Preventable Error:
A Report on Prosecutorial Misconduct in California 1997–2009

by
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and
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A VERITAS Initiative Report

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A Report on Prosecutorial Misconduct in California 1997–2009

by

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A VERITAS Initiative Report

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We dedicate this report to

Father Paul Locatelli, S.J.

as a tribute to

his compassion and commitment

to justice for all.

Foreword

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.

– American Bar Association

The majority of California prosecutors successfully discharge the obligations requisite in their two roles: acting both as advocates in seeking convictions and as ministers of justice, charged with using only fair methods to prosecute those they believe are guilty. But, as this report shows, some prosecutors have let their advocacy role prevail to the extent of using deceptive and unfair tactics to secure convictions.

This study of prosecutorial misconduct was undertaken to further understand the scope of the problem, and is a long overdue step in trying to address the issue. In 2004, the California Senate established the California Commission on the Fair Administration of Justice (CCFAJ) to examine the causes of wrongful conviction and recommend reforms to improve the administration of justice. It was my honor to serve on that Commission and to work under the extraordinary leadership of its chairman, former California Attorney General John Van de Kamp and its executive director, Santa Clara University School of Law professor and former dean Gerald Uelmen.

As a Commissioner, I was asked to assist the Commission in understanding the extent to which prosecutorial misconduct is a factor in the conviction of innocent people in the state. Until that point, very little systematic research had been done on this problem of prosecutorial misconduct in California or on its effects on the conviction of innocent people.

Early on in my work, I came across a ground-breaking study published in 1999 in the Chicago Tribune. It was conducted by reporters Maurice Possley and Ken Armstrong, and published in a five-part series. The series, "Trial & Error: How Prosecutors Sacrifice Justice to Win," focused particularly on prosecutorial misconduct since the Supreme Court's 1963 decision

in *Brady v. Maryland*. It was a terrific piece of work and I wanted to know more about it, so I called the Tribune and reached Possley. In our brief conversation, I told him what I was doing, he described their work, wished me good luck and we said goodbye. Two years later, in a Commission hearing in 2007, I reported my findings, which were later published in the CCFAJ Final Report.

Intrigued by what I had learned from my work for CCFAJ, I continued the research to expand upon the findings. In 2009, in the midst of the expanded project, Possley, who had left the Tribune in 2008 after winning a Pulitzer Prize for investigative reporting, joined me in the research. His work was essential to this report and I am deeply grateful to him.

I have many others to thank.

Thank you to Santa Clara University and in particular Santa Clara University School of Law Dean Donald Polden for unwavering support of this project. A million thanks go to Sarah Perez and Jessica Seargeant for their countless hours, intelligence, friendship, humor and support of every kind that they gave to us and to this project; to Jessica Marz whose critical role in the research and data analysis of the earlier CCFAJ study was invaluable to me; and to the staff of the Northern California Innocence Project, all of whom in some way have contributed to this work.

We are incredibly grateful for the support and friendship of the extraordinary Northern California Innocence Project Advisory Board, who with remarkable intellectual power and generosity invested hours in meetings to discuss the importance of this research and to strategize about how best to share our findings. I want to particularly thank Jim Anderson for carrying the flag for policy and reform from the beginning and Andy Ludwick who helped us crystallize our vision of this project - always with humor, encouragement and wise counsel. And, most especially, I want to thank Frank Quattrone who always encouraged excellence and has been supportive through the years it took to complete this project.

I am grateful to all of our generous donors, in particular, the remarkable man and anonymous donor whose commitment launched us into the final stretch, to the Frank and Denise

Quattrone Foundation for bringing this project home, and to the law firm of Howard Rice Nemerovski Canady Falk & Rabkin for the exceptional pro bono support they gave us to complete this project. We are especially grateful to Denise Foderaro (Quattrone), whose critical eye for detail and knowledge of the subject proved invaluable, and to Barbara Winters who brought her extraordinary editing skills to this project.

Thanks to the many Santa Clara University Law students who assisted in this research over the last five years, my heroes (you know who you are), the countless people who helped us identify the names of the prosecutors and to the colleagues who reviewed drafts and gave us invaluable feedback and guidance including: Madeline deLone, Cathy Dreyfuss, Barbara Fargo, Keith Findley, Brandon Garrett, Bennett Gershman, Daniel Medwed, Theresa Newman, Carol Sanger, Gerald Uelmen, John Van de Kamp and Ellen Yaroshefsky.

Enormous thanks go to my Associate Director Lee Raney, whose persistence and faith drove this project to completion, and our one-woman marketing department, Audrey Redmond, who managed to wrestle the pages out of our hands and out the door.

And to Maurice Possley, who in just over a year has been transformed from a person I respected and whose work I admired to someone I count on every day for his professional advice, friendship and wit.

Not least, Maurice and I want to thank our families for their patience and support during the many hours we spent away from them to bring this report to fruition. And to my partner Linda Starr, whose professional judgment and personal support make everything possible.

And to the prosecutors and members of the California State Bar who have helped and supported us in this work. You have our gratitude and highest respect.

Cookie Ridolfi
October 2010

ABOUT PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009

Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009 is the most comprehensive, up-to-date, quantitative and actionable study on the extent of prosecutorial misconduct in California, how the justice system identifies and addresses it, and its cost and consequences, including the wrongful conviction of innocent people. By shining a light on prosecutorial conduct, this groundbreaking research, the work of leading experts in the field from the highly respected legal resource, NCIP, will serve as a catalyst for reform.

ABOUT VERITAS INITIATIVE

Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009 marks the launch of the Veritas Initiative, NCIP's investigative watchdog devoted to advancing the integrity of our justice system through research and data-driven reform, using the work of our preeminent experts in the field.

ABOUT THE NORTHERN CALIFORNIA INNOCENCE PROJECT

The Northern California Innocence Project (NCIP) at Santa Clara University School of Law operates as a pro bono legal clinical program, where law students, clinical fellows, attorneys, pro bono counsel, and volunteers work to identify and provide legal representation to wrongfully convicted prisoners.

NCIP educates future attorneys, exonerates the innocent, and is dedicated to raising public awareness about the prevalence and causes of wrongful conviction. With its Veritas Initiative, NCIP promotes substantive legislative and policy reform through data-driven research and policy recommendations aimed at ensuring the integrity of our justice system.

NCIP ADVISORY BOARD

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Introduction and Executive Summary

Introduction and Executive Summary

Seventy-five years ago, in reversing a conviction because of prosecutorial misconduct, the United States Supreme Court specified the paramount obligation of a prosecutor: "[A] prosecutor has a duty to refrain from improper methods calculated to produce a wrongful conviction[1]… [While he] may strike hard blows, he is not at liberty to strike foul ones."[2] The Court emphasized the critical role the prosecutor plays in a judicial system like ours that is aimed at justice, not simply conviction: the prosecutor "is the representative… of a sovereignty whose… interest in a criminal prosecution is not that it shall win a case, but that justice shall be done."[3] Because the prosecutor had misstated evidence, bullied witnesses, put words into the mouth of a witness and intimated facts he knew were false, the Court overturned the conviction.

The problem of prosecutorial misconduct is even more critical today. Scores of academic articles and books, as well as the media, have documented the extent to which some prosecutors continue to use the very tactics the Supreme Court decried, as well as others, to obtain convictions.[4]

To more fully document the scope of the problem, the Northern California Innocence Project (NCIP) engaged in a comprehensive analysis of publicly available cases of prosecutorial misconduct in California, reviewing more than 4,000 state and federal appellate rulings, as well as scores of media reports and trial court decisions, covering the period 1997 through 2009. This study—the "Misconduct Study"—is the most in-depth statewide review of prosecutorial misconduct in the United States.

NCIP's examination revealed 707 cases in which courts explicitly found that prosecutors committed misconduct. In about 3,000 of the 4,000 cases, the courts rejected the prosecutorial misconduct allegations, and in another 282, the courts did not decide whether prosecutors' actions were improper, finding that the trials were nonetheless fair.

Identifying 707 cases in which prosecutorial misconduct was found—on average, about one case a week—undoubtedly understates the total number of such cases. These 707 are just

the cases identified in review of appellate cases and a handful of others found through media searches and other means. About 97 percent of felony criminal cases are resolved without trial, almost all through guilty pleas.[5] Moreover, findings of misconduct at the trial court level that are not reflected in appellate opinions cannot be systematically reviewed without searching every case file in every courthouse in the state. And of course, the number cannot capture cases of prosecutorial misconduct that were never discovered (for example, failure to disclose exculpatory evidence) or appealed (due, for example, to lack of resources or ineffective counsel).

The Misconduct Study's findings as to the results in these 707 cases were as follows: In the vast majority—548 of the 707 cases—courts found misconduct but nevertheless upheld the convictions, ruling that the misconduct was harmless—that the defendants received fair trials notwithstanding the prosecutor's conduct. Only in 159 of the 707 cases—about 20 percent—did the courts find that the misconduct was harmful; in these cases they either set aside the conviction or sentence, declared a mistrial or barred evidence.

The Misconduct Study shows that those empowered to address the problem—California state and federal courts, prosecutors and the California State Bar—repeatedly fail to take meaningful action. Courts fail to report prosecutorial misconduct (despite having a statutory obligation to do so), prosecutors deny that it occurred, and the California State Bar almost never disciplines it.

Significantly, of the 4,741 public disciplinary actions reported in the *California State Bar Journal* from January 1997 to September 2009, only *10* involved prosecutors, and only *six* of these were for conduct in the handling of a criminal case. *That means that the State Bar publicly disciplined only one percent of the prosecutors in the 600 cases in which the courts found prosecutorial misconduct and NCIP researchers identified the prosecutor.*

Further, some prosecutors have committed misconduct repeatedly. In the subset of the 707 cases in which NCIP was able to identify the prosecutor involved (600 cases), 67 prosecutors–11.2 percent—committed misconduct in more than one case. Three prosecutors committed misconduct in four cases, and two did so in five.

The failure of judges, prosecutors and the California State Bar to live up to their responsibilities to report, monitor and discipline prosecutorial misconduct fosters misconduct, undercuts public trust and casts a cloud over those prosecutors who do their jobs properly. The problem is critical.

Prosecutorial misconduct is an important issue for us as a society, regardless of the guilt or innocence of the criminal defendants involved in the individual cases. Prosecutorial misconduct fundamentally perverts the course of justice and costs taxpayers millions of dollars in protracted litigation. It undermines our trust in the reliability of the justice system and subverts the notion that we are a fair society.

Prosecutorial misconduct is an important issue for us as a society, regardless of the guilt or innocence of the criminal defendants involved in the individual cases.

At its worst, the guilty go free and the innocent are convicted. An especially stark example is the death penalty prosecution of Mark Sodersten, a man who spent 22 years behind bars convicted of a murder that the appellate court said he most likely did not commit.

In 2007, a California Court of Appeal found that the deputy district attorney who prosecuted Sodersten, Phillip Cline, had improperly withheld from the defense audiotapes of his interviews with a key witness.[6] After reviewing the tapes, the justices found they contained dramatic evidence pointing to Sodersten's innocence. Based on this finding, the court vacated his conviction, emphasizing: "This case raises the one issue that is the most feared aspect of our system—that an innocent man might be convicted."[7]

For Sodersten, the ruling in his case came too late: he had died in prison six months earlier. Even though the defendant's death ordinarily ends the case, the court took the unusual step of issuing a ruling anyway because of the importance of the issue:

> "[W]hat happened in this case has such an impact upon the integrity and fairness that are the cornerstones of our criminal justice system that continued public confidence in that system requires us to address the validity of [Sodersten's] conviction despite the fact we can no longer provide a remedy for petitioner himself."[8]

The court concluded:

> "To do otherwise would be a disservice to the legitimate public expectation that judges will enforce justice. It would be a disservice to justice. Most of all, it would be a disservice to [Sodersten] who maintained his innocence despite a system that failed him."[9]

The prosecutor was never disciplined. Sodersten's attorney filed a formal complaint with the California State Bar, arguing that the prosecutor "asked a jury to kill a man based on a conviction he perverted."[10] But in April 2010, the State Bar closed the investigation, because "this office has concluded that we could not prove culpability by clear and convincing evidence"—even though the tapes the prosecutor wrongfully withheld included interviews with a key witness conducted by the prosecutor himself.[11]

The prosecutor, Phillip Cline, has never been held responsible for his actions, and it is virtually certain that he never will. He has absolute immunity from any civil liability for his conduct as a prosecutor. Cline was elected District Attorney for Tulare County in 1992 and remains in that position today.

In short, as the Misconduct Study concludes, prosecutors continue to engage in misconduct, sometimes multiple times, almost always without consequence. And the courts' reluctance to report prosecutorial misconduct and the State Bar's failure to discipline it empowers prosecutors to continue to commit misconduct. While the majority of California prosecutors do their jobs with integrity, the findings of the Misconduct Study demonstrate that the scope and persistence of the problem is alarming. Reform is critical.

The failure of judges, prosecutors and the California State Bar to live up to their responsibilities to report, monitor and discipline prosecutorial misconduct fosters misconduct, undercuts public trust and casts a cloud over those prosecutors who do their jobs properly. The problem is critical.

The authors recommend a number of reforms as first steps toward the goal of eliminating attorney misconduct in criminal cases, including:

- Court-related reforms, such as expanding the existing judicial reporting requirement to mandate reporting of any finding of egregious prosecutorial misconduct, as well as any constitutional violation, even if deemed harmless; identifying in opinions the full names of prosecutors found to have committed misconduct; California Supreme Court monitoring of compliance with judicial reporting and notice obligations and making public the records of compliance; and replacing prosecutors' current absolute immunity from civil liability with a form of qualified immunity;

- Remedies for the California State Bar, such as adopting revised ethical rules concerning special responsibilities of prosecutors (modeled on the American Bar Association's Model Rule 3.8)[12], expanding discipline for prosecutorial misconduct and increasing the transparency of the State Bar disciplinary process; and

- Attorney-related reforms, such as ethical training for prosecutors and criminal defense attorneys, establishing internal misconduct procedures and developing exculpatory evidence policies.

Prosecutorial misconduct is wrong. It is not excusable as a means to convict the guilty, and it is abhorrent in the conviction of the innocent. It has no place in a criminal justice system that strives to be fair, to accurately convict the guilty and to protect the innocent. It undercuts the public trust and impugns the reputations of the majority of prosecutors, who uphold the law and live up to their obligation to seek justice.

By casting a blind eye to prosecutors who place their thumbs on the scale of justice, judges, prosecutors and the California State Bar are failing to live up to their responsibilities, fostering misconduct and opening the door to the inevitable—the conviction of the innocent and the release of the guilty. It is time to acknowledge the problem and take needed action.

Organizational Summary

The organizational structure of this report is as follows: it describes the methodology the Misconduct Study employed (Part I); provides an overview of the Study's findings (Part II); reviews the cases finding misconduct and those declining to decide the issue (Part III); discusses the role of the prosecutors (Part IV), the courts (Part V) and the California State Bar (Part VI) in addressing prosecutorial misconduct; examines the costs and consequences of prosecutorial misconduct (Part VII); shows how absolute immunity allows prosecutors to escape accountability (Part VIII) and makes recommendations for dealing with the problem (Part IX).

Recommendations

The California State Bar, in conjunction with the California District Attorneys Association, California Public Defenders Association and California Attorneys for Criminal Justice, should develop a course specifically designed to address ethical issues that commonly arise in criminal cases.

District Attorney offices should adopt internal policies that do not tolerate misconduct, including establishing internal reviews of error.

District Attorney offices and law enforcement agencies should adopt written administrative exculpatory evidence policies to govern *Brady* compliance.

The reporting statute should be expanded to require judicial reporting of any finding of "egregious" misconduct as defined by the California Commission on the Fair Administration of Justice (CCFAJ), as well as any constitutional violation by a prosecutor or defense attorney, regardless of whether it resulted in modification or reversal of the judgment, including violations of ethical rules.

Judges should be required to list attorneys' full names in opinions finding misconduct.

(continued)

Recommendations (continued)

The California Supreme Court should actively monitor compliance with the requirements of judicial reporting and notification of attorneys mandated by Business and Professions Code section 6086.7. Records of compliance—a list of cases reported to the State Bar by the court—should be publicly available.

Prosecutors should be entitled at best to qualified immunity.

California should adopt American Bar Association's Model Rule 3.8.

The State Bar should expand discipline for prosecutorial misconduct and increase disciplinary transparency.

I. Methodology

I. Methodology

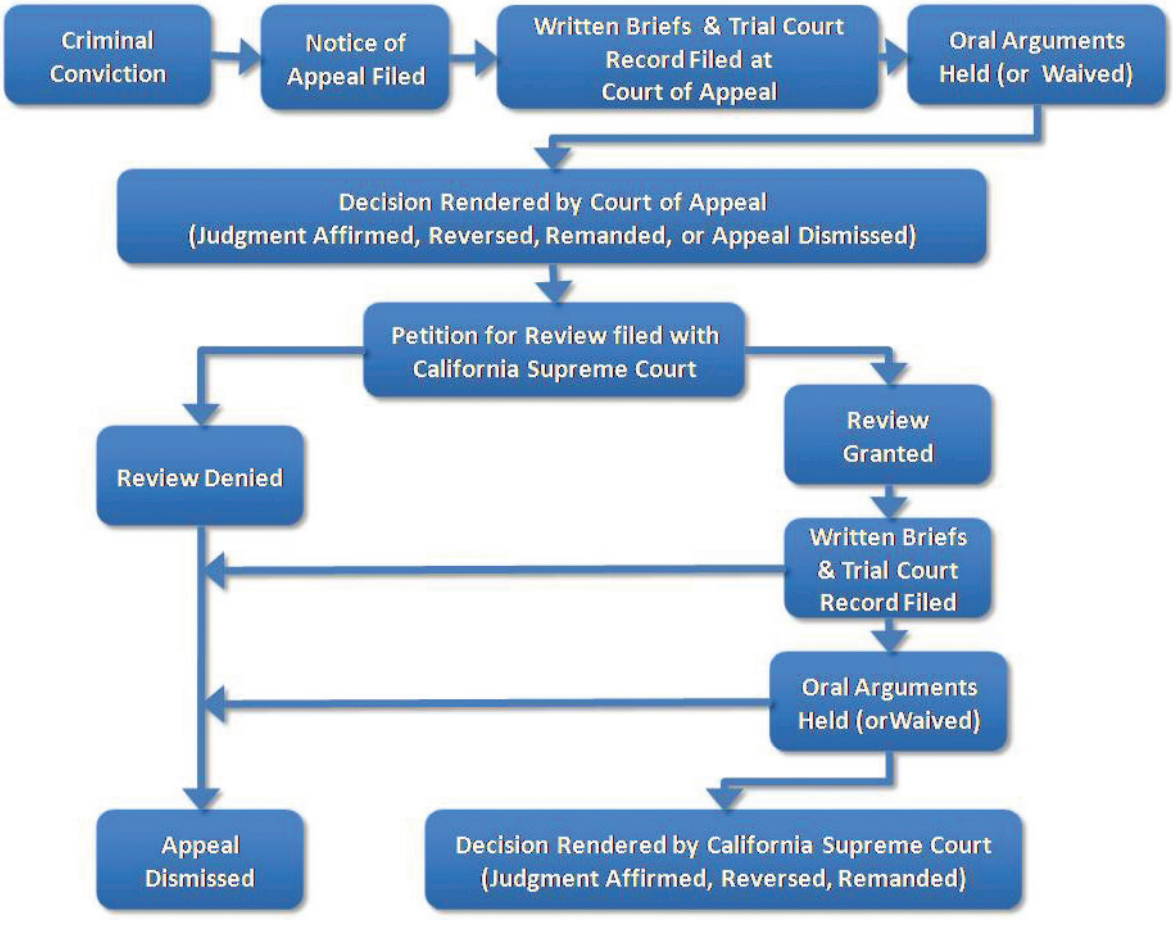
The goals of the Misconduct Study were to identify: (1) federal and state court findings of prosecutorial misconduct in criminal cases in California during the period 1997 through 2009; (2) consequences of that misconduct for the outcome of the cases; and (3) disciplinary consequences for the prosecutors themselves. The Misconduct Study expands upon and further analyzes the issues addressed in a report issued in 2008 by the California Commission on the Fair Administration of Justice (CCFAJ) on prosecutorial misconduct,[13] which covered the period 1997 through 2006.

