

October 18, 2007

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

**Report and Recommendations on Professional Responsibility
and Accountability of Prosecutors and Defense Lawyers.**

Considering the large number of criminal cases successfully concluded in California each year, professionally inappropriate behavior by prosecutors or defense lawyers is not widely prevalent. There is every indication that, overall, District Attorneys and their staffs, Public Defenders and their staffs, and private criminal defense lawyers in California provide competent and highly professional service, meeting the highest ethical standards.

Self congratulation should not blind us, however, to the problem of accountability where prosecutors and defense lawyers do occasionally go astray. While appellate courts frequently review criminal convictions to assess claims of misconduct or incompetence on the part of prosecutors or defense lawyers, their review of these claims is often limited to determining whether the impact of misconduct or incompetence requires reversal of a judgment of conviction. Whether discipline of an attorney is warranted, and what that discipline should be, is ordinarily left to supervisory personnel in the District Attorney's or Public

Defender's Office, or to the State Bar. The Commission has concluded that there are important steps which can be taken to increase the effectiveness of this system.

Internal discipline by prosecutors' or public defenders' offices necessarily lacks transparency, because of legal restrictions on disclosure to protect the privacy of employees. But the lack of public access often means that no track record is available to identify repeat offenders.

The State Bar is limited by its reliance upon the receipt of reports of misconduct or incompetence by judges or self-reporting by the offending attorneys. The Commission has discovered that much is not reported which should be, and clarification is needed of what should be reported by whom. While not recommending any statutory changes, the Commission is recommending changes in Court Rules, the California Code of Judicial Ethics, and the reporting function of the State Bar to address these shortcomings and increase the accountability and transparency of the process, without compromising the privacy of individual attorneys. While there is no public access to complaints or reports to the State Bar either, unless a disciplinary proceeding is initiated, at least the State Bar can serve as a collection and preservation point, to assure that a cumulative record is maintained and preserved.

The Commission asked its researchers to analyze every reported appellate decision in California, whether published or unpublished, where the Courts

addressed a claim of prosecutorial misconduct or defense lawyer incompetence for the ten year period ending in 2006.¹ The result of this research suggests that our reliance upon the State Bar as the primary disciplinary authority is seriously hampered by underreporting.

Reporting of Prosecutorial Misconduct.

Professor Cookie Ridolfi of Santa Clara University School of Law located 2,130 California cases in which claims of prosecutorial misconduct were raised. Courts concluded that prosecutorial misconduct did occur in 443 of these cases, or 21%. In 390 of these cases, however, the court concluded the misconduct was harmless error and affirmed the conviction. In 53 cases, the misconduct resulted in a reversal of the conviction. The most common forms of misconduct found were failing to disclose exculpatory evidence and improper argument. Ridolfi, *Prosecutorial Misconduct: A Systemic Review*, available on the Commission's website.

¹Use of the terms "prosecutorial misconduct" and defense lawyer "incompetence" can be misleading. These terms are so frequently used in the written opinions of courts that they have become a sort of shorthand that encompasses a wide variety of professional failings. Thus, "prosecutorial misconduct" includes conduct that may not be intentional, and defense lawyer "incompetence" includes deliberate misconduct. The use of these terms in this report does not imply any judgment that one is more or less culpable than the other. Both have been identified among the leading causes of wrongful convictions. A study of the first 74 DNA exonerations in the United States found that prosecutorial misconduct was a factor in 45% of the cases, and defense lawyer incompetence was a factor in 32% of the cases. Frequently, both factors were found in the same case. Scheck, Neufeld & Dwyer, *Actual Innocence*, p.365 (New American Library, 2003).

Pursuant to Section 6086.7(a)(2),² there should have been a report made to the State Bar in each of the 53 cases in which prosecutorial misconduct resulted in a reversal in the past ten years.

In a follow-up to Professor Ridolfi's research, Chief Trial Counsel Scott Drexel of the State Bar testified that, after checking half of these 53 cases to determine whether any of them resulted in a report to the State Bar, he had yet to find a single example of a report by a court of misconduct resulting in reversal of a conviction.³ Mr. Drexel attributes this to lack of judicial familiarity with the requirements of Section 6086.7. He informed the Commission that each year the State Bar sends out a letter reminding judges of the statutory requirements. A spate of reporting follows,⁴ but then

² California Business and Professions Code Section 6086.7(a)(2) provides:

“A court shall notify the State Bar of any of the following:
... (2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.”

³ This is not to suggest that prosecutors are never disciplined for misconduct by the State Bar. In February, 2006, the San Jose Mercury News reported that after reviewing 1,464 lawyer discipline cases published in the California Bar Journal between 2001 and 2005, they found just one case in which disciplinary action was taken against a prosecutor for misconduct. Zapler, *State Bar Ignores Errant Lawyers*, San Jose Mercury News, Feb. 12, 2006. Scott Drexel, Chief Trial Counsel for the California State Bar, responded by citing three 2005 cases in which prosecutors were disciplined, and another in which discipline was pending. Three of the cases involved failure to disclose potentially exculpatory evidence to the defense. Drexel, *Headlines Aside, State Bar Does Discipline Bad Lawyers*, San Jose Mercury News, Feb. 19, 2006. It is not known whether these disciplinary proceedings were initiated by judicial reports, attorney self-reporting, or complaints from other sources.

