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The Prosecutor’s Duty of Silence

Bennett L. Gershman

Prosecutors enjoy broad opportunities to communicate with the public outside the courtroom. Justice Holmes’s famous dictum -- “The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print” – is just that – a “theory.” The reality is otherwise. Prosecutors, and defense lawyers too, engage in extrajudicial speech frequently, and often irresponsibly. But in contrast to other lawyers, prosecutors have a higher “special” duty to serve justice rather than a private client. And public statements by prosecutors can do far more damage to the system of justice and persons accused of crimes than statements by defense lawyers. Prosecutors enjoy the limelight and media exposure, and to the personal and political the advantages they get from favorable publicity both to the cases they are prosecuting and to their own professional careers. Prosecutors engage in public commentary about their law enforcement activities, specific cases they are investigating and prosecuting, law enforcement policies and priorities that inform their work, and public alerts about safety. Prosecutor speech is ubiquitous, carefully orchestrated, and often hard-hitting. With the collaboration of the media, prosecutors hold press conferences and issue press releases, give briefings and interviews with reporters, post Internet and Twitter comments, appear as TV “experts,” speak in public forums, and write books about their exploits. They use the notorious “perp walk” as a form of communication, and leak confidential information.

As Justice Holmes intimated, a prosecutor’s public statements are potentially dangerous. Given a prosecutor’s high standing with the public as a “Champion of Justice” sworn to uphold the law and punish wrongdoers, a prosecutor possesses a unique ability to shape public opinion about fighting crime and specific individuals who may be under investigation and prosecution. And with the ability of the media to saturate the public with pervasive, repetitive, and inflammatory news coverage about a case,
prosecutors are well aware that their public statements can prejudice future jurors in that case and thereby inflict prejudice to persons suspected or charged with wrongdoing. Indeed, a prosecutor’s public statements can destroy a person’s reputation, prejudice his right to a fair trial, and undermine the public’s respect for the way the criminal law is administered. And most tragically, a prosecutor’s public statements can contribute to the conviction of innocent persons.

The power of the prosecutor, combined with the influence of the media, makes for a dangerous combination. The symbiotic relationship between prosecutors and the media is well known. Banner headlines and incendiary news coverage garner prosecutors free publicity and significant leverage in getting convictions. A close collaboration with prosecutors gives the media special access to confidential information about a case and the ability to spin the information to a large and receptive audience. To be sure, some prosecutor speech is legitimate and necessary. Speech by prosecutors may serve significant public interests – informing the public about law enforcement initiatives, alerting the public to dangerous situations, and seeking assistance from the public in investigating crimes and fugitives. But a considerable amount of prosecutor speech is illegitimate, unnecessary, and prejudicial. When a prosecutor campaigns on the death penalty, or the rights of victims, or testifies before a legislative body on law enforcement initiatives to fight terrorism, there is no specific prejudice to any pending or impending prosecution. However, when a prosecutor comments about specific cases, discusses the evidence and the defendant’s character, and offers opinions about the credibility of witnesses and the defendant’s guilt, the prosecutor crosses the line.

Admittedly, the line between legitimate and illegitimate prosecutor speech is not clear-cut. A prosecutor who seeks to inform the public about law enforcement initiatives against terrorism – undoubtedly a legitimate topic - may intentionally or inadvertently identify persons who are suspected of being part of a terrorist cell, their backgrounds, associates, and criminal records. And if these persons are later charged with criminal conduct, their right to a fair trial may be tainted by the prosecutor’s
comments. Further, the occasional efforts of courts and disciplinary bodies to hedge prosecutor speech, especially speech that flirts near the line, is often frustrated by vague legal and ethical standards, as well as the ability of some prosecutors to find ways within those standards to circumvent limitations on their speech. Prosecutors occasionally are disciplined for speech that violates the rules, or chastised by the courts, but sanctioning prosecutors for irresponsible speech is infrequent and often ad hoc. And hanging in the balance, of course, is the ever-present risk that unregulated or weakly-regulated prosecutor speech continues to impair the fair and evenhanded functioning of the criminal justice system, the confidence of the public in the integrity of the system, and the reputation and liberty of persons thrust into the system and facing the glare of public accusation and prosecution.

Prosecutor speech is not fungible. Application of the legal and ethical rules that regulate a prosecutor’s extrajudicial statements and subject a prosecutor to judicial and ethical sanctions depends on the role the prosecutor is performing when engaging in public speech. A prosecutor when communicating with the public occupies three distinct roles. First, a prosecutor in the vast majority of U.S. jurisdictions is an elected official who when campaigning for office has the right to inform the public about the qualities and characteristics that make him and his office the best-qualified for the position. Second, a prosecutor as the chief law enforcement official in the jurisdiction has the duty to inform the public about criminal justice policy, threats to public safety, law enforcement initiatives, and precautions the public can take to protect its safety. Third, a prosecutor is an advocate who has a dual responsibility to convict the guilty and protect the innocent. As an advocate, a prosecutor has a right to inform the public about investigative and prosecutorial actions his office is undertaking without endangering the right of those persons to be treated fairly and impartially throughout the criminal justice process.

It is apparent that the latitude afforded prosecutors legally and ethically to make public statements depends on the role that the prosecutor is performing. Thus, when a prosecutor runs for public office he engages in speech that typically is afforded the greatest protection; campaign speech
occupies a core function of First Amendment freedom. Next, when a prosecutor communicates with the public about matters of public concern, including matters that affect the administration of justice, public safety, and law enforcement policies, his speech is scrutinized more closely than campaign speech, but still is afforded considerable constitutional protection. However, when a prosecutor functions in the role of an advocate, and makes extrajudicial statements about specific cases, his public statements are scrutinized much more closely and are subject to the greatest restrictions in order to protect a defendant’s right to a fair trial. With respect to advocacy speech, the ABA’s Model Rules and Prosecution Standards prohibit prosecutors from making public statements that have a “substantial likelihood of materially prejudicing an adjudicative proceeding” or have a “substantial likelihood of heightening public condemnation of the accused.” Federal rules are more restrictive; prosecutors are forbidden from making public statements that “may reasonably be expected to influence the outcome of a pending or future trial.” It is with respect to his advocacy speech that a prosecutor can inflict the greatest damage.

