IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	DIVISION II
	)	
vs.	)	
	)	NO(s). 298396
FLOYD RODNEY BURNS,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION TO DISQUALIFY HAMILTON COUNTY DISTRICT ATTORNEY GENERAL'S OFFICE

This cause came before the Court upon motion by the Defendant, Mr. Burns, to disqualify from the prosecution of this case the Office of the District Attorney General for the Eleventh Judicial District generally, and Neal Pinkston, the District Attorney General, more specifically. Mr. Burns generally asserts three grounds as supporting disqualification in this case: (1) that General Pinkston has a conflict of interest in the prosecution of this case given that Mr. Burns filed a civil claim personally against General Pinkston in the Tennessee Claims Commission ("**Civil Claim**"); (2) that General Pinkston will be called as a witness in the trial of this case;[1] and (3) that extrajudicial statements made by General Pinkston, or his office, violate Tennessee Supreme Court Rule 8, RPC 3.6 and 3.8(f), and that, as such, disqualification should follow as an appropriate remedy.

The Court held an initial hearing on this motion on August 23, 2016. After the conclusion of the hearing on the motion, the Court respectfully denied the motion to disqualify as

[1] *See* Tenn. Sup. Ct. R. 8, RPC 3.7.

to the second and third grounds argued.[2] However, largely because these issues are not frequently discussed by Tennessee courts, the Court took the matter under advisement to more fully consider disqualification under the first ground alleged. In so doing, the Court offered the opportunity for the parties to submit any additional proof as to this issue, and the State requested until August 26, 2016 in which to offer an additional affidavit in support.

The case was then reset for disposition on September 20, 2016, though this date was subsequently continued due to a trial proceeding on that day. Following the hearing, the Court received additional proof from the parties by way of affidavits and supplemental filings, all of which has been reviewed and considered by the Court.

The Court commends counsel for their respective advocacy in this matter. During the hearing of this matter, all counsel were well prepared, and they represented their respective interests well. However, upon consideration of the pleadings filed by the parties, the evidence submitted in open court and following the hearing of this matter, the arguments of counsel, and the record as a whole, the Court hereby respectfully denies Mr. Burns's motion to disqualify.

FACTUAL BACKGROUND

As relevant to the pending motion, this cases arises out of testimony that Mr. Burns was alleged to have given during a hearing in the Hamilton County Juvenile Court on February 15, 2016. Mr. Burns is a detective with the Gatlinburg Police Department, and in December 2015, he was involved in the investigation of claims of rape involving the Ooltewah High School basketball team while that team was participating in a tournament in Gatlinburg.

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[2] This Court denied the motion to disqualify based upon RPC 3.7 without prejudice, and an agreed formal order to this effect was entered on October 5, 2016. Should the case develop in ways where material and disputed testimony may be required, the Court will re-examine this holding.

Although the claims involving the students have proceeded in the Sevier County Juvenile Court, the Juvenile Court here in Hamilton County conducted a hearing on February 15, 2016 to determine whether Ooltewah High School coaches and its athletic director failed to report actual or suspected child abuse pursuant to Tenn. Code Ann. § 37-1-403. During this hearing, Mr. Burns testified about his investigation of the underlying rape case.

Following this hearing in Hamilton County, General Pinkston publicly announced that he requested the Tennessee Bureau of Investigation to investigate Mr. Burns "for perjurious testimony related to statements he made during sworn testimony in Hamilton County Juvenile Court" on February 15, 2016. Thereafter, counsel for Mr. Burns issued a press release in which he alleged that General Pinkston's motive for requesting the investigation was political, and apparently in response to this press release, statements attributable to General Pinkston were quoted in the *Chattanooga Times – Free Press* on February 18, 2016 as follows:

> General Pinkston believes Detective Burns perjured himself in Hamilton County Juvenile Court on Monday, February 15. That's the only reason he asked the TBI to Investigate. He swore an oath to prosecute crimes, no matter who commits them.
>
> As for General Pinkston's life goals, he is a career prosecutor with no interest in leaving Chattanooga, Tennessee. Last fall he respectfully declined the Haslam Administration's attempts to appoint him to an open judgeship in Hamilton County.[3]

About a month later, Mr. Burns filed a Civil Claim against General Pinkston in the Tennessee Claims Commission alleging that, through these two statements, General Pinkston had defamed his character. The Division of Claims Administration declined to honor or to deny the Civil Claim within 90 days, and, consequently, the Civil Claim was automatically transferred

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[3] *See* Exhibit B to Motion to Disqualify, page 2.

to the administrative clerk of the Claims Commission pursuant to Tenn. Code Ann. § 9-8-402(c). The Civil Claim remains pending, and the proceedings are currently stayed by order of the Claims Commission.

In May 2016, the Tennessee Bureau of Investigation completed its investigation into the issues, and it presented the case to the Hamilton County Grand Jury. On May 18, 2016, the Grand Jury returned a true bill against Mr. Burns charging him with two counts of aggravated perjury in violation of Tenn. Code Ann. § 39-16-703.

As originally presented to this Court, the motion to disqualify alleged "that General Pinkston and his office should be disqualified from the prosecution of this case as he has brought these charges against the Defendant as retaliation for being named as an at[-]fault party in a civil claim involving the same subject matter."[4] However, during the argument on the motion in Court on August 23, 2016, Mr. Burns's counsel emphasized that the more germane issue is that, because General Pinkston is being sued civilly by Mr. Burns, General Pinkston has a conflict of interest in his participating in the criminal prosecution against Mr. Burns. As the written motion asserts:

> General Pinkston has a direct personal interest in bringing a criminal prosecution as an attempt to battle the civil claims filed against him. General Pinkston's prosecution of the Defendant can potentially give him, as district attorney, leverage over the Defendant as a civil claimant.[5]

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[4] *See* Motion to Disqualify, at 4, ¶ 15. The Court would note that no proof has been introduced by Mr. Burns that General Pinkston has pursued the prosecution in this case from any personal motive or to retaliate against Mr. Burns for the filing of the civil lawsuit or otherwise. Indeed, because this ground was not advanced at the August 23, 2016 hearing, the Court does not consider it further here. To the extent that an express ruling is needed on this ground, the Court respectfully rejects any contention that General Pinkston has initiated a prosecution in this case from any personal animus or "as retaliation" for being named in a Claim.

[5] *See id.* at 5.

Mr. Burns further argues that General Pinkston's alleged "personal interest" in the prosecution is contrasted with a prosecutor's general duty to exercise independent judgment, free of "compromising interests and loyalties."[6] Mr. Burns also alleges that General Pinkston's personal participation in this prosecution, as well as that of his office generally, constitutes an appearance of impropriety.

