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Peter A. Joy
Washington University School of Law

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Lawyers Serving as Judges, Prosecutors, and Defense Lawyers at the Same Time: Legal Ethics and Municipal Courts

Peter A. Joy*

*“We . . . conclude there is an obvious appearance of impropriety in regard to attorneys who serve as judges, prosecutors, and defense lawyers in the same criminal law arena. Consequently, the Center advises a strong position against the current practice.”*¹

I. INTRODUCTION

Imagine a criminal justice system in which one lawyer is the judge, prosecutor, and defense attorney. As far-fetched as it seems, such a system exists, not as some imaginary Kafkaesque world, but in municipal courts in Missouri and in some other states.² Of course, a

* Henry Hitchcock Professor of Law, Washington University School of Law. I thank Karen Tokarz for very helpful comments to an earlier draft of this Article. Portions of this Article intersect with and build upon some issues I have explored previously in other contexts. See Peter A. Joy, *Unequal Assistance of Counsel*, 24 KAN. J.L. & PUB. POL’Y 518 (2015) (exploring racial disparities in the justice system including unequal assistance of counsel for indigent defendants); Peter A. Joy & Kevin C. McMunigal, *Prosecutorial Conflicts of Interest and Excessive Use of Force*, 30 CRIM. JUST. 47 (2015) (analyzing prosecutorial conflicts of interests).

1. NAT’L CTR. FOR STATE COURTS, MISSOURI MUNICIPAL COURTS: BEST PRACTICE RECOMMENDATIONS 15 (Nov. 2015), available at <http://www.sji.gov/wp/wp-content/uploads/Missouri-Municipal-Court-Best-Practices-Recommendations-Final-Report-2015.pdf> [hereinafter NCSC, MISSOURI MUNICIPAL COURTS REPORT]. The National Center for State Courts (NCSC) prepared this report for the Supreme Court of Missouri and the Office of State Court Administrators. *Id.* The NCSC is an independent nonprofit “targeting the improvement of courts nationwide and around the world.” *Id.* at ii. Its recommendations for Missouri’s municipal courts are “based on various best practices operative in limited jurisdiction courts throughout the country.” *Id.*

2. See *infra* notes 4–7 and accompanying text for a description of the intersecting roles for lawyers in Missouri’s municipal courts. Other states with similar municipal court systems include Ohio and Kansas, which have some municipal courts that employ part-time judges and

single lawyer is not in all three roles in the same case, but rather holds different roles in different cases in different municipalities—often at the same time. In this world of interconnecting roles, Lawyer A prosecutes Smith in one city and plea bargains with Lawyer B, who is defense counsel representing Smith. In another city, Lawyer A is defense counsel representing Jones and Lawyer B is the prosecutor. One might suspect that when Lawyer A and Lawyer B get together, they trade plea bargains for their respective clients, obtaining better outcomes than those defendants unrepresented by lawyers who are part of this interconnecting system.³ At the same time that Lawyer A and Lawyer B may be negotiating with each other on behalf of their criminal defendant clients, Lawyer A is sometimes the judge in other cases in a third city, Lawyer B is sometimes a judge in yet a fourth city, and each may preside over cases in which the other is either prosecuting or defending. Confusing? Perhaps the following will help to explain this world of interconnected roles, responsibilities, loyalties, and most of all, the betrayal of public trust in the fairness of municipal courts in some states, such as Missouri.

A recent news report on municipal courts in St. Louis County, Missouri, illustrates multiple role interconnections with a diagram consisting of approximately fifty gray lines connecting eighteen

part-time prosecutors, and those part-time judges and part-time prosecutors also may be defense lawyers representing clients in other courts. *See, e.g.*, Ohio Rev. Code Ann. § 1901.01 (West 2013) (listing several municipal courts with part-time judges); *David J. Claus*, LANGE, DEVINE & CLAUS, LLC, <http://ldclawoffice.com/david-j-claus/> (last visited Feb. 6, 2016) (listing a lawyer's practice areas and his position as "Part-time Bellevue Municipal Prosecutor" in Bellevue, Ohio); *Johnson County Municipal Courts*, JOHNSON COUNTY BAR ASSOCIATION, <http://www.jocobar.org/general/custom.asp?page=13> (last visited Feb. 6, 2016) (listing Karen L. Torline as judge in three Kansas municipal courts and prosecutor in one other); *Karen L. Torline*, KUCKELMAN TORLINE KIRKLAND LEWIS, <http://www.ktklattorneys.com/> (last visited Feb. 6, 2016) (listing Torline's practice areas including criminal defense); *Johnson County Juvenile Lawyer*, LAW OFFICES OF RANDY R. MCCALLA, <http://www.mccallalaw.com/Attorneys/> (last visited Feb. 6, 2016) (stating that in addition to the practice of law Randy McCalla "serves as municipal court judge for both the City of Eudora and DeSoto, Kansas").

3. A news report about lawyers in St. Louis County, Missouri, serving multiple roles found: "Favors are traded behind the scenes between lawyers who frequently appear before one another. The same lawyers are simultaneously charging clients to get the same type of deals." Jennifer S. Mann et al., *A Web of Lawyers Play Different Roles in Different Courts*, ST. LOUIS POST-DISPATCH (Mar. 29, 2015, 12:15 AM), http://www.stltoday.com/news/local/crime-and-courts/a-web-of-lawyers-play-different-roles-in-different-courts/article_b61728d1-09b0-567f-9ff4-919cf4e34649.html.

“lawyers serving as prosecutor or judge in the same court or where one of the lawyers was a defense attorney in a court where the other was a judge or prosecutor.”⁴ The diagram also includes an additional thirteen red lines connecting fourteen of the lawyers to indicate that “they each took a turn as defense attorney in the court where the other lawyer served as prosecutor or judge or they serve together as prosecutor and judge in one court and in another court one was defense attorney and the other was judge or prosecutor.”⁵ Another news report found that thirteen of these lawyers held positions as a part-time prosecutor or part-time judge in three or more municipalities, and twenty lawyers held such positions in two municipalities.⁶ Of the eighty-three municipalities examined in the latter news report, sixty-nine municipalities had at least one “connection” to another municipality either through “sharing a judge or prosecutor . . . or having a judge or prosecutor who works for the same law firm as a judge or prosecutor in another municipality.”⁷ The lawyers holding these multiple roles apparently see nothing wrong with taking on what appear to be conflicting roles.⁸

Many of these lawyers also use their positions as part-time municipal judges and prosecutors to attract clients seeking their services as a defense lawyer. The addendum to a major report about municipal courts in St. Louis County contains examples of lawyers promoting their multiple roles as judges, prosecutors, and defense counsel on their law firm websites.⁹ One example is a lawyer who is

4. *Id.*

5. *Id.*

6. Durrie Bouscaren et al., *Overlapping Judges, Prosecutors Weave Tangled Web in St. Louis County Municipal Courts*, ST. LOUIS PUB. RADIO (Mar. 22, 2015), <http://news.stlpublicradio.org/post/overlapping-judges-prosecutors-weave-tangled-web-st-louis-county-municipal-courts>.

7. *Id.*

8. *See, e.g.*, Mann et al., *supra* note 3 (discussing how lawyers holding multiple roles do not see any problems with what they are doing); Bouscaren et al., *supra* note 6 (providing examples of lawyers serving multiple roles who say there is nothing wrong with doing so).

9. MO. COUNCIL FOR A BETTER ECON., PUBLIC SAFETY—MUNICIPAL COURTS, JUDGES AND PROSECUTORS ADDENDUM app. figs.3 & 5 (Oct. 2014), *available at* <http://www.bettertogetherstl.com/wp-content/uploads/2014/11/BT-Judges-and-Prosecutors-Report-FINAL1.pdf> [hereinafter PUBLIC SAFETY—MUNICIPAL COURTS, JUDGES AND PROSECUTORS ADDEMNDDUM]. The original report is MO. COUNCIL FOR A BETTER ECON., PUBLIC SAFETY—MUNICIPAL COURTS (Oct. 2014), *available at* <http://www.bettertogetherstl.com/wp-content/uploads/2014/>

the judge in one municipality, is or has been the prosecuting attorney in five other municipalities, and lists “Criminal and Traffic Matters” as a focus the lawyer’s law practice.¹⁰ Another lawyer claims to be “a skilled attorney specializing in Criminal Defense, DWI Defense, Traffic, Municipal and Family Law”¹¹ and then lists his positions as judge in two municipalities and prosecutor for three other cities.¹² A third example is a lawyer stating that he has “handled numerous criminal and traffic cases,” who serves as the prosecuting attorney in three cities, is the deputy prosecutor in an additional city, and is the judge in another.¹³

The system of lawyers serving multiple roles as judge, prosecutor, and defense lawyer raises the appearance of impropriety and potential conflict of interest issues under the ethics rules for judges.¹⁴ Lawyers serving in these multiple roles also implicates possible conflict of interest issues under the ethics rules for lawyers.¹⁵ The system of overlapping roles also raises questions of fundamental fairness. Do clients of lawyers with these overlapping roles get better plea bargains than those who are not their clients? Will a prosecutor zealously represent a city’s interests when the defense lawyer is a presiding judge in another city where the prosecutor appears frequently in the role of defense lawyer? Can a defense lawyer who is combative with a prosecutor in one city receive a fair consideration for another client from the prosecutor in his role as a judge in a second city?¹⁶ More importantly, are those individuals too poor to

10/BT-Municipal-Courts-Report-Full-Report1.pdf [hereinafter PUBLIC SAFETY—MUNICIPAL COURTS].