**Campaign Speech**

A prosecutor’s campaign speech enjoys the greatest degree of First Amendment protection. As the Supreme Court observed in giving broad protection to campaign speech by judges, “[D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges.” Indeed, if a judge – considered the most impartial and non-partisan government official -may not be prohibited from discussing their views on disputed legal and political issues, as the Supreme Court held in *Republican Party of Minnesota v. White*, then a fortiori the campaign speech by a prosecutor – part of the politically partisan Executive Branch of government - would be afforded even greater constitutional protection. Campaign speech by prosecutors ordinarily poses far less danger of
impairing the judicial process or heightening public condemnation of the accused, and restricting prosecutor speech for these reasons clearly does not apply to a prosecutor’s campaign speech.

Still, irresponsible campaign oratory by prosecutors does occur, and has been censured. The vast majority of prosecutors in the U.S. are elected, and incumbents win most of the time. Studies of prosecutor campaigns suggest that most of the election speech by prosecutors focuses on individual qualifications and character rather than prosecutorial practices and policies. Prosecutors often run on their record of convictions, especially capital convictions. A prosecutor is forbidden to permit personal or political interest affect his prosecutorial conduct – including charging, plea bargaining, and sentencing practices – nor should a prosecutor make a campaign pledge to prosecute a certain case. A prosecutor’s public statements about a specific case at the same time the prosecutor is engaged in a hotly-contested political campaign - District Attorney Michael Nifong’s prosecution of the Duke Lacrosse case – presents an obvious impermissible conflict. But the concurrence of a prosecutor’s advocacy speech with campaign speech is unusual, and discussing restrictions on a prosecutor’s speech during a political campaign, admittedly an interesting question, is not a focus of this paper.

**Speech on Matters of Public Concern**

A prosecutor’s speech on matters of public concern receives considerable constitutional protection, and may not be restricted unless a prosecutor strays from the general pronouncements and begins to focus on a particular case. When a prosecutor speaks about subjects that command the public interest, such as victim’s rights, public corruption, spousal abuse, drugs, and guns, a prosecutor enjoys wide latitude; there is no legitimate reason to restrict such speech. However, a prosecutor should resist speaking to the public on any of these issues at a time when his office is prosecuting a case involving a defendant charged with that crime. Thus, it would be entirely proper for Michael Nifong to make public statements about campus sexual abuse by Duke University students, or the dangers of excessive alcohol
at fraternity parties. But it would be improper to make these statements while his office is prosecuting a student charged with sexual abuse after drinking at a fraternity party.

Similarly, there is nothing improper in a prosecutor speaking out about the evil of public corruption, the public corruption cases he has prosecuted, and the aggressive steps his office is taking to investigate and prosecute public officials who violate their duty. What is improper is to make such statements in conjunction with his announcement of charges against a prominent public official in a high-profile case, and sprinkling details of the charges and ad hominem comments about the official’s character. There is a real danger that a prosecutor who makes relevant comments about matters of public concern – clearly a legitimate function - may in the course of that speech adopt the advocacy role and deliberately or inadvertently make impermissibly prejudicial comments about specific cases.

**Advocacy Speech**

A prosecutor’s advocacy speech has a much greater capacity to prejudice a defendant than when a prosecutor campaigns for office or engages in speech about matters of public concern. When a prosecutor speaks as an advocate about a specific case, the prosecutor plays the role of a partisan whose interests are adverse to persons accused of crimes, and with the ability to unfairly prejudice those persons by making public statements about the accused, the evidence against him, and the prosecutor’s opinions about the case. It is with respect to advocacy speech that a prosecutor must be most careful about his public statements. When a prosecutor undertakes to investigate or prosecute specific persons, with the exception of statements limited to a person’s identity, some basic facts about the arrest, and scheduling matters, a prosecutor must refrain from saying anything about the merits of the case, the witnesses, evidence, opinions as to guilt, or anything else that might be taken as a comment on the case. A prosecutor in his advocacy role has a duty to remain silent.
Most of a prosecutor’s communications with the media and the public is about current investigations and prosecutions. But in contrast to the kinds of statements prosecutors make during an election campaign, or when informing the public about matters of public concern, extrajudicial statements about pending cases have the greatest capacity to undermine the fair administration of justice and prejudice the right of persons suspected of or charged with crimes to be treated fairly during adjudicative proceedings, especially in grand jury proceedings and jury trials. Prosecutors in speaking to the public as advocates are able to employ a various modes of speech - press conferences, press releases, press briefings, and interviews; electronic speech on the Internet and Twitter; appearances on TV experts; authors of books and articles; and producers of “perp walks.” Prosecutors also leak information to the media secretly.

1. **Press Conferences**

The press conference is a centerpiece in the prosecutor’s use of the media. The press conference is an elaborate production in which the prosecutor, often flanked by other high-ranking law enforcement officials, and surrounded with displays of contraband - drugs, guns, currency - stands in front of microphones, TV cameras, lights, and hordes of media people, and presents a dramatic, provocative, and disparaging commentary on individuals charged with crimes. The content of press conferences often go well beyond the language of the complaint or indictment. Prosecutors employ inflammatory rhetoric about the case, provide disparaging opinions about the defendant’s character and guilt, and provide favorable opinions about the credibility of the government’s witnesses and the evidence. The press conference has become such a fixture in the criminal justice system that very few courts, disciplinary bodies, or commentators bother to even examine how often prosecutors by their excessive and irresponsible speech violate the ethical rules and impair not only a defendant’s right to a fair trial but also the public’s perception of the criminal justice system.
Prosecutors employ colorful, hyperbolic, and often false and misleading rhetoric to hype the case, suggesting that the defendant is guilty of “the largest corruption case in the history of the nation;” “part of the largest marijuana operation in the history of the country;” “I’m not sure that we ever had a drug dealer of the dimension of the defendant;” This indictment is shaped as a javelin to drive deep into the heart of organized crime. Now the mob is on the run.” A prosecutor at a press conference falsely stated that a defendant charged with currency reporting violations was involved in money laundering and drug trafficking. At a news conference shortly after the September 11, 2001 terrorist attack, U.S. Attorney General John Ashcroft falsely stated that three men arrested on terrorism charges on September 17, 2001, were “suspected of having knowledge of the September 11th attacks.” Later, in a press conference giving an update in the War on Terror, during the trial of the three men referred to above, referring to the value of cooperating witnesses, Ashcroft described the testimony of the cooperating witness, who had just completed his testimony, as of “substantial value to the government.” In fact, the witness’s testimony was later shown to be false.

