of booking, staging and deciding these civilized fights. . . ." The author denounces the system as allowing the court's decision to "anoint not truth but merely the winner of the brawl."); Wilson v. PNS Stores, Inc., 725 So. 2d 66, 73 (La. Ct. App. 1998); Dixon v. Winn Dixie Louisiana, Inc., 638 So. 2d 306, 316 (La. Ct. App. 1994). But cf. Luban, Hero, supra note 58 (discussing the role of the situational judge as mediator and prime mover in settlement of complex class actions).

85. See generally Wolfram, supra note 36.

86. See Dennis v. United States, 384 U.S. 855, 875 (1966) ("In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."); Commonwealth v. Edwards, 637 A.2d 259, 261 (Pa. 1993).

87. See Plooster v. Pierce Packing Co., 846 P.2d 976, 980 (Mont. 1993) (Trieweiler, J., dissenting) (criticizing the majority opinion for allowing the trier of fact to base his decision on his own experiences rather than the evidence before him. This process is "the antithesis of our adversary system."); LaChappelle v. Moran, 699 F.2d 560, 566 (1st Cir. 1983) ("Adversarial conduct by the trial judge is to be frowned upon, most particularly in a criminal trial.")

88. See Patterson v. Colorado ex rel. Attorney Gen., 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court. . . ."); United States v.
Eleventh Circuit has defined the judge’s role as the “informational
gatekeeper and legal adviser.” The judge as fact-finder is required
to make her decision solely on the evidence presented by the parties.

As part of the court’s role of a passive and neutral decision-maker,
the court must maintain its independence. The independence of the
judiciary is the cornerstone of the American justice system. Independence requires the court to have no interest in the outcome of the
case. The judge’s only interest in an adversary system must be to
give each litigant the “cold neutrality of an impartial judge.” A
vested interest in the case causes the court’s impartiality to be
questioned.

The independence of the judiciary also includes independence from
influences outside the courtroom. Although judges are not immune
from criticism, they must decide cases irrespective of the popular
will. Judges may at times decide cases that are “countermajori-

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Seacott, 15 F.3d 1380, 1390 (7th Cir. 1994)(observing that in dealing with issues not presented by the parties the court must be “mum”); Marshall v. Gates, 812 F. Supp. 1050, 1054 (C.D. Cal. 1993)(quoting Tatalovich v. City of Superior, 904 F.2d 1135, 1139 (7th Cir. 1990)(“if opposing lawyers sit on their haunches ... judges may let the adversary system take its course.”)).

89. Stepak v. Addison, 20 F.3d 396, 410 (11th Cir. 1994).

90. See Zacharias, Justice, supra note 48, at 61; Model Code of Judicial Conduct Canon 3(B)(commentary at 10)(“A Judge must not independently investigate facts in a case and must consider only the evidence presented.”); Standards, supra note 11, at 639.

91. See Judith S. Kaye, Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts, 25 Hofstra L. Rev. 703, 708 (1997)(quoting from a prosecutor who said that “[t]he independence of the judiciary is obviously one of the fundamental cornerstones of our government and democracy. It is indeed that independence that both the Government and defendants rely upon in every case for a fair and just decision on the merits.” Louis H. Pollack, Criticizing Judges, 79 Judicature 299, 301 (1996)).

92. See Tumey v. Ohio, 273 U.S. 510 (1927)(finding that due process is violated when the court has a financial interest in whether the defendant is convicted); Luban, Hero, supra note 58, at 2080 (discussing the dangers to impartiality when the judge becomes invested in the settlement of a case).

93. State ex rel Davis v. Parks, 194 So. 2d 613, 615 (Fla. 1939).

94. See Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992)(stating that a court's impartiality must be beyond question). But see In re Starcher, 457 S.E.2d 147, 152 (W. Va. 1995)(Neely, C.J., dissenting)(noting that “all of the qualities that make a person a great judge—enthusiasm, creativity, boundless energy, concern, good training, and surpassing intelligence—may cause a judge occasionally to become too involved in the case”).

95. Institutional independence, which is provided in the constitutional creation of three branches of government, is beyond the scope of this paper but is assumed to be present in an adversary system. See generally Martin H. Redish, Federal Judicial Independence: Constitutional and Political Perspectives, 46 Mercer L. Rev. 697 (1995); Landsman, supra note 4.

tarian."

The adversary system, however, is premised on the assumption that the judge will consider only the evidence presented to him within the courtroom.

C. Adversary System Distinguished From the Inquisitory System

The adversary system can be compared to its European counterpart, the inquisitorial system, which is based on civil law reflecting the Roman law. The main characteristic that distinguishes the two systems is that, in the adversary system, the function of the judge and advocate are always kept completely separate. In the inquisitorial system, the court has a more active role and, therefore, the advocate's role is diminished.

The inquisitorial judge is the state's representative in the inquest. She therefore investigates the case, calls witnesses, and defines the scope of the inquiry. The attorney's role in the inquisitorial system is primarily limited to proposing additional questions for the judge.

Additionally, the rules of procedure are much less formal, strict, or technical in the European system. Very few exclusionary rules exist in the inquisitorial system because of the lack of concern about the ability of the lay jury to properly use the evidence. In the civil law trial the lay jurors deliberate with the judge, who can instruct them during deliberations about the proper use of the evidence.

The role of judge and advocate in the inquisitorial system is merged. The judge is profoundly involved in the prosecution of the case. 

97. See generally Kaye, supra note 91.
99. See United States v. Burke, 504 U.S. 229, 246 (1992)(Scalia, J., concurring); Ball v. City of Chicago, 2 F.3d 752, 756 (7th Cir. 1993) ("Ours is an adversarial system and the judge cannot play lawyer for one or for that matter both sides of a case before him . . ."); Burdett v. Miller, 957 F.2d 1375, 1380 (7th Cir. 1992)(noting that American trial judges do not have the time to play "the proactive role" of the judge in the inquisitorial system).
100. See Combs, supra note 4, at 663, 683; Strier, Justice, supra note 33, at 210.
101. See Strier, Justice, supra note 33, at 210; Luban, Excuse, supra note 23, at 94.
102. See Stephen Lubet, Ex parte Communications: An Issue in Judicial Conduct, 74 Judicature 96, 101 (1990)(noting the difference between the European system, in which the judge has primary responsibility for the development of the facts, and the American system where it is improper for the court to undertake an ex parte investigation).
103. See Strier, Justice, supra note 33, at 210.
104. See id.; Luban, Excuse, supra note 23, at 95 (noting that it would be very unusual for the lawyer to ask more than one or two questions because such conduct might imply that the court had not done a very good job of asking questions).
105. See Luban, Excuse, supra note 23, at 95.
106. See Meese, supra note 19; Luban, Excuse, supra note 23, at 95.
107. See Luban, Excuse, supra note 23, at 95.
108. See Luban, Excuse, supra note 23, at 94.
case. For example, in the German criminal trial the judge can amend the charge either by increasing or diminishing it.109 On the contrary, in the adversary system, the prosecution of the case is left to the prosecuting attorney.110 The prosecuting attorney has almost total discretion in directing the investigation,111 in fashioning the appropriate charges,112 and deciding the available plea offers.113 The job of prosecutor and court are totally separated.114 The court should not be “on the team with the police to catch criminals.”115

III. THE RELATIONSHIP BETWEEN THE JUDGE AND PROSECUTOR

A. An Intimate Relationship

Although the judge and prosecutor are active participants in the adversary system, their relationship often develops into a more interdependent and cooperative relationship than would be enjoyed by the

109. See id.
111. See generally United States v. Martinez, 785 F.2d 663, 670 (9th Cir. 1986) superseded by 855 F.2d 621 (1988)(reversing the district court’s dismissal of the indictment); Bennett L. Gershman, The New Prosecutors, 53 U. Prrr. L. Rev. 393 (1992)(discussing the trend for prosecutors to become increasingly involved in investigations); Flowers, Code of Their Own, supra note 11 (discussing the role of the prosecutor in the investigation of criminal cases).
112. See United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965)(holding that the court cannot interfere with a prosecutor’s decisions to bring charges); see also Gershman, supra note 111, at 409 (arguing that the most extreme example of the prosecutor’s discretion is in the area of charging decisions in capital cases); see generally Ball v. United States, 470 U.S. 856, 859 (1985)(recognizing the long standing rule that prosecutor’s have broad discretion in charging decisions); Charles J. Yeager & Lee Hargrave, The Power of the Attorney General to Supercede a District Attorney: Substance Procedure & Ethics, 51 La. L. Rev. 733 (1991); Flowers, What You See, supra note 11.
114. See generally Melilli, supra note 113; In re Starcher, 457 S.E.2d 147, 150 (W. Va., 1995)(citing Justice Botien’s admonition that “[p]roblems arise when the judge ventures across the line marking the traditional division of labor between lawyer and judge.”).
defense attorney or the attorneys in a civil case.\textsuperscript{116} Professor Steele noted that this relationship sometimes takes on a “team-member” mentality.\textsuperscript{117} One commentator described an incident that exemplifies the closeness of the relationship between the judge and the prosecutor.\textsuperscript{118} As he describes it, the incident involved a public defender who was allowed by the court to see a list of the cases set for trial. The prosecutor routinely provided the list to the public defender and judge. The public defender, however, had misplaced his list, so the judge allowed him to see her list. On the list a note sticker had been placed, apparently by the court, which stated: “State should file additional witness and add attempted burglary charge.”\textsuperscript{119} Another example of the trial court assisting the prosecutor in presenting the government’s case is Missouri v. Finley.\textsuperscript{120} In Finley, the trial court suggested to the prosecutor that he reopen his cross-examination in order to inquire into matters he had failed to ask about initially.\textsuperscript{121} The actions of the judge brought him outside the role proscribed by the adversary system, in that he assumed the role of prosecutor.\textsuperscript{122}