10. PUBLIC SAFETY—MUNICIPAL COURTS, JUDGES AND PROSECUTORS ADDENDUM, *supra* note 9, app. fig.3.

11. *Id.* app. fig.4.

12. *Id.*

13. *Id.* app. fig.5.

14. *See infra* Part III.

15. *See infra* Part IV. There has been little scholarship about part-time prosecutors, and the only substantial work on the subject gives only a brief mention to lawyers serving as part-time municipal prosecutors. *See* Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1, 41–42 (1992–93).

16. A variation of this scenario is recounted in a news article quoting a lawyer who was combative with a county prosecutor in one case where the same prosecutor was the judge in a municipal court where the defense lawyer represented another client. Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014),

afford any lawyer—and especially too poor to retain a defense lawyer who is also a prosecutor and/or judge—treated more harshly in municipal courts throughout St. Louis County?

I explore these questions in light of both the underlying factual background of municipal court operations in St. Louis County and the relevant ethics rules for judges and lawyers, both serving as a prosecutor or defense attorney. The focus is on Missouri, and St. Louis County especially, where substantial attention has been directed toward the operation of municipal courts.¹⁷ Although it is beyond the scope of this Article to investigate every such jurisdiction with similar municipal court issues, the analysis and recommendations are applicable to any jurisdiction that permits practices such as those in Missouri, where municipalities have part-time judges and prosecutors who also serve as defense lawyers in other municipal courts even within the same county. My focus is on the legal ethics implications. I confine my recommendations to what the judiciary can do to address these issues, given that the highest court in each state has the authority to regulate municipal courts¹⁸ and the legal profession.¹⁹

I begin in Part II by exploring the context in which the same lawyers serve multiple roles by examining how the municipal courts in St. Louis County operate. Next, I analyze the ethics of part-time municipal court judges simultaneously serving as prosecutors and defense lawyers in other courts in the same county in Part III. I conclude Part III with a call for the Supreme Court of Missouri to amend the judicial ethics rules to prohibit a lawyer serving as a judge

<https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>.

17. See *infra* Part II.

18. Article V, § 5 of the Missouri Constitution empowers the Supreme Court of Missouri to “establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law.” MO. CONST. art. V, § 5.

19. “[T]hirteen state constitutions expressly grant the judiciary authority to regulate lawyers [and] . . . state high courts opinions [are] unanimous that regulation of lawyers in an inherent judicial function.” ABA COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY (1992), available at http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html. There are other possible ways to reform the municipal court system in Missouri or elsewhere through legislative action, but I focus on changes to the ethics rules regulating judges and lawyers, which are the domain of the highest court in each state. See *infra* Parts III.B, IV.B.

in a municipal court from serving as either a prosecutor or defense lawyer in any other court in the same county. In Part IV, I analyze the ethics of lawyers serving as both prosecutors and defense lawyers in municipal courts in the same county even if they do not also serve as judges. I conclude Part IV with alternative measures that the Supreme Court of Missouri could adopt to prohibit a lawyer serving as a prosecutor in a municipal court from serving as a defense lawyer in any other court in the same county. Although these recommendations are directed to the Supreme Court of Missouri, they are appropriate for other state high courts across the country to consider if their current ethics rules permit lawyers to have multiple roles in different municipal (sometimes referred to as limited jurisdiction) courts in the same county.

II. MUNICIPAL COURTS IN CONTEXT

In order to explore questions of possible conflicts of interest for municipal prosecutors and judges serving multiple roles, as well as the possible appearance of impropriety for such arrangements, it is important to look at the arrangements concretely and not just theoretically. To do so, I focus on municipal courts in St. Louis County to illustrate the ethical pitfalls for lawyers simultaneously serving multiple roles in the criminal justice system. This part provides a brief overview of the underlying concerns of many concerning the fairness of the municipal courts in St. Louis County when the same lawyer may be a judge, prosecutor, and defense lawyer in different municipal courts at the same time.

In the aftermath of the death of Michael Brown in Ferguson, Missouri, which is located in St. Louis County, the public protests put a spotlight on St. Louis County. Both police practices and the practices of municipal courts were a focus of protests.²⁰ In a response

20. See, e.g., Megan Davies & Dan Burns, *In Riot-Hit Ferguson, Traffic Fines Boost Tension and Budget*, REUTERS NEWS (Aug. 19, 2014, 7:44 PM), <http://www.reuters.com/article/us-usa-missouri-shooting-tickets-insight-idUSKBN0GJ2CB20140819> (reporting that heavy reliance on traffic fines as revenue source has inflamed racial tensions); Emily Thomas, *Ferguson Averages 3 Warrants Per Household, News Report Shows*, HUFFINGTON POST (Aug. 22, 2014), http://www.huffingtonpost.com/2014/08/22/ferguson-warrants-per-household_n_5698454.html (stating that a report suggests that police and municipal courts in St. Louis

to unrest around Michael Brown's death and protests about underlying social and economic conditions, Governor Jay Nixon appointed the Ferguson Commission, an independent group, to conduct a "thorough, wide-ranging and unflinching study of the social and economic conditions that impede progress, equality and safety in the St. Louis region."²¹ The Ferguson Commission's work included an investigation into the operations of the municipal court system, which was increasingly drawing public attention, and recommendations for needed reforms.²²

Preceding the Ferguson Commission's recommendations were a report on municipal courts in St. Louis County by the ArchCity Defenders²³ and the findings of the Department of Justice (DOJ) investigation into the police department and municipal court in Ferguson.²⁴ Both the ArchCity Defenders and the DOJ found municipal court practices that disparately affected African Americans.

The ArchCity Defenders' *Municipal Courts White Paper*, released the same month as Michael Brown's shooting, is based on observations at sixty different municipal courts in St. Louis County and sworn statements from clients and others during the investigation.²⁵ In approximately half of the courts studied, the

County target African Americans); Balko, *supra* note 16 (reporting that protests in Ferguson are partly a reaction to unfair policing and municipal court practices).

21. FERGUSON COMM'N, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY 14 (Oct. 4, 2015), available at http://3680or2khmk3bzp33juiea1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf.

22. The Ferguson Commission suggests several areas of reform, including reforms to the municipal court system and calls for action to address perceived conflicts of interest with lawyers serving simultaneously serving as municipal judges, prosecutors, and defense lawyers. *See id.* at 31–36; *supra* note 20.

23. The ArchCity Defenders is a nonprofit providing holistic criminal and civil legal services to the homeless and working poor in the St. Louis metropolitan area. *Our Mission & Story*, ARCHCITY DEFENDERS, <http://www.archcitydefenders.org/who-we-are/our-mission-story/> (last visited Feb. 6, 2016).

24. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4–5 (Mar. 4, 2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter DOJ FERGUSON REPORT].

25. ARCHCITY DEFENDERS, MUNICIPAL COURTS WHITE PAPER 2 (2014), available at <http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/08/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf>.

ArchCity Defenders found that the poor and minorities were disproportionately jailed for their inability to pay fines, refused access to the courts if they were with children or family, or mistreated by court personnel, prosecutors, and judges.²⁶

The DOJ found that the Ferguson Police Department both disproportionately targeted African Americans for traffic stops and searches and disproportionately used force against them.²⁷ From 2012–2014, 85 percent of persons subject to vehicle stops were African American, as were 90 percent of those receiving citations and 93 percent of those arrested, while only 67 percent of the population in Ferguson was African American.²⁸ After controlling for non-race based variables such as the reason police initiated vehicle stops, data from this same two-year period show that police searched African Americans at twice the rate of white drivers, even though African Americans were “found in possession of contraband 26% less often than white drivers, suggesting officers are impermissibly considering race as a factor when determining whether to search.”²⁹ Police charged some offenses, such as “Manner of Walking in Roadway” and “Failure to Comply,” almost exclusively against African Americans.³⁰ The DOJ report demonstrates that this pattern of targeting African Americans is also present in the police use of force, where “90% of documented force used by the FPD officers was used against African Americans.”³¹

The DOJ additionally found that the practice of the Ferguson Municipal Court, which operates on a part-time basis with a part-time judge, prosecutor, and city attorney, disproportionately harms African Americans. Among other practices, the municipal court judge, in exercising discretion, was 68 percent less likely to dismiss a case and 50 percent more likely to issue an arrest warrant when the defendant

26. *Id.* at 1–3.

27. DOJ FERGUSON REPORT, *supra* note 24, at 4–5.

28. *Id.* at 4.

29. *Id.*

30. *Id.* (“For example, from 2011 to 2013, African Americans accounted for [95 percent] of Manner of Walking in Roadway charges, and [94 percent] of all Failure to Comply Charges.”).