Because press conferences pose special dangers of prejudicing a case, some prosecutor offices have instituted guidelines to limit the prejudice when announcing charges, or ongoing investigations. The guidelines provide that press conferences to announce formal charges should be held only for the most significant and newsworthy actions, or if a particularly important deterrent of law enforcement purpose would be served, and that “prudence and caution should be exercised.” The guidelines further provide that no press conference should be held regarding ongoing matters before formal charges are brought except in “exceptional circumstances” such as reassuring the public when a particularly heinous crime has been committed, alerting the public of an imminent threat to public safety, or seeking public assistance or information.
2. **Press Releases, Briefings, and Media Interviews**

In addition to press conferences, prosecutors commonly issue press releases, give press briefing, and conduct media interviews. Prosecutor offices have institutionalized media outreach initiatives on a broad scale, presumably to maintain good relations with the media and control irresponsible contacts. Offices typically designate a person to serve as a point of contact with the media, coordinate press conferences, prepare press releases, coordinate requests from media organizations regarding in-depth stories and interviews, and prepare displays and handouts for press conferences and other media contacts. Guidelines for press releases, briefings, interviews, as well as supervision, authorization, and approval by senior prosecutors varies with the particular office and the case.

High profile investigations and prosecutions generate the most contacts, and raise difficult and controversial questions about the scope of media contacts, leaks to the media, and the prejudicial effect of the prosecutor’s statements. From reviewing many dozens of high profile cases, it appears that most prosecutors – even the most experienced - make irresponsible statements to the media with little or no concern over the ethics of their conduct, and the prejudicial impact of their statements to individuals accused of crime. Egregious examples abound. One of the most outrageous examples involved the conduct of Manhattan prosecutor Linda Fairstein, Chief of the Sex Crimes Unit of the New York County District Attorney’s Office, who in numerous statements throughout the criminal proceedings, including a stream of leaks, about the so-called “cybersex torture” case. The victim, a 20-year-old college student, reported that she had been sexually assaulted by Oliver Jovanovic, a thirty-year-old doctoral student who had tied her up for twenty hours and burned, tortured, and violently raped and sodomized her. Throughout the criminal proceedings, including a stream of leaks, Fairstein made numerous extrajudicial statements: “He terrorized this young woman to the point that she was too frightened to call the authorities;” “He tied her to a chair, undressed her and tortured her with sex toys and other objects for almost a full day;” “He tortured and sexually abused the woman, burning her with candle wax, biting
her, sexually assaulting her and threatening to dismember her as Jeffrey Dahmer, the serial killer, had
done with his victims;” “He tied the woman’s legs to a chair and gagged her before sexually torturing
her;” “He was so prepared for this and carried it off so smoothly;” “We believe this was not the first time
he did something like this;” “We believe there are other victims.”

Needless to say, Fairstein’s comments made screeching headlines in every local newspaper. One
paper’s cover page featured a full page picture of the defendant with the headline: “Prosecutor: Cyber
fiend struck before,” and “HOW MANY MORE VICTIMS.” Fairstein told the press that this case was her
office’s foray into Internet-related sex prosecution and that the case represented “a whole new entry in
the acquaintance-rape category.” Fairstein throughout the proceedings continued to leak to the media
select portions of e-mail correspondence between the defendant and alleged victim that further
demonized him. The media coverage was so extensive that trial witnesses were influenced in their
testimony of critical facts by reading a newspaper article. Jovanovic was found guilty by a jury, the
conviction was reversed for serious trial errors, and after seeking generous plea deals involving no jail
time, which the defendant refused, the District Attorney agreed to dismiss all charges with prejudice.

In light of her above statements, consider Fairstein’s comment in an interview with the Media
Studies Journal about the effects of publicity on a jury:

The period of greatest impact is pretrial because that could be anywhere from three
months to a year. Depending on the coverage, people can become immersed in reading
about the case. And from this reading-and-listening public come the people who sit on
our juries. After the trial has begun, the jurors are given a rule – that they don’t read or
listen to media accounts of the case. Most people try hard to comply. But it’s almost
impossible with the highest-profile vases for it to really happen. When a case like Chambers, the jogger, the subway bomber or the World Trade Center
bomber is on trial in New York – and it is literally a page A1 headline – our jurors are
coming to work on the subway and he bus...I mean you can’t sit on a train and not see
what’s there...And you deal with a jury pool that is just saturated with that kind of
information. You hope that you can get jurors who are telling you the truth, that they
can set aside what they’ve heard and just listen to the evidence in the courtroom. In the
end, both sides use the press to great advantage before you get anywhere near the trial
stage.
3. **Tweeting**

The advent of new ways to communicate with the media electronically enables a prosecutor to transmit via Twitter comments that arguably prejudice a defendant. The “tweets” also allow a prosecutor to refer the reader to a link to other documents, such as the charging documents, press releases, and other relevant materials. So, in the Silver case discussed above, U.S. Attorney Bharara, after his press conference and press release, he transmitted tweets announcing the charges, referred readers to the press release, and at the same time repeated the statements he made earlier: “Silver monetized his position as Speaker of the Assembly in two principal ways & mislead the public about his outside income;” “Politicians are supposed to be on the ppl’s payroll, not on secret retainer to wealthy special interests they do favors for.” Upon the defendant’s motion to dismiss the indictment based on the prosecutor’s inflammatory pre-trial statements, the federal district judge noted that one of the problems with Twitter communications is that they are read out of any context and isolated from any explanatory information. Given the restrictive platform – i.e., messages are limited to 140 characters and readers are permitted to “retweet” a single communication – the statements typically are read in isolation, and the prejudice is enhanced. A prosecutor by tweeting thereby is afforded a simple and potentially highly prejudicial form of communication.