United States v. Martinez\textsuperscript{123} provides the most striking example of the improper working relationship\textsuperscript{124} that judges and prosecutors sometimes enjoy.\textsuperscript{125} Martinez was charged with seven counts relating to the possession and mailing of explosives. On the third day of the trial, during the evening recess, the trial judge met secretly in his ho-

\textsuperscript{116} See Bennett L. Gershman, Prosecutorial Misconduct 12-13-12-14 (1996) (ill-ustrating the problem with ex parte communications between the judge and the prosecutor); Lubet, supra note 102, at 98; Thaxton & Rodriguez-Taseff, supra note 1, at 191 (providing an example of an improper relationship between the judge and prosecutor).

\textsuperscript{117} See Walter W. Steele, Jr., Unethical Prosecutors and Inadequate Discipline, 38 Sw. L. J. 965, 972 (1994).

\textsuperscript{118} See Thaxton & Rodriguez-Taseff, supra note 1, at 191.

\textsuperscript{119} Id. at 191.

\textsuperscript{120} 704 S.W.2d 681 (Mo. Ct. App. 1986).

\textsuperscript{121} See id.

\textsuperscript{122} See id. The Missouri Court of Appeals found that the judge committed reversible error when he “abandoned his time-honored role of neutrality.” Id. at 684.

\textsuperscript{123} 667 F.2d 886 (10th Cir. 1981).

\textsuperscript{124} There are some examples of the close personal relationships that some courts have had with the prosecutor assigned to their courtroom. For example, see United States v. Berman, 28 M.J. 615 (1989) (recusing judge based on a sexual relationship with the prosecutor). Additional close relationships include the judge’s relatives working in the prosecutor’s office. See Trimble v. State, 871 S.W.2d 562 (Ark. 1994) (holding that the mere fact that that the judge’s son worked in prosecutor’s office did not merit reversal).

\textsuperscript{125} Of course there are examples of a relationship that is somewhat strained. For example, in Roberts v. Commission on Judicial Performance, 661 P.2d 1064 (Cal. 1983), a judge, upon being informed that the prosecutor would be seeking appellate review of the court’s suppression motion, poked the prosecutor in the chest and accused the prosecutor of being “chicken to take the case to trial,” and said “Buddy Boy, you’re not going to get away with this.” Id. at 1066.
tel room\textsuperscript{126} with the prosecutors, court personnel, and several government witnesses. Judge Winner told the prosecutor that he believed that several spectators in the courtroom, who were sympathetic to the defendant, were attempting to intimidate the witnesses and jury. The judge informed the prosecutors that he wanted hidden cameras to be installed in the courtroom to record the intimidation. Although the court was permitted to meet ex parte regarding the protection of the jury or witnesses,\textsuperscript{128} he went on to inform the prosecutors that he would grant a motion for a mistrial. He cautioned the prosecutors to make the motion after the cameras were installed and the defendant had completed his case. The judge informed the prosecutors that he would "provoke the defendant to request a mistrial."\textsuperscript{129} The next day the judge again discussed this matter with the United States Attorney, who had not been present during the discussion the night before. The court indicated that it would continue to be in ex parte contact with the prosecution.

The morning after the meeting, the prosecutor announced in court that it had no objection to the defendant's motion for a mistrial, although no motion was currently pending. The court granted the joint motion for a mistrial. The defense attorney did not find out about the meeting between the prosecutors and the trial judge until after the case was set for a new trial.\textsuperscript{130} The case was reassigned to another judge. The new trial judge dismissed four of the counts against the defendant, finding that the consent to a mistrial had been improperly orchestrated by the judge and prosecutor and, therefore, was not a knowing and voluntary act by the defendant. The trial judge did not, however, dismiss the counts that had been severed prior to trial. Both the prosecution and the defendant appealed the ruling.\textsuperscript{131}

The \textit{Martinez} case is an extreme case of the "team spirit" that begins to develop between judges and prosecutors. Other examples of this team work mentality involve judges utilizing the prosecutor's

\textsuperscript{126} The case was being tried away from the judge's hometown and therefore he was residing in a hotel. \textit{See Martinez}, 667 F.2d at 888.

\textsuperscript{127} \textit{See id.}

\textsuperscript{128} The courts have routinely held that a judge can meet with prosecutors to discuss the safety of witnesses. \textit{See United States v. Adams}, 785 F.2d 917 (11th Cir. 1986); Parnell v. State, 627 So. 2d 1246 (Fla. App. 1993). \textit{See infra text accompanying notes 207-266 for a discussion of permissible ex parte meetings.}

\textsuperscript{129} \textit{Martinez}, 667 F.2d at 888. During the discussion one of the law enforcement witnesses volunteered to cause a mistrial by giving testimony regarding evidence that had been previously excluded. \textit{See id.}

\textsuperscript{130} A news reporter alerted the attorney to the problem. \textit{See id.}

\textsuperscript{131} The Tenth Circuit first affirmed the trial court's finding that the courts were barred by the double jeopardy clause because "bad-faith conduct" by the judge and prosecutor prodded the defendant to request a mistrial. \textit{See id. at} 889.
clerical staff to type the court's order\textsuperscript{132} or merely allowing prosecutors to ghost write the order themselves.\textsuperscript{133} This tandem attitude led one judge to send a message of reassurance to the prosecutors after the judge learned that the prosecutors were dismayed by the court's ruling.\textsuperscript{134} The prosecutor's role and the judge's tasks merged in one county in Georgia where the defense attorneys discovered that the prosecutors controlled the assignment of cases and assigned the more serious cases to former prosecutors.\textsuperscript{135} Some judges have even helped the prosecutor in strategizing their cases.\textsuperscript{136} These cases epitomize the mentality of some judges and prosecutors that, in many respects, they are on the same side and are surprised that it is of concern. One prosecutor, upon being confronted with the problem, called it "a wad of chewing gum on the legal shoe of life."\textsuperscript{137} The source of this perspective is multifaceted.

B. Reasons for the Familiarity of the Relationship

Numerous circumstances contribute to make the working relationship between the prosecutor and the court not a mirror image of the relationship the defense attorney enjoys with the judge. Familiarity with the prosecutor is one factor that contributes to the relationship. Judges frequently have experience in the prosecutor's office before their appointment to the bench.\textsuperscript{138} Upon ascending to the bench,}

\begin{itemize}
    \item \textsuperscript{132} See Brown v. Rice, 693 F. Supp. 381, 386 (W.D.N.C. 1988)(finding that it was not unusual for the judge to utilize the District Attorney's office staff to type his orders).
    \item \textsuperscript{133} See Kaye, supra note 91, at 711 (noting that judges routinely give prosecutors "a blank check to say anything they want in proposed orders").
    \item \textsuperscript{134} See Powell v. Superior Court, 283 Cal. Rptr. 777, 781 (Cal. App. 1991). According to one news report the judge said that when he heard the reports of the prosecutor's dismay over the trial court agreeing to a change of venue motion in the Rodney King case, he directed his law clerk to "advise the district attorney's office not to panic, to trust him." Richard A. Serrano, Prosecutors Won't Oppose Venue Change, L.A. Times, July 25, 1991, at B1, B4 (quotation omitted) quoted in M. Shanara Gilbert, An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases, 67 Tul. L. Rev. 1855, 1870 & n.52 (1993). The prosecutor in the Rodney King case, however, reported the ex parte communication to the defense attorney and the judge was subsequently removed from the case. See id.
    \item \textsuperscript{135} See Bright & Keenan, supra note 96, at 782-83.
    \item \textsuperscript{136} See, e.g., In re Starcher, 457 S.E.2d 147, 148 (W. Va. 1995)(noting that the court telephoned prosecutor to assist him in creating his closing argument); Ryan v. Comm'n on Judicial Performance, 754 P.2d 724, 733 (Cal. 1988) (noting how the court encouraged prosecutor to increase charges to felony); United States v. Singer, 785 F.2d 228, 230 (8th Cir. 1986)(discussing that between the conviction and post-trial motions court contacted prosecutor to express concerns over the adequacy of the trial record).
    \item \textsuperscript{137} Bright & Keenan, supra note 96, at 783 & n.110.
    \item \textsuperscript{138} See id. at 782 (noting an example of a judge who reached the bench through prosecuting highly publicized capital cases); Strick, supra note 28, at 159 (quoting a
some judges find it difficult to stop being a prosecutor and continue to prosecute from the bench.\textsuperscript{139} The judge may have worked in the prosecutor's office with prosecutors who are now appearing in their courtroom.\textsuperscript{140}