31. *Id.* at 5.

was African American.³² Further, African Americans accounted for 92 percent of cases in which arrest warrants were issued.³³ Of those arrested for outstanding municipal court warrants, 96 percent were African American.³⁴

The DOJ investigation determined that the disparate impact of police and municipal court practices on African Americans could not be explained by the difference in crime rates by people of different races, but rather was due in part to an “unlawful bias against and stereotypes about African Americans.”³⁵ Evidence of racial bias included emails circulated by Ferguson officials, including police supervisors and court supervisors, which stereotyped racial minorities as lazy,³⁶ unable to hold a steady job,³⁷ and as criminals.³⁸

The DOJ report also uncovered instances of both the municipal judge and prosecutor in Ferguson using their positions to help themselves or others. In one instance, the judge in Ferguson, who also served as the judge in another municipality, said he would take care of a speeding ticket issued to a Ferguson Police Department patrol supervisor.³⁹ In another instance, the same judge asked the prosecutor in Ferguson, who was also a prosecutor in another city, to dismiss a red light camera ticket the judge had received in the other city, and the prosecutor did so.⁴⁰ The DOJ only looked at the operation of the municipal court in Ferguson and not at other local municipal courts, and the extent to which favors were or are traded among other municipal court prosecutors and judges is unclear. Still, the instances in Ferguson that involved other municipalities suggest

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 72 (“A June 2011 email described a man seeking to obtain ‘welfare’ for his dogs because they are ‘mixed in color, unemployed, lazy, can’t speak English and have no frigging clue who their Daddies are.’”).

37. *Id.* (“A November 2008 email stated that President Barack Obama would not be President for very long because ‘what black man holds a steady job for four years.’”).

38. *Id.* (“A May 2011 email stated: ‘An African-American woman in New Orleans was admitted into the hospital for a pregnancy termination. Two weeks later she received a check for \$5,000. She phoned the hospital to ask who it was from. The hospital said, Crimestoppers.’”).

39. *Id.* at 74.

40. *Id.*

that this is widespread, and lawyers familiar with municipal court practices in St. Louis County claim that such favors are routinely traded among lawyers serving multiple roles as part-time judges, prosecutors, and defense lawyers.⁴¹

Compounding concerns over the disparate impact of the municipal court system on persons of color and the poor, and the multiple roles some lawyers play within the municipal court system, is the municipalities' dependence on court fines and fees to their operating budgets.⁴² In 2013, Missouri municipal courts collected \$132,032,352 in court fines and fees; the ninety municipalities in St. Louis County accounted for \$45,136,416, or 34 percent of the statewide total, notwithstanding that only 11 percent of the population of Missouri resides in those municipalities.⁴³ For comparison, St. Louis City has 5 percent of the population for Missouri and collected 7 percent of the statewide fines and fees in 2013, and the unincorporated areas of St. Louis County have approximately 5 percent of the population of Missouri and accounted for 5 percent of municipal fines and fees in Missouri in 2013.⁴⁴ The municipalities in St. Louis County most heavily dependent on fines and fees are, on average, predominantly African American with over one in five citizens living in poverty.⁴⁵

A report sponsored by the Missouri Council for a Better Economy (also known as St. Louis Better Together) notes that while state law prohibits compensating a municipal judge or prosecutor based in any way on caseload or fines, the fact that each municipality hires its own judge and prosecutor, and pays them directly from municipal

41. See Mann et al., *supra* note 3.

42. See, e.g., Balko, *supra* note 16 (“Some of the towns in St. Louis County can derive 40 percent or more of their annual revenue from petty fines and fees collected by their municipal courts.”); Mike Maciag, *Skyrocketing Court Fines Are Major Revenue Generator for Ferguson*, GOVERNING (Aug. 22, 2014) <http://www.governing.com/topics/public-justice-safety/gov-ferguson-missouri-court-fines-budget.html> (“A review of Ferguson’s financial statement indicates that court fine collections now account for one-fifth of total operating revenue.”).

43. PUBLIC SAFETY—MUNICIPAL COURTS, *supra* note 9, at 2.

44. *Id.*

45. *Id.* (“Municipalities’ whose largest individual source of revenue is municipal fines and fees] populations were on average 62% black, with 22% of their citizens living below the poverty line. In comparison, St. Louis county as a whole is 24% black with 11% of its population below the poverty line.”).

revenues, “contributes to distrust in a system.”⁴⁶ The report continues that such a system “perpetuates some citizens’ perception that certain courts exist not to ensure justice and safety, but rather as revenue generators for struggling municipalities. Ultimately, it calls into question the overall integrity of these courts and unduly strains the trust of citizens in their local governments.”⁴⁷

The DOJ report on the municipal court in Ferguson produced evidence suggesting that concerns that municipal courts are principally focused on revenue generation, rather than ensuring justice, are well-founded. In a 2011 report to the Ferguson City Council, the Finance Director noted that during the municipal judge’s tenure he “ha[d] been successful in significantly increasing court collections over the years.”⁴⁸ The report included a list, which the judge drew up, highlighting additional fees that the judge stated were “what he has done to help in the areas of court efficiency and revenue.”⁴⁹ The DOJ noted that many of the fees “are widely considered abusive and may be unlawful, including several that the City has repealed during the pendency of our investigation.”⁵⁰ At one point during his tenure, the municipal judge complained about a new municipal prosecutor recommending fines that “were not high enough.”⁵¹ In discussing the judge’s performance, one Ferguson City Councilmember objected to the judge’s reappointment, noting that the judge “does not listen to testimony, does not review the reports or the criminal history of defendants, and doesn’t let all the pertinent witnesses testify before rendering a verdict.”⁵² The City Manager urged the judge’s reappointment stating that “[i]t goes without saying

46. PUBLIC SAFETY—MUNICIPAL COURTS, *supra* note 9, at 1. One Missouri law provides: “The salaries of the judges . . . shall be paid by the municipality.” MO. REV. STAT. § 479.060.1 (2015). Another Missouri law similarly states: “The salary or fees of the [prosecuting] attorney and his necessary expenses incurred in such prosecutions shall be paid by the municipality.” *Id.* § 479.120.

47. PUBLIC SAFETY—MUNICIPAL COURTS, *supra* note 9, at 1.

48. DOJ FERGUSON REPORT, *supra* note 24, at 14.

49. *Id.*

50. *Id.*

51. *Id.* at 15.

52. *Id.*

the City cannot afford to lose any efficiency in our Courts, nor experience any decrease in our Fines and Forfeitures.”⁵³

The municipal courts’ emphasis on revenue generation is also reflected in a 2004 survey of municipal court employees in Missouri. Only a combined 34 percent disagreed or disagreed strongly with the statement that: “It is the responsibility of the courts to raise revenue for cities through fines and fees.”⁵⁴ At the same time, a combined 31 percent agreed or agreed strongly that the purpose of municipal courts is to raise revenue, while 33 percent neither agreed nor disagreed with the statement.⁵⁵

The National Center for State Courts (NCSC) report, “Missouri Municipal Courts: Best Practice Recommendations,” prepared for the Supreme Court of Missouri and the Office of State Court Administrators and released in November 2015, expresses strong concerns about the need for municipal courts in Missouri to function independently with clearly defined powers.⁵⁶ “[I]t is the National Center’s opinion that there is a greater tendency that the judge’s independence may be threatened or compromised through a fear of losing his or her job by displeasing city officials through rulings against the city or a reluctance to generate higher levels of revenue from fines and fees.”⁵⁷ The report also asserts that it is critical for the municipal courts to “visibly function as part of the judicial branch” with municipal court operations clearly distinguishable from city functions.⁵⁸ “In many municipal courts, employees, and tragically, some municipal judges, are confused about their overall attachment to the State Judicial Branch.”⁵⁹ And, the report takes a very tough stance on the need for the adoption of formal conflict of interest rules

53. *Id.*

54. Lawrence G. Myers, *Judicial Independence in the Municipal Court: Preliminary Observations from Missouri*, 41 COURT REV. 26, 30 fig.7 (2004). Thirteen percent strongly disagreed and twenty-three percent disagreed with the statement that the purpose of municipal courts is to raise revenue. *Id.* at 30 fig.6. Thirty-three percent neither agreed nor disagreed with the statement. *Id.*

55. Ten percent strongly agreed and twenty-one percent agreed with the statement that the purpose of municipal courts is to raise revenue. *Id.*

56. NCSC, MISSOURI MUNICIPAL COURTS REPORT, *supra* note 1, at 3–4 and accompanying recommendations.

57. *Id.* at 3–4

58. *Id.* at 4–6 and accompanying recommendations.

59. *Id.* at 5.

for municipal judges, because part-time judges serving in other roles may affect their ability to be impartial.⁶⁰

The same lawyers serving as judges, prosecutors, and defense lawyers, with overlapping and blurred roles and responsibilities, combined with municipalities that are dependent on fines and court costs and that view municipal judges as revenue generators for the municipality, are conditions that breed public distrust in the municipal courts. The following part of this Article examines the judicial ethics implications of such a court system.

III. JUDICIAL ETHICS IN MUNICIPAL COURTS

A. Problem

Does a judge in one city who is simultaneously a prosecutor in a second city and a defense lawyer in a third city live up to the rules of judicial ethics? Does it matter if the judge presides over cases involving prosecutors and defense lawyers who, in turn, are judges and prosecutors in the cities in which the judge appears as a prosecutor or defense lawyer? These types of arrangements, which currently exist in Missouri and some other states, are implicitly prohibited by existing ethics rules and explicitly prohibited in some other jurisdictions.⁶¹ As this part explains, I conclude that the Supreme Court of Missouri should follow the examples set by jurisdictions that explicitly prohibit part-time judges from also serving as prosecutor or defense lawyer in the same county in which they are judges.

