LEGAL ETHICS: PROSECUTORIAL MISCONDUCT AND THE RULES OF PROFESSIONAL CONDUCT

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# Table of Contents

**Rules of Professional Conduct and Prosecutorial Misconduct**  
by Tara Mulay

**Attachments**

ABA Criminal Justice Section Standards, Prosecutorial Function,  

Proposed Rule 3.8 Special Responsibilities of a Prosecutor

**First Annual Report: Preventable Error – Prosecutorial Misconduct in California 2010** by Maurice Possley and Jessica Sargeant
Rules of Professional Conduct and Prosecutorial Misconduct

By Tara Mulay, January 2012

Introduction

The following materials highlight a limited number of the rules and standards of professional conduct which can be used to support appellate arguments of prosecutorial misconduct in California. Only a small, representative sample of the rules of professional conduct governing prosecutors and other attorneys are specifically addressed below. My aim is first to describe the primary research resources, many of which are freely available on-line, which criminal appellate attorneys can use to find rules and standards of professional responsibility relevant to prosecutorial misconduct arguments. The materials emphasize some of the sources which have been the most influential in the case authority. Then, in order to illustrate how rules of professional conduct can bolster prosecutorial misconduct arguments, I will provide a few examples of rules and standards which lend support to relatively common claims of prosecutorial misconduct during closing argument. At the end of the materials, I will list a few “catch-all” rules governing prosecutorial behavior. Appellate counsel could arguably rely on these rules and standards whenever a prosecutor’s conduct has infringed on the defendant’s constitutional or procedural rights.

An important note – many of the rules and standards discussed below are applicable to all attorneys or, even if nominally only applicable to prosecutors, have corollaries for defense attorneys. For example, according to the ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed.1993), both a prosecutor and a criminal defense attorney have basic duties to uphold. The prosecutor and criminal defense attorney have the following basic duties:

Standard 3-1.2 (c):
The duty of the prosecutor is to seek justice, not merely to convict.

Standard 4-1.2 (b):
The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.

Consistent with the latter duty, we as criminal defense appellate attorneys must zealously endeavor to hold prosecutors to the former duty. I hope these materials assist you in doing so.
I. Research Resources: Ethical Rules and Standards Governing Prosecutors’ Conduct

1. Chapter 5 (Advocacy and Representation) of the California Rules of Professional Conduct, especially rules 5-200\(^1\) (Trial Conduct) and 5-220\(^2\) (Suppression of Evidence). These rules govern the conduct of all attorneys in California.

2. Business and Professions Code section 6068 – Governs the conduct of all attorneys in California.

3. ABA Model Code of Professional Responsibility – Provides guidance for all attorneys and the courts, but the Model Code is not enforceable. The Model Code was adopted in 1969 and amended several times, the last time in 1980. It was replaced by the ABA Model Rules of Professional Conduct in 1983. However, the Model Code is still a highly influential source for reviewing courts and is cited frequently in criminal case law. (See, e.g., *In re Sakarias* (2005) 35 Cal.4th 140, 159.) The text of the Model Code is freely available on-line here (or copy the footnoted URL.\(^3\))

\(^1\) Rule 5-200 provides:

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.

\(^2\) Rule 5-220 provides: “A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.”

\(^3\) [http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf)
4. ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed.1993) (Standards for the Prosecution Function attached as Appendix A). The standards give lawyers guidance about how to conduct themselves within the bounds of the law, but are not legally enforceable minimum conduct requirements.

- And Commentaries! Full text of the ABA Standards with commentaries are too long to be included in these materials, but are freely available on-line here (or copy the footnoted URL). For criminal defense appellate counsel, the Prosecution Function and commentaries are a Goldmine of helpful rhetoric!

- The ABA standards are a particularly influential source. Two of the California Supreme Court’s seminal prosecutorial misconduct cases cite the ABA Standards: People v. Hill (1998) 17 Cal.4th 800, 833 and People v. Bolton (1979) 23 Cal.3d 208, 213.

- The Prosecution and Defense Function are subsets of the larger ABA Criminal Justice Standards, which also provide standards applicable to judges and justices. (See, e.g., ABA Standards for Criminal Justice: Special Functions of the Trial Judge (3d ed. 1999)).


- A new edition is currently being drafted, and it might be issued by the end of 2013. The draft versions are continually being updated, but a summer 2010 draft indicated that the next edition of the Prosecution Function standards may contain ten new standards, e.g.

