

## REPORT BY THE CRIMINAL JUSTICE OPERATIONS COMMITTEE

### RECOMMENDATIONS CONCERNING THE DELEGATION OF PROSECUTORIAL AUTHORITY TO THE NEW YORK CITY POLICE DEPARTMENT

The Criminal Justice Operations Committee of the New York City Bar Association (“City Bar”) has analyzed the practice of the District Attorney for New York County (“DANY”) delegating prosecutorial authority to the New York City Police Department (“NYPD”) in criminal summons cases. For the reasons articulated below, the City Bar recommends that this practice be examined for possible conflicts of interest and/or abuses of authority.

#### I. FACTUAL BACKGROUND

Outside of New York City, District Attorneys frequently delegate the power to prosecute low-level cases to law enforcement officers, including to New York State Police officers.<sup>1</sup> This type of delegation is exceedingly rare in New York City, but the DANY has delegated prosecutorial authority in a limited number of cases to attorneys for the NYPD.

The DANY and NYPD signed a Memorandum of Understanding in February 2016 that gives the NYPD the authority to prosecute “any and all” violations in “Summons Part, in Criminal Court (where a case has been adjourned from Summons Part to Criminal Court), and in Appellate Term (where a Summons case has been appealed).”<sup>2</sup> The NYPD has said that it uses this power rarely, in approximately 10 cases per year. And according to the New York Civil Liberties Union (“NYCLU”), four cases were prosecuted by the NYPD over a four month period in 2016.

After entering into their Memorandum of Understanding, the DANY and NYPD subsequently signed a letter articulating broad standards for when the NYPD would be expected to exercise prosecutorial powers.<sup>3</sup> The NYCLU provided the City Bar with these guidelines,

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<sup>1</sup> *E.g.*, People v. Christensen, 77 A.D.3d 174, 177, 906 N.Y.S.2d 301 (App. Div. 2d Dept. 2010) (“Many district attorneys of counties in New York State, when faced with inadequate resources, have lawfully delegated their authority to prosecute Vehicle and Traffic Law cases to the police agencies which issue the tickets for those offenses.”)

<sup>2</sup> This Memorandum of Understanding was filed as Exhibit A in a motion filed in an Article 78 proceeding in Supreme Court, New York County, Index No. 101836-16, in the case of Arminta Jeffryes and Cristina Winsor v. Cyrus Vance et al.

<sup>3</sup> Rocco Parascandola and Shayna Jacobs, *Manhattan DA office seeks to limit NYPD prosecution of protesters with new guidelines*, The New York Daily News, Nov. 15, 2016, available at <http://www.nydailynews.com/new->

which include three factors: (1) whether the defendant is “a recidivist” (a term which is not defined); (2) whether there is video or other objective evidence; and (3) whether members of the public have expressed concern about the issues that led to the police contact. These guidelines are non-binding.

Recently, a New York City Criminal Court upheld the DANY’s delegation to the NYPD to prosecute a criminal case; but, in a related Article 78 proceeding, the New York State Supreme Court, Civil Term, held that the plaintiffs had stated a viable claim that such delegation was unlawful.<sup>4</sup> However, the court stayed the proceedings pending resolution of the underlying criminal cases against the plaintiffs.<sup>5</sup> One of these plaintiffs was recently acquitted.<sup>6</sup> A full discussion of the issues raised in this Article 78 decision, and other related issues, follows.

## II. THE NYPD ARTICULATES ITS RATIONALE FOR NYPD PROSECUTION

The NYPD has stated that its rationale for acting as prosecutors in certain cases is that “too many cases involving people they consider professional protesters are dismissed in summons court, paving the way for a civil lawsuit and settlement with the city.”<sup>7</sup> And NYPD Deputy Commissioner for Legal Matters Lawrence Byrne has stated that the NYPD’s intention is to “put some teeth into issuing these summons” and avoid settling “frivolous lawsuits.”<sup>8</sup>

The NYPD’s actions in prosecuting such cases seem consistent with these goals. For example, despite pursuing only approximately 10 cases per year, in one well-publicized case the NYPD prosecuted a case in which the sole charge was jaywalking.<sup>9</sup> Jaywalking is not among the top twenty offenses charged in summons court.<sup>10</sup> The NYPD’s decision to expend resources on prosecuting a jaywalking case seems surprising. However, when viewed in conjunction with its statements regarding avoiding settling lawsuits, along with the NYPD prosecutor’s offer of an