⁴ The 2006 Report on the State Bar of California Discipline System, p. 5, indicates that in 2006, the Bar received 134 reports from judges, and 83 self-reports by attorneys. These judicial reports, however, include all “reportable actions” under Calif. Bus.&Prof. Code Sections 6086.7 and 6068(a). In addition to the reversal or modification of judgments due to misconduct of an attorney, judges are required to report all findings of contempt by lawyers, all judicial sanctions against lawyers, and all civil penalties and judgments against lawyers for fraud, breach of fiduciary duty, misrepresentation or gross negligence in a

it drops off. He suggested a reminder from the Chief Justice might yield better results. It is also possible that the current lack of reporting is attributable to confusion as to who has the actual duty to report when a judgment is reversed: the trial judge who rendered the judgment? The judge who authored the reversing opinion? The Presiding Judge of the Court of Appeal that rendered the reversing judgment? All of the judges who concurred in the reversing judgment? It may be that everyone's business becomes nobody's business. Section 6086.7 should be clarified by a Court Rule clearly defining which judge of the court has the obligation to report to the State Bar.

Limiting the mandatory reporting requirement to cases that result in a modification or reversal of a judgment appears to make little sense. Whether a judgment is reversed depends upon factors such as the strength of other evidence which may have nothing to do with the egregiousness of the misconduct or incompetence. The research conducted for the Commission by Professor Ridolfi strongly confirms this. In 443 cases in which a claim of prosecutorial misconduct was sustained, only 53 cases (12%) resulted in a reversal of the judgment. In 88% of the cases, the error was deemed

professional capacity. Self-reports by attorneys are also required in numerous other categories besides reversal or modification of a judgment due to misconduct. They must report the filing of malpractice lawsuits, judgments in specified civil actions, indictments or convictions, and the imposition of sanctions or discipline.

harmless. She identifies eight examples in which nearly identical conduct by a prosecutor led to reversal in one reported decision, while in a different reported decision the judgment was affirmed because the identical misconduct was deemed “harmless error.”⁵

Reporting of Defense Lawyer Incompetence.

Professor Larry Benner of Cal Western Law School located approximately 2500 California cases in which claims of ineffective counsel were raised. Courts concluded that counsel’s performance fell below the constitutionally required minimum in 121 of these cases, or 4%. In 17 of these cases, the deficient performance was found to be harmless; 104 of the cases resulted in a reversal of the judgment. The most common forms of ineffective assistance were failure to investigate (44%) and lack of knowledge of the law (32%).⁶

With respect to criminal defense lawyers, the problem is more complex than with prosecutors. Defense representation may be supplied by a public defender’s office, a contract lawyer who agrees to supply public defender services, a private lawyer appointed by the court, or a lawyer retained by the defendant. There does not appear to be reliable data available to indicate what proportion of criminal defendants are represented by each of

⁵ Ridolfi, Preliminary Report at Appendix D.

⁶ Benner, *Systemic Factors Affecting the Quality of Criminal Defense Representation*, Preliminary Report and Supplemental Report, both available on the Commission’s website, www.ccfaj.org.

these alternative means, but the State Bar Guidelines on Indigent Defense Services Delivery Systems (2006) notes the vast preponderance of persons charged with criminal offenses in California are indigent. Nationally, it is estimated that 60 to 90% of all criminal cases involve indigent defendants. Based on his survey data, Professor Benner estimates that 85% of California criminal defendants are indigent. While contractors, administrators of assigned counsel systems and presiding judges may have varying practices or procedures to address complaints of misconduct or incompetence, there is simply no mechanism in place for discipline of privately retained lawyers. In his research for the Commission, Professor Benner examined all 121 California cases in which claims of ineffective assistance of counsel were sustained during the ten year period ending in 2006. In 20% of the cases, the identity of the lawyer could not be determined; 32% were privately retained, 33% were public defenders, and 15% were assigned counsel. Thus, it is clear that privately retained lawyers are vastly overrepresented in sustained claims of ineffective assistance of counsel. The only mechanism available to identify them, and discipline them when appropriate, is the State Bar.

Judicial Reluctance.

Part of the problem of reliance on judges to report lawyer misconduct is a deep-seated reluctance on the part of trial judges to “blow the whistle”

on lawyers who appear before them. Judges apparently proceed on the assumption that Canon 3D(2)⁷ of the California Code of Judicial Ethics takes precedence over Business and Professions Code Section 6086.7. Canon 3D(2) provides that whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take “appropriate action.” Even though Business and Professions Code Section 6086.7 imposes additional reporting requirements, California trial judges apparently construe their obligation to report misconduct or incompetence to the State Bar as limited to cases in which they consider such reporting “appropriate.” Apparently, California trial judges rarely consider it appropriate to report misconduct or incompetence to the State Bar, and even where misconduct or incompetence *does* result in a reversal, appellate judges fail to report the attorney to the State Bar.

The Commission considered proposing an expansion of Business and Professions Code Section 6086.7 to require a judicial report of *any* finding of misconduct by a prosecutor or defense lawyer, whether it resulted in modification or reversal of the judgment or not. We were persuaded that a modification of the ethical canons in the Code of Judicial Responsibility,

⁷ Canon 3D(2) provides: “(2) Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action.”

and a clarification by Rule of Court as to who has the duty to report under Business & Professions Code Section 6086.7, would be more effective.

First, we were concerned that judges who are now reluctant to report could avoid the requirement by failing to make formal “findings” of misconduct.

