

## Prosecutor for Hire?

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*Editor's note: This is the first blog post by Jonathan Holbrook, who began working with the School of Government last July as our first Prosecutor Educator. Jonathan knows the field, having worked as a prosecutor for nearly 10 years, first in state court with the Wake County District Attorney's Office, and then in federal court with the U.S. Attorney's Office. Please welcome him to the School – and to the blog.*

I am truly honored to join the staff here at the School of Government, and excited to have this opportunity to help set the course for the new position of Prosecutor Educator. Over time, my role here will likely expand to include more training and advising, similar to the great work Phil Dixon currently does with defense attorneys in his capacity as the Defender Educator. But for now, my primary focus is on a large project related to the Prosecutors' Trial Manual, which has not been updated since 2012. The manual is one of many works written and maintained by long-time faculty member Bob Farb, who [retired](#) from the School of Government last year. Rather than simply update and re-publish the existing manual, the School of Government (in consultation with an advisory committee of veteran prosecutors) is converting that material into a robust and searchable online knowledge base of North Carolina criminal procedure. This new resource will preserve the rich content and extensive research from the current manual, but in a format that is much easier to update, search, and navigate.

One of the benefits of engaging in this top-to-bottom revision of the old manual has been learning and re-learning all the nuts and bolts – and hidden gems – of North Carolina criminal procedure. The rest of this post focuses on an interesting topic that recently caught my eye, and which I think might be surprising to some readers as well.

***The victim of a serious assault hires a personal injury attorney to pursue a parallel civil case against the defendant for medical bills, lost wages, pain and suffering, etc. May that private attorney actively participate in the prosecution of the criminal case, as well?***

**Answer:** Yes – *if* the prosecutor chooses to allow it. The North Carolina Constitution (Art. IV, § 18) vests sole authority for the prosecution of all crimes in the offices of the elected District Attorneys, but the state supreme court has recognized the District Attorney's discretionary authority to "delegate" that prosecutorial function to a private attorney, as long as the District Attorney remains "in charge" of the prosecution. See, e.g., [State v. Best, 280 N.C. 413 \(1972\)](#); see also [State v. Camacho 329 N.C. 589 \(1991\)](#) (discretion to permit involvement of private prosecutors "has existed in our courts from their incipiency"). A few years ago, [a house bill](#) was proposed which would have codified and expanded this practice, but for now it appears to remain purely a matter of case law.

Readers may be more familiar with similar practices such as the appointment of a [special prosecutor](#) to avoid an alleged conflict of interest, or prosecution by another authorized state agency like the [Special Prosecutions Divisions of the Attorney General's Office](#). But the direct participation of a truly "private" attorney, hired by the victim to prosecute the case in *criminal court*, even though he or she is not a sworn Assistant District Attorney? Really...?

According to the cases -- yes, really. The concept might sound strange to our modern ears, but up until the beginning of the 20<sup>th</sup> century it was actually quite common, and it persists today in varying forms and degrees in several other

states (and, to some extent, in federal court). [This article](#) provides an interesting summary of both the history and the current scope of the practice, along with some of the thorny issues it raises. For example, what happens if the private prosecutor realizes the case is not nearly as strong as he or she initially thought? At what point does a *private* attorney's duty to zealously advocate on behalf of the victim lead to an ethical conflict with a *prosecutor's* duty to fairly and objectively evaluate the strength or weakness of the case and act accordingly? Which raises another important question (discussed in some detail [here](#)) about whether using a prosecutor who has a personal stake in the outcome of the case might violate the defendant's due process right to a fair and impartial trial.

But assuming the practice is Constitutionally permissible in North Carolina, is the involvement of a private prosecutor likely to be beneficial for the state? As long as the private attorney is capable and experienced, one could argue that overburdened prosecutors with heavy caseloads should welcome the help with open arms. Maybe so, but I see at least a couple problems with that view. First, the prosecutor still has to remain "in charge" of the case, so it doesn't entirely free him or her to go handle other matters. Second, the private attorney and the prosecutor might have incompatible goals and priorities in the case. For example, the private attorney's main objective might be locking in future civil liability with a guilty plea to a reduced charge, while the prosecutor believes that going to trial on the more serious charge is a necessary risk to ensure an appropriate level of punishment upon conviction. The prosecutor would have the final say, of course, but navigating those kinds of internal disagreements could nevertheless be an unwelcome distraction in the case.

When I worked as a prosecutor, our normal practice in these types of cases was to keep the civil attorney updated and informed about the overall progress of the criminal case, but we would generally hold off on any other private involvement until the prosecution was fully concluded. I think most civil attorneys probably prefer that option as well, but if others have had a different experience I would be very interested to hear about it in the comments.