For his part, General Pinkston argues that the Civil Claim was merely an attempt to ensure that neither he nor his office would prosecute Mr. Burns. As evidence of this motive, General Pinkston asserts that, on two occasions, offers have been made to dismiss the Civil Claim in exchange for a dismissal of the criminal prosecution. Following the hearing on this motion, General Pinkston offered the Affidavit of Executive Assistant District Attorney Lance Pope, who attested that such a conversation indeed occurred.[7] General Pinkston also asserts that Mr. Burns's motive is evidenced by his not bringing similar suits against others who also spoke out following the February 2016 hearing in Juvenile Court. According to General Pinkston, these actions show clearly that the Civil Claim is "merely a feeble criminal defense tactic" to avoid the prosecution in this case.

This issue before the Court—the potential disqualification of a district attorney based upon a pre-indictment civil claim—is not one that has been previously resolved, or even discussed, under Tennessee law. For example, the parties have not brought before the Court any

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[6] *See State v. Culbreath*, 30 S.W.3d 309, 312 (Tenn. 2000).

[7] *See* Affidavit of Executive Assistant District Attorney Lance Pope, ¶ 11 (Aug. 26, 2016). This conversation was denied by Mr. Greer during the August 23, 2016 hearing, and he offered, without objection, two letters from him following up on this June meeting. In neither of these letters does Mr. Greer mention any "quid-pro-quo," or mutual dismissal, offer made by him. *See* Exhibits 1, 2.

In addition, Mr. Delius has offered his own affidavit on this issue. In this affidavit, Mr. Delius asserts that he is the sole counsel of record with respect to the Claim. He also attests that he neither directed nor authorized anyone to offer dismissal of the civil suit in exchange for dismissal of the indictment. *See* Affidavit of Bryan E. Delius, ¶¶ 4-5 (Aug. 26, 2016).

authorities addressing the issue, and this Court's preliminary research did not reveal any binding precedent. As such, the Court took this apparent issue of first impression under advisement in order to more fully consider the question. Accordingly, having considered the pleadings filed, the arguments made, and the authorities and evidence offered by the parties, the Court now issues this opinion.

LAW AND ANALYSIS

I. THE OFFICE OF THE DISTRICT ATTORNEY GENERAL

In Tennessee, the office of the District Attorney General is a constitutional office,[8] and the district attorney is constitutionally charged with the obligation "to prosecute criminal cases in his or her circuit or district."[9] The power vested in this office is vast and extensive,[10] and the district attorney "has the inherent duty under the law of Tennessee to investigate all infractions of the public peace and acts which are against the peace and dignity of the [s]tate."[11] Indeed, our Supreme Court has recognized that "'[s]o long as the prosecutor has probable cause to believe that the accused committed an offense, the decision whether to prosecute, and what charge to bring before a grand jury generally *rests entirely within the discretion* of the prosecution,'

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[8] *See* Tenn. Const. art. VI, § 5.

[9] *See Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999); *see also* Tenn. Code Ann. § 8-7-103(1) (providing that each District Attorney General shall prosecute "all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto").

[10] *See Pace v. State*, 566 S.W.2d 861, 867 (Tenn. 1978) (Henry, C.J., concurring) (noting that the district attorney "is answerable to no superior and has virtually unbridled discretion in determining whether to prosecute and for what offense. No court may interfere with his discretion to prosecute, and in the formulation of this decision he or she is answerable to no one.").

[11] *See State v. Elrod*, 721 S.W.2d 820, 822 (Tenn. Crim. App. 1986) (alteration in original).

limited only by certain constitutional constraints."[12] As if to emphasize the point, our Supreme Court has described the office of the District Attorney General as being, "[i]n a very real sense," "the most powerful office in Tennessee today."[13]

Of course, with the vast powers of this office come significant corresponding obligations. As has been noted often, the district attorney is not the representative "of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."[14] As such, although district attorneys "are necessarily permitted to be zealous in their enforcement of the law,"[15] they have "the inherent responsibility and duty to seek justice rather than to be just an advocate for the State's victory at any cost."[16] And, correspondingly, district attorneys must also ensure that charging decisions are "based upon the evidence, without discrimination or bias for or against any groups or individuals."[17]

To that end, courts have recognized that the existence of a conflict of interest could very well impair the district attorney's obligation of impartiality.[18] A "conflict of interest" may be

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[12] *See State v. Superior Oil, Inc.*, 875 S.W.2d 658, 660 (Tenn. 1994) (emphasis added; footnote omitted).

[13] *See Dearborne v. State*, 575 S.W.2d 259, 262 (Tenn. 1978).

[14] *See State v. Jordan*, 325 S.W.3d 1, 64 (Tenn. 2010) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)); *State v. White*, 114 S.W.3d 469, 477 (Tenn. 2003) (same). Of course, impartiality is this context is not the same as disinterest. Our Supreme Court has recognized that "[i]f a prosecutor is 'honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury—not the prosecutor.'" *See Wilson v. Wilson*, 984 S.W.2d 898, 904 (Tenn. 1998).

[15] *See State v. Thomas*, 158 S.W.3d 361, 410 (Tenn. 2005).

[16] *See State v. Superior Oil, Inc.*, 875 S.W.2d 658, 661 (Tenn. 1994); *see also* Tenn. R. Sup. Ct. 8, RPC 3.8, cmt. [1] ("A prosecutor has the responsibility of a minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost.); *Wilson*, 984 S.W.2d at 904 ("While prosecutors are expected to proceed with 'eagerness and vigor' and are permitted to 'strike hard blows,' they may not strike 'foul ones.').

[17] *See Culbreath*, 30 S.W.2d at 314.

[18] *See, e.g., id.*

said to occur when a party has competing interests, where each of which would be served by opposing results or where "regard for one duty tends to lead to [the] disregard of another."[19] Thus, a conflict of interest may arise when a person "is placed in the position of divided loyalties,"[20] or it may exist where pursuing personal interests would be contrary to duties owed to other persons or entities. Our Supreme Court has recently reaffirmed that "a conflict of interest can disqualify a prosecutor where circumstances exist which render the prosecutor incapable of 'exercis[ing] his or her independent professional judgment free of "compromising interests and loyalties.'"[21] In addition, an "appearance of a conflict of interest" may also require disqualification.[22]

II. THE PRESENCE OF AN ACTUAL CONFLICT OF INTEREST AS A BASIS FOR DISQUALIFICATION

In this case, Mr. Burns argues that General Pinkston has a "personal interest" in defending against the Civil Claim brought by Mr. Burns himself. He further argues General Pinkston's personal interests in defending himself against this Civil Claim conflicts with—or appears to conflict with—General Pinkston's official interests in remaining impartial in the bringing and prosecution of the charges against Mr. Burns. Although the nature of General Pinkston's "personal interests" alleged to conflict with his public obligations is only generally defined by the motion, the Court presumes the motion to allege that General Pinkston has

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19 *See State v. Tate*, 925 S.W.2d 548, 553 (Tenn. Crim. App. 1995) (alteration in original).

