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**E-86-17 Disqualification of prosecutor when sued  
by defendant**

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**Facts**

A district attorney prosecutes an individual on several misdemeanor offenses. After several hearings, but prior to trial, the defendant brings a federal lawsuit against the prosecutor related to the misdemeanor proceedings.

**Question**

Is it necessary for the prosecutor to seek or recommend appointment of a special prosecutor to eliminate a possible appeal of sentence based on allegations of prosecutorial vindictiveness if the defendant is convicted?

**Opinion**

No. See, e.g., *Chessman v. Teets*, 239 F.2d 205 (CA 9 1957). First, we are prepared to assume that the prosecutor, forewarned of the possibility of such an appeal, would exercise due care in preparing to sustain the legitimacy of any sentencing recommendation. See, e.g., *U.S. v. Goodwin*, 457 U.S. 368 (1982) and *U.S. v. Andrews*, 633 F.2d 449 (CA 6 1980).

Secondly, the State Bar Committee on Professional Ethics is concerned that withdrawal or disqualification at this stage of a proceeding would be premature and unwarranted based as they would be on speculation regarding future prosecutorial actions. See, e.g., SCR 20.35(1)(b), pertaining to withdrawal only for specific reasons; *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (CA 7 1982), regarding abuse of disqualification motions; and *Thompson v. State*, 61 Wis. 2d 325, 212 N.W.2d 109 (1973), regarding abuse of prosecutorial discretion.