

RECUSAL OF PROSECUTOR

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Contents

I.	Introduction.	1
II.	Impartiality Not Required.	1
III.	Constitutional Officers.	1
	A. Constitutional Duties.	1
	B. Statutory Duties.	2
	C. Assistant District Attorneys.	2
	D. Noninterference.	2
IV.	Actual Conflict of Interest.	2
	A. Exclusive Grounds.	2
	B. Procedure.	2
	C. Insufficient Grounds.	3
V.	Narrowly Tailored.	3
	A. Principles.	3
	B. Examples.	4

- I. Introduction.** “[T]he primary distinction between recusal and disqualification is the self-imposing nature associated with recusals compared with the directive nature associated with disqualifications.” [State v. Smith](#), 258 N.C. App. 682, 685-86 (2018). Strictly speaking, a defendant seeking a court order to preclude a prosecutor from participating in a case is seeking disqualification, not recusal. See [State v. Perry](#), 262 N.C. App. 132, 136 (2018). This entry addresses the circumstances when a defendant may be entitled to such an order.
- II. Impartiality Not Required.** While due process entitles a person to an impartial and disinterested tribunal, the same rigid requirements are not applicable to prosecutors. Indeed, prosecutors need not be entirely neutral and detached, but “they are necessarily permitted to be zealous in their enforcement of the law.” [Marshall v. Jerrico, Inc.](#), 446 U.S. 238, 248 (1980). “In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State’s interest in the matter at hand.” [State v. Britt](#), 291 N.C. 528, 542 (1977) (quoting [State v. Westbrook](#), 279 N.C. 18, 37 (1971)).
- III. Constitutional Officers.** “The several District Attorneys of the State are independent constitutional officers, elected in their districts by the qualified voters thereof, and their special duties are prescribed by the Constitution of North Carolina and by statutes.” [State v. Camacho](#), 329 N.C. 589, 593 (1991); cf. [id.](#) at 595 (constitutional officers . . . whose duties and responsibilities are in large part constitutionally and statutorily mandated.”). The office of the district attorney is created in Article IV of the state constitution, the Judicial Article, rather than in Article III, the Executive article. District Attorneys are officers of the court and in certain situations may be considered judicial or quasi-judicial officers. [Simeon v. Hardin](#), 339 N.C. 358, 375 (1994).
- A. Constitutional Duties.** “The District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his

district.” [N.C. Const.](#) art. IV, § 18. “The clear mandate of that provision is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State.” [State v. Camacho](#), 329 N.C. 589, 593 (1991); *accord* [State v. Ward](#), 354 N.C. 231, 243 (2001); [State v. Wilson](#), 139 N.C. App. 544, 550 (2000). District Attorney are “constitutional officers expressly vested by our Constitution with the sole and exclusive responsibility for the prosecution on behalf of the State of all criminal actions in the superior courts.” [In re Spivey](#), 345 N.C. 404, 409 (1997); *cf.* [State v. Roseborough](#), 344 N.C. 121, 132 (1996).

B. Statutory Duties. “The district attorney shall . . . prosecute . . . in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of the district attorney’s prosecutorial district . . .” G.S. [7A-61](#). Thus, District Attorneys “are vested by statute with responsibility for the prosecution of all criminal actions and infractions in the district courts.” [In re Spivey](#), 345 N.C. 404, 409–10 (1997).

C. Assistant District Attorneys. The same principles apply to Assistant District Attorneys. [State v. Giese](#), 386 N.C. 127, 131 n.2 (2024). As lawful designees of a District Attorney’s power and responsibility, ADAs enjoy the authority of the DA’s office and the constitutional and statutory duties attached to it. [Id.](#)

D. Noninterference. The judiciary must make every possible effort to avoid unnecessarily interfering with the District Attorneys in the performance of their constitutional and statutory duties. [State v. Camacho](#), 329 N.C. 589, 595 (1991); *accord* [State v. Giese](#), 386 N.C. 127, 134 (2024); [State v. Diaz-Tomas](#), 382 N.C. 640, 650 (2022); [State v. Smith](#), 258 N.C. App. 682, 688 (2018).

IV. Actual Conflict of Interest.

A. Exclusive Grounds. The “key precedent” on disqualification is [State v. Camacho](#), 329 N.C. 589 (1991). [State v. Giese](#), 386 N.C. 127, 133 (2024). Under [Camacho](#), “a prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists.” [State v. Camacho](#), 329 N.C. 589, 601 (1991). An actual conflict of interest exists when a prosecutor (1) has previously represented the defendant (2) with regard to the charges to be prosecuted and, (3) as a result of the former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant’s detriment at trial. [Id.](#)

A prosecutor may be disqualified “only when the trial court has found the existence of a conflict of interests as defined by [[Camacho](#)]*—*a prior representation of [the d]efendant by the prosecutor in the matter sought to be prosecuted, in which that prosecutor has obtained confidential information detrimental to [the d]efendant.” [State v. Smith](#), 258 N.C. App. 682, 688–89 (2018). “Without that essential ingredient . . . a court’s disqualification power lies dormant.” [State v. Giese](#), 386 N.C. 127, 134 (2024).