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[york/manhattan-da-office-seeks-limit-nypd-prosecution-protesters-article-1.2874793](http://www.nydailynews.com/news/manhattan-da-office-seeks-limit-nypd-prosecution-protesters-article-1.2874793) (all sites last visited Dec. 6, 2017). The article quotes NYCLU attorney Christopher Dunn as stating, “We view these guidelines as a clear warning to the NYPD not to target demonstrators.”

<sup>4</sup> *Jeffryes v. Vance*, Index No. 101836/2016 (Sup. Ct., N.Y. Cty. Sept. 20, 2017); *see also* Colleen Long, *Judge won’t dismiss suit challenging police-as-prosecutors*, Associated Press, Sept. 22, 2017, available at <http://www.chicagotribune.com/news/sns-bc-us--police-as-prosecutors-20170922-story.html>.

<sup>5</sup> *Id.*

<sup>6</sup> Shayna Jacobs, *Judge acquits Black Lives Matter activist in NYPD prosecution case*, The Daily News, Oct. 2, 2017, available at <http://www.nydailynews.com/new-york/judge-acquits-blm-activist-nypd-prosecution-case-article-1.3537057>.

<sup>7</sup> Rocco Parascandola Stephen Rex Brown, *EXCLUSIVE: NYPD turns ‘prosecutor’ to fend off lawsuits making civil rights advocates uneasy*, The New York Daily News, Jan. 11, 2016, available at <http://www.nydailynews.com/new-york/exclusive-nypd-turns-prosecutor-fend-lawsuits-article-1.2491836>.

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

<sup>9</sup> *Jeffryes v. Vance*, 2007 WL 4509094, 2 (Supreme Court, New York County, 2017)

<sup>10</sup> “Criminal Court of the City of New York Annual Report 2016,” Office of the Chief Clerk of New York City Criminal Court, Aug. 2017, at 25, available at <https://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf>.

adjournment in contemplation of dismissal only if the defendant in the jaywalking case made a factual allocution sufficient to establish probable cause to arrest,<sup>11</sup> the NYPD's actions in prosecuting such cases take on a different cast.

Indeed, under federal law, "the existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest."<sup>12</sup> Therefore, the NYPD can gain an advantage in these frequently filed lawsuits by obtaining such allocutions in criminal cases.

The public statements by the NYPD regarding its intent in acting as prosecutors, combined with the Department's actions in selectively prosecuting cases and conditioning offers to dismiss those cases on statements that obviate the Department's civil liability, provide grounds to believe that its actions in prosecuting these cases are driven, at least in part, by the goal of avoiding settlements of what the NYPD considers "frivolous lawsuits." It is unclear to what extent the NYPD's letter articulating non-binding guidelines for selecting which cases to prosecute has impacted its practices. However, as discussed below, the mere appearance of a civil motivation in a criminal prosecution may raise significant legal questions.

### III. THE POWER TO DELEGATE PROSECUTIONS TO LAW ENFORCEMENT

The law is clear that District Attorneys may delegate their prosecutorial authority to a number of entities, including law enforcement agencies.<sup>13</sup> This is the case even where the delegate initiated the law enforcement action that led to the prosecution, and courts have upheld convictions where an arresting officer represented "the people" at trial.<sup>14</sup> The limitations on delegation are few, and the Court of Appeals has upheld a conviction even where the District Attorney delegated prosecutorial power to a complaining witness in an assault case.<sup>15</sup> The only limitation on this power that courts have consistently upheld is that District Attorneys remain "aware of all the criminal prosecutions in the county,"<sup>16</sup> and the Memorandum of Understanding between the NYPD and DANY requires the NYPD to regularly notify the DANY of its prosecutorial activities. The law is also clear that where prosecutorial delegation occurs, the

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<sup>11</sup> See Jeffryes v. Vance, 2007 WL 4509094, 2 (Supreme Court, New York County, 2017)