The American Bar Association (ABA) Code of Judicial Conduct are the prototypical ethics rules by which judges should conduct themselves.⁶² Using the ABA Code of Judicial Conduct as a model,

60. *Id.* at 15. The report calls for strong, formal conflict of interest rules. *See id.* at 14–15 and accompanying recommendations. The NCSC recommendation and rationale for strong conflict of interest rules are discussed *infra* notes 107–11 and accompanying text.

61. *See supra* note 2 and accompanying text.

62. MODEL CODE OF JUDICIAL CONDUCT (2011). The ABA House of Delegates adopted the Model Code of Judicial Conduct in 1990, and amended it in 1997, 1999, 2003, 2007, and 2010. MODEL CODE OF JUDICIAL CONDUCT (Dec. 12, 2015), http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html. The Model Code of Judicial Conduct succeeded the 1924 Canons of Judicial Ethics. *Judicial Ethics*

the Supreme Court of Missouri in 1998 adopted the Missouri Code of Judicial Conduct,⁶³ which tracks the ABA Code.

Rule 2-3.1 of Missouri Code of Judicial Conduct explicitly states: “A judge shall not practice law.”⁶⁴ There are limited exceptions stating that a judge “may represent himself or herself and may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family, but is prohibited from serving as the family member’s lawyer in any forum.”⁶⁵ A comment to the prohibition on law practice provides insight to the underlying rationale by stating: “A judge must not use the prestige of office to advance the judge’s personal or family interests. See Rule 2-1.3”⁶⁶ Rule 2-1.3 states that it is an abuse of the prestige of judicial office “to advance the person or economic interests of the judge or others, or allow other to do so.”⁶⁷

In spite of these rules highlighting the rationale that a judge who holds him or herself out as available to practice law would be using the prestige of judicial office to advance personal interests, the Missouri Code of Judicial Conduct largely excludes part-time municipal judges from the prohibition on the practice of law.⁶⁸ It

& Regulation, ABA (Dec. 12, 2015), http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation.html.

63. MO. SUP. CT. R. 2, ed. nts. (2012) [hereinafter MO. CODE OF JUDICIAL CONDUCT]. The Supreme Court of Missouri adopted the Code of Judicial Conduct in 1998, and amended it in 2011. *Id.* Prior to adopting the Code of Judicial Conduct, the Supreme Court of Missouri had adopted Canons of Judicial Ethics in 1966. *Id.*

64. *Id.* at R. 2-3.10.

65. *Id.* A comment to the rule provides for an additional exception stating: “A judge may practice law as part of his or her military service.” *Id.* at R. 2-3.10, cmt. [1].

66. *Id.*

67. *Id.* at R. 2-1.3.

68. It states:

III. PART-TIME MUNICIPAL JUDGE

A judge, other than a Senior Judge, who serves on a part-time basis as a municipal judge by election or appointment, shall comply with all provisions of this code:

(A) except:

(1) Rules 2-3.2 to 2-3.15 and Rules 2-4.1 to 2-4.2; and

(2) Rule 2-2.10 (Judicial Statements on Pending and Impending Cases), while not serving as a judge;

states that a part-time municipal judge does not have to comply with the prohibition on the practice of law except in the municipal court where the judge serves, in a matter that could be brought in the municipal court where the judge serves, or in a matter where the judge has presided over any part of the proceedings.⁶⁹ By permitting part-time municipal judges to practice law, especially without restrictions on a part-time judges also practicing law in other courts in the county as prosecutors or defense lawyers, the current Code of Municipal Conduct creates a framework within which a part-time judge may believe that he or she could use the prestige of judicial office to attract clients and perhaps enhance bargaining power as a prosecutor or defense lawyer. Still, other provisions in the Missouri Code of Judicial Conduct imply that this is not permitted.

The Preamble to the Missouri Code of Judicial Conduct begins by stressing that judges must be independent, fair, and impartial in order to preserve justice and the rule of law.⁷⁰ The Preamble continues that

(B) but shall not:

(1) practice law in the municipal division of the circuit court on which the judge serves;

(2) act as a lawyer in any matter wherein any underlying facts occurred within the geographic boundaries of the political subdivision for which the judge serves and which matter could be brought by a proceeding in the municipal division of the circuit court in which the judge serves; or,

(3) act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

Id. at R. 2, Application, III.

69. *Id.*

70. The Preamble begins by stating:

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

Id. at R. 2.00, Preamble (emphasis added).

in order to maintain the dignity of judicial office a judge should at all times, “avoid both impropriety and the appearance of impropriety” in their professional and personal lives, and “should aspire to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.”⁷¹

The emphasis on the need for the judiciary to avoid both impropriety and the appearance of impropriety is echoed in Canon 1, which states: “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”⁷² A comment explains: “The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and appropriate temperament is impaired.”⁷³ As a result, the prevailing view is that judicial behavior should be evaluated from the perspective of how the judge’s conduct appears to an objectively reasonable person.⁷⁴ Another comment notes that “it is not practicable to list all such conduct” that “compromises or appears to compromise the independence, integrity, and impartiality of a judge [and] undermines public confidence in the judiciary.”⁷⁵ Thus, the Missouri Code of Judicial Conduct contemplates a wide range of prohibited conduct not expressly enumerated.

Regarding conflicts of interest, Canon 2 simply states: “A judge shall perform the duties of judicial office impartially, competently,

71. *Id.*

72. *Id.* at R. 2-1.2.

73. *Id.* at R. 2-1.2, cmt. [5].

74. Recently, the New Jersey Supreme Court surveyed state and federal courts and noted that a majority of these courts use an objectively reasonable standard in determining whether there is impropriety or appearance of impropriety, and held that an appearance of impropriety is present “where there is a *reasonable* basis to doubt a judge’s behavior.” *In re Reddin*, 111 A.3d 74, 82 (N.J. 2015); *see also* *Inquiry Concerning a Judge*, 822 P.2d 1333, 1340 (Alaska 1991) (stating that the appropriate test is “whether petitioner [judge] failed to use reasonable care to prevent a reasonably objective individual from believing that an impropriety was afoot”); *In re K.L.W.*, 131 S.W.3d 400, 405 (Mo. Ct. App. 2004) (holding that the test for recusal is whether there is a factual basis for a reasonable person “to find an appearance of impropriety and thereby doubt the impartiality of the court”).

75. MO. CODE OF JUDICIAL CONDUCT R. 2-1.2, cmt. [3] (2012).

and diligently.”⁷⁶ Rule 2-2.11 specifies certain instances when a judge must recuse him or herself,⁷⁷ but in other instances relies on the judge’s own discretion to determine when “the judge’s impartiality might reasonably be questioned.”⁷⁸

Unfortunately, the standards for and types of impropriety, appearance of impropriety, and conflicts of interest that are not

76. *Id.* at R. 2, Canon 2. Rules 2-2.2–2-2.4 discuss a judge’s duties to be impartial and fair, to perform judicial duties without bias, prejudice or engage in harassment, and to not permit external influences on judicial conduct. *Id.* at R. 2-2.2–2-2.4.

77. Rule 2-2.11 states that a judge must recuse himself or herself when any of the following circumstances are present:

- (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer or knowledge of facts that are in dispute in the proceeding that would preclude the judge from being fair and impartial.
- (2) The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, parent, or child wherever residing, or any other member of the judge’s family residing in the judge’s household is:
 - (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - (b) acting as a lawyer in the proceeding;
 - (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
 - (d) likely to be a material witness in the proceeding.
- (3) The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, parent or child wherever residing, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding.
- (4) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
- (5) The judge:
 - (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
 - (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
 - (c) was a material witness concerning the matter.

Id. at R. 2-2.11.

78. Rule 2-2.11 states: “A judge shall recuse himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned” *Id.*

enumerated are not clearly defined by the judicial ethics rules. The judicial ethics rules presume that each individual judge will self-monitor his or her own behavior. This lack of clarity creates the ethical grey zone in which lawyers serving as part-time municipal judges have at times shown a lack of self-restraint in how they use their judicial offices. The absence of clear definitions for impropriety and conflicts of interest also likely contribute to some judges far exceeding the bounds of what is appropriate, thereby engaging in improper conduct or at least creating an appearance of impropriety triggering their discipline.

Judges have been disciplined for using their judicial office either to advance personal interests or where their actions suggest that they may be attempting to advance personal interests. For example, the State Commission on Judicial Conduct and the New York Court of Appeals, the State's highest court, found that a lawyer serving as a village judge created an appearance of impropriety when he made a statement to an attorney implying that he would use his judicial office to advance his personal interests in deciding a motion.⁷⁹ The New York Court of Appeals stated that whether he actually decided the motion on the merits was "largely irrelevant to the charge, because the harm inured when he indicated that he would use his judicial powers to satisfy a personal vendetta, a classic instance in which 'an appearance of such impropriety is no less to be condemned than is the impropriety itself.'"⁸⁰ The Court removed the lawyer from his position as village judge for this violation and for two other violations: making inappropriate and derogatory remarks about ethnic and racial groups, and failing to maintain adequate records in criminal cases.⁸¹

79. *In re Schiff*, 635 N.E.2d 286, 288 (N.Y. 1994). A village judge implied that he would rule against a party represented by a law firm where one of the partners was also a local town judge who had dismissed traffic charges against driver who had been in a traffic accident with the village judge. *Id.* at 287–88. The court stated: "Petitioner created the impression that he was using his judicial office to retaliate, and thus failed to avoid the appearance of impropriety and to conduct himself in a manner that promotes public confidence in the impartiality and integrity of the judiciary." *Id.* at 288.