Additionally, prosecutors appear daily in front of the same judge.\textsuperscript{141} The prosecutor's duties typically involve frequent official contact with the court.\textsuperscript{142} In many jurisdictions, the prosecutor's case assignments may be based on the courtroom in which the case is being handled.\textsuperscript{143} A group of prosecutors may be assigned to one judge and appear in court on every matter that is assigned to that judge's courtroom. Therefore, unlike the defense attorney who leaves the courtroom after his particular case, the judge and prosecutor remain to handle the next case.\textsuperscript{144} This constant contact between the same judge and prosecutor may lead the judge to consider that prosecutor "her" prosecutor.\textsuperscript{145}

Also, the judge and the prosecutor may consider themselves to share a common objective.\textsuperscript{146} The entities may develop an affinity for each other out of a sense that each is serving the public in a common goal of efficiently and fairly processing the hundreds of cases that are assigned to their courtroom.\textsuperscript{147} Both the judge and prosecutor benefit from a cooperative relationship. In order to function effectively and efficiently each must rely on the "other's integrity, competency, and assistance."\textsuperscript{148} As Professor Gershman noted, the parties have the "mutual ability to embarrass each other."\textsuperscript{149} This interdependency re-
quires the judge and prosecutor to work together on a variety of matters in and out of the courtroom.

The judge and the prosecutor develop a close working relationship, in part, because they communicate routinely in court and in chambers. The courts have recognized several issues upon which the judge and prosecutor can communicate privately. This variety of issues routinely brings the prosecutor in contact with the judge in the absence of a defense counsel. These permissible conversations offer the opportunity for the judge and prosecutor to speak privately upon a variety of issues. Even the most conscientious judge may begin to form a bond with a prosecutor who she privately sees routinely in her chambers. These occasions foster a sense of collaboration and cooperation that lead to the “team spirit.”

C. Problems With Too Close of a Relationship

Although the relationship between judge and prosecutor should be one of cooperation in seeing that justice is administered fairly and expeditiously, their independence must be maintained. Judges and prosecutors have shared objectives, but many times they do not share in their assessment of priorities. Most judges experience at least some pressure to move cases through the system quickly. Although the prosecutor should be aware of the need to act expeditiously, it clearly cannot be the primary motivation for his actions. The prosecutor must temper the need for expedient disposal of cases with the needs of the system and victims. Occasionally, the prosecutor must be willing to assert a position that is contrary to the judge’s insistence on speedy processing of the cases.

Additionally, judges and prosecutors must maintain independence in their decision-making process. The adversary process assumes that both sides present their case to a neutral tribunal. It is important that the judge and the prosecutor work independently, even though

150. Professor Gershman identifies the following matters: “authorizing search, arrest, eavesdropping and other investigative warrants; impaneling and supervising grand jury proceedings; signing orders to extradite defendants or commit to custody material witnesses; issuing subpoenas for witnesses and documents.” Id.

151. See infra text accompanying notes 206–265 for a discussion on these permissible ex parte communications.
they work together. When the relationship becomes too close, the court "enters the fray and becomes a "crime fighter," not a neutral decision-maker.152

Justice Marshall in his dissent to Illinois v. Sommerville153 implicitly noted the close relationship between judges and prosecutors.154 He was concerned that this relation made judges reluctant to find that prosecutors had intentionally manipulated the availability of their witnesses.155 Independence between the judge and prosecutor is necessary in a system that values the separate roles of the judge and prosecutor.

Of course, the close relationship between the prosecutor and the judge not only actually affects the proper functioning of the adversary system but it also causes the system to appear unfair. Justice Frankfurter once observed that "[t]he appearance of impartiality is an essential manifestation of its reality."156 Professor Abramson suggests that "[w]ithout the appearance as well as the fact of justice, respect for the law vanishes in a democracy."157

The Appearance of Impropriety Standard persisted in the Judicial Code even though it was excluded from the Model Rules of Professional Conduct. Canon 2 of the 1990 Model Code of Judicial Conduct states: "[a] Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities."158 The commentary to Canon 2 states the test for applying the Appearance of Impropriety Standard: "[t]he test for appearance of impropriety is whether the conduct would create, in reasonable minds, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."159 The focus of Canon 2(A) is the need for public trust in the independence and impartiality of the judici-

152. Kaye, supra note 91, at 711 (observing that the judge must stay out of the fray and not see herself as a crime fighter).
154. See id. at 481.
155. See id.
159. MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. [2] (1990). The American Bar Association rejected several paragraphs which included the following ideas: 1) acts which violated a "clear and accepted community standard;" and 2) a list of examples that were not "per se violations but nonetheless would taint the judiciary." Kaye, supra note 91, at 953 n.15 (citing MODEL CODE OF JUDICIAL CONDUCT 7-8 (Discussion Draft 1989)).
In order for a judge to possess the confidence of the community, "justice must not only be done, it must be seen to be done." A close relationship between the judge and prosecutor may appear to be improper even if no improper conduct is taking place. Citizens evaluate the system by its representatives. Experienced participants in the system recognize that litigants must believe in the fairness of the system. "No one likes to lose, but if an unfavorable decision is perceived to be the result of an impartial consideration, it is usually unbearable." The citizen that observes a friendly relationship between the judge and the prosecutor may question the fairness of that proceeding. The Appearance of Impropriety Standard requires judges to consider not only the effect of their conduct, but also the effect of their perceived conduct on the public's impression of the system. "Both the ability of courts to influence the structure of law and the ability of the police and other government officials to enforce the law depend upon public satisfaction with, confidence in, and trust of legal authorities."

Probably the most serious danger of a prosecutor/judge relationship that has grown too cooperative is the opportunity for, and the


161. In re Del Rio, 256 N.W.2d 727, 753 (Mich. 1977)(citations omitted); see also Tumey v. Ohio, 273 U.S. 510, 532 (1927)("to perform its high function in the best way, justice must satisfy the appearance of justice."); United States v. Berman, 28 M.J. 615, 618 (1989)("Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct."); Brian T. Fitzgerald, Sealed v. Sealed: A Public Court System Going Secretly Private, 6 J.L. & Pol. 381, 398 (1990)(concluding that "one of the most important policies underlying open courts [is] the maintenance of public confidence in the judicial process.").

162. See Tamminen v. Texas 653 S.W.2d 799, 809 (Tex. Crim. App. 1983) (Teague, J., dissenting)(commenting that "[i]f our criminal justice system is already burdened with too high degree of public skepticism about its fairness." Justice Teague went on to suggest that judges and prosecutors must keep themselves "above suspicion in which their fairness and integrity could appear to be compromised.").


164. Id.

165. See Stephen M. Simon & Maury S. Landsman, Judicial Ethics Simulation Based Training, 58 Law & Contemporay Problems 323, 329 (1996)(noting that even when a judge's action can be justified as in the interest of judicial efficiency or an action in good faith, the courts conclude that an appearance of impropriety may result in a "diminution of public confidence.").

occurrence of, improper ex parte communications.\textsuperscript{167} The close relationship between the prosecutor and the judge can lead to the unethical practice of improper ex parte communications. Prosecutors and courts engage in a number of permissive ex parte communications.\textsuperscript{168} As a direct result of the close relationship that often exists between the prosecutor and the judge, however, improper ex parte communications can routinely happen.\textsuperscript{169}

IV. EX PARTE COMMUNICATIONS: THE ANTITHESIS OF THE ADVERSARY SYSTEM

A. Definition of Improper Ex Parte Communications

An ex parte communication occurs when the court meets with only one side of a controversy.\textsuperscript{170} In order for an ex parte conversation to occur there must be a pending matter.\textsuperscript{171} The term ex parte means "one side only; by or for one party; done for, in behalf of, or on the application of, one party only."\textsuperscript{172} As the Supreme Court of West Virginia recognized, the "very act of talking to one party without the presence of the other creates an ex parte situation."\textsuperscript{173} The result of the

\textsuperscript{167} This is not to suggest that ex parte conversations do not occur between the judge and defense attorneys. See In re Gumaer, 867 P.2d 850 (Ariz. 1994); In re Damron, 487 So. 2d 1 (Fla. 1986); In re Berk, 297 N.W.2d 28 (Wis. 1980). One famous case involved a judge meeting with a defense attorney who, in reality was an undercover FBI agent who was involved in the Operation Greylord investigation. Although the court refused to accept any bribery payments, he was suspended for the ex parte conversations with the undercover attorney. See In re Laurie, 2 Ill. Cts Com'n 91 (1985) as reported in Lubet, supra note 102, at 98.