20 *See McCullough v. State*, 144 S.W.3d 382, 385 (Tenn. Crim. App. 2003).

21 *See Board of Prof'l Responsibility v. Reguli*, 489 S.W.3d 408, 420 (Tenn. 2015) (quoting *Culbreath*, 30 S.W.3d at 312; internal quotation marks omitted).

22 *See Reguli*, 489 S.W.3d at 420. As noted later in this opinion, the standard looking to an "appearance of a conflict" may be different from the former standard analyzing whether an "appearance of impropriety" exists.

personal financial interests in defending against the Civil Claim, along with personal and professional reputational interests as well.

A. Civil Lawsuits Involving Prosecutors or Against Prosecutors

The appellate courts in Tennessee have not had many opportunities to discuss whether, and to what extent, a defendant's bringing of a civil suit against his or her prosecutor constitutes a disqualifying conflict of interest. In a single unreported case, the Court of Criminal Appeals has recently held, in a decision authored by now-Chief Justice Bivens, that "a criminal defendant cannot create a conflict of interest (or an appearance of impropriety) requiring the disqualification of a prosecutor's office simply by filing a federal lawsuit against the office and its members."[23] Apart from *Teats*, however, this Court has not located other Tennessee authority directly addressing this issue.

Nevertheless, courts outside of Tennessee considering similar issues have recognized that, as a general principle, disqualification *could* be appropriate when a prosecutor has a conflicting personal interest in a civil case.[24] Such issues arise most often in the context of privately appointed prosecutors. For example, when a private prosecutor has a financial interest in seeing that the defendant is prosecuted—such that the prosecutor also represents the alleged victim as a plaintiff in a civil action—then disqualification of that prosecutor would likely be

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[23] *See State v. Teats*, No. M2012-01232-CCA-R3-CD, 2014 WL 98650, at *17 (Tenn. Crim. App. Jan. 10, 2014). This decision was later affirmed by the Supreme Court on other grounds, *see* 468 S.W.3d 495 (Tenn. 2015), though the Supreme Court did not discuss or review the prosecutorial disqualification issues.

[24] *See, e.g.*, *United States v. Heldt*, 668 F.2d 1238, 1276 (D.C. Cir. 1981) ("Given the need to promote the appearance of justice, a trial court on timely motion should disqualify a prosecutor from participating in a criminal action when he has a personal conflicting interest in a civil case.").

appropriate.[25] Similarly, where counsel for a party that is the beneficiary of a court order is appointed to serve as a prosecutor in a contempt action alleging a violation of that order, a disqualifying conflict may exist because of "the *potential* for private interest to influence the discharge of public duty."[26]

However, courts have also been generally hesitant to find the existence of a disqualifying conflict of interest when a defendant sues his or her prosecutor.[27] Under those circumstances, the filing of a civil claim could be abused as a litigation tactic. As one court noted the concern, "[i]t would indeed be an odd policy, and an invitation to frivolous litigation, for us to rule that a civil lawsuit automatically precluded criminal prosecution by creating a vicarious conflict of interest."[28] As other courts have recognized, allowing a prosecutor "to be disqualified merely upon the unilateral action of defendants, *e.g.*, filing lawsuits, would lead to absurd consequences."[29] Echoing this concern, a trial court in New York declined to hold that the filing

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[25] *See Commonwealth v. Eskridge*, 529 Pa. 387, 604 A.2d 700, 702 (1992) (finding a conflict where district attorney's law firm was representing car accident victims in personal injury suit against defendant).

[26] *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (emphasis in original).

[27] *See, e.g.*, *State v. Kadivar*, 460 So. 2d 391, 394 (Fla. Dist. Ct. App. 1984) (noting that the defendant's filing of a lawsuit against a prosecutor does not, *a priori*, create a conflict of interest, and concluding that the appearance-of-impropriety standard is not "designed as a shield that a defendant may turn into a sword for impeding the wheels of justice, or a rasp to wear them down so they will be ineffectual against him"); *Commonwealth v. Stafford*, 749 A.2d 489, 494-95 (Pa. Super. Ct. 2000) (rejecting disqualification because of civil allegations "against the district attorney for actions arising from the charges against the defendant," and finding that "the district attorney had no pecuniary or personal interest in seeing appellant prosecuted, and that appellant's conviction would not affect the pending civil suits or criminal complaint").

[28] *See Condon v. Wolfe*, 310 Fed. App'x 807, 824 (6th Cir. 2009).

[29] *See Kindred v. State*, 521 N.E.2d 320, 327 (Ind. 1988) (denying motion to disqualify arising from an alleged conflict of interest involving a pre-indictment lawsuit filed by the defendant against the prosecutor); *see also Soares v. Herrick*, 981 N.E.2d 260 (N.Y. Sup. Ct., App. Div. 2012) ("[P]ublic policy further supports our finding that respondent erred and exceeded his authority in disqualifying petitioner. Acquiescence to a policy by which a criminal

of a lawsuit against a prosecutor should automatically result in disqualification because such a policy would "paralyze" the administration of criminal justice:

> Public policy concerns clearly dictate that a defendant ought not be able to pre-emptively and peremptorily strike the investigating prosecutor and investigating state officials from his case merely by filing a lawsuit. Any other policy might paralyze the prosecution of criminal defendants as defendants file civil lawsuits seriatim against whatever office is assigned to prosecute their cases.[30]

Thus, although Tennessee courts have not fully explored this issue, it is clear that the mere filing of a civil lawsuit against a prosecutor does not *automatically* create a disqualifying conflict of interest for a prosecutor. Rather, this Court should look to see whether, and to what extent, the filing of a lawsuit may affect the *personal* interests of the prosecutor.[31]

B. Possible Personal Financial Interests of the Prosecutor

Although the motion to disqualify does not allege the possibility expressly, a possible personal interest of a prosecutor in defending a civil claim could be to avoid paying a civil judgment. In this case, Mr. Burns has sought compensation in the amount of $300,000 for

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defendant, through the simple expedient of commencing a civil lawsuit, may effect the removal of a duly elected District Attorney and his or her staff would establish a dangerous precedent that is wholly unwarranted under the circumstances presented here."); *Daker v. State*, 570 S.E.2d 704, 705 (Ga. Ct. App. 2002) ("We find no merit to Daker's contention that his filing of a lawsuit against the Cobb County District Attorney's Office somehow creates a conflict of interest that disqualifies that office from this case. The Supreme Court of Georgia has held that no error is committed "by denying the defendant's motion to disqualify the district attorney for conflict of interest where the only conflict of interest alleged [is] that the district attorney might be civilly liable to the defendant . . . ." (citations omitted)).