4. **Internet Postings**

With the advent of the Internet, prosecutors are able to post online anonymous comments about pending criminal cases. Probably the most outrageous example of this relatively new phenomenon occurred in New Orleans, Louisiana in the anarchy following Hurricane Katrina when several civilians were shot to death shootings by local police officers at the Danziger Bridge. Before, during, and after the federal prosecution of these officers for civil rights and conspiracy violations, three
high-ranking federal prosecutors posted online anonymous comments to newspaper articles about the case under multiple assumed names that were inflammatory, highly opinionated, and pro-prosecution. The postings castigated the defendants, their lawyers, and the New Orleans Police Department (NOPD) as a fish “rotten from the head down.” The postings contained confidential, privileged, and sensitive information that spanned the entire prosecution and went directly to the guilt of the defendants, the collective guilt of the NOPD, and the incompetence and lack of integrity of defense counsel.

When these postings came to light, and following motions by the defendants, the district court in a lengthy opinion found that the government’s misconduct was so pervasive and so prejudicial to the rights of the defendants that it contaminated every phase of the prosecution and required vacating the convictions. The online comments, according to the court, breached all standards of prosecutorial ethics, gave the government a surreptitious advantage in influencing public opinion, the jury panel, and the trial itself. The government’s misconduct permeated every stage of the prosecution.

Anonymous public statements by prosecutors about pending and impending cases, the court observed, undermine the integrity, fairness, and objectivity of the criminal justice system. Indeed, public statements on-the-record can be easily evaluated. Statements off-the-record cannot. Moreover, a prosecutor’s duty to refrain from speaking extends beyond confidential or grand jury matters, and applies beyond those actually prosecuting a case to every prosecutor in the office. Nor is there any dividing line between a prosecutor’s professional and private lives with respect to the duty to remain silent. Although statements to the press may be an integral part of a prosecutor’s job, that function is severely limited by the prosecutor’s responsibility to serve justice.

5. **Leaking Information**

Prosecutors, as noted above, are limited in what they can say about a case. Press and the media is not so limited. Prosecutors therefore have the ability to evade prohibitions on prejudicial speech by
leaking information to the media that prejudices persons who either are targets of an investigation or defendants in current prosecutions. Anyone familiar with the criminal justice system, if candid, would acknowledge that prosecutors leak information to the media, and do it often. Prosecutors leak confidential and privileged information to impress the public with information favorable to their cases, elicit the gratitude of reporters and journalists for these clandestine “scoops,” which the media typically repay the prosecutor in positive news coverage, which also enhances the prosecutor’s personal and political standing with the public. To be sure, leaking secret information is not only unethical but sometimes it violates criminal statutes, as when prosecutor reveal secret grand jury information.

Prosecutors rarely get caught for leaks. Prosecutors confide in friendly journalists, knowing that the “journalist’s Privilege” shields the journalist from having to reveal the source of the leak, and also that it would be destructive to the journalist’s career, and receipt of any future leaks, if the journalist ever betrayed his or her source. Moreover, even though it is often perfectly obvious that the government, and usually the prosecutor, was the source of the leak, prosecutors are easily able to deflect responsibility by demonstrating the numerous individuals who would have had the information about the matter that was leaked, either from interviews, subpoenas, or testimony, and plausibly may have been the leaker. When a prosecutor is identified as the leaker, as was the case recently when the Pennsylvania Attorney General was charged with orchestrating the leak of confidential material to a Philadelphia newspaper and then lying about it to a grand jury.

6. TV Appearance as Crime “Expert”

Prosecutors occasionally appear on TV programs as law enforcement “experts” to educate the public about the criminal justice system and ongoing criminal trials and investigations. When speaking about current criminal trials a prosecutor must ensure that her commentary does not risk prejudicing a specific criminal case by discussing the specific merits of an ongoing criminal prosecution or investigation, although a prosecutor may in a rare case address a “manifest injustice about which the
prosecutor is well-informed.” Presumably a prosecutor would be allowed to criticize a judge for excluding a defendant’s confession on dubious legal grounds, a prosecutor’s suppression of exculpatory evidence, or a defense attorney’s decision not to call the defendant as a witness.

Some prosecutors have become celebrities by promoting themselves as TV commentators. Jeanine Pirro, Westchester District Attorney, frequently appeared on TV on “Geraldo” and other programs during the O.J. Simpson trial. Despite criticism of Pirro as a self-seeking Hollywood-type celebrity and an insatiable “media hound,” Pirro is an attractive and well-informed lawyer, and her presence on these shows probably gave some measure of respectability to the nightly O.J. media orgy.

A prosecutor’s TV appearance sometimes is a political stunt disguised as a TV “documentary” to boost the prosecutor’s image. A so-called news program called “Brooklyn D.A.” featured prosecutors in the office of Brooklyn D.A. Charles Hynes, whose office was currently battling misconduct charges who discussed cases currently pending in the Brooklyn criminal courts, and discussed evidence in the case that incriminated the defendant. Criticism of the show focused on alleged violations of campaign finance laws by giving the prosecutor free air time during a heated political campaign. Just as troubling, of course, are the extrajudicial comments by prosecutors about pending cases, displaying evidence in those cases before the cases were tried, and interviews with prosecution witnesses, including forensic experts who expressed their opinions about incriminating evidence.

7. **Books and Articles**

Prosecutors frequently write books about their work, and often describe some of their big Sometimes these books discuss high-profile cases that the writer prosecuted personally, without excessive self-glorification. Books such as “Helter Skelter,” describing the celebrated 1970 trial of Charles Manson and his followers, and “Murder Along the Way,” describing three sensational murder trials in suburban Rockland County, New York, are examples of riveting and vivid crime dramas.
Sometimes the book is a self-glorifying diatribe in florid prose against perceived excesses in the criminal justice system. One such book, “To Punish and Protect,” describes the District Attorney’s Office as “the battleground where the fight between good and evil unfolds,” in which the writer sees herself as the victim’s “avenger,” and to “cage the bastards.” The death penalty works, and the insanity defense is “travesty.”

Whether a prosecutor’s conduct in office may be influenced by future literary or media interests is almost impossible to determine. Prosecutors must be careful not to enter into a literary or media portrayal based on cases in which the prosecutor was involved prior to the conclusion of the case, nor should a prosecutor allow his judgment to be affected by the possibility of future personal literary or other rights. If a prosecutor does participate in a literary or media event in which the prosecutor’s office was involved, the duty to maintain confidentiality must be respected.