\textsuperscript{168} See infra text accompanying notes 208-240.

\textsuperscript{169} See Haller v. Robbins, 409 F.2d 857, 859 (1st Cir. 1969)(noting that the relationship between the prosecutor and judge provided the opportunity and the environment wherein ex parte disclosures could occur); Lawless, supra note 26, at 828 (pointing out that ex parte contacts are "a serious problem, difficult to discover and even more difficult to combat"); Lubet, supra note 102, at 97 (noting that ex parte communications between judges and attorneys occur all too frequently); United States v. Huff, 512 F.2d 66, 70 (5th Cir. 1975)(noting some prosecutors believe that ex parte relationships are an accepted practice).

\textsuperscript{170} See L. Ashley Lyu, Getting at the Truth: Adversarial Hearings in Batson Inquiries, 57 Fordham L. Rev. 725 (1989); see also Yohn v. Love, 76 F.3d 508 (3d Cir. 1995)(finding the trial court's discussion with the prosecutor and State Supreme Court Chief Justice, after which the trial judge reversed his earlier exclusionary ruling, to be an improper ex parte communication).

\textsuperscript{171} See In re Smith, 670 P.2d 1018, 1020 (Or. 1983); People v. Laue, 182 Cal. Rptr. 99 (Ct. App. 1982)(stating that an after sentencing matter is not pending).

\textsuperscript{172} In re Tesmer, 580 N.W. 2d 307, 317 (Wis. 1998); see also United States v. Burger, 773 F. Supp. 289, 293 (D. Kan. 1991)(noting the distinction between letters from victims which are contained in the persistence report and conversations with prosecution, finding that the letters from the victims did not constitute ex parte communications); United States v. Meriwether, 486 F.2d 498, 596 (5th Cir. 1973).

\textsuperscript{173} In re Kaufman, 416 S.E.2d 480, 485 (W. Va. 1992); In re Starcher, 457 S.E.2d 147, 150 (W. Va. 1995).
conversation does not effect whether it is ex parte. The term ex parte reflects the absence of any person who may be adversely interested in the conversation.

In *State v. Lotter*, the Nebraska Supreme Court addressed the definition of an ex parte conversation. John Lotter was convicted after trial and sentenced to death. During the trial, the judge and prosecutor met with a prospective witness in order to assure him that if he testified he would not receive the death penalty. Counsel for Lotter was not present at the meeting, although he was notified of the resulting agreement. The defendant appealed his conviction, claiming, among several issues, that the meeting was an improper ex parte meeting because he was not present.

The Nebraska Supreme Court found that the judge and prosecutor had participated in an ex parte meeting. The court held that "an ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party." Because the sole purpose of the meeting was to secure testimony against Lotter, the court found that Lotter's interests were adverse to those of the State and witness. Therefore, the communication was ex parte.

Even conversations that occur between the judge and prosecutor to discuss co-defendants may be ex parte if the conversation might influence the judge regarding the defendant. In *Caldwell v. State*, the defendant was charged along with twelve other people in a "compli-

174. See People ex rel Rosner v. Warden, 384 N.Y.S.2d 175 (1976), Yohn v. Love, 76 F.3d 508 (3d Cir. 1995); In re Burrows, 629 P.2d 820, 826 (Or. 1981); In re Bell, 655 P.2d 569 (Or. 1982); Ryan v. Comm'n on Judicial Performance, 754 P.2d 724 (Cal. 1988); Lubet, *supra* note 102, at 97.

175. See *BLACK's LAW DICTIONARY* 517 (5th ed. 1979); Lyu, *supra* note 170, at 733; In re Tesmer, 580 N.W.2d 307, 317 (Wis. 1998)(finding conversation between judge and law professor to be ex parte conversation); Strutz v. McNagny, 558 N.E.2d 1103, 1108 (Ind. Ct. App. 1990)(finding a meeting not ex parte merely because party's co-counsel was not present).


177. See *id.* at 461, 586 N.W.2d at 603. The defendant was convicted on three counts of first degree murder, three counts of the use of a weapon to commit a felony and one count of burglary.

178. See *id.* It is unclear whether the witness's attorney was present, however the issue was not the lack of the witness's attorney but rather the absence of Lotter's attorney.

179. See *id.* at 473, 586 N.W.2d at 609. The witness had already been convicted of murder and was awaiting a death penalty hearing.

180. See *id.*

181. See *id.*

182. See *id.*

183. *Id.* at 473, 586 N.W.2d at 609-10.

184. See *id.* at 474, 586 N.W.2d at 610.

ated scenario involving a theft ring. The trial judge and prosecutor admitted meeting together ex parte to discuss the sentences of two co-defendants; but they insisted that they did not discuss the defendant's sentence. Because all the defendants' conduct was interrelated, however, the appellate court found that it could not say with certainty that the conversation about the co-defendants did not influence the judge's decision in imposing sentence on the defendant. Therefore, the conversation was ex parte and the defendant's sentence was vacated.

Both the Model Rules of Professional Conduct for lawyers and the Model Code of Judicial Conduct address improper ex parte communications. Model Rule 3.5 generally states the prohibition that "a lawyer shall not communicate ex parte with a [judge] except as permitted by law." The Model Code of Judicial Conduct, Canon 3(B)(7) states that:

A judge shall accord to every person who has a legal interest in a proceeding or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.

The courts have repeatedly condemned ex parte communications between judges and prosecutors. Prohibited conduct prior to the trial and during trial includes providing to the judge a memorandum

186. Id. at 1071.
187. See id.
188. See id. at 1072.
189. MODEL RULE OF PROFESSIONAL CONDUCT 3.5(b) in STANDARDS, supra note 11, at 68; see HALL, supra note 142, at 633 (commenting on the generally nature of the prohibition in the Model Rules of Professional Conduct). The Model Code of Professional Responsibility was more specific. It stated in Disciplinary Rule 7-110(b):

In adversary proceedings a lawyer shall not communicate or cause another to communicate, as to the merits of the cause with a judge or an official before whom a proceeding is pending, except:
1. in the course of official proceedings in the cause;
2. in writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer;
3. orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer; or
4. as otherwise authorized by law.

STANDARDS, supra note 11, at 238.
190. MODEL CODE OF JUDICIAL CONDUCT in STANDARDS, supra note 11, at 638.
191. See Demarest v. Price, 130 F.3d 922 (10th Cir. 1997); United States v. Thompson, 827 F.2d 1254, 1257 (9th Cir. 1987)(noting that adversary proceedings are the rule and ex parte proceedings are disfavored); United States v. Wolfson, 634 F.2d 1217, 1222 (9th Cir. 1980); In re Taylor, 567 F.2d 1183 (2d Cir. 1977)(noting that use of ex parte proceeding to deprive grand jury witness of his right to counsel); United States v. Miller, 485 F.2d 362 (7th Cir. 1974); United States v. Palermo, 410 F.2d 468 (7th Cir. 1969); Haller v. Robbins, 409 F.2d 857 (1st Cir. 1969); Rosner v. Warden, 384 N.Y.S.2d 175 (1976).
on the issues in the case, seeking a change in bond conditions, and discussions with the appellate court in the presence of the trial court. Additionally, the courts have prohibited meeting with the sentencing judge to discuss sentencing, presenting exhibits to the court, asking law enforcement to speak directly to the judge, and submitting an order for the court's signature without sending it to opposing counsel. 

Although the courts have denounced improper contact before the verdict, few cases have overturned convictions based on a finding of an ex parte communication. The courts have required a showing of actual prejudice by the defendant in order to warrant a reversal. In the absence of a showing that the prosecutor's conduct "affected the fairness of the trial," the courts have been reluctant to reverse the defendant's conviction.

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192. See Grieco v. Meachum, 533 F.2d 713, 718 (1st Cir. 1976); Florida Bar v. Mason, 334 So. 2d 1 (Fla. 1976). But see Commonwealth v. Perkins, 401 A.2d 1320, 1322 (Pa. 1979) (finding nothing improper in the prosecutor providing the court with legal authority prior to trial.)