For the first goal, the NCIP sought to identify the state and federal criminal cases in California during this period in which issues of prosecutorial misconduct were raised. Primarily through online legal database searches using Westlaw, NCIP researchers identified approximately 4,000 such state and federal appellate rulings that raised the issue.

From a review of these rulings, researchers segregated out those cases in which the court explicitly found no prosecutorial misconduct (approximately 3,000 of the cases) and those in which the court explicitly declined to address the issue (282 cases).

The result was identification of 707 cases in which the courts made specific findings of misconduct. Included in this number were not only the cases identified through online research, but also a small number of cases (approximately three percent) identified by examining scores of media reports and trial court decisions, including through the NEXIS online media database, and by following leads generated by Westlaw database searches and interviews with attorneys.

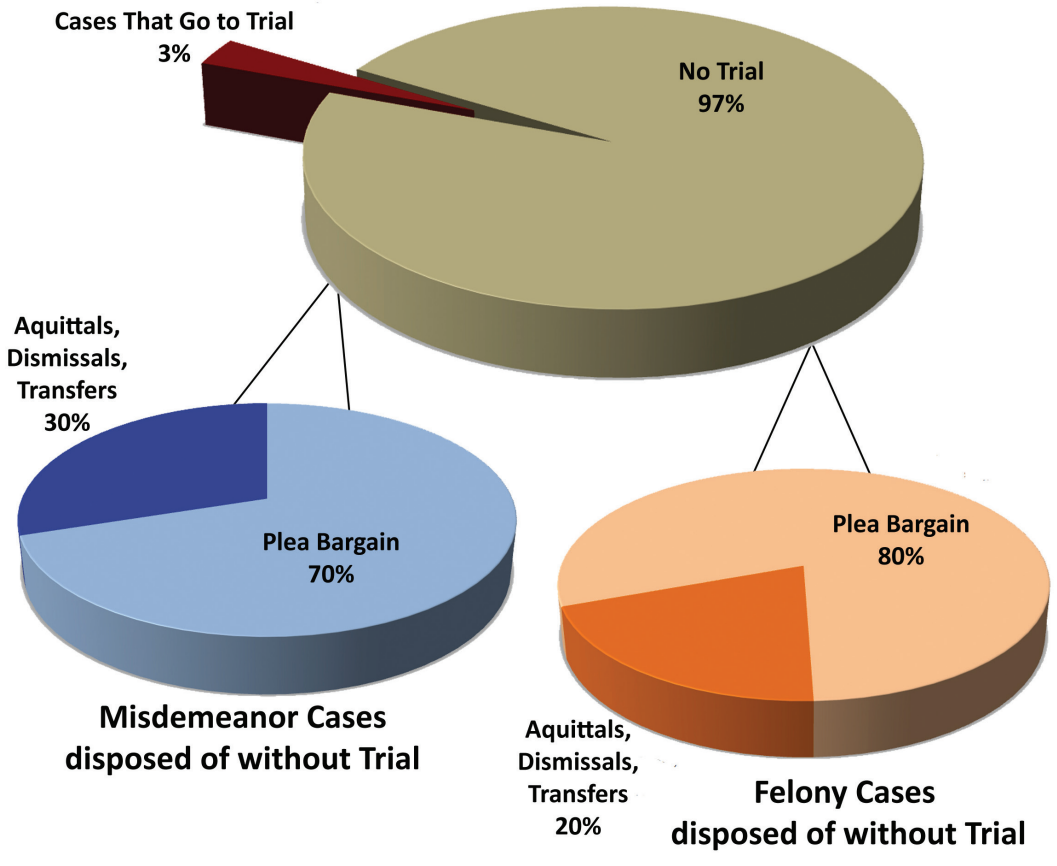
This number certainly understates the number of cases in which prosecutorial misconduct was found. The 707 cases were primarily ones reviewed by appellate courts and accordingly reflected in a trial court transcript. The overwhelming majority of cases are never subjected to judicial review. More than 97 percent of felony criminal cases are resolved without trial, almost all through guilty pleas.[14] Some cases of misconduct are never appealed. Further, during the first five years covered in the Misconduct Study, more than 90 percent of California



How a Criminal Appeal is Processed: This chart demonstrates the process for appealing a criminal conviction in California. Most of the opinions reviewed by NCIP occurred at the Court of Appeal level.

Source: Self Service Center, Superior Court of California, County of Santa Clara, available at http://www.scselfservice.org/home/overview.htm

State appellate decisions were not entered into legal databases.[15] As a result, these rulings, as well as findings of misconduct at the trial court level and not reflected in appellate opinions, cannot be systematically reviewed without personally searching every courthouse archive in the state.



Percentage of Cases that Go to Trial: Ninety-seven percent of criminal cases in California do not go to trial. This chart details what happens to them.
Source: Judicial Council of California and California Legislative Analysis Office

To determine the effect of the courts' findings of prosecutorial misconduct for these 707 criminal cases—the second goal—the results in each case were compiled. In nearly 80 percent of those cases, the courts nevertheless upheld the convictions (harmless error). In only about 20 percent of these cases did the finding result in setting aside of the conviction or sentence, mistrial, or barred evidence (harmful error).

The harmful error category is defined as cases where misconduct was found and where the finding resulted in courts setting aside convictions or sentences, declaring mistrials or barring evidence. The harmless error category is defined as cases where misconduct was found, but the courts nevertheless upheld the convictions, ruling that the misconduct did not alter the fundamental fairness of the trial. After reviewing the cases, NCIP researchers developed a third category where the court refrained from making a ruling on the prosecutorial misconduct issues, instead holding that any error would have been harmless or that the issue was waived because the defense failed to make a proper objection.

To address the third goal of identifying disciplinary consequences for the prosecutors found to have committed misconduct in these cases, NCIP researchers first confronted the hurdle of trying to identify those prosecutors by name, since reviewing courts rarely do so. Researchers so far have identified the prosecutors in 600 of the 707 misconduct cases, through examination of court dockets, and by making personal inquiries of prosecutors' and public defenders' offices, as well as other court personnel. Efforts to identify the remaining prosecutors are ongoing.

NCIP researchers then attempted to determine whether the identified prosecutors were referenced in any California State Bar disciplinary reports, as well as, more generally, to identify reports of any other cases of State Bar discipline for prosecutorial misconduct. To do this, researchers reviewed the reports of all disciplinary decisions published by the California State Bar in the State Bar Journal during this period.[16] Because the State Bar does not make these decisions available for online searching, the published reports of every case—4,714 disciplinary records—were reviewed. The results were that only ten public disciplinary reports in this nearly 13-year period (1997-September 2009) involved prosecutors—all of these since 2005—and only six of those were for conduct arising in the handling of a criminal case. Also, in the subset of the 707 cases in which NCIP was able to identify the prosecutor involved (600 cases), it found that 67 prosecutors committed misconduct more than once, including three who committed misconduct four times and two who did so five times.

II. Overview of Findings

II. Overview of Findings

The Misconduct Study identified cases alleging prosecutorial misconduct in California between 1997 and 2009. This is a summary of the findings:

- 67 of the 600 identified prosecutors in the 707 cases where misconduct was found committed misconduct more than once, three committed misconduct four times and two did so five times.

- Only six of the prosecutors in the 707 cases where misconduct was found were disciplined by the California State Bar: From January 1997 to September 2009, only ten of the 4,741 public disciplinary actions reported in the *California State Bar Journal* involved prosecutors, and only six of those, all occurring since 2005, were for conduct arising in the handling of a criminal case.

- In 707 cases, courts explicitly found that prosecutors committed misconduct.

- In 159 of the 707 cases where misconduct was found, the finding resulted in the setting aside of the conviction or sentence, mistrial, or barred evidence.

- In 548 of the 707 cases where misconduct was found, the courts nevertheless upheld the convictions, ruling that the misconduct did not alter the fundamental fairness of the trial.

- In 282 cases, the court refrained from making a ruling on the prosecutorial misconduct issue, instead holding that any error would have been harmless or that the issue was waived.

- In about 3,000 of the approximately 4,000 cases identified, the courts explicitly found no prosecutorial misconduct.

- There were approximately 4,000 federal and state criminal cases in California in which the issue of prosecutorial misconduct was raised.

III. Analysis of Cases Alleging Prosecutorial Misconduct

III. Analysis of Cases Alleging Prosecutorial Misconduct

As noted, NCIP research identified about 4,000 cases involving allegations of prosecutorial misconduct. In approximately three-quarters of these, the court rejected these allegations; those cases are not discussed in the Misconduct Study. Of the remaining cases, the court found that there was prosecutorial misconduct in 707 of them (Part A below), and declined to reach the issue in 282 cases (Part B below).

A. Cases Finding Prosecutorial Misconduct

"To submit this case to the jury would make a mockery of Mr. Ruehle's constitutional right to… a fair trial… The government's misconduct has compromised the integrity and legitimacy of the case."

– United States v. Ruehle, U.S. District Court for the Central District of California [17]

In December 2009, the federal district court dismissed the charges against Broadcom Corporation's former chief financial officer, William Ruehle, and company co-founder Henry T. Nicholas III, on the grounds that the prosecutor, Andrew Stolper, intimidated witnesses. The intimidation included telephoning the current employer of a former Broadcom employee who had initially refused to cooperate with the prosecution, resulting in her being fired. The court overturned that former employee's guilty plea.[18] The court also overturned the guilty plea of another Broadcom employee because the prosecutor coerced him to become a prosecution witness by inducing him to admit to a crime he did not commit. Judge Cormac Carney called prosecutor Stolper's conduct "shameful."[19]

The ruling of harmful error in *Ruehle* is in the minority. Of the 707 cases in which there were findings of prosecutorial misconduct, convictions were upheld in nearly 80 percent of the cases—548 of the 707—despite the finding of prosecutorial misconduct. In only 159 cases was the prosecutorial misconduct deemed sufficiently egregious in the context of the overall trial for the courts to find harmful error and set aside convictions or sentences, declare mistrials

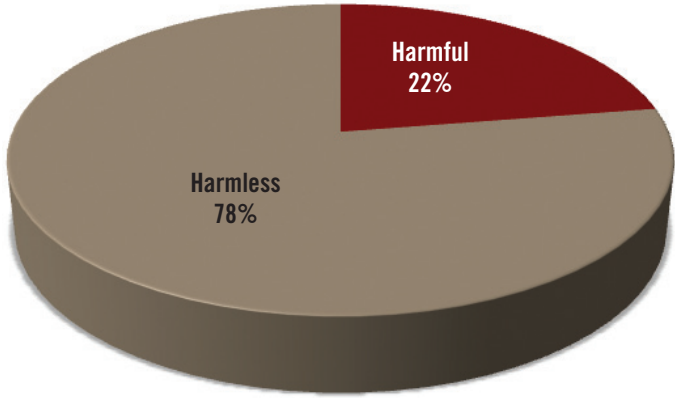
or bar evidence. This is a result of the appellate courts' liberal application of the "harmless error" doctrine employed in appellate review of misconduct.

1. Defining Misconduct: Background on the Harmless Error Doctrine

Applying the harmless error doctrine, an appellate court may affirm a conviction even where prosecutorial misconduct or other errors occurred, if it believes that the error did not affect the outcome of the case.[20] Only 20 percent of the prosecutorial misconduct cases were able to surmount this high hurdle. While this doctrine was originally intended to eliminate the need for multiple retrials for small technical mistakes, it has evolved to the point that it is now applied even to constitutional violations.

The United States Supreme Court enunciated the federal standard in the landmark case of *Chapman v. California,* holding that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[21]

In California, the harmless error rule is rooted in the California Constitution, which provides that judgments shall not be set aside or new trials granted on specified grounds "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."[22] The California Supreme Court has held that a "miscarriage of justice" requires a finding "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."[23]

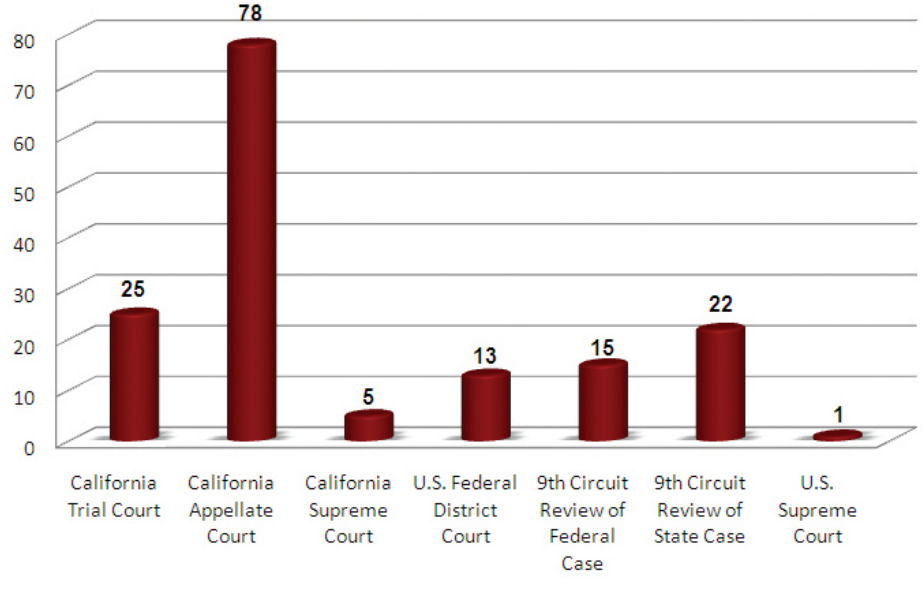


Breakdown of Misconduct Findings: Of the 707 cases finding misconduct in this study, courts ruled 78 percent harmless and 22 percent harmful. Harmful findings are cases where courts set aside convictions or sentences, declared mistrials or barred evidence. Harmless findings are cases where the conviction was upheld despite the misconduct.

2. Harmful Error: Where Misconduct Resulted in Setting Aside Convictions or Sentence, Mistrials, or Barring of Evidence

Harmful error often involves "grossly shocking"[24] prosecutorial misconduct, as in the cases of William Ruehle and Augustin Uribe. The Court of Appeal set aside Uribe's conviction for child molestation in 2008 because Santa Clara County deputy district attorney Troy Benson withheld critical evidence from the defense: a videotape of the victim's medical exam that supported the defense expert's testimony that no sexual assault had occurred.[25] On remand, the judge dismissed the case; the dismissal is now on appeal.[26] The discovery of the videotape in the Uribe case led to more than 3,000 other videotapes dating back to 1991 that had never been disclosed to defense attorneys.[27]

Uribe's case is one of the 159 in which courts found that the prosecutorial misconduct constituted harmful error and set aside convictions or sentences, declared mistrials or barred evidence.



Distribution of Harmful Case Findings by Court: The cases reviewed in this study where convictions or sentences were set aside, mistrial declared, and evidence barred fell into the above distribution. The misconduct findings came out of the California Appellate Courts in about half the cases. The other half were distributed throughout the other courts.

3. Harmless Error: Where The Courts Affirmed Convictions or Rejected Trial Challenges Despite Prosecutorial Misconduct

"We find the prosecutor engaged in a troubling and extensive pattern of misconduct… [D]espite the gravity of the misconduct, we are convinced it did not affect the verdict… In another case… it might well require reversal."

– People v. McKenzie, First District Court of Appeal[28]

The *McKenzie* case is a prime example of how the harmless error standard has been applied to affirm convictions even in the face of explicit findings of prosecutorial misconduct. The court criticized Alameda County deputy district attorney Brian Owens for engaging in repeated misconduct, stating, "The only conclusion we can draw from [the prosecutor's] dogged pursuit of this line of questioning is an intent to insinuate the existence of evidence he could not properly bring before the jury."[29] It compared this conduct to a prosecutor who "instilled a poison which the defense could not drain from the case."[30] Yet the court went on to affirm the conviction, relying on the harmless error doctrine to rule that despite the misconduct, the defendant received a fair trial. The same result occurred in nearly 80 percent of the prosecutorial misconduct cases identified in the Misconduct Study: convictions were upheld based on the "harmless error" doctrine.

> The egregiousness of a prosecutor's misconduct does not determine the harmfulness of the error; the issue for harmless error review is whether despite the misconduct, the defendant received a fair trial. That means that very serious misconduct can be deemed harmless.

Liberal application of the harmless error rule is problematic in critical respects, for which the Misconduct Study's authors offer specific recommendations (*see* Part IX). Specifically, it has led courts repeatedly to affirm convictions despite findings of prosecutorial misconduct, as in 548 of the 707 cases identified in the Misconduct Study.

It also increases even further the likelihood that prosecutors will commit misconduct with impunity. As noted, there were only six cases of public discipline for prosecutorial misconduct in a nearly 13-year period, and none for misconduct in a case where the error was found to be harmless.

In fact, there is not even a requirement to report misconduct found to be harmless. As is discussed in more detail below (see Part V), California Business and Professional Code section 6086.7 requires only that courts report misconduct whenever there is a reversal or modification in a judgment as a result of attorney misconduct. That is true even though the misconduct in harmless error cases can be just as egregious as that in cases where the error is found to be harmful, since the result depends on an analysis of the overall trial.

Harmful Error Conduct	**Harmless** Error Conduct
Perlaza, 439 F.3d 1149 (2006)	*Flores-Perez, 311 Fed.Appx 69 (2009)*
Shifting the Burden of Proof	**Shifting the Burden of Proof**
"That presumption [of innocence], when you go back in the room behind you, is going to vanish when you start deliberating. And that's when the presumption of guilt is going to take over…" (at 1169)	"when you retire to the jury room to deliberate, the presumption [of innocence] is gone. You are no longer obligated to presume innocence, but you are obligated to draw rational conclusions from the evidence." (at 71)
Combs, 379 F.3d 564 (2004)	*Brown, 2006 WL 1062095 (2006)*
Improper Examination	**Improper Examination**
"compel Combs to impugn the veracity of agent Bailey's testimony, pitting Comb's credibility against agent Bailey's." (at 573)	"forcing [defendant] to characterize all the witnesses, including police officers as liars." (at 22)
Sandoval, 231 F.3d 1140 (2000)	*Welch, 20 Cal.4th 701 (1999)*
Appeal to Religious Authority	**Appeal to Religious Authority**
"prosecutor argued to the jury that the death penalty was sanctioned by God." He paraphrased Romans 13 saying, "But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil." (at 1150)	"prosecutor read various passages of the Bible apparently sanctioning capital punishment, including Exodus, chapter 21, verse 12, which states, 'He that smiteth a man, so that he die, shall be surely put to death'."(at 761)

Harmful Error Conduct	Harmless Error Conduct
R. Guzman, 96 Cal.Rptr.2d 87 (2000)	*G. Guzman, 2005 WL 435452 (2005)*
Improper Comment on Right to Silence	**Improper Comment on Right to Silence**
The prosecutor "repeatedly emphasized Hall's (the other party in the incident) decision to testify… [and] rather clumsily alerted the jury to the fact that, unlike Hall, Guzman was not willing to explain his side of the story in court." (at 90)	The prosecutor argued that "the prosecution on this case has provided to you two out of the three murderers who come in here and tell you themselves from their own mouths what really happened" which "brought Guzman's failure to testify into sharper focus than might otherwise have been the case." (at 19)
Rodrigues, 159 F.3d 439 (1998)	*Jordan, 2005 WL 1766387 (2005)*
Impugning Defense	**Impugning Defense**
The prosecutor argued, "Mr. Neal [defense counsel] has tried to deceive you from the start in this case about what this case is really about…. [Mr. Neal] has tried to introduce a number of nonissues, false issues." (at 449)	The prosecutor argued, "What has gone on in this case is a mockery of the system. You've seen from start to finish the defense pull all sorts of games and all sorts of tricks." (at 13)

Comparing How Courts Characterize Misconduct: Courts have found the same types of misconduct in both cases where convictions or sentences were set aside, mistrials declared, or evidence barred and cases where convictions were upheld. The misconduct does not determine whether a trial is called fair by a court.

In short, the egregiousness of a prosecutor's misconduct does not determine the harmfulness of the error; the issue for harmless error review is whether despite the misconduct, the defendant received a fair trial. That means that very serious misconduct can be deemed harmless.