4http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf
“The Prosecutor’s Heightened Duty of Candor” (summer 2010 draft proposed language, Standard 3-1.3): “In light of the prosecutor’s public responsibilities and broad authority and discretion, the prosecutor has a heightened duty of honesty and candor in many situations. When in doubt and no harm to others can be foreseen, the prosecutor should err on the side of candor.”

“Improper Bias Prohibited” (summer 2010 draft proposed language, Standard 3-1.5): “(a) A prosecutor should not invidiously discriminate against, or in favor of, any person on the basis of constitutionally or statutorily impermissible criteria. Such criteria may include factors such as race, ethnicity, religion, gender, sexual orientation, political beliefs, age, or social or economic status. A prosecutor should not use other improper considerations, such as partisan or improper political or personal considerations, in exercising prosecutorial discretion.”

5. If/When it is approved: Proposed California Rule of Professional Conduct, rule 3.8 (proposed rule 3.8 attached as Appendix B), modeled on ABA Model Rules of Professional Conduct, rule 3.8. The current proposed rule is not identical to ABA rule 3.8, but it is substantially similar.

- The California State Bar will be submitting this proposed rule with 66 other proposed rules to the California Supreme Court, hopefully this spring. The rules are not expected to be approved until the end of 2013 or 2014.

- Currently, the only California rule of professional conduct specifically governing prosecutorial duties is rule 5-110, which is very limited. It provides:

  “A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall
promptly so advise the court in which the criminal matter is pending.”

II. A Few Illustrations of How the Rules and Standards Can Support Claims of Prosecutorial Misconduct During Closing Argument

Please note – This list is meant as exemplary only. It is possible to be quite creative with application of ethical rules to prosecutorial misconduct arguments and to use broad rules to bolster very specific arguments about prosecutorial misdeeds. Numerous general rules applicable to all attorneys can arguably prohibit inappropriate conduct by prosecutors. For example, the California Supreme Court cited the broad rule in former California Rules of Professional Conduct, rule 7-105 (current rule 5-200(b)) – a member of the State Bar “shall not seek to mislead the... jury by an artifice or false statement of fact or law” – in support of the principle that prosecutors may not suggest that defense counsel was obligated or permitted to present a defense dishonestly. (*People v. Bell* (1989) 49 Cal.3d 502, 538.)

Additionally, ethics rules can be very helpful outside the context of common categories of prosecutorial misconduct. Most of the sources cited in Part I, *supra*, especially the ABA Code of Professional Responsibility and the ABA Standards for Criminal Justice, Prosecution Function, address standards of professional behavior applicable at all stages of a prosecution, including investigation, plea negotiation, trial, sentencing, and appeal. Therefore, these texts can serve as valuable research resources when drafting an unusual prosecutorial misconduct argument involving a unique factual scenario.

1. **Prosecutorial Misconduct for Impugning Defense Counsel’s Integrity** (See *People v. Vance* (2010) 188 Cal.App.4th 1182, 1200-1201 [discussing this type of misconduct].)

   - Subdivision (f) of Business and Professions Code section 6068 provides that it is the duty of any attorney “[t]o advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.”

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This general rule definitely applies to the defense: *Hanson v. Superior Court* (2001) 91 Cal.App.4th 75 (defense counsel held in contempt for arguing that it was the goal of the defense and prosecution to misrepresent the facts).
ABA Standards for Criminal Justice, Prosecution Function (3d ed. 1993), standard 3-5.2, pp. 91-92: “Courtroom Professionalism. [¶] (a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.”

Commentary to standard 3-5.2 (p. 93) further states: “Prosecutors must not allow themselves to be diverted... by irrelevant or extraneous factors or disruptive behavior. Basic to an efficient and fair functioning of our adversary system of justice is an atmosphere of mutual respect by all participants for all of the other participants. ... [¶] Judicial proceedings are no place and no occasion for rudeness or overbearing, oppressive conduct. Opposing counsel must act as professionals in every sense of that word.”

Commentary to standard 3-5.8 (p. 109): “The prosecutor should not... use arguments which are, in essence, personal attacks on defense counsel. The prosecution should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. The duty to avoid such a personal attack is also, obviously, reciprocal.”