193. See United States v. Solomon, 422 F.2d 1110, 1119 (7th Cir. 1970); In re Burrows, 629 P.2d 820 (Or. 1981).


195. See United States v. Wolfson, 634 F.2d 1217 (9th Cir. 1980); Haller v. Robbins, 409 F.2d 857, 859 (1st Cir. 1969).


197. See United States v. Alverson, 666 F.2d 341, 349 (9th Cir. 1982); In re Riley, 691 P.2d 695, 699-700 (Ariz. 1984).

198. See In re Judd, 629 F.2d 435 (Utah 1981); HALL, supra note 142, at 634.

199. See United States v. Kenney, 911 F.2d 315, 321 (9th Cir. 1990) (stating that the adversary process is satisfied when the defendant is given an opportunity to dispute the prosecution's allegations contained in pre-trial motion to disqualify defendant's counsel); United States v. Walsh, 700 F.2d 846, 858 (2d Cir. 1983); Grieco v. Meachum, 533 F.2d 713, 718 (1st Cir. 1976); United States v. DeLeo, 422 F.2d 487 (1st Cir. 1970) (finding no prejudice when the court met with prosecutor ex parte to discuss the prosecutor's illness); GERSHMAN, supra note 116, at 12-15. But see Yohn v. Love, 76 F.3d 508 (3d Cir. 1996) (granting relief where prosecutor and trial judge discussed with Chief Supreme Court judge the trial court's refusal to admit crucial evidence causing the trial judge to reverse his earlier ruling); United States v. Minsky, 963 F.2d 870, 873 (6th Cir. 1992) (reversing conviction based in part on an ex parte conversation between the trial judge and prosecutor during trial regarding what statements must be turned over to the defendant); United States v. Martinez, 667 F.2d 886 (10th Cir. 1981) (reversing conviction and barring retrial based on strategy meeting between judge and prosecutor during trial).

200. See United States v. Manko, 979 F.2d 900 (2d Cir. 1992); United States v. Earley, 746 F.2d 412, 417-19 (8th Cir. 1984); Walsh, 700 F.2d at 858; Grieco, 533 F.2d at 718 (finding no violation of due process where the defendant could not show any prejudice from prosecutor submitting ex parte a trial memorandum); United States v. Persico, 349 F.2d 6, 13 (2d Cir. 1965).

201. Walsh, 700 F.2d at 857. But see Captain Alan D. Chute, Due Process and Unavailable Evidence, 118 MIL. L. REV. 93, 136 (1987) (noting that in the military courts a presumption of prejudice is created by any ex parte conversation and the
On the other hand, the courts are particularly concerned about ex parte conversations that occur before sentencing.202 The prosecutor is required to prove that the conversation with the judge did not influence his decision.203 The courts have recognized that the information conveyed may be misleading, inaccurate or inadmissible.204 Even if the information is subsequently relayed in open court, the defendant's rights are prejudiced by the prior ex parte conversation because the state "got its pitch in first."205 Finally, the courts recognize that regardless of the actual prejudice, an ex parte conversation "shadows the appearance of impartiality of any judicial proceeding."206

B. Permissible Ex Parte Communications

Although the courts have affirmed that ex parte conversations are a "dangerous procedure,"207 still many legal occasions allow prosecutors to meet ex parte with the judge.208 Both the Model Rules of Professional Conduct for lawyers and the Model Code of Judicial Conduct explicitly permit certain ex parte communications. The lawyers' ethical rules allow ex parte communications that are "permitted by law."209 The judicial code permits conversations "for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits."210
1. Communications Permitted by Law

The courts have addressed those ex parte communications that are "permitted by law." The courts have identified three areas where judges and prosecutors may meet ex parte: investigation matters, discovery issues, and safety issues.

Several occasions during the investigative stage of a criminal case may require the court and prosecutor to meet ex parte.\(^{211}\) Ex parte submission of arrest warrants, search warrants, and wiretap applications are authorized by law.\(^{212}\) Although many times these documents may be created by the law enforcement agencies, the prosecutor may present these documents for approval or may accompany the law enforcement official to the chambers of the judge in order to obtain an approval of a warrant.

The activities of the grand jury also present circumstances in which the prosecutor will meet with the court alone. Grand jury proceedings are conducted in secret and are therefore handled predominately without the presence of the defendant or his attorney.\(^{213}\) The courts have recognized a variety of issues regarding grand juries when the prosecutor may present information to the court ex parte. Several courts have permitted the ex parte submission of information supporting the issuance of grand jury subpoenas for attorney records.\(^{214}\)

Additionally, many discovery matters are determined in camera and ex parte. Judges and prosecutors meet privately on discovery
matters ranging from disclosure issues to national security.\textsuperscript{215} Rule 16(d)(1) of the \textit{Federal Rules of Criminal Procedure} provides for ex parte communications in discovery matters.\textsuperscript{216} The Notes of the Advisory Committee on Rules indicate that ex parte proceedings are disfavored, but necessary “if any adversary proceeding would defeat the purpose of the protective or modifying order.”\textsuperscript{217}

In the area of national security, Congress has specifically authorized ex parte communication between the prosecutor and the court.\textsuperscript{218} The Classification Information Protection Act (“CIPA”)\textsuperscript{219} created a pre-trial procedure that enables the court to review classified documents to ascertain whether they are discoverable before they are revealed to the defendant.\textsuperscript{220} The courts have recognized that “an adversary hearing with the defense knowledge would defeat the very purpose of the discovery rules.”\textsuperscript{221} Although the rule speaks in terms of review of documents and written submissions,\textsuperscript{222} the practical reality is that prosecutors meet with judges to explain the danger to national security and the lack of relevance of the documents.\textsuperscript{223} The Ninth Circuit in \textit{United States v. Klimavicius-Viloria} recognized that the participation of the prosecutor in ex parte hearings under CIPA was appropri-

\begin{itemize}
\item \textsuperscript{215} \textit{See} United States v. Lee, 648 F.2d 667 (9th Cir. 1981).
\item \textsuperscript{216} \textit{Fed. R. Crim. P.} 16(d)(1) provides:
\begin{quote}
\textbf{C. Regulation of Discovery}
\begin{enumerate}
\item \textit{Protective and Modifying Orders.} Upon sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred of make such order as appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party’s statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.
\end{enumerate}
\end{quote}
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{See} United States v. Pringle, 751 F.2d 419 (1st Cir. 1984).
\item \textsuperscript{219} \textit{Classified Information Protection Act} 18 U.S.C. App. 3 § 4 (1994) provides in part:
\begin{quote}
The court may permit the United States to make a written request for an authorization to delete specified items in discoverable documents in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.
\end{quote}
\item \textit{Id.}
\item \textsuperscript{220} \textit{See} United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988); United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987)(discussing the ex parte nature of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq.)
\item \textsuperscript{221} \textit{Sarkissian}, 841 F.2d at 965; \textit{see} United States v. Pringle, 751 F.2d 419, 427 (1st Cir. 1984).
\item \textsuperscript{222} \textit{See supra} note 216 for content of the rule.
\item \textsuperscript{223} \textit{See} United States v. Klimavicius-Viloria, 144 F.3d 1249, 1260-62 (9th Cir. 1998); United States v. Yunis, 867 F.2d 617, 620 (D.C. 1989).\
\end{itemize}
ate to answer any questions the court may have regarding the classified documents.\footnote{224} Further, the courts have approved prosecutors submitting ex parte materials for a determination by the court as to whether the materials are exculpatory and therefore discoverable.\footnote{225} The courts have routinely recognized that the submission of questionable \textit{Brady} material

\footnote{224} See Klimavicius-Viloria, 144 F.3d at 1261. 
\footnote{225} In \textit{Brady v. Maryland}, 373 U.S. 83, 87 (1963), the Supreme Court mandated that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Subsequent cases have mandated that the prosecution must provide exculpatory evidence whether or not the defendant requests it and that the test to define what evidence should be disclosed is the same. See \textit{United States v. Bagley}, 473 U.S. 667 (1985). The Constitution does not require an open file policy, but requires that evidence which is both favorable to the defendant on the issue of guilt or punishment and is material to be provided. A prosecutor must consider all evidence in his possession in light of these two requirements. The prosecutor bears the responsibility to assess whether information in his possession is both favorable to the defendant and material. If he determines that he does possess such evidence, he is constitutionally mandated to disclose it to the defense. The court has stressed that the mandates of \textit{Brady} and its progeny require the prosecutor to consider the evidence collectively and not item by item. See \textit{Kyles v. Whitley}, 514 U.S. 419, 420 (1995). This rule leaves the prosecution "with a degree of discretion" and also imposes "a corresponding burden." \textit{Id.}

Obviously, some evidence is clearly favorable to the defendant. Clearly a scientific test that indicated that the defendant could not have been the source of the semen found on the victim, or a witness who clearly establishes the defendant's alibi, is favorable. Additionally, evidence that goes to the credibility of a witness is considered to be favorable and therefore the prosecution must disclose it. See \textit{Giglio v. United States}, 405 U.S. 150, 154-55 (1972). Determinations of favorability are much more difficult, however, when evidence is inconclusive or neutral. The courts have not required neutral or inconclusive evidence to be disclosed. Evidence is not defined as favorable merely because it weakens the prosecution's case. The fact that a witness has died may not be evidence that is favorable on the issue of guilt, and therefore need not be disclosed. See \textit{People v. Jones}, 44 N.Y.2d 76 (1978). Additionally, the prosecutor must assess whether the evidence is material. The Supreme Court in \textit{Bagley} found that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result would have been different." \textit{Bagley}, 473 U.S. at 682. Reasonable probability means a "probability sufficient to undermine confidence in the outcome." \textit{Id.} The Supreme Court appeared to define materiality more broadly in \textit{Kyles v. Whitley}, 514 U.S. 419, 434 (1995) by stating "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." \textit{Id.} The Supreme Court requires the prosecutor to "gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." \textit{Kyles}, 514 U.S. at 437. This standard appears to place more discretion in the hands of prosecutors. However, the more prudent approach of "when in doubt, give it out" has been endorsed by the Supreme Court. \textit{United States v. Agurs}, 427 U.S. 97, 108 (1976)("The prudent prosecutor will resolve doubtful questions in favor of disclosure.").
to the court for in camera review is prudent. These submissions, however, often lead to ex parte communications between the judge and prosecutor. The court in Storer Communications, Inc. v. Presser recognized the need to present the materials to the trial court to determine whether they were exculpatory; it disapproved, however, the practice of government counsel meeting with the judge ex parte on the Brady materials.