Second, there was no reason to expect that amending the statute would lead to increased reporting. If judges are not reporting now even when there is a modification or reversal of the judgment, it is not likely they would *increase* their reporting if the requirement of modification or reversal of the judgment were eliminated. Finally, if judges are more inclined to use Canon 3D as their guide, the problem should be addressed directly in Canon 3D by defining the circumstances where a report to the State Bar *should* be made.

This change in the Canons of Judicial Ethics should be accompanied by increased training and education of judges with respect to their reporting obligations. To the extent their reluctance to report attorneys is based on a lack of confidence in the State Bar disciplinary process to sort out serious offenders from those who may be guilty of a momentary lapse, judicial ethics training should include broad exposure to how the State Bar disciplinary process works. NOT every report will lead to an investigation, and NOT every investigation will lead to discipline, but the State Bar is the

most appropriate forum to exercise discretion, and the exercise of that discretion must be informed by a cumulative track record.

Internal Discipline.

Some District Attorneys objected that discipline of prosecutors should be left to the internal discipline mechanism in each individual District Attorney's office. While the vast majority of California District Attorneys closely supervise their deputies and impose appropriate discipline when misconduct is called to their attention, one consequence of the independence of each of California's fifty-eight district attorney offices, and the civil service protection for many of their employees, is a complete lack of transparency of internal discipline procedures. The Commission's attempt, through Prof. Laurie Levenson,⁸ to survey prosecutor's offices to ascertain how complaints of misconduct are handled met with substantial resistance at first. Her efforts are continuing, and there are hopeful signs the level of cooperation in the Commission's research will improve. The information collected suggests many offices lack formal procedures for tracking and investigating complaints, with no uniform policy. Professor Levenson concludes:

⁸ Levenson, Preliminary Report, Study of California District Attorney Offices, available on the Commission's Website.

One major gap in the disciplinary system is the decision by DA offices not to keep a record of complaints of misconduct. Therefore, it is very difficult to track problem DA's other than by reputation of that individual in a given office.

Reliance upon informal internal procedures has three consequences. First, turnover in supervisory personnel will result in no continuing "track record" for subordinate employees even within the office. Second, deputies who are fired or voluntarily leave the office are free to engage in private practice while their record of prior misconduct remains invisible and inaccessible. Third, even where a report is made to the State Bar because misconduct resulted in a reversal of judgment, or discipline is contemplated for some other reason, the State Bar will have no access to any record of prior discipline to inform its exercise of discretion to undertake an investigation or initiate disciplinary proceedings.

Repeat Offenders.

The lack of a report to the State Bar in these cases means there simply is no "track record" of an offending attorney's history anywhere. Analysis of California cases in which a court made a finding of prosecutorial misconduct suggests that the phenomenon of repeat offenders is significant. The identify of the prosecutor was ascertainable in only 347 of 443 such

cases in the ten year period from January 1, 1997 to December 31, 2006. Thirty repeat offenders were identified, including two who committed misconduct in three different cases. Two-thirds of the repeat offenders committed the exact same conduct in multiple trials. Only one had ever been subjected to State Bar discipline – not for misconduct, but for non-compliance with MCLE requirements.⁹ A disturbing aspect of the “repeat offender” data is that several of the counties which appear to have a disproportionately high rate of cases in which claims of prosecutorial misconduct were sustained, also had multiple cases of repeat offenders. The Commission was unable to procure comparable data on the prevalence of repeat offenders among defense lawyers, but anecdotal evidence suggests repeated instances of incompetent representation even in California death penalty cases.¹⁰

⁹ Ridolfi, *Prosecutorial Misconduct: A Systemic Review*, available on the Commission’s Website.

¹⁰ In the case of *In Re Jones*, 13 Cal.4th 552 (1996), the California Supreme Court reversed both the death sentence and conviction of Troy Lee Jones because he was incompetently represented by his trial attorney. In the case of *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2003), the United States Court of Appeals reversed the denial of a writ of habeas corpus and remanded for an evidentiary hearing on the claim of Douglas Stankewitz that he was incompetently represented by the same attorney who represented Troy Lee Jones in the penalty phase of his death penalty trial. Stankewitz is the longest tenant of California’s death row, where he has been since October of 1978. Wilbur Jennings, who has been on death row for 19 years, is also asserting a claim of incompetent representation by the same attorney who represented Jones and Stankewitz in a pending habeas corpus proceeding.

Encouraging Reporting by Judges.

From a practical standpoint, the biggest obstacle to utilizing mandatory reporting to the State Bar to compile a “track record” for claims of misconduct or incompetence is the prevailing attitude of judges.

Expanding the mandatory reporting requirement, however, would present a particular problem for California trial judges. As described in the testimony of Judge Steven Van Sicklen, Supervising Judge of the Criminal Courts in Los Angeles County:

To require a Bench Officer to report *any* finding of incompetence or misconduct places a potential chilling effect on the Court, adds a potential irrelevant consequence to the fact finding process and leaves no discretion with regard to the *degree* of the finding. In other words does the misconduct have to be really serious or the incompetence something as innocuous as failing to ask a question a Judge might have asked if he or she were trying the case? Would every Wheeler violation have to be reported? Would the failure to call *every* potential witness in a case amount to reportable misconduct? Would this change generate unnecessary motions, or witness[es] in cases because an attorney is worried about what the Judge might think?