Thus, the prosecutorial misconduct in the 548 harmless error cases may have involved infractions just as serious as—in some cases, identical to—those in the 159 harmful error cases. Yet in the harmless error cases, the courts have no obligation to report misconduct to the State Bar or notify the prosecutor of the misconduct finding.[31] Accordingly, prosecutors are not held accountable in the vast majority of misconduct cases. In fact, even where the opinion is published, they are rarely identified by name. In some cases, they may have no idea that a court ruled they committed misconduct; the courts have no obligation to notify prosecutors in cases where the error is deemed harmless.[32]

Not surprisingly, some go on to repeat the exact same misconduct in other cases. For example, of 67 prosecutors identified in the Misconduct Study as having committed misconduct in multiple cases (some as many as five times), in the vast majority of cases the misconduct was held to be harmless error. These prosecutors committed repeated misconduct without ever being called to answer for it.

4. Findings of Prosecutorial Misconduct Categorized by Type

The term "prosecutorial misconduct" encompasses a wide range of improper tactics in criminal cases. The California Supreme Court has explained that it "implies a deceptive or reprehensible method of persuading the court or jury."[33] More broadly, the term has been used to describe any "behavior that deliberately seeks an unfair advantage over the accused or a third person, or otherwise seeks to prejudice these persons' rights."[34] Black's Law Dictionary provides specific examples, defining "prosecutorial misconduct" as "[a] prosecutor's improper or illegal act (or failure to act), esp. involving an attempt to avoid required disclosure or persuade the jury to wrongly convict a defendant."[35]

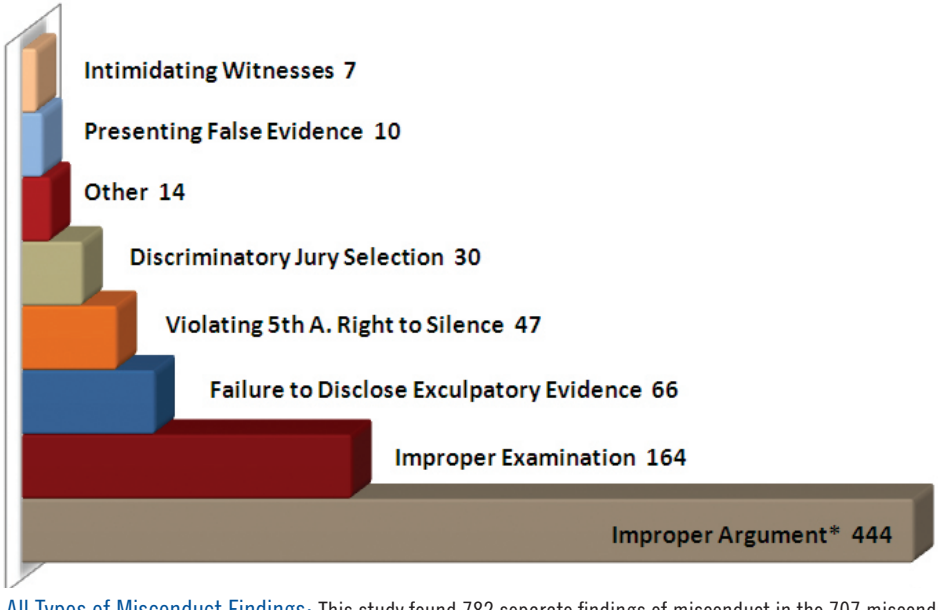
The broad scope of the concept "prosecutorial misconduct" emerges upon analysis of its specific types. To that end, NCIP researchers reviewed each of the 707 cases in which prosecutorial misconduct was found and grouped the offending conduct—whether it was held to be harmful or harmless—together into specific categories.

The majority of the eight types of misconduct findings fall into two types: improper witness examination and improper argument. Witness examination—prosecutors' direct questioning of their own witnesses or challenging of defense witnesses through cross-examination—is improper when it misleads the jury or unfairly prejudices the defendant. NCIP found 164 findings of improper examination misconduct.

As for misconduct in argument, there are a multitude of ways in which prosecutors use improper methods in opening or closing arguments to try to persuade the jury to convict the defendant. Although courts give prosecutors wide latitude during argument, there are limitations; prosecutors who exceed them commit misconduct. NCIP found 444 improper argument findings.

The specific categories, discussed in more detail below, are: eliciting inadmissible evidence in witness examination; vouching for a witness's truthfulness; testifying for an absent witness; misstating the law; arguing facts not in evidence; mischaracterizing evidence; shifting the burden of proof; impugning the defense; arguing inconsistent theories of prosecution; appealing to religious authority; offering personal opinion; engaging in discriminatory jury selection; intimidating a witness; violating the defendant's Fifth Amendment right to silence; presenting false evidence; and failure to disclose exculpatory evidence. These categories do not purport to exhaust all the ways in which prosecutors can commit misconduct; they are simply types of misconduct California courts identified during the period reviewed in the Misconduct Study.

Courts sometimes found prosecutors committed multiple acts of different types of misconduct in a single case. In totaling the number of cases that involved each type, each act that was found to be misconduct was counted separately. Since some cases involved multiple acts of misconduct, the total number of misconduct findings is greater than the total number of misconduct cases identified by NCIP researchers. There were 782 total findings of misconduct in the 707 cases in the Misconduct Study.



All Types of Misconduct Findings: This study found 782 separate findings of misconduct in the 707 misconduct cases. NCIP researchers grouped these 782 findings into the types listed above. * Improper Argument includes vouching for a witness's truthfulness, testifying for an absent witness, misstating the law, arguing facts not in evidence, mischaracterizing evidence, impugning the defense, arguing inconsistent theories of prosecution, appealing to religious authority, offering personal opinion and shifting the burden of proof.

Improper Witness Examination: Eliciting Inadmissible Evidence

The most common form of improper witness examination is eliciting inadmissible evidence. It is misconduct for prosecutors to elicit inadmissible evidence in witness examinations, and especially improper when the examination violates a specific court order. It is standard practice for judges to make rulings before or during trial on the admissibility of evidence. Enforcement of such orders is critical to protect the rights of defendants and ensure that convictions are based only on reliable and relevant evidence.

Prosecutors are required to instruct their witnesses not to testify about evidence excluded by court order. On cross-examination, prosecutors are prohibited from asking questions reasonably likely to result in answers containing prohibited information. While questioning resulting in the introduction of inadmissible evidence can be unintentional, this is often not the case. NCIP researchers found six prosecutors who committed this type of misconduct more than once. This conduct results in irreparable harm; the jury cannot "un-hear" the evidence once it is out.

Example: Harmless Misconduct

In the prosecution of Vincent Gatewood, the Court of Appeal found that in three different instances, Orange County deputy district attorney Janice Chieffo continued a line of questioning the trial court had ruled improper: "Not only did the prosecutor demonstrate disrespect for the authority of the court, she also attempted to persuade the jury by impermissible means."[36]

Prosecutors can also improperly elicit evidence that, while not specifically excluded by court order, is generally not allowed in criminal trials. A common example is attempting to use a defendant's past criminal history to establish his/her guilt of the crime for which he/she is on trial.[37]

Example: Harmful Misconduct

The Court of Appeal reversed the conviction of Arthur Lee for dangerous discharge of a firearm on the ground of prosecutorial misconduct. [38] The trial judge had instructed

the prosecutor, Los Angeles County deputy district attorney Lea D'Agostino, that in cross-examining the defendant about his prior arson conviction, she could only mention the name of the offense and could not ask further questions about the crime. The prosecutor violated this order during the defendant's cross-examination by asking questions about the details of the arson and the alleged motive, and whether the defendant had attempted arson before. The Court of Appeal reversed the conviction, holding that the arson evidence had nothing to do with the firearm charge and probably biased the jury against the defendant.

Improper Argument: Vouching for a Witness's Truthfulness

"[T]he prosecutor's opinion carries with it the [weight] of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."[39] Because of the probability that a prosecutor will unduly influence the jury in evaluating witness' credibility, it is improper for prosecutors to vouch for the truthfulness of a witness.

Example: Harmless Misconduct

The Court of Appeal found that in the 2002 prosecution of Daniel Parra for receiving stolen property, San Bernadino County deputy district attorney Carolyn Youngberg committed misconduct by stating, during closing arguments, "I submit to you that both [prosecution witnesses] are extremely credible and very honest."[40] The court found that it was misconduct for the prosecutor to "put the backing of the government behind the witnesses' honesty."[41]

Improper Argument: Testifying for An Absent Witnesses

Prosecutors must restrict their arguments to reasonable conclusions drawn solely from the evidence presented during trial; they cannot imply that they have other evidence of guilt that for reasons they cannot explain they are unable to present to the jury. When a prosecutor improperly tells the jury what a witness would have said, it denies the defendant the critical right to confront and cross-examine that witness,[42] leaving the jury simply to believe the prosecutor's version of what the testimony would have been.

Example: Harmful Misconduct

The Court of Appeal reversed the conviction of Kenneth Hall for possession of cocaine based on this type of prosecutorial misconduct.[43] During closing argument, Los Angeles County deputy district attorney Joseph Musso told the jury that the second police officer present at Hall's arrest did not testify because he would have simply supported the prosecution's version of the facts testified to by the officer who did testify. The prosecutor thereby deprived the defendant of his right to cross-examine the second officer and impeach his credibility with the jury.

Improper Argument: Misstating the Law

Rule 5-200 of the California Rules of Professional Conduct prohibits an attorney from seeking to mislead the jury by a false statement of law.[44] When prosecutors, bolstered by their authority, misstate the law, the result may be juror confusion or worse, a miscarriage of justice.

Example: Harmless Misconduct

The Court of Appeal found that it was misconduct for Santa Clara County deputy district attorney Ted Kajani, in his closing arguments at the murder trial of Leonard Thompson, to repeatedly misstate the law regarding manslaughter.[45]

Improper Argument: Arguing Facts Not in Evidence

A jury must decide a criminal case based solely on the evidence presented at trial; jurors are prohibited from relying on or seeking outside knowledge. When prosecutors argue facts unsupported by evidence, they commit misconduct.

Example: Harmful Misconduct

In 2004, the Court of Appeal overturned Damien Humphrey's first degree murder conviction because Los Angeles County deputy district attorney Vivian Moreno impermissibly suggested to the jury that she had additional evidence of Humphrey's guilt.[46] During her opening argument, Moreno continually described the defendant as

having jumped out of a van, wearing a mask and holding a gun; no evidence was ever presented showing any of these facts.

Improper Argument: Mischaracterizing Evidence

Prosecutors' characterization of the evidence and what it purportedly shows can be extremely powerful in persuading a jury, especially in closing arguments. When prosecutors mischaracterize the evidence, they mislead the jury, unfairly prejudice the defendant and commit misconduct.

Example: Harmful Misconduct

The Court of Appeal reversed the grand theft conviction of Curley Barrett on the grounds of prosecutorial mischaracterization of the evidence, although the mischaracterization may have been inadvertent.[47] Los Angeles County deputy district attorney John Evans argued Barrett testified that he had *snuck* the allegedly stolen disc in his briefcase before he left for the day, implying knowledge of theft. In fact, Barrett had testified that he had *stuck* the disc in his briefcase. The court held that even if the mischaracterization was inadvertent, it still harmed the defendant's rights and required reversal.

Improper Argument: Impugning the Defense

It is misconduct for a prosecutor to make irrelevant, insulting comments about the defendant or his lawyer or to argue that the defense is fabricated. Such arguments can prejudice the jury against the defense for reasons having nothing to do with the strength of the proof of guilt.[48] Such attacks undermine both the presumption of innocence and the prosecution's burden of proof by implying that the prosecutor personally knows that the defendant is guilty.

Example: Harmful Misconduct

In 1998, the Court of Appeal reversed Guillermo Contreras' murder conviction and life sentence, based on prosecutorial misconduct.[49] Los Angeles County deputy district attorney Jessica Goulden had argued that the defense attorney was unethical and dishonest and had allowed her witnesses to lie under oath. She also compared the

defendant to Hitler, saying, "Hitler did a lot of evil, but he was nice to children and animals. So if Hitler was on trial, [defense counsel] would be bringing in witnesses to say how nice he was to children all the time."[50]

Improper Argument: Arguing Inconsistent Theories of Prosecution

It is blatant prosecutorial misconduct for a prosecutor to argue irreconcilable theories to obtain convictions against two or more criminal defendants. For example, a prosecutor is prohibited from arguing in two separate trials, in connection with a crime in which he contends there was a single assailant, that each of the two defendants was that single assailant. Because a prosecutor's duty is to seek the truth, rather than simply to obtain convictions, arguing inconsistent theories undermines the reliability of both convictions, as well as the integrity of the criminal justice system, and creates the real likelihood of convicting one or more innocent individuals. Beyond the constitutional principles of fundamental fairness and reliability ensured by the due process clause, a prosecutor's knowing use of inconsistent arguments raises serious ethical considerations.

Example: Harmful Misconduct

In 2005, the California Supreme Court set aside the death sentence imposed on Peter Sakarias on the grounds that Los Angeles County deputy district attorney Steven Ipsen deliberately manipulated evidence in aid of conflicting theories to convict Sakarias and co-defendant Tauno Waidla in separate trials.[51] In Waidla's trial, Ipsen argued that Waidla struck the fatal blow and presented supporting medical evidence. Then, in Sakarias' trial, Ipsen omitted a portion of the medical testimony and argued that Sakarias struck the fatal blow.

Improper Argument: Appealing to Religious Authority

It is misconduct for the prosecutor to invoke religious authority. This issue generally arises in connection with punishment in the penalty phase of a capital case, where some prosecutors have argued that the Bible *requires* the death penalty or that God's will *must* be carried out by the death penalty's application. Such arguments interfere with a jury's responsibility to administer state and federal law, and allow a prosecutor to substitute personal religious beliefs

in a manner inimical to the constitutional separation of church and state. California courts have found that prosecution reliance on religious authority in support of the death penalty "tends to diminish the jury's sense of responsibility for its verdict and to imply than another, higher law should be applied."[52]

Example: Harmful Misconduct

In 2000, the U.S. Court of Appeals for the Ninth Circuit set aside the death sentence of Arthur Sandoval based on the prosecutor's improper reliance on religious authority to argue for the death penalty.[53] Los Angeles County deputy district attorney David Milton paraphrased quotations from the Bible saying that God's avengers should bring wrath upon those who commit evil; and said: "You are not playing God. You are doing what God says. This might be the only opportunity to wake [the defendant] up. God will destroy the body to save the soul."[54]

Improper Argument: Offering Personal Opinion

Because prosecutors are representatives of the people of the state of California, prosecutors' statements have inherently greater authority than those of other attorneys or witnesses. For this reason, a prosecutor may not "express a personal opinion or belief in a defendant's guilt, where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial."[55] Despite this unequivocal rule, a number of the cases of prosecutorial misconduct in the Misconduct Study involved such expression of opinion.

Example: Harmless Misconduct

In the 2000 conviction of Jackie Woods, the prosecutor stated during closing arguments "we do not prosecute anybody whom we personally do not believe to be guilty beyond a reasonable doubt."[56] The prosecutor also stated everybody in the District Attorney's office lives by this standard. The court affirmed the conviction finding that the jury could have believed this was a comment on the evidence rather than his personal opinion of Woods' guilt.

Improper Argument: Shifting the Burden of Proof

Prosecutorial misconduct concerning the burden of proof required for conviction is an especially serious violation. Given the greater power, resources and authority of the state, as represented by the prosecutor's office, the presumption of innocence is the crucial safeguard against that power and a protection of a person's liberty. That is because, in the cold reality of a typical courtroom on the first day of a jury trial, it is very difficult to really regard the "accused" as innocent. He has been brought to trial because the police and prosecutors—respected representatives of the authority of the state—believe he is guilty; that alone is difficult to surmount.

The presumption of innocence is designed to counterbalance these powerful persuasive forces: it places upon the state the burden of proving the defendant guilty beyond a reasonable doubt. As the Supreme Court characterized the presumption:

> "[I]t is the duty of the Government to establish… guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law."[57]

The presumption is based on the basic concept that it is worse to convict an innocent person than to let a guilty person go free.

Therefore, when a prosecutor tells a jury that the burden is on the defendant to prove his innocence, or that there is a presumption of guilt, or in any way implies that the defendant needs to present evidence to counter the prosecution's case, that misconduct undermines our greatest protection against wrongful convictions.

Example: Harmful Misconduct

In 2006, the U.S. Court of Appeals for the Ninth Circuit reversed the drug smuggling convictions of ten defendants based on the prosecutorial misconduct of Assistant U.S. Attorney William Gallo.[58] The prosecutor improperly told the jury that "the presumption of innocence… is going to vanish when you start deliberating. And that's

when the presumption of guilt is going to take over you."[59] On appeal, the government conceded the comment was improper, but argued it was harmless and cured by the district court's instruction. The appellate court rejected that argument and emphasized that criminal defendants have a "constitutional right to the presumption of innocence and to have the government prove guilt beyond a reasonable doubt."[60]

Presenting False Evidence

One of the most egregious forms of prosecutorial misconduct is the presentation of false testimony or evidence. This prohibition is absolute. As the Supreme Court has held: "The prosecution cannot present evidence it knows is false and must immediately correct any falsity of which it is aware even if the false evidence was not intentionally submitted."[61] Presenting false evidence to the jury harms the defendant's right to a fair trial by lying to the jury about the evidence. NCIP researchers identified 10 cases in which prosecutors were found to have presented false evidence.

Example: Harmful Misconduct

In 2009, the U.S. Court of Appeals for the Ninth Circuit ordered a new trial for Gregory Reyes, Chief Executive Officer of Brocade Communications Systems, who had been convicted in federal court of falsifying corporate financial statements. The Court ruled that the prosecutor, Assistant U.S. Attorney Timothy Crudo, argued false evidence in his closing argument to the jury. Crudo told the jury that the finance department did not know the statements were false, even though several members of the finance department had earlier told the FBI that they did know that the documents were false. Crudo went so far as to show the jury a chart, explaining how each of the finance department employees did not know about the falsified records. The Appeals Court said, "Deliberate false statements by those privileged to represent the United States harm the trial process and the integrity of our prosecutorial system. We do not lightly tolerate a prosecutor asserting as a fact to the jury something known to be untrue or, at the very least, that the prosecution had very strong reason to doubt."[62]

Engaging in Discriminatory Jury Selection

Every person accused of a crime in the United States is entitled to a trial by a jury of his or her peers. When selecting that jury, the prosecutor and defense attorney are prohibited from eliminating potential jurors based on their membership in specific racial, religious, ethnic or similar groups.[63] As the United States Supreme Court has explained, the Constitution "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant."[64] It is prosecutorial misconduct to engage in discriminatory jury selection, thereby denying potential jurors the ability to participate in the administration of justice and perpetuating racism. NCIP found 30 cases that included discriminatory jury selection.

Example: Harmful Misconduct

In 2006, the U.S. Court of Appeals for the Ninth Circuit reversed the murder conviction of Richard Kesser because of the misconduct of Humboldt County deputy district attorney Worth Dikeman who struck Native Americans from the prospective jury pool.[65] The prosecutor said that he believed Native Americans were distrustful of the criminal justice system and would not be willing to find another Native American guilty. He also said that he heard that "child molesting is okay in certain Native American cultures, and we can't treat Native American child molesters the same way we treat other child molesters…"[66]

Intimidating a Witness

It is misconduct for a prosecutor to intimidate witnesses to keep them from testifying on behalf of the defendant. When prosecutors threaten witnesses, make them unavailable (for example, by arranging to have them deported) [67] or order them not to speak to the defendant or his lawyer, they interfere with the defendant's right to prepare and present his or her defense.

One of the ways that prosecutors intimidate witnesses is by threatening perjury or other charges. If such threats prevent testimony, they violate due process by interfering with the defendant's right to present witnesses in his own defense.[68] Misconduct "include[s]… statements to defense witnesses to the effect that they would be prosecuted for any crimes they

reveal or commit in the course of their testimony."[69] NCIP found 7 court findings of witness intimidation. (See, for example, William Ruehle's case, Part III, A.)