Finally, the courts have recognized the necessity of ex parte communications regarding the safety of witnesses. In United States v. Napue, the Seventh Circuit recognized that in determining issues involving the safety of witnesses the trial court has discretion in determining the extent that ex parte proceedings are necessary. The defendant, Irving Napue, had requested that the prosecution provide a list of potential witnesses. The prosecution objected to providing a witness list, citing defendant's dangerousness. The prosecutor met with the trial judge ex parte on three occasions to describe the basis of their allegations that Napue posed a threat to the safety of the witnesses. Additionally, the prosecutor filed an ex parte written submission with specific allegations. The defendant was notified of each of these ex parte communications, but was not permitted to be present. Although the Napue court discouraged ex parte communications, it went on to acknowledge that ex parte communications are warranted where allegations regarding the safety of witnesses are serious.

In United States v. Adams, the court attempted to define the limits of the communications permitted between the prosecutor and the court regarding witnesses. In Adams, the defendants were

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227. See Storer, 828 F.2d at 332; United States v. Hackett, 638 F.2d 1179, 1188 (9th Cir. 1980).

228. See Storer, 828 F.2d at 335.

229. See United States v. Sai Keung Wong, 886 F.2d 252, 256 (9th Cir. 1989); United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United States v. Adams, 785 F.2d 917, 920-21 (11th Cir. 1986); LaChappelle v. Moran, 699 F.2d 560, 566 (1st Cir. 1983)(finding a judge acted responsibly when he met ex parte with the complainant who was a minor testifying against her father in a rape case); United States v. Phillips, 664 F.2d 971, 1000 (6th Cir. 1981); United States v. Arroyo-Angulo, 580 F.2d 1137, 1143-44 (2d Cir. 1978); Farnell v. Florida, 627 So. 2d 1246, 1247 (Fla. Dist. Ct. App. 1993)(finding that the trial court had no choice but to conduct an ex parte hearing in order to ensure the safety of the witnesses).

230. 834 F.2d 1311 (7th Cir. 1987).

231. See id. at 1316.

232. See id.

233. 785 F.2d 917 (8th Cir. 1986).
charged based on their participation in an auto theft ring.234 The judge and prosecutor met with a witness during the course of the trial because the witness had refused to testify.235 Neither the defendant nor defense counsel was permitted to be present.236 During the course of the conversation between the judge, prosecutor, and witness, the prosecutor agreed to enroll the witness in the FBI Witness Protection Program. After the witness agreed to testify, the prosecutor, in the presence of the judge, attempted to impress on the witness the important distinction between being paid to testify and merely being offered protection. The prosecutor sought to encourage the witness to testify, and that he had not been paid for his testimony in any way.237 The witness subsequently took the witness stand and testified regarding the defendant's involvement238 and the defendant was convicted.239

234. See id. The defendants were charged with one count of mail fraud pursuant to 18 U.S.C. § 2312; twenty-two counts of interstate sale of stolen motor vehicles, pursuant to 18 U.S.C. § 2313; thirteen counts of interstate transportation of stolen property pursuant to 18 U.S.C. § 2314; and one count of conspiracy, pursuant to 18 U.S.C. § 371. See id.
235. See Adams, 785 F.2d at 919. The witness had been granted use immunity, cited for contempt, and jailed for four days prior to the private meeting with the judge and prosecutor.
236. See id. The witness was first interviewed in the presence of defense counsel. However, when the witness indicated that he was in fear for his life if he testified, the court excused defense counsel. The defense counsel did not object at that time to being excluded from the conference. See id.
237. See id. The following transcript of the conversation is reported in the case:

PROSECUTOR: I want something understood, judge. I'm not willing to pay him for his testimony. There is a distinction between the two. I'm willing to help you any way I can with your safety, but I'm not willing to pay for your testimony. I don't want that in any way construed as he's being paid in return for his testimony. As long as he testifies truthfully under oath, I don't care what he says.

THE COURT: Well, that's right, and I don't either. That's exactly right, as long as it's the truth.

. . . .

PROSECUTOR: You understand, now, if they ask you have you been paid anything by the Government, I haven't paid you; I'm not paying you to testify. I'm helping you out, because you think you're in fear of your life. If they ask that question, then that's another issue, but I don't want it perceived that I'm paying you.

THE COURT: If they ask you anything, have you received anything, that could be what he'd want to tell them.

PROSECUTOR: I think what he should say is no, he hasn't, although he's made application for the witness security program, if that's an appropriate answer at the time.

THE COURT: It depends on what's appropriate at the time he testifies, whatever you tell them.

Id.

238. See id. The defendant was notified prior to the witness's testimony that the prosecutor had promised to enroll him in the witness protection program. During the course of the direct and cross-examinations, the prosecutor and witness indicated
The Eleventh Circuit affirmed the conviction because it found that the participants in the ex parte conference had followed procedures to insure that the defendant's rights were not violated. The court reiterated that the use of ex parte conferences should be unusual. Further, the court found that the trial judge should not have continued the ex parte meeting during the "witness coaching." The trial court, according to the court of appeals, should terminate the ex parte conversation as soon as he has received all of the information necessary to protect the witness.

Ex parte conversations between judges and prosecutors can be justified on the grounds of safety, discovery, and national security. These areas pose sensitive issues that a judge must review before disclosing them to the defense. If an adversary proceeding was required, the need for the judicial review would be defeated, as the matter the prosecutor sought to keep secret would be revealed. If the court subsequently decided the matter need not or should not be revealed, the damage would already have been done. Therefore, the costs to the adversary system are justified.

Although ex parte conversations regarding sensitive disclosure issues are justifiable, conversations on procedure and scheduling are not. The mere expediency of dealing with only one party does not substantiate the costs and risk that are attached to this way of proceeding.

2. Communications Not on the Merits

The courts have routinely distinguished ex parte conversation on procedural issues, which the courts deem proper, and those conversations that are on the merits, which the courts deem improper.

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that the only promise was that the prosecutor would seek to enroll the witness in the protection program. Neither related to the prosecutor's pledge to seek immediate protection if necessary. See id. at 920-21.

239. Defendant Adams was found guilty of three counts of interstate transportation of a stolen vehicle and one count of conspiracy. See id. at 918.

240. See id. at 920. The court noted that the substance of the witness's inculpatory testimony was not discussed and that the entire conference was transcribed.

241. See United States v. Klimavicius-Viloria, 144 F.3d 1249 (9th Cir. 1998); United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988); United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United States v. Pringle, 751 F.2d 419 (1st Cir. 1984); Parnell v. State, 627 So. 2d 1246 (Fla. Dist. Ct. App. 1993).

242. See FED. R. CRIM. P. 16.

243. See infra text accompanying notes 272-295.

244. See comment 7 to Model Rules of Judicial Conduct 3(B)(7) which suggests that these communications may facilitate scheduling and other administrative matters. See STANDARDS, supra note 11, at 638.