[30] *See People v. Kleiner*, 652 N.Y.S.2d 934, 939 (N.Y. Sup. Ct. 1996).

[31] *Cf. People ex rel. LoSavio v. Gentry*, 606 P.2d 57, 62 (Colo. 1980) (recognizing that in a prosecutorial disqualification case, the "allegations of interest must show concern in the outcome of the matter such that the district attorney will either reap some benefit or suffer some disadvantage; mere partiality will not suffice.").

injuries that he alleges have been suffered to his personal and professional reputation.[32] Presumably because of these possible financial consequences, the motion asserts that "General Pinkston has a direct personal interest in bringing a criminal prosecution as an attempt to battle the civil claims filed against him."[33]

However, it is important to the analysis of this case that Mr. Burns has brought his Civil Claim for defamation in the Tennessee Claims Commission.[34] Claims pursued in the Claims Commission are brought *exclusively* against the State of Tennessee itself,[35] and the claims are not brought personally against the state employee.[36] In other words, although the actions of a state employee may give rise to a claim, the state employee will have no personal or individual liability on that claim, and the payment of damages, if any, would be paid by the State through the Claims Award Fund.[37] Indeed, our Supreme Court has held that the very purpose and intent of the Claims Commission Act is "to protect state employees *from individual liability* for acts or

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32 *See* Motion to Disqualify, Exhibit 1, page 6.

33 *See* Motion to Disqualify, at page 5.

34 *See* Motion to Disqualify, Exhibit 1, page 1 (bringing Claim pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(R)).

35 *See* Tenn. Code Ann. § 9-8-307(a)(1); *see also Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000) ("Pursuant to its constitutional power to provide for suits against the state, the legislature created the Tennessee Claims Commission in 1984 to hear and adjudicate certain monetary claims against the State of Tennessee.").

36 Of course, this is not a new principle of Tennessee law. It is well-settled that suits against state employees, acting in their official capacities, are deemed to be suits against the State itself. *See Cox v. State*, 399 S.W.2d 776, 778 (Tenn. 1965) ("A suit against a state official in his official capacity is a 'suit against the state.'"); *see also Simmons v. Gath Baptist Church*, 109 S.W.3d 370, 374 (Tenn. Ct. App. 2003) ("Suits against state employees acting in their official capacities are deemed to be suits against the State itself," and also noting that the "District Attorney is entitled to a prosecutor's absolute immunity from damages arising from his initiation and pursuit of a prosecution and in presenting the State's case.").

37 *See* Tenn. Code Ann. § 9-8-109(c) ("Claim awards from the commission or the board of claims, as well as settlements, shall be paid *only* from funds appropriated or reserved for that purpose." (emphasis added)).

omissions that occur in the scope of their employment."[38] Simply stated, General Pinkston is not a named defendant in the Civil Claim, and he will not have any personal financial liability with respect to the Civil Claim even if Mr. Burns is ultimately successful in the Claims Commission.[39]

However, the filing of the defamation action in the Claims Commission also has other important consequences to this case as well. By affirmatively invoking the aid of the Claims Commission, Mr. Burns has actually *waived* any and all other claims that he may have had personally against General Pinkston in other fora,[40] including even as to possible federal claims.[41] Indeed, Mr. Burns cannot "undo" his election in this regard, because "once the claim has been filed [in the Claims Commission] and the waiver has been activated, it cannot be

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[38] *See Johnson v. LeBonheur Children's Med. Ctr.*, 74 S.W.3d 338, 343 (Tenn. 2002) (emphasis added). The Claims Commission statute further provides that "[s]tate officers and employees *are absolutely immune* from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain." *See* Tenn. Code Ann. § 9-8-307(h) (emphasis added). Mr. Burns has not alleged in his Claim that General Pinkston's actions were "willful, malicious, or criminal" or were "done for personal gain" so as to remove this immunity under the Claims Commission statute.

[39] The motion to disqualify seems to recognize this fact, as it notes that the Claim "alleges damages against the State of Tennessee based entirely on [General Pinkston's] conduct as district attorney." *See* Motion to Disqualify at 5.

[40] *See* Tenn. Code Ann. § 9-8-307(b) ("Claims against the state filed pursuant to subsection (a) *shall operate as a waiver* of any cause of action, based on the same act or omission, which the claimant has against any state officer or employee." (emphasis added)); *see also Haley v. Univ. of Tennessee*, 188 S.W.3d 518, 524 (Tenn. 2006) ("[T]he Claims Commission Act imposes a strict election of remedies requirement. The moment the plaintiff's claim is 'filed' with the Claims Commission, the plaintiff has waived all other causes of action against any state officer or employee based on the same act or omission.").

[41] *See Mullins v. Hall*, No. 10-0966, 2011 WL 2618557, at *6 (M.D. Tenn. July 1, 2011), *aff'd*, 470 Fed. App'x 476 (6th Cir. 2012) (dismissing plaintiff's suit under 42 U.S.C. § 1983 as being barred because plaintiff previously "filed a claim with the Claims Commission.").

undone."[42] Although this waiver may not apply if the statements were made outside of General Pinkston's scope of employment as a district attorney,[43] Mr. Burns does not advance such an argument in the Claims Commission.[44] As such, and at least at this point, General Pinkston is not subject to other claims by Mr. Burns arising out of these circumstances.

Consequently, as a result of Mr. Burns's Claims Commission filing, a few principles are clear:

- General Pinkston is not a named defendant or party in the Civil Claim;
- General Pinkston will not have any personal financial liability to Mr. Burns in the Claims Commission, even if Mr. Burns is successful in litigating the Civil Claim; and
- General Pinkston will not be subject to other claims brought by Mr. Burns in another forum outside of the Claims Commission.