Violating the Defendant's Fifth Amendment Right to Silence

People arrested for crimes have an absolute right not to talk to the police or otherwise give evidence against themselves. The privilege against self-incrimination is one of the most important constitutional safeguards. The Supreme Court has long recognized that the right against compelled testimony is a "fundamental right"[70]—indeed, it is "a 'principle of justice so rooted in the traditions and conscience of our people'"[71] as to constitute "one of the 'principles of a free government.'"[72] Among other consequences, it protects people from harsh, coercive interrogations by police, which result in unreliable confessions. In numerous cases where convicted defendants were later exonerated through DNA evidence, false confessions were produced by prolonged, coercive interrogations.

This very important protection against governmental abuse is undermined when prosecutors comment about the fact that a defendant invoked his right to be silent upon arrest. Prosecutors for example are prohibited from cross-examining a defendant about post-arrest silence. As the Supreme Court has noted, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[73]

The same unfairness results when a prosecutor improperly comments on the fact that a defendant chose not to testify at trial. Indeed, to allow a prosecutor to use the defendant's silence at trial as evidence against him renders the right against self-incrimination meaningless: a defendant, knowing his silence would be used against him, would feel compelled to testify. NCIP uncovered 47 times where a prosecutor committed misconduct by this method.

Example: Harmless Misconduct

In 2006, the Court of Appeal found that the prosecutor committed misconduct in commenting at trial on the post-arrest silence of defendant Travis Larimer.[74] The prosecutor not only questioned the defendant about his decision to remain silent, but he

elicited testimony from a detective that "it may be inferred that an individual is a gang member when he invokes his right to counsel and refuses to speak with police."[75] In closing argument, the prosecutor argued that the defendant's testimony was not believable because he had chosen not to speak about the incident at the time of his arrest.

Failure to Disclose Exculpatory Evidence

In 1963, the U.S. Supreme Court recognized the duty of prosecutors to disclose exculpatory evidence when it decided *Brady v. Maryland*.[76] Under *Brady*, it is the prosecution's responsibility to locate and disclose exculpatory information obtained by the police, because police are part of the prosecution team.

> "[A] prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies."

Brady violations are among the most pervasive forms of prosecutorial misconduct identified in the Misconduct Study. When prosecutors make the decision as to whether evidence is *Brady* material, their belief that the defendant is guilty can create a distorting prism through which they tend to view the evidence inaccurately as a red herring or irrelevant. *Brady* violations are, by their nature, difficult to uncover; they become apparent only when the withheld material becomes known in other ways.

Brady violations are among the most pernicious forms of prosecutorial misconduct. Failure to disclose *Brady* material keeps the jury from considering proper and admissible evidence supporting the innocence of the defendant. Without access to this evidence, innocent defendants face a serious risk of being convicted for a crime they did not commit.

Yet, nearly a half-century after *Brady*, prosecutors still violate this constitutional imperative. As one of the nation's leading scholars on prosecutorial misconduct and *Brady* violations, Professor Bennett L. Gershman has stated: "[A] prosecutor's violation of the obligation to disclose

favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies."[77]

It is impossible to know how many *Brady* violations occur—by their nature they involve evidence that is hidden from the defense. But a study of all 5,760 capital convictions in the United States from 1973 to 1995 found that the suppression of evidence by prosecutors was responsible for 16 percent of reversals at the state post-conviction stage.[78] The Misconduct Study uncovered 66 cases where courts found prosecutors had committed *Brady* violations, including several that occurred in death penalty prosecutions.

Example: Harmful Misconduct

In 2002, the U.S. Court of Appeals for the Ninth Circuit overturned the murder conviction of Gloria Killian because Sacramento County deputy district attorney Christopher Cleland failed to turn over a letter written by the key prosecution witness, stating he had lied to put Killian behind bars.[79]

Killian was accused of being the mastermind of a murder and robbery plot and was convicted in 1986 primarily on the testimony of an admitted participant in the murder. The witness, Gary Masse, had been convicted of the murder and sentenced to life without parole; he testified at Killian's trial that Killian concocted the murder, and he also denied that he had any kind of deal for leniency.

Years later, Killian's lawyers obtained a letter from Masse to the prosecutor that the prosecutor had never turned over to the defense, saying that Masse's testimony implicating Killian was a lie.

Example: Harmful Misconduct

In 2004, a Santa Clara County judge overturned the conviction of Damon Auguste for sexual assault on the ground that deputy district attorney Benjamin Field failed to disclose exculpatory evidence: DNA lab notes and evidence indicating the victim testified falsely against him.[80]

Example: Harmful Misconduct

In 2005, the U.S. Court of Appeals for the Ninth Circuit overturned the murder conviction and death sentence of Blufford Hayes Jr., finding that San Joaquin County deputy district attorney Terrence Van Oss had made a leniency deal with the chief prosecution witness, lied about it to a judge and then allowed the witness to testify falsely in court that there was no deal.[81]

B. Cases Declining to Address Misconduct

"For purposes of analysis, we will assume, without deciding, that the prosecutor's statements during her closing argument constituted prosecutorial misconduct."

—*People v. Najera, Fourth District Court of Appeal*[82]

NCIP identified 282 cases in which courts, as in the *Najera* opinion above, declined to address allegations of prosecutorial misconduct and, as a result, the prosecutors' actions were never scrutinized. The case of Tyrone Ebaniz is an example of this failure.

The Court of Appeal ordered a new trial for Ebaniz and set aside his life sentence on the grounds that newly discovered evidence pointed "unerringly to [his] actual innocence" of charges that he willingly took part in the torture and murder of a teenager.[83] The new evidence consisted of testimony from another participant that Ebaniz had been forced to take part after being beaten and threatened with an assault rifle. "In our view, no reasonable jury could reject the new evidence or, upon crediting it, convict Ebaniz," the court held.[84]

Ebaniz also argued that Tulare County deputy district attorney David Alavezos engaged in prosecutorial misconduct by asserting during closing argument that Ebaniz was lying about being forced to take part in the crime. Alavezos knew that other defendants' statements to police supported Ebaniz's claim. The court said that it was "bothered" by Alavezos' conduct, but it did not reach the question whether it constituted prosecutorial misconduct because Ebaniz's defense attorney had not objected to the argument at trial.[85] More than a year after the decision, Alavezos said that he had not even read the court's ruling, claiming that he had "never committed prosecutorial misconduct."[86]

In these 282 decisions, the courts used either of two grounds to decline to address allegations of misconduct. In 204 of the cases, the courts held that even if the prosecutor's actions were misconduct, it would not have changed the verdicts. In the remaining 78 cases, courts held that the defendants' claims of prosecutorial misconduct were waived and so, as in *Ebaniz*, ignored the issue.

1. Non-Waiver Cases

In the 204 non-waiver cases—the vast majority of the cases—the courts bypassed the critical analysis of prosecutorial misconduct by focusing only on whether, overall, the trials were fair. That meant, however, that the courts did not also provide guidance as to whether the conduct amounted to misconduct, and the prosecutor avoided any consequences.

In the 204 non-waiver cases—the vast majority of the cases—the courts bypassed the critical analysis of prosecutorial misconduct by focusing only on whether, overall, the trials were fair.

The courts' reluctance to address misconduct extended even to cases where the government did not deny that misconduct had occurred. For example, an issue in the appeal from the murder conviction of Michael Gospel was whether the prosecutor committed misconduct in arguing to the jury that Gospel was a womanizer who wanted to control women and when he could not, resorted to murder.[87] Even though Gospel argued that there were no facts to support this assertion, and even though the government did not attempt to defend the prosecutor's conduct, the Court of Appeal nonetheless evaded the issue, holding that "the comment was harmless because it is not reasonably probable that defendant would have (been acquitted) if the comment had not been made."[88]

In other cases, appellate courts avoided deciding whether prosecutors' actions were misconduct by concluding that trial judges' corrective measures were sufficient to ensure a fair trial. For example, in the case of Anaissa Gerwald, the prosecutor, by suggesting that the defendant had failed to produce evidence, violated the rule precluding prosecutors from commenting on a defendant's right to remain silent.[89] The presiding judge dressed down the prosecutor, saying,

"You are really on thin ice. As a defendant [Gerwald] has no obligation to ever do any of that. It's almost—I mean it's almost mistriable[sic]."[90] Yet the Court of Appeal avoided reaching the prosecutorial misconduct issue, holding: "Even if the prosecutor committed misconduct… any error was harmless beyond a reasonable doubt."[91]

2. Waiver Cases

In the 78 waiver cases, appellate courts refused to consider the claims of prosecutorial misconduct because the defense attorneys failed to make a timely or proper objection at trial sufficient to preserve the matter for appellate review. To avoid waiving a claim of prosecutorial misconduct, defense attorneys must satisfy strict and formal requirements: they must object to the prosecutor's specific actions, cite the actions as prosecutorial misconduct and request that the trial judge specifically instruct the jury about the misconduct.[92] Failure to satisfy any one of these requirements can result in the permanent loss of appellate review of the issue.

In the 78 waiver cases, appellate courts refused to consider the claims of prosecutorial misconduct because the defense attorneys failed to make a timely or proper objection at trial sufficient to preserve the matter for appellate review.

For example, the Court of Appeal recently declined to address claims of prosecutorial misconduct, even though the prosecutor was accused of improperly arguing to the jury that it could not acquit unless it rejected the testimony of all prosecution witnesses and of improperly commenting on the defendant's failure to assert his innocence after he was arrested.[93] The court avoided addressing the allegations of misconduct on the grounds that defense counsel did not object to the alleged misconduct, saying: "There is no reason to believe an objection to any of the alleged misconduct would have been futile or that an admonition to the jury to disregard any misstatements of law would not have been effective."[94]

Summary

Prosecutorial misconduct is a critical issue for the integrity of the criminal justice system, which the Misconduct Study sought to more fully document. In 707 cases, courts found prosecutors committed misconduct. In 548 of the cases where misconduct was found, the courts nevertheless upheld the convictions by ruling that the misconduct did not alter the fundamental fairness of the trial. In 159 of the 707 cases where misconduct was found, the finding resulted in the setting aside of convictions or sentences, declaring mistrials, or barring evidence. Courts refrained from making a ruling on the issue of prosecutorial misconduct and instead held that any error would have been harmless or refused to consider the issue because the defense failed to make a proper objection in 282 cases.

IV. Role of Prosecutors in Addressing Misconduct

IV. Role of Prosecutors in Addressing Misconduct

"[The] duty of furthering just convictions 'is [the prosecutor's] highest purpose.'… 'While lawyers representing private parties may—indeed must—do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules.'… This is so because '[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly.'"

— *Thompson v. Calderon, U.S. Court of Appeals for the Ninth Circuit* [95]

Prosecutors have the difficult responsibility of wearing two hats. On the one hand, they are ministers of justice. Their responsibility is to prosecute only those they believe are guilty and use only fair methods in doing so. The California District Attorneys Association has recognized these "strict" ethical obligations, telling its members:

> "In administering justice, a prosecutor must abide by a strict code of ethics… [The primary role of the prosecutor is to 'investigate and prosecute impartially' criminal suspects on behalf of the People. Prosecutors should prosecute with 'earnestness and vigor' while employing only 'legitimate investigative techniques' to ensure that 'guilt shall not escape or innocence suffer.'"[96]

The American Bar Association also recognizes the special place of prosecutors in our constitutional system: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[97]

On the other hand, prosecutors are advocates: they aim at "winning the case" by obtaining convictions. In that role, they can be tempted by a variety of improper tactics, such as hiding exculpatory evidence, intimidating witnesses and presenting false evidence. While the majority of prosecutors resist those temptations, the Misconduct Study demonstrates that many do not,

finding 707 cases of court-identified misconduct—159 of which so undermined the trial's fairness that such drastic remedies as overturning convictions were required.

Not only are certain prosecutors failing to avoid misconduct, they and others may be failing to satisfy their obligation to report it. Prosecutors, like all attorneys, are bound by the requirements of California Business & Professions Code Section 6068(o)(7) "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:… Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney."[98] While the State Bar does not make public the reports of misconduct it receives, it is unlikely that prosecutors are complying with this reporting obligation; there have only been six cases of public discipline for prosecutorial misconduct in nearly 13 years.

Prosecutorial misconduct and failure to report do not occur in a vacuum. Nor is misconduct the result of individual acts performed in isolation. Rather, incidents of misconduct often involve—or are the result of—insufficient training, too much emphasis on winning trials rather than doing the right thing, and a culture that does not talk about it.

Because prosecutors are in the best position to prevent misconduct, internal procedures are an effective way to prevent and correct errors and misconduct. Creating a safe, non-punitive and open learning environment where prosecutors can freely discuss and learn from mistakes is a first important step toward a more open and fair administration of justice. It can also lead to fewer misconduct claims and reduce the need to resort to outside agencies to regulate and discipline attorneys.

It is imperative that prosecutorial agencies establish procedures for identifying and correcting error, educate prosecutors in best practices to avoid error and misconduct and establish "an environment where winning trials is not the most important measure of success, for the individual or the office as a whole."[99] The authors offer some recommendations in this regard in Part IX.

V.
Role of the Courts in Addressing Misconduct

V. Role of the Courts in Addressing Misconduct

"[J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."

– *Preamble, California Code of Judicial Ethics* [100]

The California Code of Judicial Ethics details the vital position of judges as leaders of the criminal justice system, charged with guarding the integrity of the judicial process. That responsibility includes monitoring the conduct of the attorneys in the cases over which they preside.[101] The Misconduct Study identifies two areas in which judges' discharge of this responsibility should be improved regarding prosecutors found to have committed misconduct: reporting them to the State Bar for potential disciplinary proceedings; and identifying them by name in opinions discussing misconduct.

A. Reporting Prosecutorial Misconduct

California Business and Professions Code Section 6086.7(a), the reporting statute, mandates specific circumstances in which a court must report instances of misconduct to the State Bar:

> "A court shall notify the State Bar… (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."[102]

The reporting obligation applies only to cases that are reversed or modified as a result of misconduct. The court is also required to notify any attorney that it so reports.[103]

The limitation of the reporting statute to cases of reversal or modification means that the majority of misconduct findings need not be reported. Of the 707 findings of misconduct identified by NCIP researchers, 548 did not fall under the statute.

Despite the very specific mandate articulated in California law, there is little evidence courts are meeting even this limited reporting obligation. In July 2008, the California Commission

on the Fair Administration of Justice (CCFAJ) issued a report quoting the Chief Trial Counsel of the State Bar as saying that a review of nearly 30 prosecutorial misconduct reversals failed to reveal a single instance of reporting by the appellate courts.[104]

One example of such failure to report is illustrative. In 2009, the Court of Appeal reversed the conviction of Harold Ball after finding that Fresno County deputy district attorney Melissa Baidzar Baloaian Sahatjian had failed to disclose exculpatory evidence.[105] The court, however, declined to report Sahatjian's conduct to the State Bar, because it said it was not "egregious."[106]

The reporting statute does not afford a court the discretion to choose not to report misconduct it deems not egregious: it requires reporting "*[w]henever* 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."[107] The statute evidences recognition that *any* conduct on which reversal is based, even in part, is serious enough to require notification of the State Bar concerning potential disciplinary investigation.

The California Commission on the Fair Administration of Justice issued a report quoting the Chief Trial Counsel of the State Bar as saying that a review of nearly 30 prosecutorial misconduct reversals failed to reveal a single instance of reporting by the appellate courts.

In any case, the seriousness of the prosecutor's conduct in *Ball* cannot be disputed. The prosecutor failed to notify the defense attorney when an anticipated prosecution witness, upon seeing the defendant in the courtroom, said he was not the man who attacked the victim; instead, the prosecutor simply sent the witness home. Before trial ended, the witness told the defense attorney what happened, and the prosecutor conceded she had sent the witness away without notifying the defense. Nevertheless, the trial judge refused to allow the witness to testify, and the defendant was convicted and sentenced to four years in prison.

The Court of Appeal set aside the conviction and sentence, finding that the prosecutor's conduct required a new trial. The court nonetheless declined to report to the State Bar the prosecutor's withholding of crucial exculpatory evidence from the defense, despite the unequivocal mandate of the statute, and even though the court noted that the prosecutor "did not admit what happened until after defense counsel found out about it independently, and there is no way to rule out the possibility that she never would have told otherwise."[108]

NCIP found evidence that the court noted its intent to report misconduct in only six cases.[109] This failure to report prosecutorial misconduct is also documented in the 2008 CCFAJ report.[110]

There is some evidence that the CCFAJ report has had some effect. After its release, the California Supreme Court incorporated a segment on reporting misconduct into its training sessions for judges and released a new judicial manual that includes guidelines for reporting.[111]

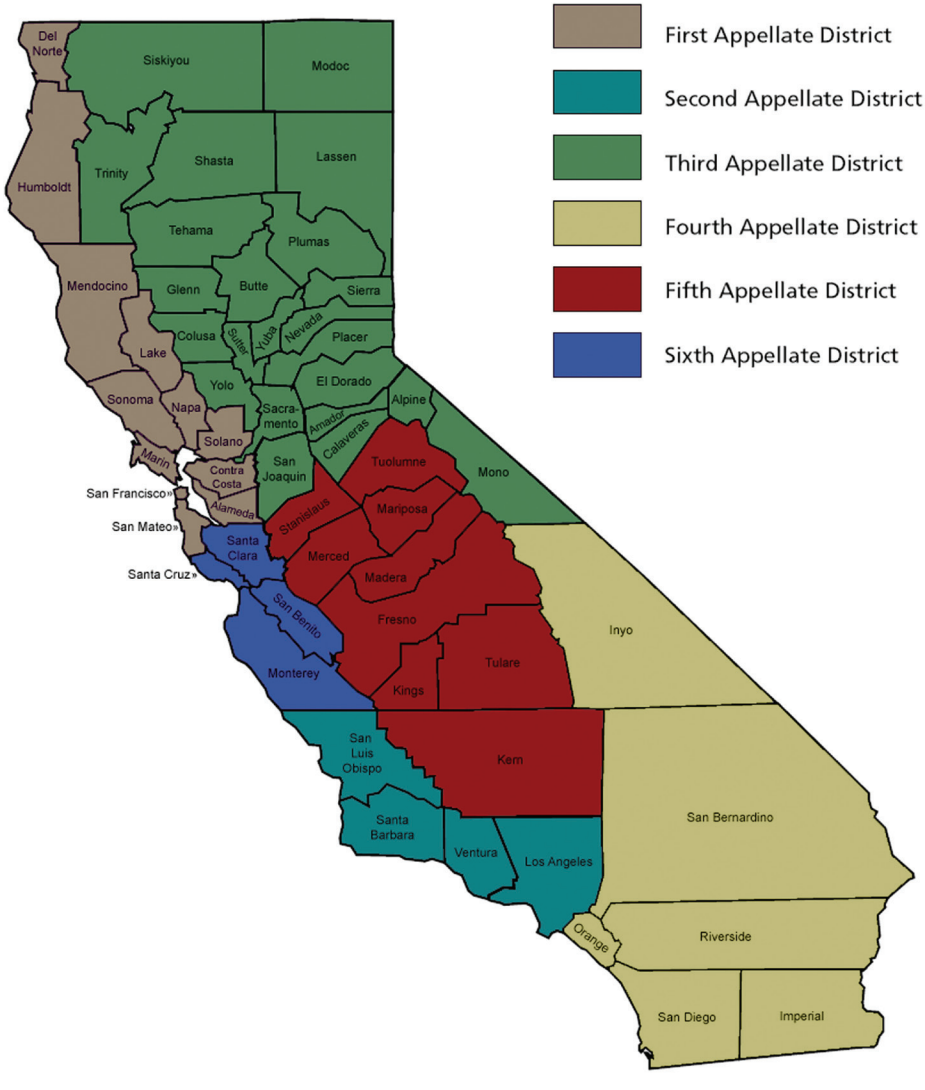
Judges are in a unique position to deter misconduct and help prosecutors better understand their obligations through their actions and opinions. Reporting cases of misconduct is a critical part of this role. The Misconduct Study's authors make specific recommendations as to ways in which the courts' compliance with this obligation can be improved. (See Part IX.)