B. Procedure. There is no *per se* disqualification rule based on a prosecutor’s prior representation of the defendant; rather the determination is made on a case-by-case basis. [State v. Reid](#), 104 N.C. App. 334, 346 (1991), *rev’d on other grounds*, 334 N.C. 551 (1993). When disqualification is sought, the trial court must make inquiry as to whether the defendant’s former counsel participated in the prosecution of the case

or divulged confidential information to other prosecutors. *State v. Camacho*, 329 N.C. 589, 601 (1991) (quoting *Young v. State*, 297 Md. 286, 297 (1983)).

When the defendant failed to show that the prosecutor previously represented him *on the charges to be prosecuted*, “further inquiry or direction by the trial court was unnecessary.” *State v. Perry*, 262 N.C. App. 132, 137 (2018).

Even if the trial court finds an actual conflict of interest, whether it is a disqualifying conflict is “a matter within its sound discretion.” *State v. Perry*, 262 N.C. App. 132, 138 (2018).

C. Insufficient Grounds.

1. Principles. The mere appearance of impropriety cannot justify disqualification. *State v. Camacho*, 329 N.C. 589, 599 (1991). An actual conflict requires more than a possibility that an impression of a conflict of interest might arise at some future time. *State v. Giese*, 386 N.C. 127, 134 (2024).

“A conflict of interests sufficient to disqualify a prosecutor cannot arise merely from the unilateral actions of a criminal defendant.” *State v. Smith*, 258 N.C. App. 682, 689 (2018). Hence, no disqualifying conflict of interest was created by the defendant filing a civil lawsuit against the district attorney. *Id.*

2. Examples.

- When the alleged victim of cyberstalking and harassing phone calls was the county manager who oversaw the county’s facilities and public services, including the courthouse where the District Attorney works, no actual conflict of interest was created by the “professional overlap” between county managers and DAs. *State v. Giese*, 386 N.C. 127, 135 (2024).
- When two attorneys, initially assigned to be co-counsel for the defendant, resigned prior to obtaining any confidential information and joined the District Attorney’s Office but did not discuss the case with other prosecutors, the trial court did not err by denying the defendant’s motion to recuse the district attorney’s office. *State v. Anthony*, 354 N.C. 372, 394 (2001).
- When an attorney, who worked as a public defender during the defendant’s first trial but had minimal involvement with the case, later joined the District Attorney’s Office, but had no involvement with the prosecution, the trial court erred by ordering the entire District Attorney’s Office to withdraw from prosecuting the case. *State v. Camacho*, 329 N.C. 589, 602 (1991).
- When an attorney, who had previously represented the defendant on one of the three felony convictions underlying his habitual felon indictment, had not previously represented the defendant in the substantive charges to be prosecuted, the trial court did not err by denying the defendant’s motion to disqualify the prosecutor or the office. *State v. Perry*, 262 N.C. App. 132, 137 (2018).

V. Narrowly Tailored.

A. Principles. “[A]ny order tending to infringe upon the constitutional powers and duties of an elected District Attorney must be drawn as narrowly as possible.” *State v. Camacho*, 329 N.C. 589, 595 (1991). Even if an individual prosecutor has a conflict, an order directing that the entire District Attorney’s Office have no participation in the case would be “highly suspect.” *Id.* Rather, the trial court must inquire as to whether the defendant’s former counsel participated in the prosecution of the case or divulged any confidential information to other prosecutors. *Id.* at 601.

If the trial court finds an actual conflict of interest, “the trial court may disqualify the prosecutor having the conflict from participating in the prosecution of a

defendant's case and order that prosecutor not to reveal information which might be harmful to the defendant." [State v. Camacho](#), 329 N.C. 589, 602 (1991). Still, "any order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information." *Id.* at 601; accord [State v. Giese](#), 386 N.C. 127, 134 (2024) ("reaching only those prosecutors with an actual conflict").

B. Examples.

- An order that disqualified the entire district attorney's office based on the defendant's filing of a civil lawsuit against the district attorney was not narrowly tailored to address any possible conflicts of interest. [State v. Smith](#), 258 N.C. App. 682, 690 (2018).
- An order that disqualified the entire prosecutorial district based on the professional overlap between the county manager and the DA's Office was unnecessarily all-encompassing and incongruent with the narrow-tailoring requirement. [State v. Giese](#), 386 N.C. 127, 136 (2024).
- Even if the trial court found an actual conflict of interest arose from a prosecutor's previous representation of the defendant on one of the three felony convictions underlying his habitual felon indictment, disqualifying the entire district attorney's office would have been impermissibly excessive. [State v. Perry](#), 262 N.C. App. 132, 138 (2018).

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