As such, because of his personal immunity from the Civil Claim, General Pinkston does not have, or at least he does not appear to have, any personal financial interest in the outcome of the Civil Claim. Other courts have concluded that no conflict of interest can exist when, because of immunity, the prosecutor has no "personal interest" in the lawsuit that could interfere with the

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[42] *See Haley v. Univ. of Tennessee*, 188 S.W.3d 518, 524 (Tenn. 2006) (holding that even voluntary dismissal of a Claim does not affect the waiver of other claims). Importantly, the waiver attached upon the "filing" of the claim with the Division of Claims Administration, not at a point later in the process. *See Sumner v. Campbell Clinic PC*, No. W2015-00580-COA-R3-CV, 2016 WL 1213919, at *7 (Tenn. Ct. App. Mar. 29, 2016), *perm. app. denied*, Aug. 18, 2016. Thus, whatever waiver of other claims has occurred here, it occurred on March 15, 2016 when Mr. Burns filed his notice of claim in the Division of Claims Administration.

[43] *See* Tenn. Code Ann. § 9-8-307(b); *see also Estate of Drew v. U.T. Reg'l Med. Ctr. Hosp.*, 121 F.3d 707 (6th Cir. 1997).

[44] To the contrary, Mr. Burns appears to assert in the Claims Commission action that General Pinkston *was acting* within the scope of his employment at the time the statements were made. *See* Motion to Disqualify, Exhibit 1, page 1, and page 5, ¶ 34 (asserting basis of recovery as being pursuant to Tenn. Code Ann. § 9-8-307(a)(l)(R), which permits "[c]laims for libel and/or slander where a state employee is determined to be acting within the scope of employment.").

prosecutor's public duties.[45] The same is true here, and as such, the Court finds that no actual conflict of interest exists due to personal financial interests under these circumstances.

C. POSSIBLE REPUTATIONAL INTERESTS OF THE PROSECUTOR

Although the motion to disqualify does not allege the possibility expressly, another possible source of a personal conflict of interest could be that a prosecutor has a conflicting interest between upholding his or her personal and professional reputations and his or her interests in performing public duties. Indeed, a few other courts have recognized that "[t]he threat posed to a prosecutor's interests in his personal and professional reputation by a bona fide civil action alleging bad faith in the performance of official duties" may serve as a basis for disqualification.[46]

That said, this Court has located only one case in which disqualification was based upon a conflict developed because of a prosecutor's personal interest in his or her reputation. In *State v. Cox*,[47] the Louisiana Supreme Court was confronted with a case in which the accused was charged with "criminal defamation" for statements made about the judge and the prosecutor. Although the district attorney initially refused to recuse himself from the prosecution, he did so later in the proceedings. After the accused was convicted at trial, he appealed and argued in part that the prosecutor should have recused himself from the beginning.

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[45] *See Lux v. Commonwealth*, 484 S.E.2d 145, 150 (Va. Ct. App. 1997) (holding that because the prosecutor was entitled to immunity against a Section 1983 suit, "the Commonwealth's attorney had no personal interest in the lawsuit that might interfere" with the prosecutor's official decisions).

[46] *See United States v. Heldt*, 668 F.2d 1238, 1275-76 (D.C. Cir. 1981).

[47] *See State v. Cox*, 167 So. 2d 352, 357 (La. 1964).

The Louisiana Supreme Court agreed with the defendant. Also finding that the prosecutor should have recused himself earlier in the proceedings, the court made the following observations:

> A sincere and conscientious public official like District Attorney Pitcher would naturally be outraged by the alleged defamatory statements, as would any person having his good reputation. He would naturally feel that a conviction of the accused would be a public vindication of the wrong done him, and he would have a great personal interest in seeing that the accused was convicted. He appeared at certain stages of this prosecution as a prosecutor and appeared later as a prosecuting witness with a personal interest. The two roles are incompatible.[48]

Because of the prosecutor's "great personal interest" to his reputation in seeing that the accused was convicted, the court set aside the convictions and remanded the case for a new trial.

Similar circumstances plainly do not exist in this case. The alleged grounds for disqualification in this case do not involve any alleged injury to General Pinkston's reputation, whether personally or professionally. Outside of conclusory allegations that General Pinkston may have political interests in pursuing this prosecution, no proof has been introduced to show that General Pinkston has any personal interest in convicting Mr. Burns. As such, if there are possible consequences to General Pinkston's reputation based upon his having to defend against the allegations made in the Civil Claim, the Court believes that this ground is too speculative a basis upon which to order disqualification.

In his pleadings before this Court, General Pinkston has denied the allegations asserted in the Civil Claim, and the Claims Commission has not yet made any finding that the Civil Claim

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[48] *See id.* at 357.

has merit.[49] At least at this point in the litigation, therefore, the record is not developed sufficiently such that the Court could make a finding, beyond speculation, that General Pinkston has in any way been forced to choose between maintaining his professional reputation through obtaining a conviction and conscientiously performing his public duties. As such, the Court does not find, under these circumstances, that an actual conflict of interest exists due to any personal reputational interests.

D. USE OF THE PROSECUTION AS "LEVERAGE" AGAINST THE CIVIL CLAIM

Finally, Mr. Burns asserts that a conflict of interest exists because General Pinkston can improperly use the criminal prosecution as "leverage" over the Civil Claim.[50] It is unclear from the motion whether this ground is advanced independently of the possibility that General Pinkston would have personal financial or reputational interests in defending against the Civil Claim. However, giving the benefit of the doubt to Mr. Burns and assuming that this ground is

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[49] In his motion, Mr. Burns implies that the Claims Commission has found merit to his Claim, and he asserts that because "[t]he Division of Claims Administration chose not to use its statutory discretion to deny the civil claim," this action has "directly inculpate[d] General Pinkston for his behavior." *See* Motion to Disqualify, at 5.

Respectfully, this assertion may not fully appreciate the statutory process involving the Division's investigation of filed claims. The Division has an obligation to "investigate every claim and shall make every effort to honor or deny each claim within ninety (90) days of receipt of notice." *See* Tenn. Code Ann. § 9-8-402(c). However, "[i]f the division fails to honor or deny the claim within the ninety-day settlement period, the division shall *automatically transfer* the claim to the claims commission." *See id.* (emphasis added). The State does not suffer a penalty if the Division fails to resolve a claim within ninety days, and the State may still "assert any or all available defenses" after the claim's transfer. *See* Tenn. Code Ann. § 9-8-403(f).

Thus, while it is true that the Division did not deny this Claim before transferring it—the Division did not honor the Claim, either, though—the Division's action may simply mean that it was unable to investigate the Claim within the ninety-day period. As such, the Court hesitates to interpret the Division's transfer of the Claim as an indication of the Division's own view of the merits of the Claim or that the Division has otherwise "inculpated" General Pinkston.

[50] *See* Motion to Disqualify, at 5.

an independent argument for disqualification, the Court does not believe that this possibility—if it exists at all—weighs in favor of disqualification.