80. *Id.* (quoting *Matter of Spector v. State Comm'n. on Judicial Conduct*, 392 N.E.2d 552 (N.Y. 1979)).

81. *Id.* at 287–88.

In another case, a committee on judicial conduct recommended to the New Hampshire Supreme Court that a district court judge be disciplined for telephoning a police officer, whom the judge knew personally, a short time after the officer had issued a summons for speeding to the judge's brother.⁸² The committee found that officer told the judge that "he would feel more comfortable if Judge Snow's brother would come down to the station and bring the summons and that they could then take care of it."⁸³ The committee also found that although the judge told the officer "that he wasn't calling to fix the ticket," the judge informed his brother to take the summons to the police station where all copies were destroyed and the ticket was voided.⁸⁴ The court concurred with the committee's finding that "[e]ven the appearance that Judge Snow intervened to obtain favorable treatment from the police for his brother plainly undermines public confidence in the integrity and impartiality of the judiciary."⁸⁵ The court also agreed with the committee's finding that the judge "should have known that his actions would create the appearance of impropriety."⁸⁶ The court issued a public censure, suspended the judge for a period of six months without pay, and required the judge to complete successfully a course in judicial ethics.⁸⁷

Despite such examples of the misuse of judicial office, some municipal judges in Missouri and elsewhere have shown a lack of self-restraint by assuming that there is nothing improper in simultaneously serving as prosecutor, defense lawyer, and judge in other municipal courts. The extent to which some may trade upon their judicial office either to be vindictive, as did the village judge in New York, or possibly to wield influence to benefit others, as did the district judge in New Hampshire, we do not know. According to the DOJ report, there is at least some evidence of this occurring in the Ferguson Municipal Court.⁸⁸ There is also evidence from the DOJ

82. *In re Snow's Case*, 674 A.2d 573, 574–75 (N.H. 1996).

83. *Id.* at 575.

84. *Id.*

85. *Id.* at 578.

86. *Id.*

87. *Id.* at 579–80.

88. See DOJ FERGUSON REPORT, *supra* note 24, at 74–75.

report that at least one judge also saw his job as to generate revenue for the city,⁸⁹ and certainly many involved in the municipal court system see this as an objective of the municipal courts.⁹⁰

As the large number of part-time judges serving as defense lawyers also illustrates,⁹¹ few if any of these judges are concerned with how it looks to the public and whether it may interfere with their judicial role. Their reasoning is simple—if there is not an express rule prohibiting their actions, it must be permissible. This reasoning may explain how the municipal judge in Chesterfield, Missouri, represented a defendant in a DUI case in Town and Country, Missouri, as the defendant drove from Town and Country into Chesterfield.⁹² The defendant was arrested by a Town and Country police officer in Chesterfield, where the defendant's lawyer is a judge.⁹³ Even in such an extreme case where the defendant could have been charged in Chesterfield,⁹⁴ the municipal judge from Chesterfield went to Town and Country to defend him. The judge would not respond to calls from the press to explain how he justified taking on the case, but the prosecutor from Chesterfield, who also serves as a defense lawyer in other municipalities, stated that he saw nothing wrong with the judge taking on a role that seemed in conflict and that, in his view, it was acceptable to take on different roles in different cases.⁹⁵

The resulting system of municipal courts with part-time judges who also engage in private practice operates with a patina of unrealistic expectations. Many lawyers hired as municipal judges cannot resist the possible rewards they may reap by also being a

89. *See id.* at 14–15; *see also* PUBLIC SAFETY—MUNICIPAL COURTS, *supra* note 9, at 1.

90. *See supra* notes 54–55 and accompanying text.

91. *See* Mann et al., *supra* note 3; *see also* Bouscaren et al., *supra* note 6.

92. Jeremy Kohler & Stephen Deere, *Municipal Mercenaries Often Thrive Off of Contrary Roles*, ST. LOUIS POST-DISPATCH (Mar. 28, 2015, 11:00 AM), http://www.stltoday.com/news/local/crime-and-courts/municipal-mercenaries-often-thrive-off-of-contrary-roles/article_46094377-d311-53ee-9776-7110e98fd03f.html.

93. John Hoffman, the publisher of a newsletter focusing on municipal court cases in west St. Louis County, stated that the defendant “could have been charged in Chesterfield.” *Id.* In my experience, it would usually require the arresting officer to be a Chesterfield police officer for charges to be brought in Chesterfield.

94. Hoffman stated: “He was driving drunk in Chesterfield. He was violating Chesterfield’s ordinance . . . It’s not right.” *Id.*

95. *Id.* *See infra* note 141 for the Chesterfield prosecutor’s explanation.

prosecutor and defense lawyer in other municipal courts. While the extent of the rewards from generating business due to their multiple roles is unclear, there are examples that some lawyers serving as a municipal judge promoting their multiple roles on their firm websites, presumably to attract new clients.⁹⁶ It is also unclear to what extent those municipal judges who also serve as defense lawyers and prosecutors in other municipal courts obtain better outcomes for clients in exchange for giving better outcomes to the other lawyers who are also judges and prosecutors, but the DOJ Ferguson Report indicates that dismissing tickets for others and having one's own tickets dismissed are some of the advantages.⁹⁷

Another unrealistic expectation is that a municipality, which is dependent on court fines and fees, will not pressure its judge to focus on generating fines and fees, rather administrate justice. As the DOJ report on the municipal court in Ferguson and a prior survey of municipal court employees demonstrate, just the opposite can occur.⁹⁸ The DOJ report also suggests that it is unrealistic to expect that a lawyer who is hired as a municipal judge will resist such pressure.⁹⁹ The fact that such a system is permitted to operate in a way that it generates such questions should, at least, fit a reasonable person's definition of the "appearance of impropriety."

These concerns led the NCSC to "conclude there is an obvious appearance of impropriety in regard to attorneys who serve as judges, prosecutors, and defense lawyers in the same criminal law arena. Consequently, the Center advises a strong position against the current practice."¹⁰⁰ The NCSC reached this conclusion through observations and interviews indicating some of the lawyers serving as both part-time municipal judges and prosecutors where ethically challenged by serving in multiple roles.¹⁰¹

The Missouri Code of Judicial Conduct places an emphasis both on the *integrity* of the judiciary by prohibiting "impropriety" and on

96. See PUBLIC SAFETY—MUNICIPAL COURTS, *supra* note 9.

97. See DOJ FERGUSON REPORT, *supra* note 24, at 74–75.

98. See *id.* at 14–15; see also Myers, *supra* note 54.

99. See DOJ FERGUSON REPORT, *supra* note 24, at 14–15.

100. NCSC, MISSOURI MUNICIPAL COURTS REPORT, *supra* note 1, at 15.

101. *Id.* at 14–15. The NCSC report findings are discussed in more detail *infra* at notes 107–11 and accompanying text.

the *appearance of integrity* by prohibiting the “appearance of impropriety.” For the rule of law to operate, the public must have confidence in the judiciary, and public confidence depends upon judges behaving fairly, impartially, and without regard to their personal interests. Every entity that has examined the practice of part-time municipal judges and prosecutors in Missouri, including the NCSC report commissioned by the Supreme Court of Missouri, has concluded that the lack of a clear prohibition for municipal judges to serve also as prosecutors and defense lawyers in other municipalities undermines public confidence in the judiciary.

Given the findings of the NCSC, the DOJ investigation into the police and municipal court in Ferguson,¹⁰² the St. Louis Better Together report,¹⁰³ and the broader findings of the ArchCity Defenders’ white paper on municipal courts throughout St. Louis County,¹⁰⁴ there is reason for the public to lack confidence in the municipal court system. It is no surprise, then, that the Ferguson Commission’s own investigation also found that there is a lack of trust in the fairness and function of the municipal courts.¹⁰⁵ The perceptions of conflicts of interest invited by the current practices undermine the legitimacy of the municipal courts and cause citizens to question whether justice is being consistently served. These doubts have grown as the municipalities employing lawyers as judges have become increasingly dependent on court fines and costs.¹⁰⁶

B. Solution

To remedy these perceived conflicts of interest and lack of confidence in the part-time municipal court system, several different entities have recommended changes to the part-time judge system in municipal courts. The independent study for the Supreme Court of

102. See DOJ FERGUSON REPORT, *supra* note 24, at 4–5, 71–72, 75; see also Mann et al., *supra* note 3.

103. See PUBLIC SAFETY—MUNICIPAL COURTS, *supra* note 9; see also *id.* at 1.

104. See ARCHCITY DEFENDERS, *supra* note 25, at 1–2; see also DOJ FERGUSON REPORT, *supra* note 24, at 4–5.

105. FERGUSON COMM’N, *supra*, note 21, at 34.

106. See Maciag, *supra* note 42; PUBLIC SAFETY—MUNICIPAL COURTS, *supra* note 9, at 1–2; MO. REV. STAT. § 479.120 (2015).