8. “Perp Walk”

A prosecutor may engage in extrajudicial speech as effectively by conduct and by verbal communications, particularly when the conduct is tantamount to making a statement. The deliberate escorting of an arrested person by police in front of TV cameras and news reporters as a means of shaming or pressuring the suspect and garnering publicity for the prosecutor is well within the ethical rule that prohibits extrajudicial comments that might prejudice an adjudicative proceeding as well as heightening public condemnation of the defendant. Commentators have noted that the perp walk gives publicity-hungry prosecutors an opportunity to enhance their careers and police an chance to get on television. The perp walk displays the accused in a way that damages his character and stigmatizes him as guilty. In suggesting guilt in this way the prosecutor is also conveying his opinion about the accused, an illegitimate subject for comment. The perp walk may also constitute a form of pre-trial punishment and an erosion of the presumption of innocence.
The so-called “perp walk” was popularized by U.S. Attorney Rudolph Guiliani in 1987 when he locked up three Wall Street bankers who were handcuffed and arrested at their desk. Since then other defendants – particularly White Collar suspects – have been subjected to the “perp walk.” Prosecutors justify the perp walk as a legitimate exercise of discretion to (1) deter others from committing crimes; (2) ameliorate public outrage at the defendant’s conduct; (3) encourage guilty pleas and cooperation; (4) induce victims and witnesses to come forward with information; (5) provide public access to the operation of the justice system with respect to arresting people; and (6) exposes the suspect’s physical condition to make it less likely that the police will physically abuse a suspect who has been exposed to the media.

Regulating Prosecutor Speech

Extrajudicial statements by prosecutor are subject to a wide array of legal and ethical rules that address the content, circumstances, and timing of the statements. Whenever a prosecutor speaks publicly, especially those prosecutors who are elected, there is always the concern that the prosecutor’s statements may be influenced by a prosecutor’s personal and political interest in potential media contacts and attention. Almost everything a prosecutor does or says may be motivated, at least in part, by personal or political interests. Aware of this danger, the ethics standards provide in several places that a prosecutor’s professional judgment and conduct must never be influenced by personal or political interest and considerations. With respect to the broad and recurring modes of speech discussed above, there is a special danger that a prosecutor’s personal and political interests might well conflict with a prosecutor’s duty to do justice, and the need to avoid speech that may prejudice the rights of an accused or the administration of justice. However, absent an admission, it is difficult if not impossible to show that a prosecutor’s public statements are motivated by hidden personal or political agenda rather than a disinterested desire to protect the public and fight crime effectively. The typical inquiry by courts
and disciplinary bodies, however, is whether the statements, viewed objectively, violate a legal or ethical rule regulating prosecutor speech.

1. **Statements About Pending Cases**

   A prosecutor in his advocacy role is allowed to make limited public statements about pending cases. These matters include:

   - Defendant’s name, age, residence, employment, family status, and other background information;
   - The substance of the charge;
   - The identity of the investigating agency and length and scope of the investigation;
   - The circumstances of the arrest, including the time, place, pursuit, resistance, presence of weapons, and description of physical items seized at the time of arrest;

   A prosecutor is prohibited from making public statements about pending cases that he knows or should know have a “substantial likelihood of materially prejudicing a criminal proceeding” or having a “substantial likelihood of heightening public condemnation of the accused.” The rules identify several subjects that are more likely than not to have a materially prejudicial impact on future proceedings in a case. These subjects are generally seen as creating a risk of prejudice without serving any legitimate or necessary law enforcement function. Thus, prosecutors are cautioned to refrain from communicating on the following subjects:

   - A defendant’s prior criminal record;
   - Observations about a defendant’s character;
   - Statements, particularly confessions or admissions, attributable to a defendant, or a defendant’s refusal to make a statement;
   - Reference to investigative procedures, tests, and examinations, or a defendant’s refusal to submit to tests or examinations;
   - Statements concerning the identity or credibility of prospective witnesses;
   - Statements concerning evidence or argument in the case;
Opinions as to the defendant’s guilt or the likelihood of a guilty plea;

The fact that a defendant has been charged, unless there is also a statement explaining that the charge is merely an accusation and that the accused is presumed innocent.

Examples of prosecutors speaking about these subjects are legion. U.S. Attorney Preet Bharara when announcing the corruption charges against New York State Speaker Sheldon Silver created a “media circus” by his over-the-top “uncensored views” disparaging Silver’s character, announcing his opinion on Silver’s guilt, and bundled together factual allegations with a broad attack on public corruption and Silver’s crimes. District Attorney Michael Nifong in a succession of numerous press statements about the Duke Lacrosse case demonized the three defendants charged with raping a woman at a party as “a bunch of hooligans” who committed a “gang rape” based on “racial hostility,” denounced them for “not wanting to admit to the enormity of what they have done,” branded their conduct as “offensive,” “unconscionable,” “reprehensible,” “appalling,” and “not telling the truth about it,” stated his opinion that “a rape did occur,” “I am convinced there was a rape,” the evidence of the victim’s demeanor and trauma “was certainly consistent with a sexual assault.” As the cases progressed, it turned out that a rape did not occur, the victim lied, and the young men accused of rape were innocent.

2. Statements About Past Cases

A prosecutor’s comments on past cases might be made in connection with each role that a prosecutor performs. For example, during an election campaign a prosecutor might try to tout as a measure of her effectiveness her record of previous convictions, including capital convictions. Similarly, a prosecutor when discussing law enforcement policy, the need to strengthen laws with respect to certain types of investigations, or the need for additional resources might allude to previous investigations and prosecutions. Finally, a prosecutor in commenting on a current case might seek to
highlight the case by describing a systemic problem, or a troubling pattern of similar cases that have been prosecuted.

To be sure, from an ethical standpoint, the correct way to approach statements about previous investigations, prosecutions, and convictions is to inquire what the prosecutor’s purpose is in discussing these cases, whether that purpose is legitimate and necessary, and whether the statements are inconsistent with a prosecutor’s role to serve justice.

3. Responsive Statements

A prosecutor is allowed to respond to public statements from any source in order “to protect the prosecution’s legitimate official interests.” A prosecutor should use this privilege to engage in overkill; responsive statements should be limited to such information that is necessary to mitigate the adverse publicity, not exacerbate it. Prosecutors may not respond when their statements have a substantial likelihood of materially prejudicing a criminal proceeding.