Rather than leaving it up to each individual judge to determine which forms of misconduct or incompetence are serious enough to merit a report to the State Bar, the Commission concluded that Canon 3D should itself define what kinds of misconduct are so serious that a report to the State Bar and the attorney's supervisor would ordinarily be appropriate. While the Commission has limited its identification of examples of egregious conduct to criminal cases, these examples might be equally egregious in civil cases, and there may be additional examples applicable to civil cases. The Judicial Council may wish to address that question, but the Commission felt it was beyond its purview. Every report of such misconduct or incompetence may not result in discipline, or even in an investigation, but the complaints would be available to identify repeat offenders. A "track record" of all reports with respect to every offending attorney would be maintained.

The Commission concluded it would also be useful to maintain a county-wide track record, so particular offices that may have a high rate of prosecutorial misconduct or defense lawyer incompetence can be identified. The need for additional training, stronger internal discipline mechanisms, or greater public accountability can thus be facilitated. Commission research suggests that some California counties may have a disproportionately high number of convictions being reversed because of judicial findings of

prosecutorial misconduct, and in some cases, they appear to be the same counties that have a “repeat offender” problem of prosecutors responsible for multiple findings of misconduct. We believe that this objective can be achieved by simply reformulating the data collected by the State Bar Disciplinary System regarding reports of misconduct.

Identifying Egregious Misconduct.

The task of identifying “egregious misconduct” that should be reported to the State Bar should not be difficult. There are certainly some forms of misconduct which all reasonable lawyers and judges would agree are serious, and should give rise to heightened concern and scrutiny. This is not to suggest that other forms of misconduct may not be equally serious, and that judges should only find a report to the State Bar appropriate in the defined circumstances. But the discretion of judges to determine what “corrective action” is “appropriate” should be guided by a collective judgment of the circumstances that would call for a report to the State Bar. The Commission agreed that the following forms of misconduct should be encompassed by such a recommendation:

1. *Lying to a Court.*

A deliberate misrepresentation of law or fact to a Court should be reported. Current Rule 5-200(B) provides that a member “shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of law” in presenting a matter to a tribunal. Recommended reporting should be limited to deliberate violations of Rule 5-200(B), but “artifice” should not be included. “Artifice” is an overly broad term that, according to the Merriam-Webster dictionary, includes “clever or artful skill.” A specific requirement that requires reporting of any willful misrepresentation of law or fact to a court is appropriate. The current reporting requirement includes not only misconduct and incompetence, but any willful misrepresentation when it results in a modification or reversal of a judgment. This change would eliminate the necessity of a modification or reversal of a judgment based upon the willful misrepresentation before reporting to the State Bar.

2. *Appearing in a judicial proceeding while under the influence of illicit drugs or alcohol.*

Drug or alcohol intoxication would certainly qualify as “failing to perform legal services with competence,” as prohibited by Rule 3-110, but we do not want to subject every claim of incompetence to mandatory reporting.

Reporting could be limited to *incompetence* caused by intoxication, but even

a lawyer whose drunkenness causes a delay in a trial should be reported, whether it produces a failure to perform with competence or not. A specific rule that requires reporting of a lawyer who appears in court under the influence of illicit drugs or alcohol is appropriate. Interestingly, Judge Van Sicklen used the example of intoxication in suggesting that “appropriate action” means either discussing the matter with the attorney or reporting the matter to the State Bar. If no report is made, the same attorney could be repeatedly showing up drunk before a number of judges, none of whom are even aware of prior repeated transgressions.

Reporting an intoxicated attorney to the State Bar will often lead to intervention, and referral to the State Bar’s Lawyer Assistance Program, preventing future damage to clients and facilitating treatment of the offending attorney. If no report is made, however, no track record of the attorney’s repeated lapses will be available.

3. Engaging in willful unlawful discrimination in a judicial proceeding.

Judge Van Sicklen asked whether every *Wheeler*¹¹ violation should be reported to the State Bar. We conclude that it should. A *Wheeler* violation occurs when a judge finds a pattern of discrimination requires an

¹¹ *People v. Wheeler*, 22 Cal.3d 258 (1978) requires a lawyer to provide an explanation when peremptory challenges demonstrate systematic exclusion of a cognizable group. Cognizable groups include race, religion, ethnicity, gender and sexual orientation. If the explanation is not satisfactory, the jury panel must be excused. A similar requirement is imposed by the U.S. Constitution. *Batson v. Kentucky*, 476 U.S. 79 (1986). If improper discrimination is utilized in a deliberate effort to cause discharge of the jury panel, additional sanctions may be imposed. *People v. Willis*, 27 Cal.4th 811 (2002).

explanation, and the explanation does not dispel the appearance of deliberate racial discrimination. It ordinarily requires dismissing the jury panel and starting over. The more appropriate question may be why shouldn't every *Wheeler* violation be reported to the State Bar, whether by the prosecutor or the defense lawyer? There is currently no specific Rule of Professional Conduct that addresses improper discrimination in court.¹² But Section 231 of the California Code of Civil Procedure provides:

231.5. A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.

Commissioners Jim Fox and Greg Totten believe that not every *Wheeler* violation necessarily includes willful, unlawful discrimination. The Commission majority, however, concludes that dismissal of the jury panel and the resulting mistrial caused by the improper use of a peremptory challenge at least creates a presumption of unlawful discrimination that should be called to the attention of the State Bar.