Missouri and the Office of States Courts Administrator, prepared by the NCSC,¹⁰⁷ recommends that there be “strong, formal conflict of interest rules for municipal judges.”¹⁰⁸ This recommendation is based on the fact that lawyers serving as prosecutors and judges at the same time “create situations where reasonable people often raise questions about the underlying incompatibility in those roles and a lawyer’s capacity to effectively separate them and serve impartially as a judge.”¹⁰⁹ The report continues that “observations and interviews gave us the impression that some lawyers who are both municipal judges and municipal prosecutors do have difficulty effectively and ethically balancing those roles.”¹¹⁰ The study recommends that the Supreme Court of Missouri “consider a rule that prohibits lawyers who serve as municipal judges from simultaneously working as municipal prosecutors,” noting that some other states “commonly place formal restrictions on the ability of lawyers to serve in both functions.”¹¹¹

The Ferguson Commission’s recommendations concerning conflicts of interests of part-time judges serving as part-time prosecutors presaged the concerns in the study commissioned by the Supreme Court of Missouri released in November 2015. The key Ferguson Commission recommendation to prevent conflicts of interest among municipal judges is: “Municipal judges shall be prohibited from engaging in municipal court practice in the county in which they serve as municipal judges.”¹¹² Explaining its concern and focus on conflicts of interest, the Commission noted the interconnections between lawyers serving as judges, prosecutors, and defense lawyers, and stated that “trust in the municipal court system is low, and fairness of the municipal courts is in doubt, the perceptions of conflicts of interest invited by the current practices undermines the legitimacy of the municipal courts and causes citizens to question whether justice is being consistently served.”¹¹³

107. NCSC, MISSOURI MUNICIPAL COURTS REPORT, *supra* note 1, at ii.

108. *Id.* at 14.

109. *Id.*

110. *Id.* at 14–15.

111. *Id.* at 15.

112. FERGUSON COMM’N, *supra* note 21, at 34.

113. *Id.*

I agree with underlying rationale for these recommendations, and I believe that the Supreme Court of Missouri should revise the Missouri Code of Judicial Conduct to be more similar to other jurisdictions that limit part-time judges' practice of law. By placing reasonable restrictions on municipal judges' outside law practice, the Supreme Court of Missouri would promote public trust and ensure that municipal court judges avoid the appearance of impropriety and possible conflicts of interest. Other state high courts have imposed such restrictions, and the different models are useful to consider.¹¹⁴

For example, the Colorado Code of Judicial Conduct provides that a part-time judge "shall not practice law in the court on which the judge serves or in any comparable level court in the same judicial district on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves."¹¹⁵ Such a restriction in Missouri would still permit a part-time municipal judge to hold multiple judgeships within the same judicial circuit and practice at the associate and district court levels within the same judicial circuit, as well as practice law at all levels in other judicial circuits, in state courts of appeals, the state high court, engage in transactional law practice such as contracts and trusts and estates, and practice law in federal court.

New York takes another approach, and its rule states that a part-time judge "shall not practice law in the court on which the judge serves, or any other court in the county in which his or her court is

114. The NCSC report notes that:

Many states require all judicial positions to be full-time and bar judges from practicing law. Some, like Georgia and New Jersey, prohibit part-time judges from serving as prosecutors in any matters, and others, like Utah and Arizona, ban part-time judges or judges pro-tem from appearing as attorneys in any types of cases they preside over as judges.

NCSC, MISSOURI MUNICIPAL COURTS REPORT, *supra* note 1, at 14.

115. COLO. CODE OF JUDICIAL CONDUCT, App. III (2010), https://www.courts.state.co.us/userfiles/file/code_of_judicial_conduct.pdf ("Part-Time Judges"). Colorado has sixty-four counties and only twenty-two judicial districts, and some judicial districts in less populated areas encompass two to seven counties. *Courts by District*, COLO. JUDICIAL BRANCH (JAN. 27, 2015), <https://www.courts.state.co.us/Courts/District/Choose.cfm>. Similar to Colorado, Missouri has 114 counties and 22 judicial circuits, with judicial circuits in less populated areas encompassing two to five counties. *Circuit Courts of Missouri*, YOUR MO. COURTS (JAN. 27, 2015), <https://www.courts.mo.gov/page.jsp?id=321>.

located.”¹¹⁶ Such a restriction in Missouri would permit a part-time municipal judge to hold multiple judgeships within the same judicial circuit, as well as practice law at all levels in other judicial circuits, in state courts of appeals, the state high court, engage in transactional law practice such as contracts and trusts and estates, and practice law in federal court. It would be more restrictive than Colorado’s rule in that a part-time municipal court judge would be prohibited from practice at the associate and district court levels of same judicial circuit as the judge’s municipal court if the judicial circuit was located in the same county where the lawyer served as a judge.

Both the Colorado and New York approaches have something to offer Missouri. In a more densely populated area where a judicial circuit consists of one county, such as the 21st Judicial Circuit consisting of St. Louis County,¹¹⁷ the Colorado approach would appear to be less restrictive. Under such a rule, a part-time municipal court judge in St. Louis County would not be able to practice law in the other approximately eighty municipal courts in the county as a prosecutor or defense lawyer, but could continue practicing lawyer at all other court levels within the circuit. In contrast, in a less densely populated area, such as the 42nd Judicial Circuit that consists of five counties,¹¹⁸ a part-time municipal court judge would be prohibited from practicing in any other municipal court in a much larger geographical circuit with five times as many counties as the 21st Judicial Circuit even though the 42nd Judicial Circuit contains fewer municipal courts.¹¹⁹

The New York approach, which prohibits practice in any court in the county in which a judge’s court is located, would be more restrictive in a more densely populated area such as St. Louis County, where the associate and district courts for the judicial circuit are located. In contrast, such an approach would be less restrictive in

116. 22 NYCRR 100.6(B)(2) (2006).

117. *21st Judicial District*, YOUR MO. COURTS (Jan. 27 2015), <https://www.courts.mo.gov/page.jsp?id=1908>.

118. *42nd Judicial Circuit*, YOUR MO. COURTS (Jan. 27 2015), <https://www.courts.mo.gov/page.jsp?id=1926>.

119. The 42nd Judicial Circuit covers a large areas consisting of five counties, the most counties of any single circuit in Missouri, and there are fifteen active municipal courts in the circuit. *Id.*

thinly populated areas, especially if the municipal judge's court is not located in the same county as the judicial circuit court. For example, Crawford County is part of the 42nd Judicial Circuit and the associate and circuit courts are located Reynolds County.¹²⁰ There are only three municipal courts in Crawford County, and under a New York type approach a part-time judge in one of those municipal courts would be free to practice in the associate and district level courts.

In order to strike a balance between the approaches in states such as Colorado and New York, I recommend that the Supreme Court of Missouri exercise its authority to amend the Missouri Code of Judicial Conduct to impose a reasonable restriction on a part-time municipal judge's private law practice that would prohibit a judge from practicing law in any municipal court located in the same county in which the judge's court is located. At present, the Missouri Code of Judicial Conduct states that a part-time municipal judge "shall not . . . practice law in the municipal division of the circuit court on which the judge serves."¹²¹ By expanding the prohibition to include all municipal courts within the county in which the lawyer is a municipal judge, the Supreme Court of Missouri would provide attorneys serving as part-time judge clear guidance. The amended rule could be worded to say that a part-time municipal judge "shall not . . . practice law in any municipal court within the same county in which the judge serves."

Such a change would affect part-time municipal judges' outside law practice as either municipal prosecutors or defense lawyers, but it would be a least-restrictive measure to prevent the appearance of impropriety and perceived conflicts of interest. This change would curb the public perception that some municipal judges capitalize on their judicial office to generate business as defense lawyers in other municipalities within the same county. This change would also be less restrictive than what is common in other states that permit part-time judges, which provide that "part-time municipal judges could have a felony, family or civil law practice, but not a municipal law practice."¹²²

120. *Id.*

121. MO. CODE OF JUDICIAL CONDUCT R. 2 Application, III(B)(1) (2012).

122. NCSC, MISSOURI MUNICIPAL COURTS REPORT, *supra* note 1, at 15 n.19.

Such a change is also consistent with the expectation, expressed in the Missouri Code of Judicial Conduct that: “A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the code.”¹²³ Every judicial position, including that of a part-time judge, comes with prestige and responsibilities. Chief among the responsibilities is the obligation to promote public confidence in the judiciary, which includes not using the prestige of judicial to advance personal interests as well as avoiding the appearance of impropriety that a part-time judge is doing so. The Supreme Court of Missouri can take a major step toward showing the general public that the court takes this responsibility seriously by imposing restrictions on part-time judges prosecuting and defending citizens in the same county in which they are expected to be fair and impartial.

IV. ETHICS OF PROSECUTORS SERVING AS DEFENSE LAWYERS IN MUNICIPAL COURTS

A. Problem

Is it permissible for a prosecutor in City A to be the defense lawyer for defendant who lives in City A and was arrested in City B for DUI in violation of City B’s ordinance as the defendant drove out of City A onto the roads of City B? Do existing conflict of interest rules for prosecutors provide sufficient guidance to a part-time municipal prosecutor asked to defend such a defendant in another municipality within the same county? If not, is more guidance needed?