No evidence has shown that General Pinkston has attempted to use the criminal prosecution to favorably resolve the Civil Claim. Indeed, it is difficult to see how this would be the case. A successful prosecution of the aggravated perjury case, for example, will not result in the dismissal of Mr. Burns's defamation action on its merits.[51] Given the different elements for proving the offense of aggravated perjury and the tort of defamation, as well as the differing burdens of proof applying to each, it appears unlikely that a successful prosecution would have any foreseeable effect on the defamation action.[52] Moreover, to the extent that the civil proceedings could be used to gather evidence in aid of the prosecution, all proceedings in the Claims Commission have been stayed. Finally, there has been no evidence at all that General Pinkston has offered to seek dismissal of the indictment in return for a favorable resolution of the

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[51] One could, perhaps, suppose that a criminal conviction finding Mr. Burns guilty of aggravated perjury could constitute or establish a type of "truth" defense in a defamation action. *See Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978) (recognizing that "truth" is an absolute defense to a defamation claim "when the defamatory meaning conveyed by the words is true."). However, this possibility, which is not argued by the parties, is admittedly more academic than practical. It seems peculiar that General Pinkston would seek to prove guilt beyond a reasonable doubt merely to establish the "truth" of his previous statements, when, in a civil forum, he could seek to establish the same facts on a much lesser standard of proof. *See Ali v. Moore*, 984 S.W.2d 224, 230 n.7 (Tenn. Ct. App. 1998) ("The prosecution in Ali's criminal trial was faced with a higher burden of proving the truthfulness of the attempted bribery charges brought against Ali: guilt beyond a reasonable doubt. By contrast, in a civil [defamation] suit, Ali's culpability need only be shown by a preponderance of the evidence."). Thus, the Court does not find that General Pinkston has a personal interest in prosecuting Mr. Burns simply to establish a defense to the Civil Claim.

[52] To the contrary, the elements of each do not overlap at all. For example, a successful prosecution of the aggravated perjury case requires proof of *Mr. Burns*'s intention to deceive, but it does not involve proof of any intention on the part of General Pinkston. *See* Tenn. Code Ann. § 39-16-703(a)(1). Conversely, a successful defamation action would require proof of some level of fault on *General Pinkston*'s part, but it would not involve proof of any level of fault on the part of Mr. Burns. *See, e.g., Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999).

Civil Claim.[53] Consequently, the Court does not find that General Pinkston has attempted to "leverage" the criminal prosecution to achieve a favorable disposition of the Civil Claim.

Based upon the record and proof developed thus far, Mr. Burns has not demonstrated that General Pinkston has been placed in a position of divided loyalties. Mr. Burns has not shown that General Pinkston has made, or will likely make, "a choice between possible alternative courses of action" that are helpful to his personal interests but harmful to his pubic obligations.[54] Accordingly, Mr. Burns's motion seeking to disqualify General Pinkston from prosecution of this matter on the basis of an actual conflict of interest is, very respectfully, denied.

III. THE APPEARANCE-OF-IMPROPRIETY STANDARD AS AN INDEPENDENT BASIS FOR DISQUALIFICATION

Even in cases where no actual conflict of interest may be present, Mr. Burns argues that this Court must also consider whether General Pinkston's "conduct has created an appearance of impropriety," and, if so, order disqualification as a remedy.[55] For the reasons given below, the Court does not believe that the "appearance-of-impropriety" standard survived the 2002 enactment of the Rules of Professional Conduct. Even if the standard did survive, however, the filing of the Civil Claim is not a circumstance in which an ordinary knowledgeable citizen, fully

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[53] Of course, behind the scenes of this case is the suspicion that the Civil Claim was actually filed as part of an attempt to "leverage" the criminal prosecution. This subject was discussed at the hearing, and since that time, both sides have submitted conflicting proof as to whether persons affiliated with Mr. Burns have attempted to use the Claim as leverage to achieve a favorable resolution to the prosecution. However, because General Pinkston has no personal or financial conflict of interest, the Court does not believe that resolution of this disputed factual matter is necessary at this time.

[54] *See Tate*, 925 S.W.2d at 552 ("A test for determining a disqualifying conflict in that situation is whether the attorney "made a choice between possible alternative courses of action [that were] helpful to one client but harmful to the other.'" (alteration in original; citations omitted)).

[55] *See* Motion to Disqualify, at 4-5.

acquainted with the facts, would conclude that General Pinkston's participation in this prosecution poses a substantial risk of disservice to the public interest. As such, the Court respectfully denies Mr. Burns's motion on this ground as well.

A. THE APPEARANCE OF IMPROPRIETY STANDARD FOLLOWING THE RULES OF PROFESSIONAL CONDUCT

In *State v. Culbreath*,[56] our Supreme Court recognized that a prosecutor's conduct giving rise to the appearance of impropriety should result in the prosecutor's disqualification from a matter, even when no actual conflict of interest was present. The appearance-of-impropriety standard was part of Tennessee's then Code of Professional Responsibility, which was a set of Canons, Disciplinary Rules, and Ethical Considerations that governed lawyer conduct in this state. As Ethical Consideration 9-6 in Canon 9 recited the standard, "Every lawyer owes a solemn duty . . . to avoid not only professional impropriety but also the appearance of impropriety."[57]

However, in August 2002 and some two years after *Culbreath* was decided, the Supreme Court repealed the provisions of the Code of Professional Responsibility "in their entirety"[58] and adopted instead the new Tennessee Rules of Professional Conduct ("RPCs").[59] In adopting the RPCs, the Supreme Court did not retain the "appearance of impropriety" standard for conflicts of

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56 *See State v. Culbreath*, 30 S.W.3d 309 (Tenn. 2000).

57 *See Clinard v. Blackwood*, 46 S.W.3d 177, 186 (Tenn. 2001).

58 *See* Order Amending Tennessee Supreme Court Rule 8 To Adopt The Tennessee Rules Of Professional Conduct (Tenn. Aug. 27, 2002, as amended Sept. 17, 2002) ("Therefore, in accordance with this Court's inherent power to establish ethical standards relating to the practice of law and to oversee the administration of law in the courts of this state, IT IS NOW ORDERED that the current provisions of the Code of Professional Responsibility contained in Supreme Court Rule 8 be deleted in their entirety and that the provisions of the Tennessee Rules of Professional Conduct, which are attached as an Appendix to this Order, be adopted in their place.").