¹² Rule 2-400 prohibits discriminatory conduct in the management or operation of a law practice, but applies only to employment decisions and accepting or terminating representation of a client.

4. *Willful Brady violations.*

A “Brady violation” occurs when a prosecutor withholds or suppresses exculpatory evidence that is material to issues of guilt or punishment. It is a violation of the defendant’s constitutional right to due process of law. *Brady v. Maryland*, 373 U.S. 83 (1963). Exculpatory evidence includes evidence to impeach the credibility of witnesses. Brady violations can occur even where the exculpatory evidence was never delivered to the prosecutor by the police, however. *Giglio v. United States*, 405 U.S. 150 (1972). Thus, requiring the reporting of every Brady violation would be too broad.

Reporting every violation of Rule 5-220 of the California Rules of Professional Conduct might also be too broad, since it simply provides, “A member shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or produce.” We do not want to make every discovery violation subject to reporting, only deliberate, bad faith violations of a constitutional duty. By limiting the recommended reporting requirement to bad faith violations that are deliberate, we address a narrow category of the most egregious Brady violations, where the prosecutor is aware of exculpatory evidence and deliberately suppresses it.

5. Willful presentation of material perjured testimony.

There are likely to be very few cases where a judge can conclude that a lawyer was aware that testimony he or she presented was perjurious. But such situations do occur, and reasonable lawyers and judges would agree this is among the most serious forms of misconduct imaginable, especially in criminal cases. A defense lawyer who conforms to the ethical requirements regarding the presentation of the testimony of the accused would not be willfully presenting perjured testimony even if he knows his client is lying, because the accused has a constitutional right to testify over the objection of his attorney.

6. Willful unlawful disclosure of victim or witness information.

The California Penal Code includes very specific limitations on the disclosure of the name or address of the victim of a sex offense (California Penal Code Section 293) and the addresses or telephone numbers of victims and witnesses revealed in the course of pre-trial discovery (California Penal Code Section 1054.2). Willful violation of Section 1054.2 by an attorney is a misdemeanor. Whether an attorney is charged with a misdemeanor or not, a willful violation of these provisions should be reported to the State Bar.

7. Failure to Properly Identify Oneself in Interviewing a Victim or Witness.

The California Penal Code requires that prosecutors, defense lawyers and their investigators clearly identify themselves, identify the full name of the agency which employs them, and identify whether they represent the prosecution or defense before interviewing victims and witnesses. If the interview is in person a business card or official identification must be presented. California Penal Code, Section 1054.8. These provisions offer important protection to victims and witnesses. A failure to comply with these requirements should be reported to the State Bar.

Reporting Misconduct or Incompetence to Supervisors.

The California Public Defenders Association suggests that if there is to be a duty to report misconduct, it should also be required that notice go to the head of the prosecutor or public defender office or the contractor of defender services or the administrator of an assigned counsel program, or the presiding judge who controls appointment of individual attorneys. That can be easily accomplished by including such a requirement in the Rule of Court defining which judge has the mandatory duty to report.

Self Reporting by Lawyers.

If the self reporting requirements of California Business and Professions Code Section 6068(o) were fully complied with, a great deal

more of the unreported misconduct and incompetence of lawyers would come to the attention of the State Bar. Section 6068(o) provides that every California lawyer has a duty:

(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

Although it is limited to a reversal of judgment, as opposed to “a modification or reversal,” Section 6068(o)(7) is roughly comparable to the judicial reporting requirement in Section 6086.7(a)(2). Thus, even if judges are underreporting, the attorneys themselves should be reporting cases in which misconduct or incompetence has led to reversal of a judgment. The lack of self reporting may be attributable to the lack of enforcement of the self-reporting requirement. Instead of operating as a “fail-safe” mechanism to require reporting by two separate, independent sources, the self reporting requirement is widely ignored, assuring that even repeat offenders completely escape any scrutiny by the bar.

While the Commission does not offer any recommendation to change the self-reporting requirement, it believes that many California attorneys are simply unaware that this requirement exists. Continuing legal education programs dealing with ethics, which are mandatory for California attorneys, should focus attention on this requirement. And the State Bar should examine compliance with self-reporting requirements in exercising its discretion whether discipline is appropriate for misconduct or incompetence, as well as basing discipline on the failure to self-report itself when appropriate.

RECOMMENDATIONS OF THE COMMISSION

The Commission offers four recommendations addressed to the rule-making authority of the California Judicial Council and the State Bar of California.

In addition, the Commission recommends enhanced training in ethics for California prosecutors, defense lawyers and judges, to familiarize them with the requirements for reporting and self-reporting of misconduct and incompetence, and the consequences of such reports.

1. The Commission recommends *no* change in the statutory language of Business & Professions Code Section 6086.7:

6086.7. (a) A court shall notify the State Bar of any of the following:

(1) A final order of contempt imposed against an attorney that may involve grounds warranting discipline under this chapter. The court entering the final order shall transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.

(2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.

(3) The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions

of less than one thousand dollars (\$1,000).

(4) The imposition of any civil penalty upon an attorney pursuant to Section 8620 of the Family Code.

(b) In the event of a notification made under subdivision (a) the court shall also notify the attorney involved that the matter has been referred to the State Bar.

(c) The State Bar shall investigate any matter reported under this section as to the appropriateness of initiating disciplinary action against the attorney.