<sup>12</sup> Jenkins v. City of N.Y., 478 F.3d 76, 84 (2d Cir. 2007)(internal quotations and citations omitted)

<sup>13</sup> People v. Soddano, 86 N.Y.2d 727, 728 (1995)(" It is well settled, however, that [County Law § 700(1)] does not require the District Attorney's personal presence at every criminal hearing in a county, and the prosecution of petty crimes or offenses may be delegated to subordinates and other public or administrative officers and even to private attorneys."); see also People v. De Leyden, 10 N.Y.2d 293 (1961); People v. Czajka, 11 N.Y.2d 253, 254 (1962) ("It is no longer open to question that petty crimes or offenses of this nature may be prosecuted in courts of special sessions by administrative officers and attorneys other than the District Attorney.")

<sup>14</sup> *Id.*

<sup>15</sup> People v. Van Sickle, 13 N.Y.2d 61, 62–63, 192 N.E.2d 9 (1963) ("the District Attorney, as the elected representative of the people and charged with this responsibility, must carry the responsibility and must set up a system whereby he knows of all the criminal prosecutions in his county and either appears therein in person or by assistant or consents to appearance on his behalf by other public officers or private attorneys.")

<sup>16</sup> Soddano, 86 N.Y.2d at 728; see also Van Sickle, 13 N.Y.2d 61 at 62–63.

delegated agency has the same ultimate power over plea bargaining that the District Attorney would have, including the right to refuse to plea bargain altogether.<sup>17</sup>

In 2008, the Second Department held that a private attorney retained by a complaining witness may not represent “the people” in a criminal prosecution.<sup>18</sup> The court’s lengthy analysis ultimately hinged on the distinction between the role and duties of a party representing the public and the role and duties of a party representing a private entity.<sup>19</sup> Though the reasoning behind this holding calls into question the delegation of prosecutorial authority to the police in some circumstances, as analyzed below, it by no means undermines the broad principle that a public entity may represent “the people” in a criminal action, and in fact upholds just that principle.

#### **IV. THE LEGALITY AND ROLE OF CONSIDERING CIVIL LIABILITY IN PROSECUTING CRIMINAL ACTIONS**

While there are few legal restrictions barring District Attorneys from delegating their authority in general, Court of Appeals case law calls into question the legitimacy of delegating prosecutorial authority where such authority is used to avoid civil liability.

The Court of Appeals held in Cowles v. Brownell that a “release from civil liability” granted “as a condition of the District Attorney’s consent to dismissal of criminal” charges cannot be enforced.<sup>20</sup> In so holding, the Court noted that:

Insulation from civil liability is not the duty of the prosecutor. The prosecutor's obligation is to represent the People and to that end, to exercise independent judgment in deciding to prosecute or refrain from prosecution. This obligation cannot be fulfilled when the prosecutor undertakes also to represent a police officer for reasons divorced from any criminal justice concern. To enforce a release-dismissal agreement under these circumstances is simply to encourage violation of the prosecutor's obligation.<sup>21</sup>

The Court’s opinion in this case noted that there might be a reason to uphold such a waiver were it “genuine, compelling and legitimately related to the prosecutorial function,” but that such reason would need to “overcome the strong policy considerations disfavoring enforcement of such agreements.”<sup>22</sup> Subsequently, courts have struck such waivers from plea agreements.<sup>23</sup>

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<sup>17</sup> People v. Christensen, 77 A.D.3d 174, 906 N.Y.S.2d 301 (App. Div. 2d Dept. 2010).

<sup>18</sup> Sedore v. Epstein, 56 A.D.3d 60, 65–66, 864 N.Y.S.2d 543 (App. Div. 2d Dept. 2008)

<sup>19</sup> *See id.* at 67 (“The duty of a prosecutor is thus somewhat different from that of an attorney retained by a party, as the canons of professional ethics recognize.”)