Scheduling matters have been recognized as procedural and therefore are routinely discussed ex parte. The American Bar Association Standards acknowledge the need for communications between the court and the prosecutor on scheduling matters. Standard 3-5.1 states: "control over the trial calendar should be vested in the court. The prosecuting attorney should advise the court of facts relevant in determining the order of cases on the court's calendar."247

The court in United States v. Hussin held that conversations between the judge and prosecutor about the absence of a witness were not improper because they were not on the merits. The trial court made this distinction on the record:

It had nothing to do with the merits of this case. It had nothing to do with anything in this case except the absence of this witness . . . I don't think it is the type of an ex parte communication that is forbidden by the Rules because it was not an ex parte communication on any of the merits of this lawsuit.249

The Sixth Circuit concluded that it should determine the prejudice to the defendant based on the effect of the conversation to his due process rights. The court determined that the conversations regarding procedure did not have a reasonably substantial relational to "the fulness of his [the defendant's] opportunity to defend against the charge."251 The Florida Supreme Court, in Rose v. Florida, distingushed improper ex parte communications on the merits and proper conversation that were "strictly administrative matters not dealing in any way with the merits of the case."253

The problem with the distinction between private conversations on procedure and conversations on the merits is threefold. First, the distinction between the two is not often clear. The definition of "on the merits" clearly refers to the subject matter of the communication and not the phase of the proceedings. One court limited the merits of a proceeding to those defined by the "legal rights and duties of the parties as they are disclosed by the pleadings and evidence." However,
the content of the communication is important to determine whether the risks of ex parte communications, namely improper influence or inaccurate information, have occurred.\textsuperscript{256} It is sometimes difficult to determine whether a discussion on procedural matters has affected the rights or duties of the parties.\textsuperscript{257}

Decisions on procedure can advantage one party or disadvantage another. In \textit{Hussin},\textsuperscript{258} the ex parte conversation occurred shortly before the trial was to begin. The court and the prosecutors discussed the absence of a crucial witness that the prosecutors had allowed to leave the jurisdiction.\textsuperscript{259} The conversation resulted in an adjournment of the trial. Although the actual granting of the continuance occurred after argument in open court, the defense objected to the procedure. The defense attorney rightly suggested to the court that the ex parte communication "did touch on the question of adjournment" which he felt "created an appearance of impropriety" at a critical stage in the proceedings.\textsuperscript{260}

Justice Harding, in his concurring opinion in \textit{Rose v. State},\textsuperscript{261} recognized that even scheduling matters can afford one party an advantage or disadvantage. He noted that because of the crowded dockets and calendars of most judges, the scheduling of matters might affect the parties. He suggested that, even in scheduling matters, the court should strive to avoid ex parte communications.\textsuperscript{262}

Finally, a proper conversation can quickly evolve into an improper one. Justice William Berry, a former member of the Oklahoma Supreme Court, describes just such an instance in his book \textit{Justice For Sale}.\textsuperscript{263} The attorney, according to Justice Berry, indicated that he wanted to discuss the procedure for cases seeking original jurisdiction in the Supreme Court. Because the Judge was new to the bench, he thought such a conversation might be helpful. He describes the conversation like this:

Mr. Doe then went on to explain how the Supreme Court might reach down into one of the lower courts and either stop the action, or ask certain questions that might save an appeal later.

\begin{itemize}
  \item \textsuperscript{256} See \textit{id.}.
  \item \textsuperscript{257} See \textit{Rose v. State}, 601 So. 2d 1181, 1184 (Fla. 1992) (Harding, J., concurring) ("Ex parte communications with a judge, even when related to such matters as scheduling, can often damage the perception of fairness and should be avoided where at all possible."); Lubet, supra note 102, at 96 (commenting that the problems with ex parte communications may stem from judges' failures to recognize ex parte contacts as they occur).
  \item \textsuperscript{258} No. 89-2243, 1990 WL 47540 (6th Cir. Apr. 17, 1990).
  \item \textsuperscript{259} See \textit{id.} at *1-2.
  \item \textsuperscript{260} Id. at *1.
  \item \textsuperscript{261} 601 So. 2d 1181, 1184 (Fla. 1992).
  \item \textsuperscript{262} See \textit{id.}.
  \item \textsuperscript{263} WILLIAM A. BERRY, \textit{JUSTICE FOR SALE} 117-18 (1996).
\end{itemize}
Pretty soon, however, Mr. Doe started talking about the other side, what dirty so-and-sos they were, and how they were playing all these dirty tricks on him. I stopped him right there. "Wait just a minute Mr. Doe. You came out here to discuss procedure, which was great, and I appreciate it. But now you're getting into the merits of the lawsuit."  

The lawyer glared at the Justice and left. Justice Berry explains that later he received a letter from the attorney not apologizing, but merely suggesting that this was the way business was conducted in Oklahoma. Such events can transpire any time a private conversation occurs between an attorney with a case pending and the judge that is hearing the case.

The seminal case in the area of ex parte communication, *Haller v. Robbins*, began as a conversation on procedure. In *Haller*, the defendant was charged with several offenses, including kidnapping, stemming from the burglary and abduction of a young woman. The defendant pled guilty to one count of kidnapping pursuant to a plea agreement reached with the prosecution. Sometime between the entry of the plea and the sentencing, the prosecutor disclosed to the judge, in the absence of the defendant or his counsel, the hearsay statement of the victim containing details of the defendant's sordid behavior during her abduction. The Superior Court found that this information was communicated "in the process of the County Attorney's keeping the court informed of the status of the criminal docket.

Although it was quite permissible under the rules of professional conduct for the prosecutor to meet with the court regarding the docket, the conversation that occurred regarding the victim's description of the torture inflicted by the defendant violated the defendant's due process rights.

Although it is permissible conduct under the rules, these conversations contribute to the "team spirit" between the judge and the prosecutor. Additionally, conversations on procedure and scheduling can unfairly advantage the prosecutor. Further, these administrative matters can naturally result in conversations about the merits of the case. Finally, ex parte communications negatively impact the proper operation of the adversary system.

264. *Id.* at 118.
265. See *id.*
266. See *id.*
267. 409 F.2d 857, 859 (1st Cir. 1969).
268. See *id.* at 858-59.
269. The exact timing of the disclosure remained unresolved. See *id.* at 859.
270. See *id.*
271. *Id.*
272. See *id.* at 860.
C. Impact on the Adversary System

1. Only One Side of the Case is Presented

The basic premise of the system, that each party will present its side of the case in a partisan manner, is thwarted by ex parte conversations.\(^{273}\) The Supreme Court in *Herring v. New York*\(^{274}\) recognized that the very premise of our adversary system of criminal justice is that "partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."\(^{275}\) In an ex parte conversation, the prosecutor is the only advocate present.\(^{276}\) The court in *Wolfson* recognized that "[i]however impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case."\(^{277}\) If "truth is best discovered by powerful statements on both sides of the question,"\(^{278}\) then no truth is likely to emerge from a one-sided conversation, where the defendant's side of the case is not presented nor is the prosecution's version controverted.\(^{279}\) It is through the interplay of the two participants, presenting their cases and disputing the other side's version, from which a fair decision can be reached.\(^{280}\) The participation of both parties is the "fundamental instrument of judicial judgment."\(^{281}\)

This notion of joint participation is reflected in the basic rights of the criminal defendant found in the Sixth Amendment to the United States Constitution.\(^{282}\) It reads, in pertinent part, "[i]n all criminal

\(^{273}\) See *Lubet*, *supra* note 102, at 96 (noting the one-side presentation in ex parte communications).

\(^{274}\) 422 U.S. 853 (1975).

\(^{275}\) Id. at 862.

\(^{276}\) See *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969).

\(^{277}\) United States v. *Wolfson*, 634 F.2d 1217, 1222 (9th Cir. 1980).


\(^{280}\) See *United States v. Huff*, 512 F.2d 66, 70 (5th Cir. 1975); *United States v. Kenney*, 911 F.2d 315, 321 (9th Cir. 1990)(stating that the adversary process is satisfied when the defendant is given an opportunity to dispute prosecution's allegations).

\(^{281}\) *In re Taylor*, 567 F.2d 1183, 1188 (2d Cir. 1977)(quoting *Carroll v. Princess Anne*, 393 U.S. 175, 183 (1968)).

\(^{282}\) See *United States v. Cronic*, 466 U.S. 648, 655 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1932). In *Gideon*, the Supreme Court declared:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

Id.
prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."283 This fundamental right requires that not only counsel is appointed, but that the accused has "counsel acting in the role of advocate."284 The defendant receives little benefit from the right to counsel if counsel is unable to correct inaccurate or misleading information conveyed to the court in secret.285 The rights afforded the defendant in the Sixth Amendment can be eradicated by the ex parte relationship that develops between the judge and prosecutor.

2. Rules Not Enforced or Enforceable

The formality required by the adversary process286 does not operate in an ex parte communication. No structured rules control the conversations between judges and prosecutors. Most of these conversations happen "off the record,"287 many times in chambers, and are not governed by the rules of procedure or evidence.288 Therefore, the benefits and restraints of these regulations289 are not present when the judge meets privately with the prosecutor.