2. The Commission recommends the adoption of the following

California Rule of Court:

When notification of the State Bar is required of a court pursuant to California Business and Professions Code Section 6086.7(a), if the order of contempt, modification or reversal of judgment, imposition of judicial sanctions or imposition of a civil penalty is signed by a Superior Court judge or magistrate, that judge or magistrate shall notify the State Bar. Modification of a judgment includes the vacation of a judgment in granting an Extraordinary Writ. If the order of contempt, modification or reversal of judgment, imposition of judicial sanctions or imposition of a civil

penalty is by the Court of Appeal or the Supreme Court, the author of the Court's order or opinion shall notify the State Bar. The report to the State Bar shall include the State Bar member's full name, and State Bar number, if known. When notifying the attorney involved pursuant to California Business and Professions Code Section 6086.7(b), the judge, magistrate or Justice identified in this Rule shall also notify the attorney's supervisor, if known.

3. The Commission recommends the following changes in Canon 3D of the California Code of Judicial Ethics (Changes indicated in bold):

D. Disciplinary Responsibilities

(1) Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge shall take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority.

(2) Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, **or makes a finding that such violation has occurred**, the judge shall take appropriate corrective action.

Appropriate corrective action should include a prompt report to the State Bar and to the attorney's supervisor, if known, where an attorney in a criminal proceeding has engaged in egregious misconduct, including but not limited to:

- a. A willful misrepresentation of law or fact to a Court;**
- b. Appearing in a judicial proceeding while intoxicated;**
- c. Engaging in willful unlawful discrimination in a judicial proceeding;**
- d. Willfully and in bad faith withholding or suppressing exculpatory evidence (including impeachment evidence) which he or she is constitutionally obligated to disclose.**
- e. Willful presentation of perjured testimony.**
- f. Willful unlawful disclosure of victim or witness information.**
- g. Failure to properly identify oneself in interviewing victims or witnesses.**

Any doubt whether misconduct is egregious should be resolved in favor of reporting the misconduct.

(3) A judge who is charged by prosecutorial complaint, information, or indictment or convicted of a crime in the United States, other than one that would be considered a misdemeanor not involving moral

turpitude or an infraction under California law, but including all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol, shall promptly and in writing report that fact to the Commission on Judicial Performance.

(4) A prompt report means as soon as practicable, and in no event more than thirty days after knowledge is acquired or a finding is made.

4. The Commission recommends that the State Bar include, in its annual report on the State Bar of California Discipline System, the number of Reportable Actions received from Courts pursuant to each of the four categories in Business and Professions Code Section 6068.7(a), and each of the six categories in Canon 3D(2) of the California Code of Judicial Ethics. In addition, the Report should indicate the number of Reportable Actions related to the conduct of prosecutors and defense lawyers by County. Defense lawyer data should be reported to distinguish public defenders, contract defenders, appointed lawyers, and privately retained lawyers. Prosecutorial data should be reported to distinguish district attorneys and city attorneys.

5. The Commission recommends that law school courses in legal ethics and continuing education programs in legal ethics for prosecutors, defense lawyers and judges include familiarity with the obligations to report misconduct and incompetent representation by lawyers, and the obligation of lawyers to self-report, to the California State Bar, as well as familiarity with the consequences of such reports with respect to the State Bar’s investigatory and disciplinary authority.

Respectfully submitted,

California Commission on the Fair Administration of Justice:

John K. Van de Kamp, Chair

Jon Streeter, Vice Chair

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Harold O. Boscovich, Jr., Danville

Chief William Bratton, Los Angeles Police Department

Jerry Brown, California Attorney General

Ron Cottingham, Peace Officers’ Research Association of California

Glen Craig, Sacramento

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*Commissioner Jim Fox dissents only from the recommendation to include all *Wheeler* violations within “Engaging in willful unlawful racial discrimination” on the list of examples of egregious misconduct in the Commission’s proposed Canon 3D (D)(2)(c).

**Commissioner Greg Totten dissents from the recommendation of amendments to Canon 3D in recommendation number 3, and to the inclusion of such data in the State Bar report referred to in recommendation 4, on the basis of his explanation in the attached letter.



OFFICE OF THE DISTRICT ATTORNEY

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October 12, 2007

Commissioners
California Commission on the Fair Administration of Justice
900 Lafayette Street, Suite 608
Santa Clara, CA 95050

Re: **Dissent from the Commission's Final Report on Professional Responsibility**

Dear Commissioners:

I must respectfully dissent from the Commission's Final Report on Professional Responsibility.

It is appropriate for the Commission to urge clarification of the judicial officer responsible for reporting misconduct to the State Bar and include the attorney's supervisor as a recipient of such report. However, I strongly oppose the Commission's recommendation to create a separate rule of court that attempts to identify categories of misconduct subject to the reporting requirement contained in Business and Professions Code section 6086.7. This proposed rule places an unreasonable burden on prosecutors and the courts that will significantly increase litigation of collateral issues and further erode civility while doing little to address the issue of professional responsibility. As discussed below, there are several significant problems with the Commission's recommendations for change.

First, the report is clearly premised upon an underlying assumption that simply because courts are not fully complying with reporting requirements, attorney misconduct goes undetected and unaddressed within the criminal justice system and in district attorney offices. Most prosecutors would find this assumption both erroneous and offensive to our profession's duty of integrity and fairness.