<sup>20</sup> Cowles v. Brownell, 73 N.Y.2d 382 (1989)

<sup>21</sup> *Id.* at 387

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

<sup>23</sup> *See e.g.*, People v. Wein, 294 A.D.2d 78, (App. Div. 1st Dept. 2002)

It seems likely that conditioning receipt of an adjourned in contemplation of dismissal (“ACD”) on a plea allocution that establishes probable cause is tantamount to a “release from civil liability,” and, under Cowles, cannot be used to defend against a subsequent civil suit arising out of the arrest. “Insulation from civil liability is not the duty of the prosecutor,” and obtaining factual allocutions with an eye toward immunizing the prosecuting authority from civil liability would seem to violate this principle. Therefore, to the extent that NYPD prosecutors are driven even in part by the goal of avoiding future civil liability, the Cowles ruling calls into question the DANY’s delegation of prosecutorial authority on both legal and policy grounds.

## V. ETHICAL ISSUES

Unlike ordinary attorneys, whose primary ethical responsibilities stem from their need to “protect and advance the rights of one side,” a prosecutor “must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness. Put another way, his mission is not so much to convict as it is to achieve a just result.”<sup>24</sup> This broad ethical principle animates the application of more specific ethical rules to prosecutors and raises issues regarding the DANY’s delegation of prosecutorial authority to the NYPD.

Such delegation implicates three specific ethical obligations: (1) the prohibition on conflicts of interest; (2) the obligation of attorneys not to present or threaten criminal charges solely to gain influence in a civil matter; and (3) the duty of supervising and managing attorneys to enforce ethical rules among their subordinates.

### A. Conflicts of Interest

According to Rule 1.7(a) of the New York Rules of Professional Conduct, “a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing different interests; or (2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyers’ own financial, business, property interests.”

This rule has particularly broad implications for prosecutors, who have no specific client, but instead represent the public at large, and must, therefore, balance competing interests to achieve a result consistent with the public good.<sup>25</sup> Consistent with this rule, the American Bar Association has, since the 1930s, discouraged prosecutors from representing litigants in civil actions whom they encountered as part of criminal investigations.<sup>26</sup> Moreover, in light of the

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<sup>24</sup> People v. Zimmer, 51 N.Y.2d 390 (1980); *see also* Connick v. Thompson, 563 U.S. 51, 65-66 (2011) (internal quotation marks omitted) (“Prosecutors have a special duty to seek justice, not merely to convict.”); American Bar Association Criminal Justice Section Standards 3-1.2(c) (“The duty of the prosecutor is to seek justice, not merely to convict.”).

<sup>25</sup> *See* A.B.A. Standard 3-1.3(f) (“A prosecutor should not permit his or her professional judgment or obligations to be affected by his own political, financial, business, property, or personal interests.”)

<sup>26</sup> *See* ABA Comm. On Prof’l Ethics & Grievances, Formal Op. 39 (1931) (finding that it was “professionally improper” for an attorney to represent an individual he had investigated for starting a fire in a suit to collect insurance because doing so would run afoul of the rule that he not use his position to further his professional

prosecutor’s “special, quasi-judicial role,” the New York State Bar Association Committee on Professional Ethics has found that ethical considerations constrain a part-time prosecutor from serving as a police officer.<sup>27</sup> According to the Committee, “[i]n our view, the interests in maintaining public confidence in the impartiality and objectivity of law enforcement agencies, and in minimizing the appearance of exploitation of the prestige of public offices, would be disserved by . . . dual employment” as a prosecutor and police officer.<sup>28</sup> Moreover, the practice “would likely impair the lawyer-prosecutor’s exercise of professional judgment.”<sup>29</sup>

One could argue that the Rules of Professional Conduct and American Bar Association standards at issue here are designed to address attorneys who directly benefit from civil actions, whereas the NYPD attorneys at issue gain nothing personally in the relevant civil cases. However, where NYPD attorneys pursue a civil benefit in a criminal case, this conflict is inevitable. Moreover, whether or not the NYPD prosecutes cases with a civil benefit in mind, there is at least an appearance of a conflict, which itself calls into question the wisdom of this practice. This appearance of a conflict was noted by the Article 78 decision cited in Section II, *supra*, which held that “the alleged potential for Police Department prosecutors’ conflict of interest . . . violates the accuseds’ federal and state constitutional rights to procedural due process, because the potential conflict undermines the reliability of the adversary process through which criminal justice is dispensed.”<sup>30</sup>