B. Identifying By Name Prosecutors Found to Have Committed Misconduct

As the United States Supreme Court has noted, one way to deter misbehaving prosecutors is to "publicly chastise the prosecutor by identifying him in [the court's opinion]."[112] Unfortunately, courts of review only rarely refer to errant prosecutors by name. NCIP's review of the 707 appellate opinions where courts found misconduct reveals that prosecutors were identified in only 80 cases. In 49 of those cases, the prosecutor was referred to only by last name.

The failure to fully identify prosecutors found to have engaged in misconduct has specific adverse consequences. First, the valuable avenue of deterrence the Supreme Court identified is undermined, since prosecutors engaged in misconduct are rarely held up to public scrutiny.

Second, determining what, if any, consequences there were to prosecutors in specific cases of misconduct becomes extremely difficult. When opinions fail to name the prosecutors who



State of California, Courts of Appeal, Appellate Districts

Source: California Courts website. Available at http://www.courtinfo.ca.gov/reference/documents/appdistc.pdf

engaged in the misconduct, identifying them usually requires a time-consuming and difficult search of the trial record. It was only through such means that NCIP researchers identified the prosecutors in 600 of the 707 cases that found prosecutorial misconduct.

VI.
Role of the California State Bar in Addressing Misconduct

VI. Role of the California State Bar in Addressing Misconduct

"[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."

– Imbler v. Pachtman, United States Supreme Court[113]

The State Bar of California, the largest bar association in the nation, has the important responsibility of investigating all complaints of attorney misconduct in California, including prosecutorial misconduct, and prescribing appropriate discipline. Its disciplinary proceedings and the sanctions imposed serve critical public purposes of punishment, education and deterrence, and, more broadly, "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."[114] It has not been achieving these purposes in the case of prosecutorial misconduct.

A. Failure to Discipline Prosecutorial Misconduct

The Misconduct Study reveals that the State Bar rarely publicly disciplines prosecutorial misconduct. It is impossible to determine the reasons for this failure to discipline without public information concerning the number of reports or complaints of prosecutorial misconduct the Bar receives, the number of those it investigates[115] and the number that result in private discipline.[116]

Regardless of the reasons, the facts of disciplinary failure are undeniable: of the 4,741 public disciplinary actions reported in the *California State Bar Journal* in a nearly thirteen-year period—from January 1997 to September 2009—only ten involved prosecutors, and only six of these were for conduct in the handling of a criminal case.[117]

The six that were disciplined for prosecutorial misconduct had all withheld evidence:

- Santa Clara County deputy district attorney Benjamin Field was suspended for four years in 2010 for misconduct in multiple cases over a decade, including violating a court order, withholding evidence in two separate cases and making a deceptive closing argument.[118]

- San Joaquin County deputy district attorney Michael Freeman stipulated to withholding evidence from the defense, resulting in a public reprimand in 2009.[119]

- Santa Clara County deputy district attorney Peter Waite was publicly reprimanded in 2009 for suppressing an expert opinion that was favorable to the defense in a burglary, rape and robbery prosecution.[120]

- Sonoma County deputy district attorney Brooke Halsey was suspended for three years in 2007 for multiple violations, including suppression of evidence, misleading a judge and making false representations in court.[121]

- Butte County deputy district attorney Leo Barone was suspended for one year in 2005 for failing to disclose exculpatory evidence and making misrepresentations to the court and defense.[122]

- San Diego County deputy district attorney James Fitzpatrick was placed on probation for two years in 2005 for willfully failing to disclose exculpatory evidence to the defense, violating a court order and being untruthful.[123]

However, there are numerous other cases where prosecutors suppressed critical evidence, just as in the six cases of discipline, but have no public record of discipline. These include:

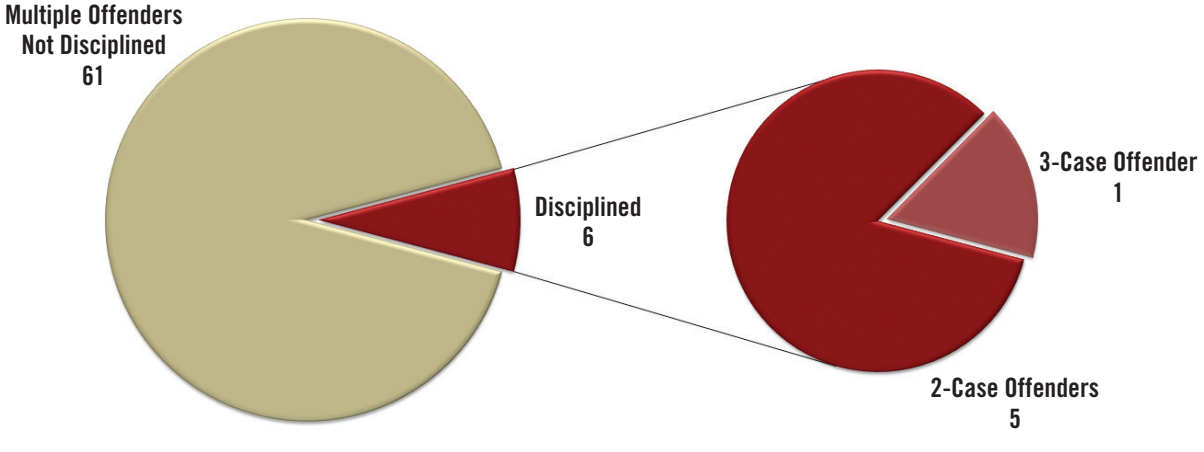
- In 1999, a conviction obtained by San Diego County deputy district attorney Keith Burt was reversed because "the prosecution withheld crucial discoverable evidence, presented false or misleading evidence and made misrepresentations in its closing argument to the jury."[124]

- In 2006, a Federal District Court judge found Los Angeles County deputy district attorney Sterling Norris had withheld exculpatory information.[125]

- In 2008, a Riverside County Superior Court judge dismissed a narcotics prosecution after ruling that deputy district attorney Edward Hong intentionally withheld evidence from the defense.[126]

- In 2005, the U.S. Court of Appeals for the Ninth Circuit found former San Joaquin County deputy district attorney Terence Van Oss failed to turn over exculpatory evidence and allowed a witness to falsely testify in a death penalty prosecution.[127] Van Oss has never been disciplined; he has been a judge in the Superior Court of San Joaquin County since 1990.

The six disciplined prosecutors were all disciplined after 2004 and the establishment of the California Commission on the Fair Administration of Justice.[128] Prior to 2005, not a single prosecutor was disciplined for conduct in a criminal case, and to date, no California prosecutor has been disbarred for prosecutorial misconduct.

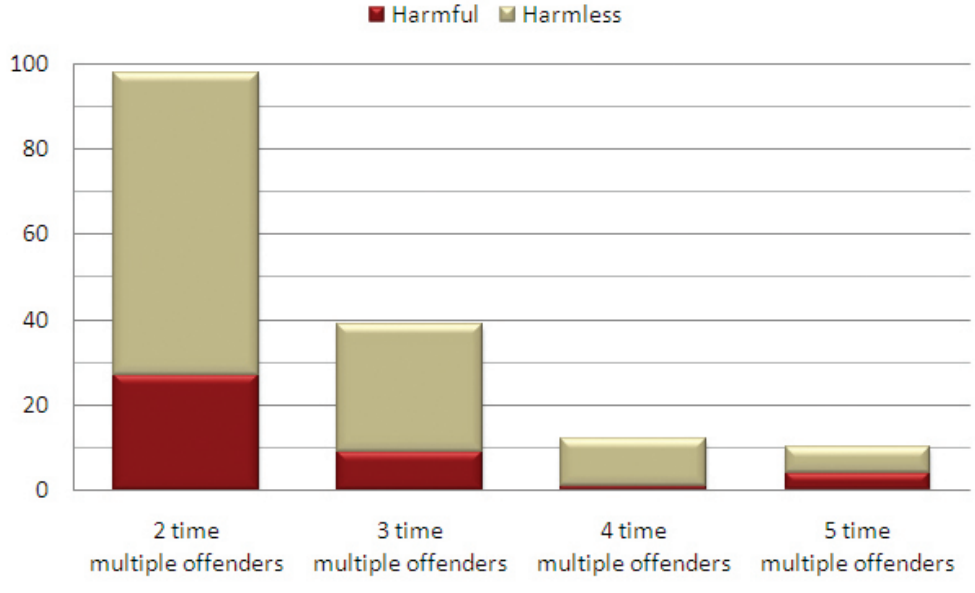


Number of Multiple Offenders Disciplined by the State Bar: Only six multiple offenders out of the 67 identified in this study have been disciplined by the State Bar as noted in the *California State Bar Journal.* Of those six multiple offenders, five of them committed misconduct in two cases and one committed misconduct in three cases.

B. Failure to Discipline Prosecutors with Repeat Violations

The published records also reveal that many of the undisciplined prosecutors were repeat offenders. In the cases of prosecutorial misconduct in which NCIP was able to identify the prosecutor involved, 67 had committed misconduct multiple times, three of these committed misconduct four times and two did so five times. All six prosecutors who were disciplined are multiple offenders.

A striking example of repeat prosecutorial misconduct that has not been publicly disciplined is Los Angeles County deputy district attorney Grace Rai. In October 2008, the Court of Appeal reversed the conviction of Mark Broughton and severely criticized Rai's conduct in prosecuting the case.[129] The court found that Rai committed serial misconduct that included asking improper questions, eliciting inadmissible evidence and hearsay, disobeying court orders and making improper arguments. Finding that many of Rai's violations were of "major



Misconduct Committed by Multiple Offenders: NCIP researchers found that multiple offenders committed misconduct in both harmful (convictions or sentences set aside, mistrials declared, or evidence barred) and harmless (convictions upheld) cases. This chart details the breakdown of cases by how many cases were handled by multiple offenders who committed misconduct two, three, four, and five times. For example, the first bar details the number of cases handled by two-time multiple offenders broken down into harmful and harmless.

significance," the court stated: "We think that absent the prosecutorial misconduct, there was a reasonable probability the verdict would have been different."[130]

This was not the first time that an appellate court criticized Rai for misconduct. In 2006, the Court of Appeal affirmed the conviction of Calvin Benn, but found Rai engaged in regrettable conduct that was "not to be condoned," "fell below acceptable professional standards" and in all likelihood knowingly violated a court order.[131]

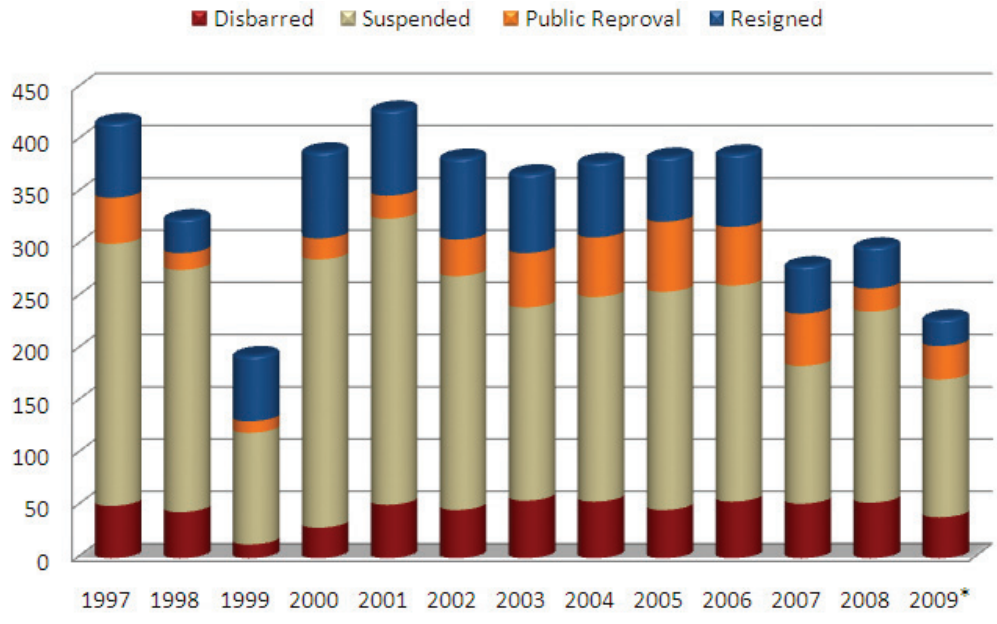
Despite these explicit findings of misconduct, public State Bar records reveal no discipline of Rai. This failure cannot be explained by the court's failure to report the misconduct: in 2008 the court in the Broughton case specifically directed that its finding of Rai's misconduct be sent to the Bar.

Rai's case is not unique. Among the prosecutors with multiple findings of misconduct who have no public record of discipline are the following:

- Los Angeles County deputy district attorney Michael Duarte was cited for failing to disclose exculpatory evidence and altering notes of an interview with a witness, causing mistrials in two separate prosecutions.[132] A trial court judge fined him $1,000 for his conduct in one case.

- Los Angeles County deputy district attorney Robin Sax Katzenstein committed misconduct by arguing facts not in evidence in two cases, resulting in reversals of convictions in 2008 and 2009.[133]

- Orange County deputy district attorney Michael Flory has been found to have committed misconduct in five cases—in one the conviction was reversed for his engaging in discriminatory jury selection; in the other four the misconduct was held to be harmless error.[134]



Types of Public Discipline 1997–2009*: This chart depicts the major types of discipline reported by the California State Bar Journal to all attorneys from 1997 through September 2009. Based on our methodology, NCIP researchers found that the Bar disciplined many attorneys during the years reviewed. However, only 10 out of 4,462 disciplinary actions involved prosecutors.
* NCIP reviewed through September 2009

C. In Contrast, Active Discipline of Non-Prosecutors

It's not that the State Bar does not discipline lawyers. From January 1997 through September 2009, the State Bar published 4,741 discipline records detailing a variety of offenses, primarily financial violations and breach of duty to clients by private attorneys.[135]

A total of 586 lawyers were disbarred. The majority of the other public disciplinary actions were suspensions, probation and reprovals for misconduct that ranged from the egregious to the more innocuous. For example, in 2000, Jeffrey Nelson was suspended for 20 months after pleading guilty to a criminal misdemeanor (later dismissed) for bouncing an $850 check from his personal account.[136]

Nor is the Bar reluctant to discipline criminal defense attorneys, even when they do not discipline the same conduct by prosecutors. For example, the Bar suspended criminal defense attorney Maureen Kallins[137] for two years because she "repeatedly crossed the line from zealous

The failure by the State Bar to publicly discipline prosecutors sends a message that prosecutors can commit misconduct with impunity. Prosecutors, in effect, know they can commit misconduct to obtain convictions.

advocacy to contemptuous disrespect for the courtroom."[138] Yet, the Bar never disciplined Los Angeles County deputy district attorney Rosalie Morton, even though courts found she had engaged in prosecutorial misconduct in four cases, three of which resulted in reversal of convictions, including tactics that were "petty and childish, heightening the acrimonious atmosphere in the courtroom and threatening the ability of defendant to receive a fair trial."[139]

The failure by the State Bar to publicly discipline prosecutors sends a message that prosecutors can commit misconduct with impunity. Prosecutors, in effect, know they can commit misconduct to obtain convictions.

D. The Bar's Recent Responses to Criticism

There have been recent signs of progress in the State Bar's approach to prosecutorial discipline. In 2009, the California State Bar, responding to the CCFAJ report and its recommendations, unanimously agreed to reaffirm "its commitment to establishing and monitoring disciplinary policies that support the primary purposes of the disciplinary proceedings conducted by and of the sanctions imposed by the State Bar of California, specifically, the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."[140]

The State Bar also unanimously agreed that it would begin separating the reports of misconduct made to it to distinguish seven categories of attorneys, including prosecutors, and make the number of complaints public.[141] As a result, the State Bar's Office of the Chief Trial Counsel installed new reportable action screens into its computer system to track reports against attorneys in a manner consistent with the CCFAJ Report.[142]

Specifically, the CCFAJ had recommended that the State Bar include in its annual report on the State Bar's discipline system the number of reportable actions[143] received from courts pursuant to Business and Professions Code section 6068.7(a),[144] any reportable actions that involve any one of seven identified categories of egregious conduct;[145] and the number of reportable actions related to the conduct of prosecutors and defense lawyers for each county. This data will be published in the Bar's 2010 Annual Report to be issued in April 2011.[146]

We applaud these efforts to adopt the CCFAJ recommendations.[147] However, more accountability and transparency is needed. In conjunction with the California courts, records of compliance with the reporting statute should be made public. (see Part IX)

VII. Costs and Consequences of Prosecutorial Misconduct

VII. Costs and Consequences of Prosecutorial Misconduct

"Crime is contagious. If the government becomes a law-breaker, it breeds contempt for the law… it breeds anarchy."

– Olmstead v. United States, United States Supreme Court 1928; Justice Brandeis, dissenting[148]

The devastating effects of prosecutorial misconduct cannot be overestimated. The costs are financial, emotional, psychological and societal. The adversely affected include innocent defendants wrongly convicted, taxpayers forced to bear the massive expenses of protracted litigation and incarceration, crime victims and their family members required to relive their pain, and, more broadly, the public in general, whose trust in the entire criminal justice system is undermined.

A. Consequences for Innocent Defendants Wrongly Convicted

There is no more harmful consequence of prosecutorial misconduct than the conviction of the innocent. Yet it occurs repeatedly, causing devastating damage to the lives of the innocent, as well as those victimized by true perpetrators who remain free.

DNA exoneration cases provide an avenue to identify and analyze the consequences for innocent persons who were wrongly convicted in connection with prosecutorial misconduct. With the advent of DNA testing, biological material recovered from crime scenes can now be used to identify with scientific certainty the identity of the true perpetrator. This has led to the exoneration of more than 250 people who were wrongfully convicted of heinous crimes, as well as, in many cases, the identification and arrest of the actual perpetrators.

In studies of these DNA exoneration cases, prosecutorial misconduct has been identified as one of seven primary causes of wrongful conviction.[149] Two recent studies have shown the alarming frequency in which courts upheld convictions of innocent people, including in cases of prosecutorial misconduct, incorrectly finding harmless error.

In August 2010, Dr. Emily West analyzed 255 cases where DNA proved the person convicted was innocent and determined that prosecutorial misconduct was raised as an issue on appeal or in a civil law suit in 65 cases.[150] Of these 65 cases, courts rejected the claims of prosecutorial misconduct in 34. Of the 31 cases in which the courts found prosecutorial misconduct, they ruled 12 harmful and 19 harmless.[151] It is troubling to see how often courts declare misconduct to be harmless when the defendant is in fact innocent, even holding that the evidence of guilt is "strong."[152]

Two recent studies have shown the alarming frequency in which courts upheld convictions of innocent people, including in cases of prosecutorial misconduct, incorrectly finding harmless error.

While DNA exonerations conclusively establish innocence, most exonerees prove their innocence using non-DNA evidence. In California, three examples of innocence cases that involved prosecutorial misconduct are:

- In 2002, the U.S. Court of Appeals for the Ninth Circuit overturned the conviction of Gloria Killian after finding that the prosecutor had failed to turn over exculpatory evidence: a letter written by the sole prosecution witness, stating he had lied to put Killian behind bars. Killian won her release after 18 years in prison.[153]

- In 2003, Quedellis "Rick" Walker was freed from prison after serving nearly 12 years for a murder he did not commit. Evidence surfaced that the prosecutor failed to disclose to the defense leniency deals with the state witness who lied to implicate Walker.[154]

- In 2000, Oscar Lee Morris was freed after serving 16 years in prison for murder because a Los Angeles County Superior Court judge set aside his conviction and ordered a new trial. An appellate court in 1988 had found that the prosecutor hid evidence of a secret deal with the state's key witness, but found the misconduct harmless. Morris won his release a decade later after the witness admitted he had lied.[155]

It is impossible to overestimate the magnitude of the wrong done to an innocent person wrongfully convicted of a crime. The psychological, emotional and economic harm can be equivalent to the destruction of a life.

Of those who were able to obtain jobs after their release, 43 percent were paid less than they earned prior to their imprisonment.