A prosecutor’s ability to respond is permitted in order to equalize the positions of both sides, or correct misstatements about the prosecutor’s conduct. To the extent that this rule allows a prosecutor to “fight fire with fire,” it is said to encourage a judicially-sanctioned “free-for-all” and, once provoked, may encourage excesses by prosecutor. The Supreme Court in United States v. Young considered the scope of a prosecutor’s response during a trial, admittedly a different context. The Court did not approve the prosecutor’s response, albeit invited by defense counsel provocation, but did not find it to be plain error. The proper test should be whether the prosecutor’s response was reasonably designed to repair the damage, rather than aggravate it.

4. References to Public Records

Although a prosecutor is prohibited from making materially prejudicial extrajudicial statements, the ethics rules create an exception that allows a prosecutor to make extrajudicial statements about
information contained in a public record, apparently despite its content. This “safe harbor” exception obviously creates broad opportunities for prosecutors to make highly prejudicial statements that are contained in public records, or to actually file court documents that contain information that a prosecutor is barred from expressing directly. This “safe harbor” exception presents an attractive opportunity for prosecutors to create damaging public records and then disseminating these records to the media directly, or alert the media to their existence. Moreover, the meaning of “public records” has generated considerable confusion. Some prosecutors have exploited this exception to disseminate publicly highly prejudicial information contained not only in “public records” of a court or other government agency, but also materials publicly available on the Internet and other news accounts previously reported in the media. Adopting such an expansive concept of a public record that includes unfiltered and untested contents of all publicly accessible media “would permit the public record safe harbor to swallow the general rule of restricting prejudicial speech.”

The public record exception does not give a prosecutor cart blanche to gratuitously place prejudicial information in a public record in order to have that information reported by the media. An egregious example in a federal criminal fraud trial in which the defendant was accused of misappropriating funds from the federal housing administration. During the trial the prosecutor filed a “motion” with the clerk of the federal district court, although as the appeals court observed, “the true character and purpose of which [was] not readily apparent.” The motion referred to a report of a civil settlement between the defendant and the housing agency having no connection with the criminal case, and which described the defendant’s “breaches,” “conversions,” “kick-backs,” “embezzlements,” and other violations of law. The motion garnered immediate and widespread publicity. Although the jury was polled by the trial judge and did not respond when asked if it had heard news reports connected with the case, the Court of Appeals nevertheless reversed the conviction, finding that the prosecutor’s self-serving and irrelevant statements “may have tainted the jury and damaged the cause of justice.”
The public record exception assuredly was not intended to allow prosecutors to smear a defendant indirectly by creating purposeless and illegitimate records. Prosecutors, however, are able to file documents in a case lawfully that may inflict prejudice on a defendant. For example, the federal prosecution of Sheldon Silver, New York State Assembly Speaker, was initiated by a 35-page, single-spaced sealed complaint which described in vivid and inflammatory detail the defendant’s scheme to bribe, secure kickbacks, and extort millions of dollars from private lawyers and others. The complaint disingenuously referred to witnesses by anonymous identifiers but which were easy for the media to identify by name, described the defendant’s “corrupt arrangement with a law firm” which, according to the complaint, “had no connection to his official position,” and asserted that several government witnesses were “reliable.” The prosecutor then quickly leaked the complaint to the media to set the stage for the defendant’s arrest the next day, followed by the Press Conference extravaganza.

It would seem that if a prosecutor sought to take advantage of the protection of the public record safe harbor, the prosecutor ought not be allowed to provide information beyond quoting from and making reference to the public record and making clear that what is being disclosed is the contents of the public record and not the prosecutor’s own opinion about the evidence and the defendant’s guilt.

The prosecutorial tactic of inserting prejudicial information into a public record and then alerting the media may be a trap for the unwary litigant. For example, during a secret grand jury investigation a prosecutor subpoenas witnesses and documents. Assuming a witness moved to quash the subpoena, it would not be surprising if prosecutor’s response contained highly prejudicial and even inflammatory information to support the subpoena. Obviously if such motion practice occurred during a grand jury proceeding, all of these undisputedly public records should be filed under seal, and not accessible to the media. Whether the media learns about these filings, of course, depends on whether the information is leaked to the media.
Although there is no settled definition of “public record,” several courts have refused to extend the concept to include all information that is publicly accessible on the Internet and in media reports. These courts have limited the concept of public record to refer only to public government documents, i.e., the records and papers on file with a government entity to which an ordinary citizen would have lawful access.

5. **Statements Prejudicial to the Administration of Justice**

A prosecutor’s extrajudicial statements may be so irresponsible as to constitute conduct prejudicial to the administration of justice. This broad standard of professional misconduct covers advocacy statements that materially prejudice a specific adjudicative proceeding, which was one of the bases for disbarring Michael Nifong, the Duke Lacrosse prosecutor. Also subject to sanctions are improper comments by prosecutors aimed not at a specific legal proceeding but more generally at matters the prosecutor believes are of public concern in the criminal justice system. Although, as noted above, a prosecutor has much greater leeway in speaking out on matters of public concern, his public statements may be so irresponsible as to constitute conduct prejudicial to the administration of justice.

Prosecutors occasionally make public statements critical of judges and the justice system. Ethics rules address such statements indirectly. Prosecutors are cautioned that any statements about the judiciary and the justice system, especially statements expressing disagreement, be “respectful.” However, some public statements about judges and the justice system cross the line, and prosecutors have been cited by professional disciplinary bodies for “engaging in conduct prejudicial to the administration of justice.” Prosecutors know that they occupy a special status with the public as the embodiment of law and order. They know that in contrast to criticism by defense lawyers, a prosecutor’s criticism of judges and the justice system is likely to carry far more weight with the public, and affect adversely the public’s confidence in the judiciary, and the administration of justice generally.
A prosecutor’s extrajudicial statements about the conduct of judges and the operation of the justice system may be so irresponsible and prejudicial to the administration of justice as to warrant disciplinary sanctions. Needless to say, a prosecutor’s attack on judges makes for good press and may enhance a prosecutor’s image as an aggressive crusader against lawless judges. Thus, an Arizona prosecutor’s relentless attack on judges and other public officials for obstructing his efforts at fighting corruption led to his disbarment. Andrew Thomas, the Maricopa County prosecutor, publicly accused judges of lawless, biased, and corrupt conduct. A flow of press releases repeatedly charged that a judicial “faction” was “dodging the law and demonstrating a disregard for the will of the people” and engaged in a “conspiracy” to thwart his investigations into judges and other public officials. Without any supporting evidence, Thomas brought a civil RICO complaint against 14 persons, including four judges. Employing an amalgam of invective, insinuation, and diatribe, he charged the defendants with a massive conspiracy to engage in judicial and official misconduct, including extortion, bribery, hindering prosecution, and obstructing government administration. Thomas had the complaint dismissed a few weeks after he filed it, claiming, falsely, that the U.S. Department of Justice would be investigating the matter.