## **B. Pursuing Criminal Charges For Civil Purposes**

Rule 3.4(e) of the New York Rules of Professional Conduct prohibits an attorney from “present[ing], participat[ing] in presenting, or threaten[ing] to present criminal charges solely to obtain an advantage in a civil matter.” This ethical pitfall may be avoided so long as the prosecuting agency “has investigate[d] the facts and circumstances to confirm that there is and continues to be probable cause to believe that the target of that charge is guilty and that the charge is provable.”<sup>31</sup>

Assuredly, NYPD attorneys acting as prosecutors believe there is probable cause of guilt, especially for the typically broad, non-criminal charges at issue in summons court. However, the very nature of the Memorandum of Understanding, which gives the NYPD wide latitude in

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success); ABA Comm. On Prof’l Ethics & Grievances, Formal Op. 135 (1935) (deciding that a prosecutor may not represent in a civil suit a person he investigated in his role as a prosecutor after a car accident because “a prosecutor who accepts employment in a civil litigation . . . evinces a lack of appreciation of general ethical principles, overturns considerations of sound public policy . . . and thereby subjects himself to public criticism.”); ABA Comm. On Prof’l Ethics & Grievances, Formal Op. 278 (1948) (finding that, while U.S. Attorneys are not per se precluded from representing clients in civil matters in federal courts, they should not do so when “the United States is a party, or . . . [when] good taste and good name of his profession require him to refuse.”)

<sup>27</sup> N.Y. Eth. Op. 616 (1991).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Jeffryes v. Vance*, Index No. 101836/2016 (Sup. Ct., N.Y. Cty. Sept. 20, 2017), at p. 12-13 (internal citations omitted); *see also* Colleen Long *supra* note 4.

<sup>31</sup> N.Y. Eth. Op. 821 (2008)

deciding which summons cases to prosecute, coupled with the NYPD's publicly stated rationale for exercising this delegated authority, suggest that "such agreements encourage prosecutors to violate ethical rules which forbid attorneys from pressing criminal charges 'solely to obtain an advantage in a civil matter' and caution against using the criminal process to force settlement of private claims."<sup>32</sup> While on an individual basis NYPD attorneys can be presumed to follow ethical guidelines, the very nature of the Memorandum of Understanding at least creates an appearance of compromised ethics, and may encourage the undermining of an important Rule of Professional Conduct.

There is a difference between an attorney who seeks "advantage in a civil matter" that personally benefits that attorney, and one who seeks such "advantage" on behalf of a governmental entity. The latter at least creates a more minimal "appearance of impropriety." However, both face the same concern that decisions regarding criminal prosecutions, "one of the government's most awesome and dangerous powers,"<sup>33</sup> should be driven solely by the best interests of that prosecution. In other words, when a criminal prosecution is affected by civil concerns, the beneficiary of those civil matters is not relevant.

The NYPD's stated goals in prosecuting these cases raise concerns about the violation of Rule 3.4(e) of the New York Rules of Professional Conduct. This concern was echoed in the Article 78 decision cited in Section II, *supra*, which noted that "it surely is unfair if the prosecutors are concerned about protecting their employer and co-employees from civil liability, rather than being solely concerned about achieving justice for the people of the county, who elected the District Attorney to accomplish that objective above all else."<sup>34</sup>

## VI. EQUAL PROTECTION

The clear majority of people who receive a criminal summons either have their cases dismissed or ACD – a comprehensive study of the summons system by John Jay College showed that 79% of summonses are so dismissed or receive an ACD.<sup>35</sup> And nearly all of those people will not face a prosecutor as their adversary, as all five District Attorney's offices in New York City do not prosecute summons cases as a matter of policy. However, under the agreement between the DANY and NYPD, certain defendants in summons cases will face a lawyer as their adversary, and may be required to engage in certain behavior they otherwise would not, in order to achieve a dismissal or adjournment in contemplation of dismissal.