59 *See* Tenn. Sup. Ct. R. 8.

interest as part of the "black letter" rules.[60] Indeed, the Supreme Court specifically noted in comment [9] to RPC 1.10 that "[t]he 'appearance of impropriety' standard existing under the Code of Professional Responsibility *has not been retained in these rules.*"[61]

This change is important, as no reported case in Tennessee since the adoption of the RPCs has recognized that the appearance-of-impropriety standard continues to serve as an independent basis for disqualification for conflicts of interest under Tennessee law. In 2004, the

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[60] *See* Tenn. Sup. Ct. R. 8, RPCs 1.7, 1.9, 1.10. This result was perhaps foreshadowed in *Clinard v. Blackwood* itself. In footnote 7 of the majority opinion, the Supreme Court noted as follows:

> Our adherence to the appearance of impropriety standard arises from application of the current version of the Tennessee Code of Professional Responsibility. *Future revisions to the Code of Professional Responsibility may yield different results.*

See Clinard, 46 S.W.3d at 187 n.7 (emphasis added) (citing Proposed Rule 1.10 cmt. 6, Tennessee Bar Ass'n Comm. for the Study of Standards of Prof'l Conduct (Nov. 1, 1997) and noting that the proposal "reject[s the] appearance of impropriety standard in imputed disqualification cases").

[61] *See* Tenn. Sup. Ct. R. 8, RPCs 1.10, cmt. [9] (emphasis added). The Supreme Court's acknowledgement here of the change in standards could be of importance as comment [9] was of its own creation, and was not part either of the ABA's Model Rules of Professional Conduct or of the Tennessee Bar Association's Petition asking the Court to adopt the RPCs.

Of course, the TBA argued for rejection of the continued use of the "appearance of impropriety" standard in the new RPCs, as "[t]he ABA Model Rules explicitly rejected the use of 'appearance of impropriety' as a basis for imposing discipline on the grounds that it is question-begging and affords lawyers insufficient guidance as to the conduct for which they can be disciplined." *See* TBA Standing Committee on Ethics and Professional Responsibility, *Revised Committee Draft of Proposed Tennessee Rules of Professional Conduct*, filed Dec. 3, 2001, Exhibit B to Supplemental Memorandum, at 61. Indeed, at least one panel of the intermediate court of appeals hinted that a change in standards for disqualification may occur with the adoption of the RPCs. *See Burns v. State*, No. W2000-02871-CCA-R9-PD, 2001 WL 912817, at *4 (Tenn. Crim. App. Aug. 9, 2001) ("The Tennessee Supreme Court [in *Clinard*] noted that the 'appearance of impropriety' standard has been widely criticized and has been rejected by the American Bar Association's Model Rules of Professional Conduct. The court also noted that future revisions to our Code could yield a similar rejection. Since the ultimate outcome of *Clinard* was based upon the 'appearance of impropriety' provision, the *Clinard* holding may not be lasting precedent." (citations omitted)).

Supreme Court again addressed disqualification of a district attorney general under *Culbreath*'s appearance-of-impropriety standard, though it did so only because the *previous* Code of Professional Responsibility provided for the rules of decision at the time of trial:

> At the time of this trial, attorneys in Tennessee were governed by the Code of Professional Responsibility. Effective March 1, 2003, the Code of Professional Responsibility was replaced by the current Tennessee Rules of Professional Conduct. Since the new rules were given prospective application, our decision in this case deals only with the law as it existed at the time of trial.

See State v. Davis, 141 S.W.3d 600, 613 n.9 (Tenn. 2004) (citation omitted). Indeed, in another post-2002 decision involving issues of prosecutorial disqualification, the Supreme Court noted that the appearance of impropriety, "on the other hand, existed under the [previous] Tennessee Code of Professional Conduct."[62]

It is true that, in some unreported cases since 2002, the Court of Criminal Appeals has continued to cite *Culbreath* as providing the applicable standard for disqualification under present law,[63] though no decision has applied the appearance-of-impropriety standard to actually disqualify a district attorney specifically or his or her office more generally under the RPCs. However, these unreported cases are problematic. Most recently, in an unreported decision in *State v. Askew*, the intermediate appellate court noted the continued use of the appearance-of-impropriety standard in prosecutorial disqualification cases. In so doing, however, it cited the

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[62] *See also White*, 114 S.W.3d at 477. In *White*, the Supreme Court again noted that its decision was "primarily based on provisions of the Code of Professional Responsibility applicable to this case," though it also noted that the issues addressing actual conflicts of interest would have been resolved similarly under the new RPCs.

[63] *See, e.g.*, *Mason v. State*, No. M2013-01170-CCA-R3-PC, 2014 WL 1657681, at *8 (Tenn. Crim. App. Apr. 23, 2014) (citing *Culbreath* without further analysis of the change in the standards); *State v. Dixon*, No. M2010-02382-CCA-R3-CD, 2012 WL 2356523, at *14 (Tenn. Crim. App. June 21, 2012) (citing *State v. Coulter*, 67 S.W.3d 3, 28-29 (Tenn. Crim. App. 2001) which, in turn, cited *Culbreath*).

Supreme Court's pre-RPC opinion in *Clinard*[64] despite *Clinard*'s own recognition that its decision was based on then-present law that could (and did) change with the adoption of the RPCs. Other post-2002 cases have also continued to cite the since-repealed Ethical Considerations 9-1 and 9-6 as authority for the standard,[65] and one case has even cited *RPC 1.10* as authority for the continued use of the appearance-of-impropriety standard, despite that Rule's specific recognition that the appearance-of-impropriety standard *was not retained* as a standard of disqualification under the new RPCs.[66]

On the other hand, other unreported cases since 2002 have declined to apply the *Culbreath* appearance-of-impropriety standard as a basis for prosecutorial disqualification. In *State v. Clinard*, the Court of Criminal Appeals relied instead on the standards set forth in the new Rules of Professional Conduct to decide issues of prosecutorial disqualification,[67] and, in so doing, the court noted that the Supreme Court's 2004 decision in *Davis*, and, by extension, *Culbreath*, was "construing the disciplinary rules as they existed prior to the adoption of the Rules of Conduct."[68] Similarly, in *State v. Casteel*,[69] the Court of Criminal Appeals noted that the appearance-of-impropriety standard was not adopted as part of the RPCs and that, assuming it was error not to disqualify a prosecutor because of an appearance of impropriety, "such error

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64 *See State v. Askew*, No. M2014-01400-CCA-R3-CD, 2015 WL 9489549, at *5 (Tenn. Crim. App. Dec. 29, 2015).

65 *See State v. Leberry*, No. M2003-01228-CCA-R3-CD, 2005 WL 711913, at *19 (Tenn. Crim. App. Mar. 28, 2005) (citing expressly Tenn. R. Sup.Ct. 8, EC 9-1, 9-6). The decision in *Leberry* was later designated by the Supreme Court as "Not for Citation," meaning that the opinion "has no precedential value." *See* Tenn. Sup. Ct. R. 4(E)(1).