The impact of incarceration is devastating; defendants lose much more than their freedom. In addition to the pain of separation from friends and family, imprisonment can result in loss of education, employment, job skills, earnings and physical health. The innocent further must deal with the psychological dissonance of having been profoundly wronged by society.[156]

In 2007, a *New York Times* study of 137 DNA exonerees found that most "have struggled to keep jobs, pay for health care, rebuild family ties and shed the psychological effects of years of questionable or wrongful imprisonment."[157] Economic harm, of course, is significant. Studies have found that more than 90 percent of exonerees lost all their assets—savings, vehicles, houses —while imprisoned.[158] Of those who were able to obtain jobs after their release, 43 percent were paid less than they earned prior to their imprisonment.[159]

Only in extremely limited circumstances can the exonerated prevail in civil litigation against the prosecutors whose misconduct caused their wrongful conviction. In 1976, the United States Supreme Court decided *Imbler v. Pachtman,*[160] holding that when prosecutors act within the scope of their duties they are absolutely immune from civil liability. The Court based its conclusion on its belief that "[p]rosecutors must be free to make discretionary decisions without constant dread of retaliation," even though it openly acknowledged that their decision would "leave unredressed the wrongs done by dishonest [prosecutors]." [161] As a result, civil lawsuits against prosecutors usually are dismissed soon after the cases are brought to court; the rare cases of recovery against prosecutors is for conduct in a non-prosecutorial capacity.[162] (See Part VIII.)

B. Financial Costs to Taxpayers

"Needless to say, the conduct which compels the result we reach in this case has generated substantial costs to the public. The expense of the lengthy trials, which have now gone for naught, the costs of the proceedings undertaken in this court in order to uncover the misconduct in the earlier trials, and the cost of an additional retrial, should that take place, are very high and wholly regrettable."

– People v. Butler, Fourth District Court of Appeal [163]

Prosecutorial misconduct imposes a heavy financial cost on cities and counties, primarily borne by taxpayers, through prolonged criminal litigation and incarceration. These massive costs provide another reason that society should care about prosecutorial misconduct, even in cases where the defendants in fact are guilty. Moreover, it has resulted in substantial payments by cities and counties in several civil cases alleging prosecutorial misconduct. And taxpayers also ultimately bear the costs of any compensation paid those who were wrongly convicted.

The costs of the prolonged criminal litigation that prosecutorial misconduct can entail are staggering, through retrials—some defendants were tried as many as four times—and multiple appeals.

1. Financial Costs from Prolonged Criminal Litigation

The costs of the prolonged criminal litigation that prosecutorial misconduct can entail are staggering, through retrials—some defendants were tried as many as four times—and multiple appeals.

The *Butler* case quoted above, which lasted more than 12 years, is a prime example. In 1999, the court reversed the 1994 convictions of Stacy Butler and three other defendants for murdering a police officer, based on the "serious prosecutorial misconduct" of San Diego County deputy district attorney Keith Burt. It found that Burt not only used false and

misleading evidence at trial, but he provided a key witness numerous benefits, including transferring the witness from prison to the District Attorney's office to have sex with his wife, none of which was disclosed to the defense. In 1991, nine years before the case would be concluded, the *San Diego Union-Tribune*[164] estimated the cost of the prosecution of the case would likely top $2 million.

The NCIP investigation found cases that dragged on even longer, some for more than two decades, no doubt costing taxpayers many millions more. The prosecution of Blufford Hayes Jr. is currently in its 30th year. Granted a retrial on murder charges because former San Joaquin County district attorney Terrence Van Oss hid evidence and presented false evidence,[165] Hayes has been awaiting retrial since 2005. The cost of the prosecution exceeds $1 million.[166]

Taxpayers also bear the high cost of prolonged incarceration resulting from the drawn-out litigation of prosecutorial misconduct cases. The financial cost of housing inmates is high: in 2009 California spent $45,000 per year per inmate. Taxpayers have paid over $240,000 to house Blufford Hayes in the San Joaquin County Jail since 2005.[167]

2. Financial Costs from Civil Lawsuits

Another source of financial cost to taxpayers resulting from prosecutorial misconduct is settlements and judgments in civil lawsuits. While the doctrine of absolute immunity for prosecutors acting within the scope of their duties usually results in their dismissal in such cases, a civil case involving prosecutorial misconduct that includes other defendants nonetheless can result in payments by cities and counties.

For example, in 2006, David Genzler, who had been convicted of involuntary manslaughter and served five years in prison, sued the county of San Diego as well as former prosecutor Peter Longanbach[168] and a district attorney's office investigator.[169] The lawsuit sought $5.5 million in damages, alleging that Longanbach had committed prosecutorial misconduct by coaching a witness to lie against Genzler and by failing to turn over information favorable to his defense.[170] Two years after a federal judge ruled that Longanbach was not covered by immunity provisions because he was acting in an investigative capacity, the case settled, with the county of San Diego paying Genzler an undisclosed sum.[171]

In Santa Clara County, four lawsuits alleging prosecutorial misconduct have cost taxpayers over $5 million in settlements over the past five years, in addition to litigation costs. In 2005, Santa Clara taxpayers paid nearly $1 million to Glen Nickerson, who spent almost nineteen years in prison before his murder conviction was overturned due to evidence of police and prosecutorial misconduct. [172] In 2007, the county paid exonerated criminal defendant Rick Walker $2.75 million in settlement of a lawsuit alleging prosecutorial misconduct. [173]

In 2009, the county authorized a $750,000 settlement of a lawsuit alleging prosecutorial misconduct against deputy district attorney Benjamin Field, in a rare case in which the prosecutor was not dismissed before trial on the basis of immunity. The settlement occurred after the court held that trial was required to determine whether Field was entitled to immunity, because factual issues remained as to whether he sought to obtain a search warrant in direct violation of a court order.[174] That same year, the county paid $1 million to Jeffrey Rodriguez to settle a lawsuit that also included allegations of prosecutorial misconduct.[175]

Santa Clara County is not the only county with high incidences of prosecutorial misconduct, as well as big payouts. For example, in August 2010 the city of Long Beach paid out an $8 million settlement in a case alleging prosecutorial misconduct brought by Thomas Goldstein.[176] Goldstein, who was convicted of a 1979 murder in Long Beach, spent 24 years in prison before being released after a federal judge ruled that Los Angeles County prosecutors withheld evidence of deals with a jailhouse informant and failed to correct perjured testimony.

Goldstein sued the prosecution, Long Beach police officers and the City of Long Beach, asserting that former Los Angeles County district attorney John Van De Kamp and his chief deputy failed to adequately train and supervise their deputies on their obligations relating to informants and failed to establish a system that would have facilitated information-sharing among deputy prosecutors. Although the Supreme Court rejected Goldstein's argument and expanded the prosecutorial actions covered by absolute immunity to activities that cast them "in the role of an administrator or investigative officer rather than that of advocate," [177] Goldstein was permitted to pursue his lawsuit against Long Beach, resulting in the settlement.

Lawsuits continue. In May 2010, Augustin Uribe filed a suit against Santa Clara County and deputy district attorney Troy Benson seeking $38 million, alleging that Benson's failure to turn over exculpatory evidence violated his constitutional right to a fair trial. A motion to dismiss is pending.[178]

3. Financial Costs of Compensation

Taxpayers may also be liable for the statutory costs of compensation to victims of wrongful imprisonment due to prosecutorial misconduct. California's compensation statute requires that exonerees receive compensation in the amount of $100 a day for each day of wrongful incarceration.[179] To date the California Compensation Board has approved payout of over $3 million under this statute.[180]

C. Emotional Costs of Protracted Litigation for Victims of Crime

When criminal cases are prolonged as a result of prosecutorial misconduct, crime victims and their families also suffer. Retrials and the lengthy appellate process harm surviving crime victims and their families, as they endure the unraveling of convictions and are forced to relive the crime on retrial. Because the lapse in time often weakens the prosecution's case, they watch helplessly as prosecutors negotiate plea agreements rather than seek retrial, frequently resulting in lesser sentences or the release of the defendants.

D. Consequences for the Criminal Justice System

Prosecutorial misconduct also has significant adverse implications for the criminal justice system as a whole.

First, there can be major damage to the viability of the prosecutions in proceedings drawn out due to prosecutorial misconduct. With the passage of time, testimony becomes less exact, and evidence is lost or destroyed. Memories fade. Witnesses disappear or die. In some cases, the misconduct itself so damages the credibility of the prosecution that after a reversal, the only pragmatic approach is to negotiate a plea agreement that allows the defendant to walk free.

Second, when the innocent are convicted through prosecutorial misconduct, the guilty remain free and often commit other crimes. In some cases where DNA profiles exonerated the innocent and were linked to the true criminals, authorities discovered that many continued engaging in crime.

A stark example is the 1980 wrongful conviction of Kevin Green in Orange County Superior Court for assaulting his pregnant wife and murdering her unborn fetus. [181] By the time he was exonerated in 1996, police had discovered that the real assailant was Gerald Parker, nicknamed the "Bludgeon Killer." Parker had committed five murders prior to the attack on Green's wife; and while law enforcement and prosecutors focused on Kevin Green, Parker remained free and committed other crimes, including the rape of a 13-year-old girl.[182]

Third, prosecutorial misconduct is perpetuated through failure to deter. The Supreme Court's assumption in *Imbler v. Patchman* that prosecutors would be deterred as a result of state bar disciplinary proceedings has proven to be false. As this study demonstrates, the California State Bar rarely disciplines prosecutors who are found to have engaged in misconduct. Because the Bar has not fulfilled its responsibility to educate and deter misconduct through discipline, prosecutors know they can continue to commit misconduct to obtain convictions with almost no risk of reversal.

Finally, prosecutorial misconduct undermines public confidence in the entire criminal justice system. As the Supreme Court emphasized in *Brady v. Maryland,* "our system of justice suffers when any accused is treated unfairly." [183] Prosecutors bear a heavy responsibility entrusted by the public, and they are expected to discharge their duties honestly and, most of all, fairly. When they do not, the costs extend beyond the damaging consequences in the individual case. Prosecutorial misconduct fundamentally undermines public trust in the reliability of the justice system and subverts the notion that we are a fair society.

VIII.
Prosecutorial Immunity from Civil Liability

VIII. Prosecutorial Immunity from Civil Liability

"[I]t is by no means true that such blanket absolute immunity is necessary or even helpful in protecting the judicial process."

– Imbler v. Pachtman, United States Supreme Court, Justice White, concurring[184]

The injustice to the exonerated continues after incarceration: they are denied any recourse against the prosecutors whose misconduct resulted in their wrongful conviction. In 1976, the United States Supreme Court held in *Imbler v. Pachtman*[185] that prosecutors are absolutely immune from liability for conduct within the scope of their duties; they can be sued only when they are engaged in other activities, such as investigative or administrative tasks. Most recently, in *Van de Kamp v. Goldstein*,[186] the Court expanded absolute immunity by limiting the scope of that exception, protecting a district attorney and a former chief deputy district attorney from liability for training and supervisory failures that resulted in withholding of impeachment material. The Court, reiterating *Imbler's* rationales, held that while training and supervision concerning "how and when to make impeachment information available at a trial" were management responsibilities, they nonetheless were absolutely immunized from liability because they were "directly connected with the prosecutor's basic trial advocacy duties."[187]

The adoption of the absolute immunity doctrine resulted from the *Imbler* Court's attempt to balance competing interests. The Court explicitly recognized the irreparable harm to the innocent that the absolute immunity doctrine causes: "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."[188] However, it reasoned that applying a doctrine of qualified immunity—where a prosecutor could be held liable depending on the specific "circumstances and motivations of his actions"[189] —"would prevent the vigorous and fearless performance of the prosecutor's duty."[190] On balance, the Court held, it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[191] The Court emphasized that misconduct would still be deterred and prosecutors punished, because a prosecutor is subject "to professional discipline by an association of his peers."[192]

The Court's reasoning does not withstand scrutiny, as a variety of commentators have pointed out.[193] First, the balance the Court struck is incorrectly skewed because the Court misjudged how qualified immunity would affect honest prosecutors. The stringent requirements to surmount a qualified immunity defense provide ethical prosecutors adequate protection to ensure independent performance of their duties: the victim of misconduct would need to prove that the prosecutor violated clearly-established constitutional law with a culpable state of mind. As the Supreme Court has noted in other contexts, the qualified immunity defense "provides ample protection to all."[194] Other professionals, like physicians, are required to perform under the pressure of potential liability for gross negligence or willful misconduct; there is no reason prosecutors cannot do the same.

Second, as the Misconduct Study has shown, the Court was incorrect in its assumption that prosecutorial misconduct would be deterred and punished by the disciplinary bodies charged with the responsibility of regulating attorney conduct. In California, six cases of State Bar discipline in 13 years shows that public discipline is rare; 707 cases finding prosecutorial misconduct show that deterrence, if it exists, is inadequate. In contrast, allowing the possibility of civil liability under the limited circumstances of qualified immunity would greatly increase deterrence. As Justice White pointed out in *Imbler*: "It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct."[195] Absolute immunity allows prosecutors to commit misconduct with impunity, knowing that they are immune from any consequences, even if they act intentionally, in bad faith or with malice.

Finally, the doctrine of absolute immunity not only denies the innocent a remedy and fails to deter prosecutorial misconduct; it violates the integrity of the criminal justice system. As one commentator noted:

> "Absolute prosecutorial immunity undermines this compelling obligation to protect the innocent and to see that justice shall be done. We are not concerned here with minor breaches of professional etiquette. Prosecutors who engage in misconduct strike not just hard blows, but criminal blows. Specifically, when a prosecutor violates a person's due process rights, the violation is a crime. Subornation of perjury is a crime.

> Tampering with and coercing witnesses is a crime. Using false evidence before a grand jury or court is a crime. Yet the prosecutors who engage in this criminal conduct are not prosecuted, are not disciplined, and are not held liable for their crimes."[196]

The Supreme Court recently has shown a heightened interest in addressing issues of prosecutorial immunity, agreeing to hear three such cases in the past two years.[197] Hopefully, the Court will recognize the injustice of the absolute immunity doctrine and instead adopt qualified immunity for prosecutorial misconduct, as the authors recommend (see Court-Related Reforms, Part IX,B,4).

IX. Recommendations

IX. Recommendations

This in-depth analysis of prosecutorial accountability in California has proven that the system is flawed. Prosecutors commit misconduct, some repeatedly. Courts fail to report this misconduct despite their legal obligation to do so. The State Bar almost never holds the prosecutors accountable.

Each of these actors has an important role in prosecutorial accountability. The authors recommend reforms affecting each of them as first steps toward the goal of eliminating prosecutorial misconduct in criminal cases.

A. Attorney-Related Reforms

1. Ethics Training

The California State Bar, in conjunction with the California District Attorneys Association, California Public Defenders Association and California Attorneys for Criminal Justice, should develop a course specifically designed to address ethical issues that commonly arise in criminal cases.

These sessions should include the specific obligations to disclose exculpatory evidence; guidelines for avoiding misconduct in court, such as improper impeachment and arguments; and other areas where there is a demonstrated recurrence of misconduct. Training would help both prosecutors and defense counsel better understand their ethical obligations. Public defenders, prosecutors and private attorneys handling predominately criminal cases should be required to take the course once every three years.

2. Internal Misconduct Policies

District Attorney offices should adopt internal policies that do not tolerate misconduct, including establishing internal reviews of error.

As part of their internal policies, District Attorney offices should establish internal disciplinary processes and institute uniform procedures for tracking and investigating complaints of misconduct. Examples from other professions provide good models. Many large medical centers hold "Morbidity and Mortality" conferences that conduct peer reviews of any errors

that led to serious complications or patient death. Comparable models should be instituted to address misconduct in criminal cases.

3. Exculpatory Evidence Policies

District Attorney offices and law enforcement agencies should adopt written administrative exculpatory evidence policies to govern Brady compliance.

These exculpatory evidence policies should be publicly available, and the agencies should provide in-house trainings regarding them.[198] The policies should include procedures for collecting *Brady* material, tracking its delivery and disclosing it to the defense. Prosecutors should develop checklists for *Brady* disclosure obligations that can help ensure that police are turning over all *Brady* material to prosecutors and that prosecutors are turning over that material to defense in turn.[199] Material relevant to factual innocence or an affirmative defense should be disclosed as soon as that determination is made, and prior to entry of a guilty plea.[200]

B. Court-Related Reforms

1. Expansion of the Reporting Requirement of Business and Professions Code Section 6086.7

The reporting statute should be expanded to require judicial reporting of any finding of "egregious" misconduct as defined by the California Commission on the Fair Administration of Justice (CCFAJ), as well as any constitutional violation by a prosecutor or defense attorney, regardless of whether it resulted in modification or reversal of the judgment, including violations of ethical rules.

As noted, California Business and Professional Code section 6086.7 currently requires that courts report misconduct to the State Bar only when there is a reversal or modification in a judgment as a result of attorney misconduct.

As noted by the CCFAJ report, noncompliance is a problem. To address it, following the publication of the CCFAJ report in 2008, the California Supreme Court introduced a component into their judicial education program explaining the court's obligation to report under the statute. The authors applaud this effort, but more is needed.

The Misconduct Study shows that prosecutorial misconduct has serious adverse consequences (see Part VII), regardless of whether in the context of the overall case it constituted harmful error. The authors therefore recommend that section 6086.7 be expanded to include a requirement to report any "egregious" misconduct, as defined by but not limited to the types detailed in the CCFAJ Final Report: willful misrepresentation, appearance while intoxicated, willful unlawful discrimination, suppression of exculpatory evidence, willful presentation of perjured testimony, willful unlawful disclosure of information and failure to properly identify self. Further, the courts should report any misdeeds amounting to a constitutional violation, such as interfering with defense witnesses and commenting on the Fifth Amendment right to silence.

For reporting to deter misconduct adequately, a prosecutor should be reported based on the seriousness of the conduct and not on the guilt of the defendant. Any doubt whether misconduct is egregious should be resolved in favor of reporting the misconduct.

2. Inclusion of Attorney Names In Opinions

Judges should be required to list attorneys' full names in opinions finding misconduct.

Full identification of the attorneys whose misconduct would be reported under an expanded version of section 6086.7 (see Court-Related Reform number 1) not only will provide more transparency and a potential deterrence due to being publicly named, but will provide notice to those attorneys that what they did was improper.

3. California Supreme Court Monitoring of Reporting

The California Supreme Court should actively monitor compliance with the requirements of judicial reporting and notification of attorneys mandated by Business and Professions Code section 6086.7. Records of compliance—a list of cases reported to the State Bar by the courts—should be publicly available.

The findings of the Misconduct Study show that it is virtually impossible to assess judicial compliance with the obligation to report misconduct to the State Bar and to notify attorneys found to have committed misconduct. It is also clear that there is a critical need to track misconduct so that it may be identified and addressed. More transparency is needed to restore trust in the justice system and therefore, records of compliance should be made public.

4. Elimination of Absolute Immunity for Prosecutorial Misconduct

Prosecutors should be entitled at best to qualified immunity.

As noted, under current law prosecutors are absolutely immune from civil liability for their misconduct, even where they acted intentionally, in bad faith or with malice. The authors recommend that absolute immunity for prosecutors be abandoned and replaced in all circumstances by qualified immunity, to deter and ensure accountability for such misconduct and allow redress for its victims. Qualified immunity protects "government officials…from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[201] When applying qualified immunity, courts ask whether the law governing the official's conduct was clearly established; and whether, under that law, a reasonable officer could have believed the conduct was lawful.[202]

Qualified immunity will still protect honest prosecutors whose misconduct results from actions taken in good faith and without malice. But victims of prosecutorial misconduct will have recourse against prosecutors who commit misconduct knowingly and intentionally.

C. State Bar-Related Reforms

1. Special Responsibilities of Prosecutors

California should adopt American Bar Association's Model Rule 3.8.

The California State Bar is currently in the process of adopting ethical rules more in line with the ABA Model Rules, including Rule 3.8. Model Rule 3.8 deals specifically with the special responsibilities of prosecutors, making it a disciplinary offense to prosecute a charge without probable cause, seek to have an unrepresented defendant waive rights, subpoena a lawyer in a grand jury proceeding or make public comments that might harm a defendant. The rule also mandates that prosecutors disclose all exculpatory or mitigating evidence and make reasonable efforts to ensure a defendant knows of their right to counsel.[203] The authors recommend that California join the other 49 states who have already adopted some form of Rule 3.8 by adopting it in its entirety.