The public rightfully expects prosecutors to go into the competitive arena of the courtroom on a daily basis and make literally hundreds of split second decisions on law, evidence, and argument. It is also a routine occurrence and accepted strategy for defense counsel to make claims of

misconduct against prosecutors during the heat of trial. As with any system administered by human beings, the court process is imperfect and errors are inevitable.

Through comprehensive training, extensive scrutiny of prosecutor applicants and prompt discipline when warranted, district attorneys strive to minimize errors and root out individuals who do not meet the very high ethical standards of our noble profession. As a result, sustained claims of prosecutor misconduct are exceedingly rare.¹

¹ The statistics upon which the Commission relies establish that incidents of prosecutor misconduct are rare in California.

The Preliminary Report of Professor Laurie Levenson lists in Section IX.A (pp. 8-9) appellate decisions citing prosecutorial misconduct and rankings of 10 California counties as a percentage of felony cases filed. She concludes, "Percentage-wise, the number of prosecutorial claims per felony cases is less than 1%, averaging from .028% to .008%." (*Id.*, fn. 7.) Converted to common fractions, this is equal to 1/3000 cases to 1/12,000 cases. And this is just the number of *claims*; the number of cases in which the court has found error is far smaller, and the number of cases in which error was reversible is smaller still. Professor Levenson's figures indicate that of 199 cases between 2000-2005 in which prosecutorial misconduct was found, only 15 (7.5%) constituted reversible error.

The Judicial Council of California reports 1,588,079 felony filings in California in the 6-year period from the 2000-2001 fiscal year through the 2005-2006 fiscal year. (Judicial Council of California, 2007 Court Statistics Report, Table 7, p. 51.) <http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf>). Applying the percentages from Professor Levenson's report, this would mean that prosecutorial misconduct was claimed in only 127 to 445 of these 1.6 million cases.

The Commission also considered the California Public Defenders Association Response to Focus Questions on Professional Responsibility Issues. This response states that prosecutorial misconduct is "often" cited as a factor in appellate dismissal or reversal of cases or reduction of sentences. (CPDA Response, p. 2.) In support of this contention, the response cited "Harmful Error," a Prosecutorial Misconduct Study Report written by the Center for Public Integrity. (CPDA Response, pp. 2-3, fn. 1.) According to the response, the study "studied 590 California cases from 1970 to the present [actually, 2003] in which the defendant alleged prosecutorial misconduct. . . . Of all the defendants who alleged misconduct, one later proved his innocence. [¶] Of the cases in which judges ruled a prosecutor's conduct prejudiced the defendant, 48 involved improper trial arguments or examination, 11 involved withholding evidence from the defense, eight involved discrimination in jury selection, three involved improper pre-trial tactics, two involved threatening a witness and the three remaining cases involved destruction of evidence, breaching an agreement and eavesdropping." (*Ibid.*)

These figures, which cover a period of 33 years, show that only in only 75 cases was prejudicial error found, including only 11 cases of withholding evidence. This is only one *Brady* violation every three years statewide, which cannot be considered a crisis under any definition.

The low incidence of prosecutorial misconduct is also supported by the statistics provided in a report prepared for the Commission's July 11 hearing by Professor Kathleen Ridolfi entitled "Prosecutorial Misconduct: A Systematic Review." She states that she reviewed California state and federal appellate court cases decided between January 1, 1997 and December 31, 2006. (Ridolfi report, Appx. A, p. 15.)¹ Of these, 2,130 raised an issue of prosecutorial misconduct on appeal, and the court found misconduct in 443 of these cases. (Ridolfi report, p. 4.) The court found the error to be prejudicial in only 53 of these cases. (Ridolfi report, p. 5.)

Yet the majority effectively encourages more second-guessing of prosecutors. If the proposed rule were adopted in our highly adversarial system, demands by counsel for judicial findings of misconduct would become commonplace and the courts would inevitably find themselves mired in ruling on disputes among lawyers rather than evidence and law affecting the underlying charges. The majority thus overlooks the inherent dangers of seeking perfect process without regard to its impact on the prompt and fair resolution of criminal cases. More than three decades ago, Justice Macklin Fleming of the California Court of Appeal warned about the pursuit of perfect procedure:

For when we aim at perfect procedure, we impair the capacity of the legal order to achieve the basic values for which it was created, that is, to settle disputes promptly and peacefully, to restrain the strong, to protect the weak, and to conform the conduct of all to settled rules of law. If criminal procedure is unable promptly to convict the guilty and promptly acquit the innocent of the specific accusations against them, and to do it in a manner that retains public confidence in the accuracy of its results, the deterrent effect of swift and certain punishment is lost, the feeling of just retribution disappears, and belief in the efficacy of the system of justice declines.²

The majority report also indirectly infers that civil service protection and the privacy of prosecutor personnel records somehow insulate prosecutor misconduct. I have been a prosecutor for 25 years and that has not been my experience. Simply stated, the basic civil service and privacy protection afforded to prosecutors have never precluded management in this office from dealing directly, swiftly and appropriately with prosecutor misconduct.

Second, the *Wheeler* and *Brady* provisions contained in the proposed rule are fraught with peril. *Brady* is a dynamic area of the law and no one can confidently predict how it will develop in the courts next year, let alone ten years from now when the Supreme Court is scrutinizing a prosecutor's decision in a capital case. Likewise, it makes no sense to require reporting any time a court concludes counsel violated *Wheeler* because it does not accept the prosecutor's reasons for excusing jurors. A court's decision on *Wheeler* is often subjective and can be influenced by a myriad of factors including the court's own bias or feelings about the underlying case.