66 *See Askew*, 2015 WL 9489549, at *5.

67 *See State v. Clinard*, No. M2007-00406-CCA-R3-CD, 2008 WL 4170272, at *5 (Tenn. Crim. App. Sept. 9, 2008). Despite the superficial similarity in the style of the case, this decision is unrelated to the previous Supreme Court decision in *Clinard v. Blackwood*.

68 *See id.* at *4.

69 *See State v. Casteel*, No. E2003-01563-CCA-R3-CD, 2004 WL 2138334, at *16 (Tenn. Crim. App. Sept. 24, 2004).

would be harmless in light of the new Rules of Professional Conduct."[70] Finally, in a decision decided within weeks of the effective date of the new RPCs, the Court of Criminal Appeals addressed an issue of prosecutorial disqualification under the appearance-of-impropriety standard, noting the change in applicable legal standards:

> This Court notes that effective March 1, 2003, the Code of Professional Conduct currently set forth in Supreme Court Rule 8, which is patterned after the American Bar Association's Model Code of Professional Conduct, *will no longer govern the ethical conduct of Tennessee attorneys*. Instead, the standards of ethical conduct for Tennessee attorneys *will be governed* by the Tennessee Rules of Professional Conduct, which is patterned after the American Bar Association's Model Rules of Professional Conduct.

See State v. Davis, No. M2001-01866-CCA-R3-DD, 2003 WL 1523277, at *19 n.7 (Tenn. Crim. App. Mar. 25, 2003), *aff'd on other grounds*, 141 S.W.3d 600 (Tenn. 2004) (emphasis added).

In light of the clear change in the law in 2002, and without controlling authority to the contrary recognizing the continued viability of a since-repealed standard,[71] this Court questions whether the appearance-of-impropriety standard continues to serve as an independent basis for prosecutorial disqualification. Even if this Court were to personally believe that such a standard *should* continue to apply in these circumstances given the nature of the office and of the issues involved,[72] no court must ever let itself be governed by personal preferences in the matters of law or public policy.[73] As such, presuming that this standard for disqualification did not survive

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70 *See id.*

71 *See* Tenn. Sup. Ct. R. 4(G)(1), (2) ("unpublished opinions for all other purposes shall be considered persuasive authority. . . . (2) Opinions reported in the official reporter, however, shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction.").

72 *But see Clinard*, 46 S.W.3d at 187 n.8 (identifying other judicial and academic authority rejecting this standard as a proper basis for disqualification).

73 *See, e.g., Jordan v. Knox Cty.*, 213 S.W.3d 751, 780 (Tenn. 2007) (noting that courts "are not composed of judges free to write their personal opinions on public policy into

the 2002 enactment of the Tennessee Rules of Professional Conduct, disqualification on this ground would not be appropriate.

B. DISQUALIFICATION BASED ON AN APPEARANCE OF IMPROPRIETY

Nevertheless, because some appellate cases have continued to apply the appearance-of-impropriety standard as an independent basis for disqualification, the Court believes that it should consider these issues under that standard. Prior to the change in the law, the Supreme Court cautioned that, at least with respect to private counsel, disqualification "is ordinarily unjustifiable based solely upon an appearance of impropriety."[74] Thus, before one may be disqualified under this standard, the appearance of impropriety "must be real," and it "cannot be a fanciful, unrealistic or purely subjective suspicion of impropriety."[75]

An appearance of impropriety must also reflect "objective public perception rather than the subjective and 'anxious' perceptions of the litigants."[76] Consequently, an appearance of impropriety can exist only "in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the . . . representation poses substantial risk of disservice to either the public interest or the interest of one of the clients."[77]

In this case, an ordinary knowledgeable citizen, fully acquainted with the facts, would not find that General Pinkston's continued participation in this case would be improper. Such a

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law."); *Gentry v. Larkin*, 389 S.W.3d 329, 336 (Tenn. Ct. App. 2012) ("We, however, are not free to decide cases based upon our personal preferences but instead must decide them based upon the law.").

74 *See Clinard*, 46 S.W.3d at 187.

75 *See id.*; *see also Askew*, 2015 WL 9489549, at *5.

76 *See Clinard*, 46 S.W.3d at 187.

77 *See White*, 114 S.W.3d at 477 (applying the standard as it previously "existed under the Tennessee Code of Professional Conduct").

citizen, fully acquainted with the facts, would know that the criminal allegations asserted against Mr. Burns were independently investigated by the TBI and that an indictment was sought based upon this investigation. Such a citizen would also know that Mr. Burns filed his Civil Claim only after he was aware that a TBI investigation had been initiated, a fact tending to show that the investigation was not brought in response to the filing of the Civil Claim.[78]

Moreover, an objective citizen, fully acquainted with the facts, would also know that General Pinkston is not a named defendant in the Civil Claim; does not face any personal financial liability with respect to the Civil Claim; and does not have a reasonable prospect of being named as a defendant in other claims. Further, such a citizen, fully acquainted with the facts, would not be aware of any facts indicating that General Pinkston has sought to "leverage" the criminal prosecution in any way to achieve a favorable resolution of the Civil Claim for his personal benefit. Although Mr. Burns asserts that the prosecution has been brought by General Pinkston in retaliation for the filing of the Civil Claim, no objective facts support this assertion, and, because the standard is an objective one, the subjective suspicions or beliefs of Mr. Burns to the contrary will not support a finding of an appearance of impropriety under our law.[79]

Under the circumstances of this case, the Court does not believe that General Pinkston's continued participation in this prosecution does not invite the public's "doubt or distrust of the integrity in our law, [in] our courts or in the administration of justice."[80] Nor does General Pinkston's continued prosecution of this case objectively pose a substantial risk of disservice to

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[78] Other courts have declined to find that a prosecution was initiated in response to a civil suit when the *investigation* began before the suit was filed, even if the indictment was returned at some point following. *See Condon*, 310 Fed. App'x at 824.

[79] *See Clinard*, 46 S.W.3d at 187.

[80] *See Tate*, 925 S.W.2d at 551 ("[N]o practice must be permitted which invites doubt or distrust of the integrity in our law, our courts and in the administration of justice.").

the public interest. Accordingly, Mr. Burns's motion to disqualify based upon an alleged appearance of impropriety is, very respectfully, denied.

CONCLUSION

For the foregoing reasons, the Court respectfully denies Mr. Burns's motion to disqualify General Pinkston, or his office, from the continued prosecution of this case.

It is so ordered.

Enter, this the 18th day of October, 2016.

TOM GREENHOLTZ, Judge