2. Enforcement and Accountability

The State Bar should expand discipline for prosecutorial misconduct and increase disciplinary transparency.

Revisions to the Rules of Professional Conduct will not deter misconduct unless the State Bar disciplines prosecutors for their ethical violations. While the Bar has limited resources, and while financial violations and client protection are crucial, the Misconduct Study's demonstration of the importance of prosecutorial misconduct warrants heightened scrutiny in this area. The lack of transparency of the Bar's disciplinary process makes it difficult to monitor the extent to which the Bar is addressing issues of prosecutorial misconduct.

As discussed in Part VI, the California State Bar has agreed to separate reports of misconduct to the State Bar in a manner consistent with the CCFAJ Report. It also agreed to include in its 2010 Annual Report the number of reportable actions pursuant to Business and Professions Code section 6068.7(a),[204] any reportable actions that involve any one of seven identified categories of egregious conduct[205] and the number of reportable actions related to the conduct of prosecutors and defense lawyers for each county.

While these changes are an important step towards progress, more is required in connection with disciplining errant prosecutors and increasing transparency. The State Bar's reasons for closing investigations where courts reported misconduct should be made public, and the Bar's annual discipline report should include more specific numbers as to how many prosecutors and criminal defense attorneys were investigated and received discipline.[206] The State Bar must also address the problem of multiple offenders, by directing any criminal justice attorney found to have committed misconduct more than once to take an ethics class specifically designed to address ethical issues that occur in criminal cases.

Conclusion

Conclusion

"Our criminal justice system depends on the integrity of the attorneys who present their cases to the jury. When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened."

– Hayes v. Brown, U.S. Court of Appeals for the Ninth Circuit [207]

Our criminal justice system aims at a difficult and critical balance. The requirement that prosecutors only use fair means of conviction means that they sometimes are unable to convict people they believe are guilty. But that is the balance we have struck, recognizing that it is better that some guilty go free than the fairness of trials be compromised and the innocent convicted.

The Misconduct Study demonstrates that the system is failing to achieve this balance. Those charged with ensuring it—the courts, prosecutors, and the State Bar—are not fulfilling their obligations to monitor, report and discipline prosecutorial misconduct. It is difficult to imagine a stronger wake-up call than the Misconduct Study's finding that out of 707 cases of court-identified misconduct, only six prosecutors were disciplined.

The authors have made specific recommendations for dealing with the problem. But the real remedies lie with the public, which must recognize the severity and importance of the problem and keep pressure on those responsible until reform occurs. The terrible consequences of prosecutorial misconduct for innocent defendants, taxpayers, crime victims and the entire criminal justice system mandate action.

The time for change and professional accountability is now.

Endnotes

Endnotes

1. 295 U.S. 78, 88 (1935).
2. *Id.*
3. *Id.*
4. James Liebman, Jeffrey Fagan, and Valerie West, *A Broken System: Errors in Capital Causes 1973–1995* (2000) (reviewed 5,760 capital cases nationwide to examine prejudicial error, including prosecutorial misconduct); Kathleen Ridolfi, *California Commission on the Fair Administration of Justice: Prosecutorial Misconduct: a System Review* (2007) (reviewed all appeals alleging PMC in California between 1996 and 2007 and reported the court findings and any subsequent prosecutorial disciplining.); Ken Armstrong and Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win (Parts 1–5)*, Chicago Tribune (1999) (reviewed court record and appeals across the country between 1963 and 1999 to determine how many homicide convictions were overturned because of prosecutorial misconduct); Bill Moushey, Win at All Costs (10-part series) Pittsburgh Post-Gazette (1998) (review of federal prosecutorial misconduct across the country); The Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors*, (2003).
5. 2010 Court Statistics Report, Statewide Caseload Trend 1999-2000 through 2008-2009, Judicial Council of California, available at http://www.courtinfo.ca.gov/reference/documents/csr2010.pdf. While guilty pleas do create a court record of the plea and sentencing, there is no record of the facts of the case or the defendant's interactions with the prosecutor prior to entering the guilty plea.
6. In re Mark Sodersten, 146 Cal. App.4th 1163 (Ct.App. 2007).
7. *Id.* at 1236.
8. *Id.* at 1171.
9. *Id.*
10. Letter from Michael Cross to Scott J. Drexel, Chief Trial Counsel, State Bar of California (Mar. 30, 2007).
11. Letter from Donald K. Steedman, Supervising Trial Counsel, State Bar of California (Mar. 15, 2010).
12. American Bar Association, Model R. of Prof'l Conduct 3.8 (2008).
    Special Responsibilities of A Prosecutor

    The prosecutor in a criminal case shall:

    a. refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

    b. make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

    c. not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

    d. make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose

to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

e. not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

   i. the information sought is not protected from disclosure by any applicable privilege;

   ii. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

   iii. there is no other feasible alternative to obtain the information;

f. except for statements that are reasonably necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

g. When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

   i. promptly disclose that evidence to an appropriate court or authority, and

   ii. if the conviction was obtained in the prosecutor's jurisdiction,

      A. promptly disclose that evidence to the defendant unless the court authorizes delay, and

      B. undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

h. When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

13. Final Report, California Commission on the Fair Administration of Justice, (Gerald Uelmen, ed. 2008) available at http://www.ccfaj.org.

14. Judicial Council of California, *supra* note 5.

15. Interview with Ed Jessen, Reporter of Decisions, California Court of Appeal (Jan. 2010).

16. The Bar also privately reproves attorneys; there is no way to review these private decisions. http://www.calbar.ca.gov/Attorneys/LawyerRegulation/FAQ.aspx.

17. Transcript of Record at 5195-5201, United States v. William J. Ruehle, SACR 08-00139-CJC (C.D. Cal. 2009).

18. Stuart Pfeifer, *Charges against Nicholas dropped; The co-founder of Broadcom had been accused of providing drugs to friends and business associates*, L.A. Times, Jan. 29, 2010.

19. Transcript of Record at 5195-5201, United States v. William J. Ruehle, SACR 08-00139-CJC.

20. 28 U.S.C. §2111 (1994).
21. 386 U.S. 18, 22 (1967).
22. Cal. Const. art. VI, §13. The harmless error rule was also codified in Sections 353 and 354 of the California Evidence Code, providing that reversal for evidentiary error is precluded unless the erroneous admission or exclusion of evidence resulted in the "miscarriage of justice."
23. People v. Watson, 46 Cal.2d 818 (Cal. 1956).
24. People v. Uribe, 162 Cal.App.4th 1457 (Ct.App. 2008).
25. Tracey Kaplan, *Sex abuse conviction dismissed, DA berated citing "numerous acts of misconduct," judge orders man freed after serving four years of possible life sentence*, S.J. Mercury News, Jan. 7, 2010, 1A.
26. Tracey Kaplan, *Freed man sues Santa Clara County for $38 million*, S.J. Mercury News, May 19, 2010.
27. Tracey Kaplan, *Judge orders new trial in second case as before, tape of exam wasn't given to defense*, San Jose Mercury News, 30 Oct. 2009, 1B.
28. People v. McKenzie, 2007 WL 2193548 (Cal. Ct.App. 2007).
29. *Id*. at 8.
30. Hardnett v. Marshall, 25 F.3d 875, 879 (9th Cir. 1994).
31. Cal. Bus. & Prof. Code §6086.7
32. Interview with David Alavezos (Aug. 2010).
33. People v. Price, 1 Cal.4th 324, 448 (Cal. 1991).
34. Bennett L. Gershman, *Prosecutorial Misconduct*, (2d ed., Thompson/West, 2007).
35. Black's Law Dictionary, (Bryan A. Garner ed. Thompson/West 8th ed. 2004).
36. People v. Gatewood, 2002 WL 31667940 (Cal. Ct.App. 2002).
37. United States v. Dow, 457 F.2d 246 (1972).
38. People v. Lee, 2001 WL 1346013 (Cal. Ct.App. 2001).
39. U.S. v. Young, 470 U.S. 1, 18-19 (1985).
40. People v. Parra, 2003 WL 22064473, 4 (Cal. Ct.App 2003).
41. *Id*.
42. U.S. Const. amend VI.
43. People v. Hall, 82 Cal.App.4th 813 (Ct.App. 2000).
44. California Rules of Professional Conduct Rule 5-200(B) (2009) (emphasis added).
In presenting a matter to a tribunal, a member:
    a. Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

b. *Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;*

c. Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

d. Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

e. Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

45. People v. Thompson, 2009 WL 3809657 (Cal. Ct.App. 2009).
46. People v. Humphrey, 2004 WL 289629 (Cal. Ct.App. 2004).
47. People v. Barrett, 2003 WL 22272309 (Cal. Ct.App. 2003).
48. People v. Cash, 28 Cal.4th 703, 732-733 (Cal. 2002).
49. People v. Contreras, 78 Cal.Rptr.2d 349 (Cal.App. 2 Dist. 1998) (depublished).
50. *Id.*
51. In re Peter Sakarias, 35 Cal.4th 140 (Cal. 2005).
52. People v. Wrest, 3 Cal.4th 1088, 1107 (Cal. 1992).
53. Sandoval v. Calderon, 231 F.3d 1140 (9th Cir. 2000).
54. *Id.* at 1149, n.1.
55. People v. Bain, 5 Cal.3d 839, 848 (Cal. 1971).
56. People v. Woods, 2001 WL 1649216, 11 (Cal. Ct.App. 2001).
57. Leland v. Oregon, 343 U.S. 790, 802-3 (1952).
58. United States v. Perlaza et al, 439 F.3d 1149 (9th Cir. 2006).
59. *Id.* at 1169.
60. *Id.* at 1170-1171.
61. Napue v. Illinois, 360 U.S. 264 (1959).
62. United States v. Reyes, 577 F.3d 1069, 1077 (9th Cir. 2009).
63. People v. Wheeler, 22 Cal.3d 258, 276 (1978).
64. Batson v. Kentucky , 476 U.S. 79, 83 (1986).
65. Kesser v. Cambra, 465 F.3d 351 (9th Cir. 2006).
66. *Id.* at 355-356.
67. *See* People v. Pigage, 112 Cal.App.4th 1359 (Ct.App. 2003).
68. People v. Warren, 161 Cal.App.3d 961, 973-977 (Ct.App.1984).
69. People v. Hill, 17 Cal.4th 800, 835 (Cal. 1998).
70. Malloy v. Hogan, 378 U.S. 1, 6, 9 (1964) (citation omitted).

71. Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled on other grounds, 395 U.S. 784, 794 (1969) (citation omitted).
72. Malloy, 378 U.S. at 9 (citation omitted).
73. Doyle v. Ohio, 426 U.S. 610, 618 (1976).
74. People v. Holguin, 2006 WL 760718 (Cal. Ct.App. 2006).
75. *Id.* at 5.
76. Brady v. Maryland, 373 U.S. 83 (1963).
77. Gershman, *supra* note 34.
78. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1846, 1850 (2000).
79. Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002).
80. State Bar Court Case No. 05-O-00815
81. Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005).
82. People v. Najera, 2004 WL 1345123, 5 (Cal. Ct.App. 2004).
83. People v. Ebaniz, 94 Cal.Rptr.3d 606, 612 (Ct.App. 2009).
84. *Id.* at 627.
85. *Id.* at 625.
86. Interview with David Alavezos (Aug. 2010).
87. People v. Gospel, 2006 WL 1413545 (Cal. Ct.App. 2006).
88. *Id.* at 8.
89. People v. Gerwald, 2003 WL 21324399 (Cal. Ct.App. 2003).
90. *Id.* at 2.
91. *Id.* at 4.
92. People v. Price, 1 Cal.4th 324, 447 (Cal. 1991).
93. People v. Ocampo, 2009 WL 2437698 (Cal Ct.App. 2009).
94. *Id.* 8.
95. Thompson v. Calderon, 120 F.3d 1045 (9th Cir.1997) (en banc), reversed on other grounds sub nom. Calderon v. Thompson, 523 U.S. 538 (1998); internal citations omitted.
96. California District Attorneys Association, What is a Prosecutor?, available at http://www.cdaa.org/whatpros.htm, (quoting Berger, 295 U.S. 78 at 88).
97. ABA Model Code of Prof. Responsibility EC 7-13 (1981); see also ABA Standards for Criminal Justice §3-5.8(c)(d) (2d ed.1981) (prosecutor has responsibility to guard rights of accused and those of society).

98. Cal. Bus. & Prof. Code §6068(o)(7) (2009).

99. Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, And Models for Creating Them* (forthcoming).

100. Cal. Code of Judicial Ethics, Preamble (2008).

101. Cal. Code of Judicial Ethics, Canon 3B(3), 3B(6) (2008).

102. Cal. Bus. & Prof. Code §6086.7(a)(2) (2009).

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

        i. 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.

        ii. Whenever 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.

        iii. 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).

        iv. 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.

103. Cal. Bus. & Prof. Code §6086.7(b).

104. CCFAJ, *supra* note 13 at 71.

105. People v. Ball, 2009 WL 1942427 (Cal. Ct.App. 2009).

106. *Id.* at 7.

107. Cal. Bus & Prof. Code §6086.7(a)(2) (emphasis added).

108. *Ball*, 2009 WL 1942427 at 7.

109. Not all 159 harmful cases reviewed in this study fell under the reporting statute. Also, there is no data on how many cases were actually reported. This number represents the number of cases reviewed by this study that specifically mentioned in the written opinions that the court was sending the decision to the State Bar pursuant to §6086.7.

110. CCFAJ, *supra* note 13 at 71.

111. *Qualifying Ethics Core Faculty Manual*, Judicial Council-Adminstrative Office of the Courts, Education Division/Center for Judicial Education and Research, tab 4 (2010).

112. United States v. Hasting, 461 U.S. 499, 506 n.5 (1974).

113. Imbler v. Pachtman, 424 U.S. 409, 428-429 (1976)

114. Cal. State Bar R. Proc. tit. IV, Standards for Attorney Sanctions for Prof'l Misconduct 1.3.

115. Under the State Bar Act, the Bar has discretion about whether to investigate a complaint; and holds that it may decline to review complaints that are not made by a judge who heard a matter related to the complaint—another reason judicial reporting of misconduct is so critical. See The California State Bar, Notices and Terms of Use, available at http://www.calbar.ca.gov/Notices.aspx.

116. For example, through private sources NCIP researchers ascertained that in 2005, Sacramento County deputy district attorney Christopher Cleland was privately admonished for his conduct in the case of Gloria Killian. Private reprovals are not included in the records of public discipline.

117. The remaining four prosecutors were disciplined for conduct outside the courtroom. Ernest Licalsi (now elected judge for Madera County Superior Court) and Peter Longanbach (State Bar Court Case No. 04-V-12515) were disciplined for misuse of office. George Dunlap (State Bar Court Case No. 02-O-14001) was suspended for failing to report a felony indictment against him. B. Iver Bye (State Bar Court Case No. 98-O-01162) was suspended for 30 days for improperly intervening in the prosecution of an acquaintance.

118. State Bar Court Case No. 05-O-00815

119. State Bar Court Case No. 06-O-15162

120. State Bar Court Case No. 06-O-11208

121. State Bar Court Case No. 02-O-10195

122. State Bar Court Case No. 04-O-14030

123. State Bar Court Case No. 95-O-18080

124. People v. Butler, 1999 WL 33601521, 36 (Cal. Ct.App. 1999).

125. Gantt v. Roe, 389 F.3d 908 (9th Cir. 2004).

126. People v. Medina, 2009 WL 498686 (Cal. Ct.App. 2009).

127. Hayes, 399 F.3d 972.

128. S. Res. 44, (Cal. 2004).

129. People v. Broughton, 2008 WL 4648984 (Cal. Ct.App. 2008).

130. *Id.* at 14.

131. People v. Benn, 2006 WL 2382918 (Cal. Ct.App. 2006).

132. *See* Caitlin Liu, "*New Trial Ordered in Slayings of 2; Courts: A judge throws out Kenneth Leighton's conviction and criticizes the prosecutor's "prejudicial misconduct,"* L.A. Times, Aug. 14, 2001 and Twila Decker, *Trial Stopped; Actions of Prosecutor Criticized*, L.A. Times, May 10, 2001.

133. *See* People v. Brewer, 2009 WL 4609067 (Cal. Ct.App. 2009); People v. Valera, 2008 WL 1087943 (Cal. Ct.App. 2008).

134. *See* Harmless cases: People v. Guzman, 2004 WL 552973 (Cal. Ct.App. 2004); People v. Pacheco, 2004 WL 1053654 (Cal. Ct.App. 2004); People v. Pigage, 112 Cal.App.4th.1359 (Ct.App. 2003) and People v. Echevarria, 2005 WL 1030128 (Cal. Ct.App. 2005) and Harmful case: People v. Gomez, 2001 WL 1003295 (Cal. Ct.App. 2001).

135. Cal. State Bar R. Proc. tit. IV, Standards for Attorney Sanctions for Prof'l Misconduct 2.2, 2.4.

136. State Bar Court Case No. 98-C-00852

137. State Bar Court Case No. 97-O-15422

138. *Id.*

139. People v. Hill, 17 Cal.4th 800 at 834 (Cal. 1998).

140. E-mail from Itzel D. Berrío, Office of the Chief Trial Counsel of the California State Bar to Maurice Possley, Visiting Research Fellow at the Northern California Innocence Project (Sept. 10, 2010, 02:47 p.m. PDT) (on file with author).

141. *Id.*

142. CCFAJ, *supra* note 13 at 81.

143. For the purposes of this report, Reportable Actions refer to any judgments reversed or modified by a court due to attorney misconduct.

144. These include Contempt (i.e., a final order of contempt issued against an attorney); Reversal (i.e., a modification or reversal of a judgment based upon attorney misconduct); Sanction (i.e., the imposition of judicial sanctions against an attorney); and Judgment (i.e., a judgment issued against an attorney).

145. These categories of egregious misconduct include willful misrepresentation, appearance while intoxicated, willful unlawful discrimination, suppression of exculpatory evidence, willful presentation of perjured testimony, willful unlawful disclosure of information and failure to properly identify self.

146. California State Bar, 2009 Annual Discipline Report, pg. 15.

147. CCFAJ, *supra* note 13 at 81.

148. 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

149. *See* www.innocence project.org—know the causes wrongful convictions: Eyewitness misidentification, invalidated or improper forensic science, false confession or admissions, police misconduct, prosecutorial misconduct, informants, and bad lawyering.

150. Emily M. West, Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases, August 2010, available at http://www.innocencenetwork.org.

151. *Id.*

152. Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev 55 (Jan. 2008). Professor Brandon Garrett examined the appellate histories of the first 200 DNA exonerations for which he found 133 written opinions. Garrett's analysis revealed that 14 percent of appellants won reversals - just 9 percent when separating out the capital cases, where there is a much higher reversal rate. In other words, appellate courts failed to recognize innocence or grant relief in 86 percent when including capital cases or 91 percent of non-capital cases. In 10 percent of the cases they based their decisions on what they perceived to be "overwhelming" evidence of guilt and in half of all the cases, "strong" evidence of guilt. Of the 18 cases reversed where there were written opinions, judges made statements in 8 cases, (i.e. 6 percent of all 133 cases with a written opinion) suggesting the defendant might be innocent.

153. Killian, 282 F.3d 1204.

154. Bandon Bailey, *Falsely imprisoned East Palo Alto man to get $2.75 million settlement*, S.J. Mercury News, Sep. 28, 2007.

155. People v. Morris, 46 Cal.3d 1 (Cal. 1988). See also Neda Raouf, *L.B. faces $10 million civil suit; Court: Freed man says city, detectives withheld vital evidence in case*, L.B. Press-Telegram, Nov. 2, 2002.

156. Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation, 2009, available at http://www.innocencenetwork.org.

157. Janet Roberts and Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice is Slow to Make Amends*, New York Times, Nov. 25, 2007.

158. Frequently Asked Questions, Burden of Innocence, Frontline, http://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/faqsreal.html (citing Life After Exoneration Program, http://www.exonerated.org).

159. *Id.*

160. 424 U.S. 409.

161. *Id. at 428.*

162. *Id. at 430*.

163. Butler, 1999 WL 33601521.

164. Jim O'Connell, Costs rise for public defender; County probing why expense up 34 percent in 4 years, San Diego Trib., Dec. 2, 1991.