Disparate treatment of otherwise similarly situated individuals arguably violates constitutional Equal Protection principles. Broadly, "an agency of the State denies equal protection when it treats persons similarly situated differently under the law."<sup>36</sup> Policies that do

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<sup>32</sup> *Cowles v. Brownwell*, 73 N.Y.2d 382, 388, 389 (Titone, J. concurring in the result)

<sup>33</sup> *Ginzburg v. United States*, 383 U.S. 463, 477 (1966)

<sup>34</sup> *Jeffreys v. Vance*, Index No. 101836/2016 (Sup. Ct., N.Y. Cty. Sep't 20, 2017), at p. 13

<sup>35</sup> The Misdemeanor Justice Project at John Jay College of Criminal Justice, "The Summons Report: Trends in the Issuance and Disposition of Summonses in New York City 2003-2013," John Jay College, April 27, 2015, at 21, available at <http://misdemeanorjustice.org/wp-content/uploads/2016/08/The-Summons-Report-2003-2013.pdf>

<sup>36</sup> *Abrams v. Bronstein*, 33 N.Y.2d 488, 492, 310 N.E.2d 528, 530 (1974)

not discriminate on the basis of a suspect class are subject to a rational basis test, while those that do so discriminate must pass strict scrutiny.<sup>37</sup>

The Supreme Court's Appellate Term addressed the equal protection issue in a related context in People v. Murphy. In that case, the court examined the New York State Police's blanket policy against plea bargaining, which places those arrested by that agency on unequal grounds to those arrested or charged by any other entity.<sup>38</sup> The majority held that the State Police's policy passed a rational basis test because refusing to plea bargain directly with a defendant avoids an appearance of impropriety.<sup>39</sup> The dissent argued that the State Police's policy was rational, but that the delegation of prosecutorial authority to the State Police was not, because it meant that "motorists in the same court, before the same judge, for the same traffic violation, are being treated differently depending on whether the ticket was issued by a NYSP officer or some local police officer."<sup>40</sup> By the dissent's logic, the nature of the delegate's actions can render the delegation itself infirm. The Court of Appeals denied leave to review this decision.

The NYPD practices at issue here place those they prosecute at a systemic disadvantage compared to others in summons court because the lack of an adversary would necessarily benefit any litigant. The rationale for NYPD prosecutor engagement in these cases, as stated by the NYPD's chief attorney, appears to be, at least in part, to curb civil liability. This policy may be rational, in that it is not arbitrary and the NYPD may, as a general matter, have a legitimate interest in avoiding civil liability. However, when the NYPD is acting as a prosecutor, Cowles casts doubt on the legitimacy of that purpose, as explained in sections III-V, *supra*. Moreover, as the dissent in Murphy argued, even if the NYPD's interest in prosecuting cases were legitimate, the DANY's delegation of authority to the NYPD may nonetheless fail a rational basis test, as it results in substantially disparate prosecution of similarly situated individuals based on the discretion of an agency whose interests may vary from those of the DANY. If nothing else, the delegation of authority and the prosecution of these cases implicate equal protection issues that – especially when considered in conjunction with the other issues addressed herein – raise questions as to whether the DANY/NYPD agreement is good policy or legally valid.

## VII. SEPARATION OF POWERS

The DANY's delegation of prosecutorial authority to the NYPD also raises issues regarding the structure of government. District Attorneys are elected by citizens to represent their interests as a whole, whereas administrative agencies run by unelected officials are bound only to serve their agency's interests. Where these two interests diverge and power is delegated to the administrative agency, the interests of all citizens may be subordinated to the interests of the government agency. Moreover, when the prosecutorial delegate whose interests diverge from that of the citizenry is also the agency whose actions are under scrutiny, the result undermines a

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<sup>37</sup> See e.g., Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978); People v. Salazar, 112 A.D.3d 5 (App. Div. 1st Dept. 2013); People v. Murphy, 29 Misc. 3d 79, 912 N.Y.S.2d 372 (App. Term 2010)

<sup>38</sup> People v. Murphy, 29 Misc. 3d 79, 912 N.Y.S.2d 372 (App. Term 2010)

<sup>39</sup> *Id.* at 81

<sup>40</sup> *Id.* at 82



fundamental check on governmental power: an independent prosecutor to evaluate the legality of law enforcement actions. To put it another way, the agreement between the DANY and NYPD may be akin to allowing the fox to guard the henhouse. Therefore, even if the agreement between the DANY and NYPD does not violate any statute, holding, standard, or Rule of Professional Conduct, it may, in practice, operate in a manner that is inconsistent with our system of government.