It is helpful at the outset to note that that the existing conflict of interest rules do not specifically address conflicts of interest for prosecutors. The ABA Model Rules of Professional Conduct,¹²⁴ upon

123. MO. CODE OF JUDICIAL CONDUCT R. 2-1.2, cmt. [2] (2012).

124. MODEL RULES OF PROF’L CONDUCT (2015) [hereinafter MODEL RULES]. The ABA adopted the Model Rules in 1983, and they replaced the Model Code of Professional Responsibility, which the ABA adopted in 1969. STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 4 (2013).

which Missouri and other states model their lawyer ethics rules,¹²⁵ contains only one ethics rule directed to prosecutors entitled “Special Responsibilities of a Prosecutor.”¹²⁶ This rule, Model Rule 3.8, does not even mention prosecutorial conflict of interest. Neither Missouri nor any other state has enacted an ethics conflict of interest rule specifically for prosecutors. As a result, Model Rule 1.7, the conflict of interest rule generally applicable to all lawyers, governs conflict of interest for prosecutors.

Missouri’s conflict of interest rule, Missouri Rule 4-1.7(a)(2), tracks the Model Rule and states that a conflict of interest exists when “there is a *significant risk* that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”¹²⁷ Similarly, the *Restatement (Third) of the Law Governing Lawyers*, which also provides guidance to lawyers, does not have a conflict of interest provision specifically dealing with prosecutors. Like the Model Rules and state rules, the *Restatement* has a general risk rule applicable to all lawyers, including prosecutors. *Restatement* Section 121 defines a conflict of interest as occurring whenever there is a “*substantial risk*” that the lawyer’s representation of a client will be “materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.”¹²⁸ A substantial risk is defined as “more than a mere possibility,” but need not be “immediate, actual, and apparent.”¹²⁹ The *Restatement* explains that there must be a “significant and plausible” risk of adverse effect on the representation of the client.¹³⁰

125. Today, all the states, except California, and the District of Columbia have adopted the number system and most of the language in the Model Rules. GILLERS ET AL., *supra* note 124, at 3.

126. MODEL RULES, R. 3.8.

127. MO. SUP. CT. R. 4-1.7(a)(2) (2007) (emphasis added) [hereinafter MO. RULES OF PROF. CONDUCT].

128. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (emphasis added).

129. *Id.* § 121 cmt. [c(iii)].

130. *Id.*

The ABA Criminal Justice Standards are another source of guidance to prosecutors.¹³¹ Among the various types of conflicts of interest prohibited are any conflict with respect to a prosecutor's "official duties,"¹³² and "permit[ting] his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests."¹³³

Thus, both the Model Rules and the *Restatement* focus on the risk that various incentives may adversely affect a lawyer's representation of his or her client. While the Criminal Justice Standards do not expressly state that the focus is on risk, they both elevate the prosecutor's official duties above personal interests and caution a prosecutor not to let personal interests, including financial interests, affect his or her professional judgment or obligations. In sum, all of these authorities emphasize that a prosecutor, including those who are part-time, must be primarily dedicated to his or her official obligations and avoid the risk that other considerations, such as the financial incentives to switch sides to become defense counsel, will undermine their professional judgment and underlying official duties as a prosecutor.

For some part-time prosecutors at the county level who enforce state laws, clear guidance does exist in the form of advisory ethics opinions and some state statutes that explicitly state that a prosecutor may not defend in criminal cases in his or her own county and elsewhere in the state.¹³⁴ Some states have extended this ban to prohibit a county prosecutor from defense practice in federal court and, in some states, even defense practice in another state.¹³⁵ The rationale for the ban on defense work within the state is that a prosecutor who represents the state should not take a position contrary to the state due to the duty of loyalty to the state as a client.

131. Standard 3-1.1 explains the function of the ABA Criminal Justice Standards, in pertinent part, as follows: "These standards are intended to be used as a guide to professional conduct and performance." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION Standard 3-1.1 (3d ed. 1993) [hereinafter ABA CRIMINAL JUSTICE STANDARDS].

132. Standard 3-1.3(a) states: "A prosecutor should avoid a conflict of interest with respect to his or her official duties." *Id.*

133. *Id.* at Standard 3-1.3(f).

134. Underwood, *supra* note 15, at 37–38.

135. *Id.* at 38.

The more expansive bans on a part-time county prosecutor representing criminal defendants in federal court or in another state's courts "are usually justified in terms of 'appearances,' or on the ground that a defense role might interfere with the ability or willingness of other police forces and prosecutors to cooperate with the switch-hitter in other cases."¹³⁶

The National District Attorneys Association has taken a similar hardline stance by issuing a standard expressly prohibiting a prosecutor from simultaneously being a defense attorney. In the National Prosecution Standards, the organization states that in jurisdictions that do not prohibit private practice by a prosecutor: "The prosecutor in his private practice should not represent clients in any criminal or quasi-criminal related matters, regardless of the jurisdiction where the case is pending."¹³⁷ The National Prosecution Standards also prohibit indicating one's status as a prosecutor in advertising or any communications about one's private practice,¹³⁸ which would also preclude a part-time prosecutor from listing his or her status on a firm website to attract business, as some do in St. Louis County.¹³⁹ The rationale for such strong prohibitions appear grounded in the view that a prosecutor, even a part-time prosecutor, is not an advocate like other lawyers and should put the best interests of society first at all times.¹⁴⁰

Turning back to the hypothetical of a prosecutor for City A switching roles to become the defense lawyer for a defendant arrested of DUI in adjacent City B, let us analyze the prosecutor's obligations to City A and the risks of switching sides to be a defense lawyer in City B. The prosecutor is obligated to represent the interests of City A, which includes the residents of City A. This obligation includes promoting public safety, by enforcing the laws and seeking sanctions

136. *Id.* at 40–41.

137. NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS Standard 1-3.2(a) (3d ed. 2009) [hereinafter NATIONAL PROSECUTION STANDARDS].

138. *Id.* at Standard 1-3.2(c) ("The prosecutor should not indicate his or her status as a prosecutor on any letterhead, announcement advertising, or other communication involved in the private practice. . . .").

139. *See supra* notes 10–13 and accompanying text.

140. Commentary to the prosecutor's responsibilities emphasize the prosecutor's overarching obligation to the best interests of society. NATIONAL PROSECUTION STANDARDS, *supra* note 137, at Standard 1 cmt.

against those who drive dangerously. Does switching sides to become a defense lawyer in City B undermine this obligation? In the role of a defense lawyer, the lawyer's obligation is to seek the defendant's objectives, which include keeping the defendant's ability to drive. Even if the defendant is a repeat offender, as a defense attorney the lawyer who is also a prosecutor is obligated to seek dismissal or reduction of the charges if there is a legal basis to do so.¹⁴¹ In such a situation, some of the citizens in City A would likely believe that their prosecutor is not protecting them from drunken drivers.

This is exactly what a resident of St. Ann, Missouri, said when the prosecutor for St. Ann became the defense lawyer for another St. Ann resident who was arrested in the neighboring city of St. John, Missouri.¹⁴² After switching roles to become a defense lawyer, the part-time prosecutor filed a motion to stay the suspension of his client's license, and obtained a series of continuances for nearly a year delaying any possible punishment for his client and enabling his client to continue to drive with a valid license.¹⁴³ The resident said: "It makes me feel unsafe. And I don't think it's a good thing for my community to have. I know they're [drunken drivers] out there, but I just don't understand why the prosecuting attorney would represent him."¹⁴⁴

Under the ethics rules and other authorities, such as the *Restatement* and the Criminal Justice Standards, a part-time municipal prosecutor should not switch sides to become a defense lawyer when there is significant and substantial risk of impairment to the prosecutor's ability to represent the municipality's interests, and there is no good reason for taking this risk. In the hypothetical and

141. This is exactly the position that the prosecutor in Chesterfield, Missouri, took in explaining that he saw nothing wrong with the municipal judge in Chesterfield serving as the defense lawyer for a defendant charged with "Driving Under the Influence" in adjacent Town and Country, Missouri. A news report stated that he said "'it's natural for an attorney to take on roles that seem contrary. He also represents people accused of driving drunk. Each day and each court appearance presents a different case with a different set of facts and relevant law,' he said. 'When I am hired by a client, my job is to listen to what the issue is, give advice and recommendations, and then follow their instructions.'" Kohler & Deere, *supra* note 92.

142. *Id.*

143. *Id.*

144. *Id.* The complaining resident "is a member of Mothers Against Drunk Driving who says her daughter was injured by a drunken driver in 1998." *Id.*

real life situations explained above, the risk of impairment to the prosecutor's ability to represent a municipality's interests is substantial. By switching from prosecutor to defense lawyer for a person charged with a DUI, the prosecutor is obligated as a defense lawyer to help that person keep his license and continue to drive. At the same time, the lawyer prosecuting the driver is obligated to promote public safety by trying to suspend the person's license and keep him off of the road for some period of time. Although this type of conflict in switching roles is not expressly prohibited by Missouri Rules of Professional Conduct, there seems to be no justification for a prosecutor to engage in such activity.

Here the only justification for a prosecutor to switch roles to be a defense lawyer in other municipal courts in the same county appears to be a prosecutor's self-interest in having no restrictions on his or her practice that might limit potential income from practicing in other municipal courts as a defense attorney. Another arguable justification may be that if there was such a restriction there could be a dearth of qualified lawyers willing to forego potentially lucrative municipal defense practice in the same county by becoming part-time prosecutors. But, that has not been shown in other jurisdictions.