3. The Impartiality of the Judge is Impaired

During an ex parte conversation, a judge's impartiality is impaired in two ways. First, the judge may be influenced by the information and argument he is hearing from one advocate, to the exclusion of the opposing view.290 The adversary process recognizes that the decision-maker must remain neutral until all of the information has been provided to her.291 A judge who "prematurely commit[s]" herself to one version of the facts may fail to appreciate the value of all the evidence.292 Additionally, the judge may also become cemented in her opinion based merely on the fact that she heard one uncontroverted version first.293 The lack of appreciation for the importance of all the

283. U.S. CONST. amend. VI.
284. Anders v. California, 386 U.S. 738, 743 (1967); see Jones v. Barnes, 463 U.S. 745, 758 (1983)(Brennan, J., dissenting)(stating that "counsel must function as an advocate for the defendant, as opposed to a friend of the court") (citations omitted).
286. See supra text accompanying notes 53-76.
287. "Off the record" refers to the lack of a transcript.
288. Rule 101 of the Federal Rules of Evidence defines the scope of application for the rules as being "proceedings in the courts." Rule 1101(d)(3) specifically precludes the use of the evidence rules in the issuance of arrest and search warrants.
289. See supra text accompanying notes 53-76.
291. See LANDSMA, supra note 4, at 2-3.
292. Id. at 3; see Haller, 409 F.2d at 859-60.
293. See Haller, 409 F.2d at 859-60; see also United States v. Phillips, 664 F.2d 971, 1001 n.31 (5th Cir. Unit B Dec. 1981)(noting that defendants argued that the
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Evidence carries the dual risks of impartiality and erroneous decisions on the facts or law.\textsuperscript{294} Secondly, the judge is forced into the position of an advocate.\textsuperscript{295} Certain tasks are more properly the functions of an advocate. The judge, when reviewing ex parte information, may be required to perform some of the roles that are more naturally the roles of the advocate.\textsuperscript{296} Additionally, because the judge is not given all the information, he is forced to attempt to take on the role of the opposing view in evaluating the evidence. Ex parte communications between the judge and prosecutor thwart the proper functioning of the adversary system and therefore must be eliminated.

V. ELIMINATING THE TEAM MENTALITY

Many times the relationship that builds between the prosecutor and the judge develops over time. The improper conversations that occur begin in permissible settings and are unintended.\textsuperscript{297} Most judges and prosecutors do not intend to act improperly by communicating ex parte.\textsuperscript{298} The communications become just a natural result of a cooperative and collaborative effort.\textsuperscript{299} As Professor Lubet noted,
they may result from "laxity, inattention, or simple ignorance of the law."\textsuperscript{300}

A. Controlling the Relationship

One of the primary causes for a relationship that goes beyond mere acquaintances is the constant contact and cooperation.\textsuperscript{301} Therefore, in order to avoid the creation of this "team," supervisors and managers in prosecution offices should consider carefully before assigning prosecutors to work in courtrooms where former colleagues are sitting as presiding judge. Obviously, this may require the chief judges to also be aware of the problem in the assignment of judges who have previously worked for the prosecutor's office. Larger jurisdictions should assign judges who have come from the prosecutor's offices to a division that may not require as much contact with prosecutors.

Additionally, prosecutors should be rotated from courtroom to courtroom to avoid developing an intimate relationship between the prosecutor and the court. The time that a prosecutor remains in one division should be limited. This may require reassignment of cases. However, the benefit to the adversary system and appearances of fairness outweighs the administrative problems that may arise.

Prosecutors must avoid unnecessary ex parte conferences with judges. The prosecutor's office must have a policy that discourages ex parte communications.\textsuperscript{302} The policy should disapprove of not only unethical conversations on the merits but also ex parte discussions on procedure, scheduling and administrative matters. The prosecutor should encourage the court to hold all dialogues regarding these matters either in the physical presence of the opposing counsel or by telephone. Issues of administration of the docket and procedure can be discussed with both the prosecutor and a representative from the public defender's office.

Prosecutors must be educated about the relationship between the court and prosecutors.\textsuperscript{303} The prosecutor's office and judges must recognize the costs to the system caused by intimate relationships between them. The prosecutor's office must educate the prosecutors about the unfair tactical advantages that they receive based on the relationship. The attorneys must not seek to curry favor and seek un-

\textsuperscript{300} Lubet, supra note 102, at 97.

\textsuperscript{301} See supra text accompanying notes 138-144.

\textsuperscript{302} See National Prosecution Standard 6.3, created by the National District Attorneys Association, suggests that a prosecutor's office should create and maintain a code of professionalism. Nat'l Prosecution Standards § 63 (2d ed. 1991).

fair advantage from these relationships.\textsuperscript{304} They must also be convinced that such actions are improper and unprofessional. They should not perceive the creation of close relationships with the court as part of their zealous representation of the state. Training must include role modeling by the chief prosecutors and elected prosecutors showing the proper relationship between the court and prosecutor.\textsuperscript{305}

\section*{B. All Communications Between the Judge and Prosecutor Should Occur in the Courtroom}

All conversations held in the court's private chambers have the potential to lead to improper conduct and create a sense of informality and familiarity that contribute to the "team" mentality. Therefore, all contact between a prosecutor and a judge should occur in the courtroom. Conversations that routinely occur in chambers, including scheduling and requests for warrants, can easily occur in the courtroom. If the judge and prosecutor avoid meeting in chambers, problems can be avoided.\textsuperscript{306}

First of all, conversations that occur in the courtroom have a more formal and public atmosphere. Even though the judge and prosecutor may be alone, the sense that they are restrained by the formality of the courtroom may deter improper conversation and cooperation. Additionally, because the conversations take place in a courtroom, the proper respective roles of judge and advocate are perpetuated. The judge remains on the bench and the advocate/prosecutor addresses the court from the well of the courtroom. The physical distance assists in maintaining the separation of roles and viewpoints.

Conversations are more likely to be placed on the record if they transpire in the courtroom. The location of the conversation lends itself to the communications being recorded. All conversations that occur between the judge and prosecutor should be recorded. The recording of all conversations, including those permissible ex parte\textsuperscript{307}

\textsuperscript{304} See National Prosecution Standard 23.3 mandates that "[c]ounsel should not seek to unfairly influence the proper course of justice by any relationship, communication, or pressure upon the court." \textit{NAT'L PROSECUTION STNDARD} § 23.3 (2d ed. 1991).

\textsuperscript{305} See generally Schiltz, supra note 299 (discussing the importance of mentoring in the professional life of the new lawyer). But see Gershm\textsuperscript{305} an, supra note 116, at § 12:15 (suggesting that a court can speak to a supervising prosecutor about objectionable behavior of a staff prosecutor).

\textsuperscript{306} See Egelak v. Alaska, 438 P.2d 712, 715 (Alaska 1968)(noting that the prosecutor should have shown the court proposed picture exhibits in open court in presence of opposing counsel).

\textsuperscript{307} See supra text accompanying notes 206-265. I include in this category the presentation to the judge of search and arrest warrants. Although no evidence is being elicited, by taking the applications on the record there is no question about whether the judge received additional information in deciding the propriety of the warrant.
conversations, allows for meaningful review of the conversation. Several courts have commented on the need to have ex parte conversations recorded. In United States v. Watchmaker, the Eleventh Circuit approved an ex parte conversation with a frightened juror because the entire conversation was transcribed.

Finally, people tend to be more circumspect when they know that their words will be recorded and possibly reviewed. A judge and prosecutor, who know that their words are being recorded, are less likely to improperly speak on the merits or even appear to be collaborating. The judge in Martinez would have been less willing to suggest that he was planning to goad the defense attorney into asking for a mistrial had he known that his words were being recorded. The presence of a recording device would cause judges and prosecutors to maintain the correct posture of distinct participants in the adversary system.

VI. CONCLUSION

The old saying "familiarity breeds contempt" seems not to hold true in the case of the relationship between the prosecutor and the judge. The constant contact, both in the courtroom and in permissible ex parte communications, causes a "team spirit" to develop that has a negative impact on the proper functioning of the adversary system. A conscious effort by the judge and prosecutor to resist collaboration is necessary to prevent the adversary system from being thwarted. The system cannot function when the defendant's principal adversary has "private access to the ear of the court." As Justice Berry put it: "The concept of equal justice is meaningless if some parties benefit from a relationship with a judge, while others do not."

308. See United States v. Napue, 834 F.2d 1311, 1321 (7th Cir. 1987); United States v. Adams, 785 F.2d 917, 920 (11th Cir. 1986); United States v. Watchmaker, 761 F.2d 1459, 1466 (11th Cir. 1985); United States v. Walsh, 700 F.2d 846, 858 (2d Cir. 1983)(noting that a verbatim transcript of the ex parte conversation was made); United States v. Phillips, 664 F.2d 971, 1000 n.31 (5th Cir. Unit B Dec. 1981)(noting that prosecutors obtained another judge's permission before approaching the trial judge ex parte about the defendant's plans to disrupt the trial); United States v. Hackett, 638 F.2d 1179, 1188 (9th Cir. 1980).

309. See Watchmaker, 761 F.2d at 1466.

310. 667 F.2d 886 (10th Cir. 1981). For a full description of the case, see supra text accompanying notes 123-131.

311. See Martinez, 667 F.2d 886.


314. Berry, supra note 263, at 113.