Other public attacks by prosecutors against judges may be so reckless as to constitute conduct prejudicial to the administration of justice. Thus, a New York prosecutor issued a “news alert” that publicly attacked a judge who, according to the prosecutor, during a trial on charges of sexual misconduct, in his robing room, ordered the victim to get down on the floor and show the position she was in when she was attacked. As it turned out, the allegation against the judge was false, and the prosecutor public release of the allegation was unwarranted and unprofessional, and properly subject to discipline. Similarly, a prosecutor’s public attack on judges for not being aggressive enough may constitute misconduct, as in one case where the prosecutor publicly, and falsely, branded a judge’s decision as a “get-out-of-jail-free card for every criminal defendant in New York State.”
6. **Speech Critical of a Verdict**

A verdict that disappoints a prosecutor may be an occasion for the prosecutor to criticize the jury or the judge, or comment on deficiencies in the justice system, and suggest that the defendant improperly beat the system. The prosecutor in this way saves face. However, a prosecutor should not make statements critical of a verdict, whether by a judge or jury. Given the prosecutor’s authority and prestige, such remarks risk improperly influencing jurors in other cases to which they may sit. It may also be seen as intimidating a judge when a case is tried without a jury.

7. **Statements Referring to Severity of Sentence**

It is unethical for prosecutors to promote themselves and their office, either in campaigning for office or in other public statements, by claiming that the sentences that have been imposed in prosecuted cases demonstrate that the prosecutor has been an effective and aggressive official. Such statements are inconsistent with a prosecutor’s role as a minister of justice, whereby a prosecutor has a duty to maintain an attitude of fairness and objectivity, rather suggest an attitude motivated by vengeance and retribution. Rather, the prosecutor should seek to ensure that the sentencing process is done in a fair and equitable manner.

8. **Statements About Conviction Rates**

Prosecutors like to promote their conviction rates as a measure of their effectiveness. Those prosecutors who campaign for office often make their record of convictions the most significant factor that the public should consider in determining the prosecutor’s fitness for the position. Flaunting conviction rates is not only misleading; it is unethical.
The Prosecutor’s Duty of Silence

Given the several roles that a prosecutor performs, and the broad opportunities for a prosecutor to speak outside the courtroom, the idea that a prosecutor has a “Duty of Silence” seems far-fetched. Indeed, a prosecutor’s public statements are often not only permissible but sometimes indispensable. A prosecutor’s election speech describing his work and fitness for office is critical to the proper functioning of democracy, and enjoys the greatest constitutional protection for speech. A prosecutor’s speech that informs the public about the prosecutor’s activities, educates the public about law enforcement plans and priorities, and informs the public about matters of public concern and threats to the public welfare and safety, also enjoys considerable constitutional protection. However, the broad protection given to election speech and speech on matters of public concern is based on the assumption that such speech promotes necessary and legitimate objectives. However, such broad protection of prosecutorial speech does not apply to extrajudicial speech that does not serve legitimate prosecutorial interests, such as statements concerning pending or impending cases, and individuals suspected or accused of wrongdoing. Any interest a prosecutor might have in speaking about these cases, or the public might have in learning from the prosecutor about these cases, is overridden by the constitutional right of persons accused of crime to receive a fair trial by an impartial jury. After a defendant has been accused of a crime, any statement a prosecutor makes about the case has the potential to prejudice the jury. With respect to speaking about these persons, a prosecutor has a duty to remain silent.

The prosecutor’s duty of silence flows from several sources. First, as the most powerful figure in the American criminal justice system, the prosecutor has the power to employ, lawfully, “the most terrible instruments of government” to deprive persons of their liberty, destroy their reputations, and even bring about their death. It is the prosecutor alone who decides whether or not to bring criminal charges, who to charge, what charges to bring, whether a defendant will stand trial or plead guilty, and
whether to confer immunity from prosecution. A prosecutor literally holds the power to invoke or deny punishment. And a prosecutor’s discretion to exercise these powers is virtually unlimited, and rarely second-guessed by the courts. Indeed, the ability of courts, disciplinary bodies, and other investigative agencies to impose significant restraints on a prosecutor’s use of his powers is so negligible that it makes the prosecutor accountable to himself alone. As the Supreme Court darkly observed: “Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual.”

Moreover, a prosecutor in exercising his awesome powers has the legal and ethical duty to serve not a private client, or his own personal or political interests, but rather the interest of justice. A prosecutor occupies a unique role in the justice system, and has interests and responsibilities far different from the defense lawyer. A prosecutor is considered a quasi-judicial” official, indeed a “Minister of Justice” who has the dual responsibility to convict the guilty and protect the innocent. Long ago the Supreme Court gave the classic description of the prosecutor’s role to serve to bring about a just one:

[He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal case is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculate to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

As this essay shows, a prosecutor can commit “foul blows” by speech as well as conduct. But in contrast to other principal actors in the criminal justice system such as judges and defense lawyers, a prosecutor’s “foul speech” has a much greater potential to prejudice the public. A prosecutor’s speech needs to be considered within a culture that glorifies prosecutors, views the prosecutor as protecting the community and rule of law against lawbreakers, sees the prosecutor as a special guardian and
warranter of the facts, and trusts the prosecutor’s assertions, judgements, and opinions about a case and individuals accused of crimes as truthful and persuasive. The public has always looked up to the prosecutor. Famous New York District Attorneys like William Travers Jerome, Thomas E. Dewey, and Frank S. Hogan have been lionized for their aggressive investigations and prosecutions of murderers, gangsters, and corrupt officials. Dewey was the inspiration for the character in the popular radio show “Mr. District Attorney,” with its memorable preamble: “Mr. District Attorney! Champion of the People! Guardian of Our Fundamental Rights to Life, Liberty, and the Pursuit of Happiness.” The media celebrates prosecutors. TV shows such as “Law and Order,” “CSI,” and “Brooklyn D.A.” portray the prosecutor as a tough, honorable, and courageous official. Many prosecutors seek to amplify that public image with swaggering and dramatic press conferences that reinforce public fury over violent crime and public corruption and see the prosecutor as their “Champion.” Rather than refraining from inflammatory rhetoric, some prosecutors stoke the flames.