For example, more than fifteen years ago the New Jersey Supreme Court enacted a court rule that expressly prohibits a lawyer from simultaneously serving as a prosecutor and defense counsel in the same county. In 2000, the New Jersey Supreme Court ruled on a claim of ineffective assistance of counsel lodged against a defense lawyer who had represented a defendant in the Superior Court for Middlesex County, while he was a part-time municipal prosecutor in New Brunswick, also located in Middlesex County.¹⁴⁵ The defendant argued that he did not know of the lawyer's employment as a prosecutor and that his lawyer's role as a prosecutor created a conflict that deprived the defendant of effective assistance of counsel.¹⁴⁶ The court determined that because there was no rule or law prohibiting the defendant's lawyer from simultaneously serving as a municipal prosecutor and representing the defendant in the Superior Court of the same county there was no actual conflict or prejudice to the

145. *State v. Clark*, 744 A.2d 109, 110 (N.J. 2000).

146. *Id.*

defendant.¹⁴⁷ The case, though, prompted the court to consider the issue, and it determined that a court rule that prohibited a municipal prosecutor from representing a defendant in the municipal court in which the lawyer was a prosecutor should be amended “to preclude a municipal prosecutor from simultaneously serving as a defense counsel in the same county in which he or she serves as municipal prosecutor.”¹⁴⁸ The court then proceeded to amend New Jersey Court Rule 1:15-3(b) to state, in pertinent part:

A municipal prosecutor shall not represent a defendant in any other municipal court in that county or in a criminal proceeding in the Superior Court in that county but may represent a defendant in a municipal court or in a criminal proceeding in the Superior Court in a county other than the one in which he or she serves as a municipal prosecutor.¹⁴⁹

In stating why such a rule was required, the court explained: “The dual role strikes at the integrity of the criminal justice system because it epitomizes how a prosecutor’s impartiality can be undermined.”¹⁵⁰ The court determined that confining the prohibition of dual roles to the same county in which the municipal prosecutor serves was sufficient and that a statewide ban was not necessary.¹⁵¹

In reaching its decision to amend the rule, the court also acknowledged that it may lead to resignations by some municipal prosecutors, but the policy reasons for such a rule far outweighed that consideration.¹⁵² Predictions of mass resignations proved to be unfounded.¹⁵³ While some did resign, most municipal prosecutors

147. *Id.* at 110–11.

148. *Id.* at 112.

149. *Id.*

150. *Id.* at 111–12. The Court reasoned that without such a rule a municipal prosecutor might be in the position of relying on a police officer one day and the next day be in the position of cross-examining the same officer or his or her partner in Superior Court. *Id.* at 111 (“Dual representation in the same county therefore presents a significant possibility of conflict that could impair a defendant’s right to a fair trial, including effective assistance of counsel, while at the same time creating prosecutorial partiality.”).

151. *Id.* at 112.

152. *Id.*

153. Mark Hansen, *Weathering the Fallout: N.J. Prosecutors Adjust to Court Decision Barring Defense Work*, 87 A.B.A. J. 24 (2001).

continued to hold onto their positions.¹⁵⁴ As one prosecutor remarked, “[t]here doesn’t seem to be any shortage of people willing to do the job.”¹⁵⁵

B. Solution

As the present situation in Missouri—and especially in St. Louis County—demonstrates, municipal prosecutors do not always appreciate the potential conflict of interest presented when also serving as defense lawyers within the same county. While current ethics rules provide the basis for a prosecutor in such a situation to decline to represent potential clients in other municipal courts within the same county, this does not appear to be the norm. Instead, some lawyers promote their role as municipal prosecutors on their websites to help generate business as defense counsel in other municipal courts in the same county.¹⁵⁶ Municipal prosecutors need more guidance on this matter, and there are at least two possible approaches for the Supreme Court of Missouri to provide that guidance: a change to the ethics rules or a change to the court rules for municipal courts.

One possible approach would be to add a new section to Missouri Rules of Professional Conduct Rule 4-3.8 prohibiting a municipal prosecutor from representing a defendant in any other municipal court in the same county in which he or she is a prosecutor. Or, language addressing this conflict could be added to the comments to Rule 4-1.7. Comment [8] to Rule 4-1.7, for example, addresses conflicts where there is a significant risk that the lawyer’s ability to represent a client will be materially limited as a result of the lawyer’s

154. *Id.*

155. *Id.* (quoting John Dangler, immediate-past president of the County Prosecutors Association of New Jersey).

156. *See supra* notes 9–13 and accompanying text. In most states that have part-time prosecutors, a municipal prosecutor may be a defense counsel outside of the city in which he or she is a prosecutor provided that the case does not involve the police or violation of ordinances of the prosecutor’s city. Underwood, *supra* note 15, at 41–42. Missouri had advisory ethics to this effect. MO. BAR INFORMAL OP. 20000200 (2000) (stating that a part-time municipal prosecutor may defend in other municipalities provide no law enforcement officers from the municipality where the lawyer is a prosecutor are involved).

other responsibilities or interests.¹⁵⁷ An additional sentence could be added to the end of this comment to state: “A municipal prosecutor shall not represent a defendant in any other municipal court in the same county in which he or she is a prosecutor.”

Another approach, which I believe is preferable to changing the ethics rules, is for the Supreme Court of Missouri to exercise its power under the Missouri State Constitution to create a new court rule to address this matter.¹⁵⁸ Rule 37 of Missouri Supreme Court Rules and Court Operating Rules concerns statutory and ordinance violations and violation bureaus, which include municipal courts.¹⁵⁹ Rule 37.01 states: “Rule 37 governs the procedure in all courts of this state having original jurisdiction of ordinance violations and the disposition of any such violation in a violation bureau.”¹⁶⁰ At present, Rule 37.12 is reserved, which means that section of Rule 37 is

157. The comment states:

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

MO. RULES OF PROF. CONDUCT R. 4-1.7, cmt. [8] (2007).

158. The Missouri Constitution states:

The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

MO. CONST. art. V, § 5.

159. MO. SUP. CT. R. 37 (2004), <http://www.courts.mo.gov/page.jsp?id=831>.

160. MO. SUP. CT. R. 37.01 (2004), <http://www.courts.mo.gov/courts/ClerkHandbooks/P2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/2821b2ba9f82ec4386256be0070d8de?OpenDocument>.

available for possible future rule adoption. I recommend that the Supreme Court of Missouri adopt the following Rule 37.12: “A municipal prosecutor shall not represent a defendant in any other municipal court in the same county in which he or she is a prosecutor.”

One advantage of a court rule is that it would specifically address lawyers practicing law in municipal courts. The number of lawyers serving as municipal prosecutors in Missouri is relatively small compared to all of the lawyers licensed to practice law in Missouri, and a court rule change targeted at municipal court practice appears to be the better solution to this problem than amending the ethics rules. This is also consistent with how other state high courts, such as New Jersey, have addressed this issue. At the same time that the Supreme Court of Missouri should consider such a rule, it could also consider whether it would be appropriate to prohibit a municipal prosecutor not only from representing a defendant in a municipal court but also in the associate or circuit court in the same a county in which he or she serves as a municipal prosecutor, as the New Jersey Supreme Court rule did.

V. CONCLUSION

The current ethics rules applicable to part-time judges and prosecutors in Missouri and some other states lack specific prohibitions on lawyers simultaneously serving as judges, prosecutors, and defense lawyers in municipal courts in the same county. In the absence of express language prohibiting the practice, several lawyers have adopted these multiple roles in St. Louis County municipal court system, which has been described as “the ultimate good old boys club” where “[f]avors are traded behind the scenes between lawyers who frequently appear before one another.”¹⁶¹ The longer such a system exists, the greater the erosion of public confidence in the justice system will be. The appropriate body to address these issues is the Supreme Court of Missouri, which has the authority and responsibility to regulate the conduct of judges and

161. See Mann et al., *supra* note 3.

lawyers.¹⁶² The appropriate person to monitor municipal judges is the presiding judge of the circuit who has “general administrative authority over the judges and court personnel of all divisions of the circuit court hearing and determining ordinance violations within the circuit.”¹⁶³

This Article sets forth reasonable recommendations that would prevent a part-time municipal judge from serving as a prosecutor or defense lawyer in other municipal courts in the same county,¹⁶⁴ and would prevent a part-time municipal prosecutor from representing a defendant in any other municipal court in the same county in which he or she is a prosecutor.¹⁶⁵ These are straightforward and easy to adopt measures. These measures are calculated to help municipal judges avoid impropriety and the appearance of impropriety, as well as help municipal judges and prosecutors avoid potential and actual conflicts of interest. Most of all, these measures would help to build public confidence that all courts, including municipal courts, are focused on doing justice. As Justice Frankfurter stated, “justice must satisfy the appearance of justice.”¹⁶⁶ If the Supreme Court of Missouri acts to set higher standards of ethics among lawyers in municipal courts, the court will take a major step toward satisfying the appearance of justice and a major step forward toward justice itself.

162. See *supra* note 18 and accompanying text.

163. See MO. SUP. CT. R. 37.04 (2004), <http://www.courts.mo.gov/courts/ClerkHandbooks/P2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/c5e2c9785009eaff86256ca6005212d1?OpenDocument>.

164. See *supra* Part III.

165. See *supra* Part IV.

166. *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13 (1954).