The Judicial Council reports that there were 2,585,018 felony filings from the 1996-97 fiscal year through the 2005-06 fiscal year. Using Professor Ridolfi's figures, only .08% (8 in 10,000) of the cases raised an issue of prosecutorial misconduct, in only .02% (2 in 10,000) did the court find prosecutorial misconduct, and .0002% (2 in 100,000) involved prejudicial misconduct. These figures are a small percentage of the 2.6 million felony filings during that period.

² Justice Macklin Fleming, *The Price of Perfect Justice: The Adverse Consequences of Current Legal Doctrine on the American Courtroom*, Basic Books, Inc., New York, 1974.

Wheeler and *Brady* issues are the subject of intense scrutiny and litigation in the criminal justice system. Under existing law, the court already has the authority to report violations of *Brady* or *Wheeler*.³ Creating a new court rule regarding misconduct that attempts to further define these two case doctrines will not increase the reporting of such violations. Instead, the rule would further complicate existing law, potentially narrow the circumstances under which a court already disposed to report would in fact report, and once again encourage greater litigation of collateral issues. Indeed, there is even some risk that concern about the obligation to report could influence the court's decisions on the merits of the underlying *Wheeler* or *Brady* issue.

Third, at least some of the misconduct cases cited in one of the Commission's studies appear to merit further scrutiny and review. For example, Professor Kathleen Ridolfi's study erroneously lists two cases from Ventura County, where the court allegedly found prosecutor misconduct but concluded it was "harmless error." Our review of both of these cases suggests they should not be included in the study at all.

In *People v. Hosea* (Feb. 3, 2004, B165929) 2004 WL 198360, 2004 Cal.App.Unpub.LEXIS 1109, there is no judicial finding of misconduct. In that case, the defense objected to a comment by the prosecutor during argument that to find the defendant not guilty, the jurors would have to believe the defendant's story. The court held that there was "no prejudicial misconduct" but did not state whether there was misconduct at all. The court stated in part:

To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. . . . Prosecutorial misconduct involves use of deceptive or reprehensible methods to persuade the jury, or acts so egregious as to create an unfair trial. . . . There was no such egregious conduct here. The prosecutor did not employ deceptive or reprehensible methods in his argument to the jury. After the defense objection, the trial court reiterated that the prosecutor bore the burden to prove appellant's guilt beyond a reasonable doubt. This was effectively an admonition that cured **any error**. . . Appellant received a fair trial. There was no prejudicial misconduct. (Emphasis added.)

In the second case, *People v. Johnson* (Mar. 19, 2003, B156533) 2003 WL 1309091, one might infer that the court found misconduct but the court's opinion is not entirely clear on that issue. In that case, the prosecutor asked a deputy sheriff whether the defendant was one of the people depicted in a videotape. The defense objected that the testimony was improper. The reviewing court's analysis of the issue inconsistently referred to "the error" and the "alleged misconduct." The court stated:

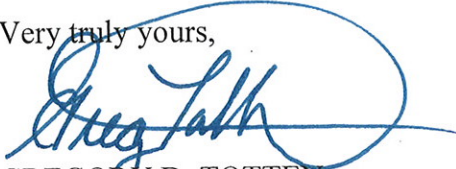
³ Rule of Professional Conduct 5-220, Business and Professions Code § 6086.7 and *People v. Wheeler* (1978) 22 Cal. 3d 258, 282 fn. 29.

The trial court found that **the error** could be easily cured by admonishing the jury [noting that the trial court struck the question and the answer]. . . . [¶] A trial court is vested with considerable discretion in ruling on a motion for mistrial based on prosecutorial misconduct. . . . Hence, in the absence of prejudice to the fairness of a trial, prosecutor misconduct will not trigger reversal. . . . [¶] Here there was no prejudice. The evidence was overwhelming . . . [¶] The trial court was in the best position to gauge **the misconduct** and the effect on the jury. It found that an admonishment would cure **the error**. . . . [¶] On this record, we agree. . . . The **alleged misconduct** was harmless beyond a reasonable doubt. (Citations omitted and emphasis added.)

Finally, the suggestion that district attorneys do not keep records of prosecutor misconduct is misleading and use of the term “repeat offender” for attorneys is not appropriate within the professional responsibility subject matter of this report. District attorneys are required to maintain confidential personnel files on prosecutors and findings of misconduct would ordinarily be documented in such files by way of performance evaluation or disciplinary action. We do not keep separate public records listing such findings and identifying the attorneys because doing so would violate the attorneys’ rights to privacy in their own personnel records. Use of the term “repeat offender” is typically associated with individuals who commit multiple violations of criminal law and for this reason it is inappropriately inflammatory to use such a term when referring to either defense attorneys or prosecutors for committing errors in court.

In sum, I respectfully dissent from the Commission’s Final Report on Professional Responsibility for all of the reasons set forth above. I continue to believe the court’s failure to report attorney misconduct is most effectively addressed through additional training and education. The Commission’s recommendation to create a new rule is neither necessary nor will it accomplish its intended purpose.

Very truly yours,



GREGORY D. TOTTON
District Attorney

GDT/jd