### **VIII. THE DISQUALIFICATION OF A DISTRICT ATTORNEY OR THEIR REPRESENTATIVE**

The United States Supreme Court held in Lafler v. Cooper that, while there is no constitutional right to plea bargaining, where such bargaining takes place it may have constitutional implications.<sup>41</sup> And the Court of Appeals held in People v. Adams that issues with plea bargaining may require the disqualification of a District Attorney.<sup>42</sup> In Adams, the complainant was a sitting judge, and the District Attorney's office openly stated in discussing a possible plea that while "in most cases this [plea] would be an adequate resolution," it was not in this case "due to the position of the victim."<sup>43</sup> The Court held that, while it did not find that any "actual impropriety" occurred, the District Attorney must be disqualified due to "an unacceptably great appearance of impropriety."<sup>44</sup>

While, as a general rule, New York Courts have held that "actual prejudice" is required to disqualify a District Attorney, as in Adams and other cases discussed below, the Court of Appeals has, in some instances, found disqualification appropriate on the basis of even an appearance of impropriety. For example, in Schumer v. Holtzman, the Court of Appeals held that "actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence" is required to disqualify a District Attorney, and "the appearance of impropriety, standing alone, might not be grounds for disqualification."<sup>45</sup> However, People v. Adams demonstrates an example of when the mere appearance of impropriety was sufficient, due to "the appearance that the District Attorney's office refused to accept a reduced charge because the complainant was a sitting judge who demanded that the matter go to trial, rather than because a trial was, in its own disinterested judgment, appropriate."<sup>46</sup> Similarly, the Court of Appeals required a District Attorney to be disqualified in People v. Zimmer due to an appearance of impropriety where the District Attorney was a stockholder in the corporation he indicted, asking the question, "no matter the good faith and complete integrity of the District Attorney, under these circumstances what impression could the defendant have had of the fairness of a

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<sup>41</sup> "Much the same reasoning guides cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all." Lafler v. Cooper, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012)

<sup>42</sup> People v. Adams, 20 N.Y.3d 608 (2013)

<sup>43</sup> *Id.* at 611, 613 (internal citations omitted)

<sup>44</sup> *Id.* at 613

<sup>45</sup> Schumer v. Holtzman, 60 N.Y.2d 46, 55 (1983) (emphasis added)

<sup>46</sup> *Id.* at 613

prosecution instituted by one with the personal and financial attachments of this prosecutor?”<sup>47</sup> The Court of Appeals also required disqualification of a District Attorney in People v. Shinkle based on the mere appearance of impropriety where the prosecuting attorney had “initially represented the defendant and participated actively in the preparation of his defense.”<sup>48</sup> Therefore, while generally the principle articulated in Schumer v. Holtzman that actual prejudice must be demonstrated to disqualify a District Attorney applies, the Court of Appeals has found in numerous circumstances that the mere appearance of impropriety may be sufficient to so disqualify.

The NYPD’s prosecution of summons cases raises concerns implicating the Rules of Professional Conduct, the Court of Appeals’ ruling in Cowles, and the constitutional principles of Equal Protection and separation of powers. These issues when considered together raise, at the very least, an “appearance of impropriety” sufficient to require disqualification of the NYPD from prosecuting summons cases under the standard articulated in Adams, Zimmer, and Shinkle, and arguably establish “actual prejudice arising from a demonstrated conflict of interest,” under the standard articulated in Schumer v. Holtzman.

## **IX. CONCLUSION**

Whether or not NYPD prosecutors are, in fact, misusing their delegated authority for the improper purpose of averting future civil liability, the appearance of impropriety, heightened by the NYPD’s own articulated rationale for prosecuting these cases, and coupled with the conflict inherent in having the NYPD play dual roles as prosecutor and witness, raise a host of concerns about whether the delegation is legally proper and defensible in practice. For the reasons set forth above, the City Bar recommends that the DANY reconsider the practice of delegating prosecutorial authority to the NYPD and ultimately discontinue it if the legal, constitutional and ethical concerns it raises cannot be adequately addressed.

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December 2017

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<sup>47</sup> People v. Zimmer, 51 N.Y.2d 390, 395 (1980)

<sup>48</sup> People v. Shinkle, 51 N.Y.2d 417, 420 (1980)