165. Hayes, 399 F.3d 972.

166. Interview with Rod Kawano, Senior Deputy County Administrator for San Joaquin County (Aug. 2010).

167. *Id.*

168. Peter Loganbach, State Bar Court Case Nos. 01-C-0583 and 04-V-12515-RMT.

169. Leslie Wolf Branscomb, *Man convicted of 1996 killing suing county and DA: Civil rights violated, says ex-SDSU student*, San Diego Union-Tribune, Sept. 11, 2006.

170. *Id.*

171. *Id.*

172. Kathleen "Cookie" Ridolfi & Maurice Possley, *Prosecutor misconduct has a high public cost*, S.J. Mercury News, Nov. 12, 2009 at A8.

173. *Id.*

174. Tracey Kaplan, *High tech entrepreneur to get $750,000 from Santa Clara County in settlement over questionable house search*, S.J. Mercury News, Oct. 9, 2009.

175. Ridolfi & Possley, *supra* note 182.

176. Rebecca Cathcart, *Wrongfully Convicted Man Gets $7.95 Million Settlement*, N.Y. Times, Aug. 12, 2010.

177. Van de Kamp, 129 S.Ct. 855 at 861.

178. Uribe v. County of Santa Clara, et.al, Docket Number 10-cv-01758-LHK (dismissal pending).

179. Cal. Penal Code §4900

180. Letter from Jennifer A. Chmura, Senior Staff Counsel, California Victim Compensation & Government Claims Board to Cookie Ridolfi, Executive Director, Northern California Innocence Project, Sept. 20, 2010.

181. Anna Cekola and H.G. Reza, *O.C. Grand Jury Heard Parker Admit 6 Killings, L.A. Times*, Aug. 20, 1996.

182. *Id.*

183. 373 U.S. 83 at 409 87.

184. 424 U.S. 409 at 442, 442 (White, J., concurring)

185. 424 U.S. 409.

186. 129 S. Ct. 855 (2009).

187. *Id.* at 863.

188. 424 U.S. at 427.

189. *Id.* at 419 n.13. As the Court explained the distinction: "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial. " Id.

190. *Id.* at 427.

191. *Id.* at 428.

192. *Id.* at 429.

193. See generally, Margaret Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L.Rev 53 (2005), Douglas J. McNamara, Buckley, Imbler, and *Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to its Absolute Means*, 59 Alb. L.Rev. 1135 (1996), Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 Charleston L.Rev. 1 (Fall 2009).

194. Malley v. Briggs, 475 U.S. 335 (1986).

195. Imbler, 424 U.S. at 442 (White, J., concurring)

196. Margaret Johns, 2005 B.Y.U. L.Rev 53, 123 (citations omitted).

197. Aside from the *Van de Kamp* case, discussed in text, the Court had full briefing and heard argument prior to the settlement in *Pottawattamie County, Iowa, et al. v. McGhee*, 547 F.3d 922 (8th Cir. 2008) (cert. dismissed, 130 S.Ct. 1047 2010), in which prosecutors had used perjured and fabricated testimony to convict two men; Iowa paid $12 million to settle the lawsuit before the Court ruled. *Connick v. Thompson* is currently before the Court, with oral argument scheduled for October 6, 2010. The Supreme Court will decide whether a district attorney's office can be held liable for the admitted actions of a prosecutor who withheld exonerating evidence in a death row inmate's case.

198. CCFAJ, *supra* note 13 at 87.

199. *Symposium: New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 Cardozo L. Rev. 1961, 1974 (2010).

200. CCFAJ, *supra* note 13 at 89-90.

201. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

202. Tribble v. Gardner, 860 F.2d.321, 324 (9th Cir.1988).

203. ABA Model R. 3.8 (See note 12 for full text).

204. Cal. Bus. & Prof. Code §6086.7 (See note 95 for full text).

205. These categories of egregious misconduct include willful misrepresentation, appearance while intoxicated, willful unlawful discrimination, suppression of exculpatory evidence, willful presentation of perjured testimony, willful unlawful disclosure of information and failure to properly identify self. See Final Report, CCFAJ at 75-77.

206. Similar to the ABA Discipline Surveys, See http://www.abanet.org/cpr/discipline/sold/ for more information.

207. Hayes, 399 F.3d. at 988.

Appendix A: Harmful Cases by Jurisdiction

Appendix A: Harmful Cases by Jurisdiction

State Cases

Alameda

Cooper, 314 F.Supp.2d 967 (2004)
Green, 532 F.3d 1028 (2008)
Laviene, 2003 WL 22285604 (2003)
Parham, 2002 WL 1767430 (2002)
Young, 2002 WL 31175909 (2002)

Butte

Little, 68 Cal.Rptr.2d 907 (1997)
Pickett, State Bar Court Case No. 04-O-14030 (2004)
Song, 124 Cal.App.4th 973 (2004)
Stanley, 2006 WL 1523128 (2006)

Contra Costa

Allen, 2004 WL 179472 (2004)
Cameron, Contra Costa Times 12/12/2006 (2006)
Currie, 2005 WL 2187271 (2005)
Johnson, Contra Costa Times 12/15/2000 (2000)
Johnson, 545 U.S. 162 (2005)

Fresno

Addison, 2005 WL 2812263 (2005)
Ball, 2009 WL 1942427 (2009)

Humboldt

Kesser, 2006 WL 2589425 (2006)

Inyo

Phillips, 2005 WL 2746769 (2005)

Kern

Alexander, 2006 WL 1431195 (2006)
Alonso, 2002 WL 99504 (2002)
Cheadle, 2002 WL 31223538 (2002)
Cumberworth, 2006 WL 3549939 (2006)
McCombs, 2002 WL 31863511 (2002)
Sons, 164 Cal.App.4th 90 (2003)

Kings

Alves, 2003 WL 502762 (2003)

Lassen

Silva, 416 F.3d 980 (2005)

Los Angeles

Alvarado, 141 Cal.App.4th 1577 (2006)
Barrett, 2003 WL 22272309 (2003)
Batts, 134 Cal.Rptr.2d 67 (1999)
Beltran, Daily News of L.A. 3/4/1997 (1997)
Beltran, Daily News of L.A. 2/11/1998 (1998)

All reasonable measures have been taken to ensure the quality, reliability, and accuracy of the information in this report. If you believe there is an error, we encourage you to contact us via email at veritas@scu.edu.

Brewer, 2009 WL 4609067 (2009)
Broughton, 2008 WL 4648984 (2008)
Carrocci, 2004 WL 65251 (2004)
Cleland, 134 Cal. Rptr.2d 479 (2003)
Collins, Appellate Case No. B120993 (1999)
Contreras, 78 Cal.Rptr.2d 349 (1998)
Conway, U.S Dist. Case No. CV-00-07350-VAP (2009)
Donan, 2001 WL 1261935 (2001)
Gantt, 389 F.3d 908 (2004)
Garcia, 2005 WL 2387474 (2005)
Goldstein, (2002)
Hall, 82 Cal. App. 4th 813 (2000)
Hill, 72 Cal.Rptr.2d 656 (1998)
Humphrey, 2004 WL 2896929 (2004)
Kurwa, Pasadena Star-News 7/15/2003 (2003)
Lee, 2001 WL 1346013 (2001)
Leighton, L.A. Times 8/14/2001 (2001)
McClain, 2000 WL 873798 (2000)
McGee, 2009 WL 6615481 (2009)
Muhammad, 2003 WL 1963202 (2003)
Nino, 2007 WL 2111011 (2007)
Paulino, 2008 WL 4070694 (2008)
Pratt, L.A. Times 5/30/1997 (1997)
Ramirez, 141 Cal. App. 4th 1501 (2006)
Sakarias, 25 Cal.Rptr.3d 265 (2005)
Salazar, 2004 WL 957701 (2004)
Sandoval, 231 F.3d 1140 (2000)
Sasson, 2002 WL 18314 (2002)
Silva, 25 Cal. 4th 345 (2001)
Smith, The Press Enterprise 6/4/2002 (2002)
Smith (2nd mistrial), The Press Enterprise 6/4/2002 (2002)
Smith, 2007 WL 1817107 (2007)
Tillman, L.A. Times 5/10/2001 (2001)
Townsend, 2005 WL 665572 (2005)
Turner, 121 F.3d 1248 (1997)
Turner, 2001 WL 7231333 (2001)
Valera, 2008 WL 1087943 (2008)
Vasquez, 2009 WL 2059902 (2009)
Walton, 2009 WL 3284027 (2009)
Williams, 2009 WL 2381756 (2009)
Woods, 2006 WL 3438603 (2006)
Wright, 2006 WL 217803 n.8 (1998)

Madera

Arroyos, 2008 WL 116344 (2008)
Rangel, 2002 WL 31009418 (2002)

Marin

Pelfini, State Bar Court No. 02-O-10195 (2001)

Monterey

Hughes, 2004 WL 2418364 (2004)

Orange

Brown, 17 Cal. 4th 873 (1998)
Carrillo, 119 Cal.App.4th 94 (2004)
Gomez, 2001 WL 1003295 (2001)
Guzman, 2000 WL 670004 (2000)
Leyva, 2003 WL 1605777 (2003)
Luong, 2006 WL 1682636 (2006)
Martinez, 127 Cal. Rptr. 2d 305 (2002)
McCain, Appellate Case No. G025408 (2000)
Thompson, 120 F.3d 1045 (1997)

Riverside

Chester, The Press Enterprise 10/13/2006 (2006)
Collier, The Press Enterprise 5/20/2003 (1998)
Fernandez, 2002 WL 519491 (2002)
Medina, 2009 WL 498686 (2009)
R.T.P., 43 Cal.Rptr.3d 536 (2006)

Sacramento

Johnson, 2008 WL 4998770 (2008)
Johnson D, 2007 WL 2372579 (2007)
Killian, 282 F.3d 1204 (2002)
Thomas, 2001 WL 1539616 (2001)

San Benito

Westfall, 2004 WL 171654 (2004)

San Bernardino

Jimenez, The Press Enterprise 12/10/2006 (2006)
Singh, 142 F.3d 1157 (1998)

San Diego

Anzalone, 29 Cal.Rptr.3d 689 (2005)
Berardi, 57 Cal.Rptr.3d 170 (2007)
Butler, 1999 WL 33601521 (1999)
Guzman, 2002 WL 819255 (2002)
Harrell, Copley News Service 11/21/1997 (1997)
Kasim, 56 Cal. App. 4th 1360 (1997)
Roquemore, 2006 WL 636805 (2006)
Terrones, S.D. Tribune 1/20/2001 (2001)
Tolliver, 2002 WL 498168 (2002)

San Francisco

Duran, 106 F.3d 407 (1997)

San Joaquin

Gonzales, 165 Cal.App.4th 620 (2008)
Hayes, 399 F.3d 972 (2005)
Le, 2006 WL 2949021 (2006)
Vasquez, 2006 WL 978948 (2006)

San Mateo

Ali, 2009 WL 1924792 (2009)
Hunter, U.S. Dist. Case No. C 90-3275 (1998)
Quartermain, 1997 WL 474421 (1997)
Ricardo, 1999 WL 561595 (1999)
Valenzuela, San Mateo C. Times 6/9/2004 (2004)

Santa Barbara

Lewis, 321 F.3d 824 (2003)

Santa Clara

Auguste, State Bar Court Case No. 05-O-00815 (2004)
Ballard, State Bar Court Case No. 05-O-00815 (2004)
Deal, 2003 WL 22094433 (2003)
Kanda, 2009 WL 4263638 (2009)
Lopez, 2005 WL 1349813 (2005)
Pham, U.S. Dist. Case No. C 02-1348 (2007)
Sampson, 2002 WL 462279 (2002)
Shazier, 42 Cal.Rptr.3d 570 (2006)
Uribe, 162 Cal.App.4th 1457 (2008)

Santa Cruz

Gomez, 2006 WL 1991740 (2006)

Sierra

Miller, L.A. Times 2/15/2003 (2003)

Solano

Allen, 2008 WL 2673363 (2008)
Gaines, 54 Cal.App.4th 821 (1997)

Sonoma

Joseph, 2008 WL 5274808 (2008)
Rutledge, S.F. Chronicle 8/24/2007 (2004)

Stanislaus

Dustin, 99 Cal.App.4th 1311 (2002)

Tulare

Perez, 2006 WL 3518137 (2006)
Sodersten, 53 Cal.Rptr.3d 572 (2007)

Yolo

Racimo, 2006 WL 3365860 (2006)

Federal Cases

United States Central District

Combs, 379 F.3d 564 (2004)
LaPage, 231 F. 3d 488 (2000)
Leung, 351 F.Supp.2d 992 (2005)
Ruehle, U.S. Dist. Case No. 08-00139-CJC (2009)
Welton, 2009 WL 2390848 (2009)

United States Eastern District

Derington, 229 F.3d 1243 (2000)
Urie, 2006 WL 1525832 (2006)

United States Northern District

Blueford, 312 F.3d 962 (2002)
Reyes, 577 F.3d 1069 (2009)
Rodrigues, 159 F.3d 439 (1998)

United States Southern District

Alvarado, 2006 WL 3487005 (2006)
Carter, 2001 WL 32068 (2000)
Caruto, 2008 WL 2440558 (2008)
Fimbres, 2002 WL 31395960 (2002)
Fitzgerald, 615 F.Supp.2d 1156 (2009)
Geston, 299 F.3d 1130 (2002)
Killins, U.S. Dist. Case No. 98CR3608T (1999)
Leon-Gonzalez, 2001 WL 1485876 (2001)
Perlaza, 439 F.3d 1149 (2006)
Robledo-Vela, 2002 WL 1941166 (2002)
Shaver, 607 F.Supp.2d 1168 (2009)
Velarde-Gomez, 2001 WL 1262610 (2001)

Appendix B: Harmless Cases by Jurisdiction

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State Cases

Alameda

Allen, 366 F.3d 823 (2004)
Baxter, 2005 WL 3150256 (2005)
Boyette, 29 Cal.4th 381 (2002)
Brambila, 2005 WL 950588 (2005)
Byrd, 2006 WL 1493795 (2006)
Crawford, 2006 WL 3493046 (2006)
Darden, 2001 WL 1613768 (2001)
Ervin, 22 Cal. 4th 48 (2000)
Friend, 211 P.3d 520 (2009)
Gilbert, 2006 WL 2687043 (2006)
Gipson, 2004 WL 1059766 (2004)
Harrison, 2002 WL 467715 (2002)
Hasley, 2005 WL 3100718 (2005)
Hernandez P, 2002 WL 490601 (2002)
Hiskas, 2003 WL 21018410 (2003)
Hovey, 458 F.3d 892 (2006)
Irias, 2003 WL 205163 (2003)
Johnson D, 2003 WL 21186656 (2003)
Jordan, 2005 WL 1766387 (2005)
Juniel, 2006 WL 350371 (2006)
Lang, 2003 WL 122783 (2003)
Lee, 2006 WL 2329431 (2006)
Loeun Sa, 2009 WL 1133337 (2009)
Love, 2002 WL 31117263 (2002)
McCowan, 2001 WL 1407689 (2001)
McKenzie, 2007 WL 2193548 (2007)
Moore, 2006 WL 3813619 (2006)
Morales, 2004 WL 2850547 (2004)
Morales, 2005 WL 1693800 (2005)
Nichols, 1999 WL 459362 (1999)
Noche, 2003 WL 21977077 (2003)
Simmons, 2005 WL 480176 (2005)
Terry, 2006 WL 75346 (2006)
Welch, 85 Cal.Rptr.2d 203 (1999)
Young, 34 Cal.4th 1149 (2005)

Amador

Alders, 2001 WL 1338035 (2001)
Frye, 77 Cal.Rptr.2d 25 (1998)

Butte

Cooper, 2004 WL 407156 (2004)
Gilbert, 2003 WL 22413690 (2003)
Rogers, 2003 WL 21101820 (2003)

Calaveras

Smithey, 86 Cal.Rptr.2d 243 (1999)

Contra Costa

Bland, 2006 WL 217968 (2006)
Bryden, 73 Cal.Rptr.2d 554 (1998)
Hilton, 2006 WL 1125233 (2006)
Levine, 2003 WL 21541274 (2003)
McCaffery, 1999 WL 1097989 (1999)
Payton, 2003 WL 22040421 (2003)
Pratcher, 2009 WL 2332183 (2009)
Ramirez F, 2009 WL 1027554 (2009)
Sutton, 2003 WL 932524 (2003)
Young, 1997 WL 557972 (1997)

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Del Norte

Stephens-Miner, 2003 WL 1958850 (2003)

El Dorado

Caico, 2006 WL 3191135 (2006)
Coddington, 23 Cal.4th 529 (2000)
Cox, 30 Cal. 4th 916 (2003)

Fresno

Anderson 2005 WL 356838 (2005)
Calderon, 2006 WL 306920 (2006)
Contreras, 2004 WL 1303654 (2004)
Fanady, 2007 WL 155179 (2007)
Flores F, 2002 WL 66151 (2002)
Garcia, 2005 WL 1941341 (2005)
Jacome, 2005 WL 1189036 (2005)
Johnson E, 2007 WL 1247062 (2007)
Kephart, 2006 WL 2000035 (2006)
Lor, 2002 WL 31320348 (2002)
McCombs, 2002 WL 31097693 (2002)
Ortiz, 2005 WL 3471784 (2005)
Phaphonh, 2005 WL 3494952 (2005

Humboldt

Evers, 2001 WL 3095769 (2001)
Holland, 2005 WL 1799429 (2005)
Leon, 2002 WL 1880747 (2002)

Imperial

Foster, 2006 WL 3412538 (2006)

Kern

Barboza, 2003 WL 21310573 (2003)
Flores, 2007 WL 852864 (2007)
Garza, 2003 WL 21641496 (2003)
Gibson, 2006 WL 1163270 (2006)
Lopez, 2003 WL 22683400 (2003)
Lucas, 2002 WL 1473114 (2002)
Quiroga, 2009 WL 3034319 (2009)
Siler, 2006 WL 3759526 (2006)
Welch, 2006 WL 401694 (2006)
Williams, 2006 WL 3802620 (2006)
Williams, 2007 WL 1653054 (2007)

Kings

Baday, 2004 WL 49715 (2004)
Bowen, 2005 WL 775752 (2005)
Serna, 2004 WL 759248 (2004)

Lake

Boone, 2009 WL 190999 (2009)

Los Angeles

Aguilar, 2004 WL 170625 (2004)
Aguilar, 2001 WL 1530898 (2001)
Aguilar, 2006 WL 2556927 (2006)
Ahumada, 2006 WL 2349170 (2006)
Alfaro, 2005 WL 1077575 (2005)
Amadi, 2004 WL 119401 (2004)
Anderson, 2003 WL 21995454 (2003)
Anderson, 2005 WL 2496839 (2005)
Anderson, 2008 WL 241088 (2008)
Archer, 2004 WL 103354 (2004)
Arcila, 2003 WL 194948 (2003)
Baker, 2002 WL 3176409 (2002)
Bautista, 2005 WL 1744414 (2005)
Beaghan, 2004 WL 1558467 (2004)
Belden, 2002 WL 90992 (2002)

Belei, 99 Fed.Appx. 813(2004)
Beltran, U.S. Dist. Case No. CV 01-3404-GAF (2004)
Benavente, 2009 WL 5067615 (2009)
Benn, 2006 WL 2382918 (2006)
Bodnar, 2004 WL 1172980 (2004)
Bowles, 2007 WL 1203711 (2007)
Braddock, 2001 WL 1566430 (2001)
Brown, 2009 WL 2170487 (2009)
Broyles 2003 WL 1984557 (2003)
Buckhalter, 2008 WL 224366 (2008)
Caballero, 2008 WL 1778068 (2008)
Cabrera, 2009 WL 4809884 (2009)
Cantabrana, 2006 WL 3423267 (2006)
Carlsen, 2008 WL 217881 (2008)
Caro, 2008 WL 62531 (2008)
Carrier, 2004 WL 1447754 (2004)
Castro, 2005 WL 2387463 (2005)
Cruzata, 2003 WL 22093914 (2003)
Duran, 2001 WL 1656607 (2001)
Earp, 85 Cal.Rptr.2d 857 (1999)
Eckman, 2009 WL 1277733 (2009)
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