Moreover, prosecutors are able to use the public forum effectively because they have always enjoyed an extremely close relationship with the media. Reporters typically try to cultivate an acquaintance with prosecutors. Reporters know that it’s the prosecutor who effectively dominates the criminal justice system, possesses and controls the evidence of guilt, knows who the prominent targets are being investigated, and the theories and opinions of cases being litigated. Reporters would be foolish to alienate the prosecutor. The press also cultivates a close relationship with prosecutors. They have frequent contacts, they dine with prosecutors, they flatter them by writing and broadcasting favorable news accounts, and they strenuously avoid deception and curve balls that might discourage prosecutors from providing future scoops. Prosecutors have stated publicly that “the press has to be nice to me.” With such a favorable outlet for their public commentary, prosecutors know that they can control the information they wish to disseminate, shape the way the media and ultimately the public views the disclosures, and insure that the prosecutor’s “spin” will be received uncritically. And if a
prosecutor chooses to divulge secret, confidential, or privileged information to a friendly reporter, the
prosecutor is confident that given their close relationship, as well as the privilege protecting news
sources, the prosecutor’s identity will never be revealed.

Further, the power of the media to overwhelm the public with pervasive and inflammatory
information is a familiar spectacle. The murder case of Dr. Sam Sheppard is probably the most famous
example of a high-profile criminal trial pervaded by a media frenzy. But despite the Supreme Court’s
castigation of the judge, lawyers, and the media, and the subsequent enactment of criminal justice
standards to protect a Free Press and a Fair Trial, case after case since Sheppard v. Maxwell depicts
prosecutors orchestrating public relations blitzes, and the media lapping it up eagerly and with alacrity.
A recent example is the manner in which Preet Bharara, United States Attorney for the Southern District
of New York, conceived and carried out his media “brinksmanship” relative to the defendant’s right to a
fair trial. Bharara launched his extrajudicial “blitz” by leaking to the media a 35-page, single-spaced
sealed complaint charging Sheldon Silver, Speaker of the New York State Assembly, with fraud,
conspiracy, and extortion. After the complaint was unsealed, and Silver was arrested and processed,
Bharara held a press conference in which he castigated the widespread corruption in Albany (“show-
me-the-money culture of Albany”) and offered gratuitously his subjective opinion of Silver’s character
(“dishonest,” “greedy,” and engaged in “secret self-reward cleverly and cynically”). In case anyone
missed the press conference, Bharara issued an inflammatory press release highlighting these same
themes (charges against Silver part of the “culture of corruption” in Albany; charges against Silver “go to
the very core of what ails Albany”; “Politicians are supposed to be on the people’s payroll, not on secret
retainer to wealthy special interests they do favors for;” Silver represents “lack of transparency, lack of
accountability, and lack of principle, joined with an overabundance of greed, cronyism, and self-
dealing”). Bharara followed the release with similar comments via Twitter. The following day – the
timing was deliberate - Bharara gave a speech at a local law school covered massively by the media, in
which he lampooned Silver, ridiculed his conduct as “business as usual,” and asked the audience “Is this really how government should be run?” Finally, a few weeks later, Bharara gave an interview with a journalist in which after noting the importance of public corruption prosecutions he added:

[W]hen you see somebody who’s been charged with (and we’ve convicted many, many people before this case) – and you see somebody who has basically sold his office to line his pockets and compromised his integrity and ethics with respect to how to make decisions on all those issues I mentioned that affect people’s lives, that’s a big problem. And it’s a big problem for democracy.

A prosecutor also needs to be silent because the consequences of his speech are so grave. As Holmes reminded, a criminal trial must be carried out in a courtroom, not in the media. A criminal defendant is guaranteed a fair trial by an impartial jury. Indeed, the right to a fair trial is “the most fundamental right of all freedoms.” Moreover, the components of a fair trial – public trial by an impartial jury – do not necessarily insure a fair trial when a prosecutor may have previously tainted the proceeding by irresponsible public statements by a prosecutor about evidence that may never get admitted, confessions that are inadmissible, comments about the defendant’s character, and opinions about the defendant’s guilt. The Supreme Court articulated this overriding concern in *Gentile v. State Bar of Nevada*, a case involving public statements by a defense lawyer:

The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on materials admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and ex parte statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

It is noteworthy that the Court was referring to extrajudicial statements not by a prosecutor but by of defense counsel. It is not unreasonable to suggest, as noted above, that while extrajudicial statements by all lawyers can be prohibited, extrajudicial statements by a prosecutor have a far greater potential to prejudice a jury than statements by the defendant’s lawyer, and extrajudicial statements by a prosecutor can be more readily restricted. And lest we forget, a prosecutor’s statements that refer to
evidence that may never be admitted at trial, or contain opinions on a defendant’s character and guilt, have the potential to contribute to the conviction of an innocent person. Indeed, as several cases discussed above show, the danger of a prosecutor’s irresponsible statements contributing to a wrongful conviction is real.

**Conclusion:**

The modes of speech by prosecutors, and the protection afforded public speech, vary with the role of the prosecutor. Campaign speech, and speech on matters of public concern, enjoy the greatest protection because such speech is typically seen as legitimate and necessary the democratic process and to core functions of the prosecutor’s work. But when a prosecutor speaks in the role of an advocate, and makes statements about current prosecutions, such statements have the capacity to prejudice future criminal proceedings. It is with respect to this advocacy speech that a prosecutor has to be most careful, and except for limited facts about a case, a prosecutor as a general rule has a duty to refrain from speaking.

To be sure, politics, power, and ego drive much of the prosecutor speech. And with the closeness of the relationship with a media eager and able to obtain and disseminate widely a prosecutor’s statements, the danger to the system, and those accused of crime, as noted in this essay, is apparent. Regulation of prosecutor speech is piecemeal and inconsistent. The only meaningful control is the prosecutor’s own sense of fair play, justice, and ability to exercise self-restraint.