California Rules of Professional Conduct, rule 5-200 (B) and (E): “in presenting a matter to a tribunal, a member [¶] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law; [¶] (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.”
ABA Model Code of Professional Responsibility, EC 7-25 “'[A] lawyer should not by subterfuge put before a jury matters which it cannot properly consider.'” Also DR 7-106(C)(3): “In appearing in his professional capacity before a tribunal, a lawyer shall not [¶] (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.” And DR 7-106(C)(4): “In appearing in his professional capacity before a tribunal, a lawyer shall not [¶] (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on this analysis of the evidence, for any position or conclusion with respect to the matters stated herein.”

ABA Standards for Criminal Justice, Prosecution Function (3d ed.1993), standard 3-5.8 and commentaries:

- 3-5.8 (p. 106) - “(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw. (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.[¶]”

- Commentary to standard 3-5.8 (p. 108): “Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor’s office and undermine the objective detachment that should separate a lawyer from the cause being argued.”

ABA Standards for Criminal Justice, Prosecution Function (3d ed.1993), standard 3-5.9 (p. 109) - “The prosecution should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.”

- NOTE: The reference to intentional or purposeful conduct in this standard may not be entirely helpful. California authority is clear that a prosecutor commits misconduct if his or her conduct is improper, regardless of whether the conduct was
purposeful or the prosecutor acted in bad faith. *(People v. Hill, supra, 17 Cal.4th at 828; see also Frazier v. Cupp (1969) 394 U.S. 731, 736 [determination of whether the prosecutor’s remarks during opening statement referring to facts not introduced in evidence violated the defendant’s confrontation rights did not turn on whether the prosecutor acted in bad faith].)* For that reason, appellate counsel might wish to cite standard 3-5.8 and its commentaries, quoted above, instead of rule 3-5.9.

3. **Misstating the Law.** (See People v. Hill, supra, 17 Cal.4th at 829; People v. Bell (1989) 49 Cal.3d 502, 538.)

   • California Rules of Professional Conduct, rule 5-200 (B): “in presenting a matter to a tribunal, a member [¶] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.”

4. **Arguing evidence for an improper purpose, e.g., when the judge has ruled the evidence inadmissible or admissible only for a specific purpose.** *(See, e.g., People v. Williams (2009) 170 Cal.App.4th 587, 629 [discussing this type of misconduct].)*

   • ABA Model Code of Professional Responsibility:

     ◦ DR 7-106(A) (Trial Conduct): “A lawyer shall not disregard . . . a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.”

     ◦ EC 7-22: “Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of tribunal.”

     ◦ EC 7-25: “Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he
should be diligent in his efforts to guard against his unintentional violation of them.”

- Business and Professions Code section 6068(b): “It is the duty of an attorney . . . [¶] (b) To maintain the respect due to the courts of justice and judicial officers.” (See People v. Pigage (2003) 112 Cal.App.4th 1359, 1373-1374.)

- Commentary to standard 3-2.8 of the ABA Standards for Criminal Justice, Prosecution Function (3d ed. 1993), p. 37: “The prosecutor has the professional obligation to maintain a respectful attitude toward the court. This is necessary to give due recognition to the position held by the judge in the administration of law . . . The appropriate way to challenge the judge’s decisions is through appropriate procedural devices, including objections and appeals designed for that purpose, not by a show of belligerency that exceeds the need to make a record of what the prosecutor believes is error in the case.”

5. Appeals to passion and prejudice. (See, e.g., People v. Vance (2010) 188 Cal.App.4th 1182, 1198-1121 [misconduct for urging jurors to put themselves in the shoes of the victim].)

- ABA Standards for Criminal Justice, Prosecution Function (3d ed. 1993) standard 3-5.8(c) and (d), p. 106: “(c) the Prosecutor should not make arguments calculated to appeal to the prejudices of the jury. (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.”


III. Examples of “Catch-All” Ethical Rules Governing Prosecutorial Conduct – Rules Which Arguably Prohibit the Prosecutor from Committing any Conduct which Infringes on a Defendant’s Constitutional or Procedural Rights.

- Subdivisions (a) and (b) of Business and Professions Code section 6068: It is the duty of an attorney to “support the Constitution and
laws of the United States and of this state” and “maintain the respect due to the courts.” (See also People v. Hill, supra, 17 Cal.4th at 819-820 [quoting subdivision (b)]; People v. Espinoza (1992) 3 Cal.4th 806, 819–820 [same].)6

• If approved, Comment [1] to Proposed California Rule of Professional Conduct, rule 3.8: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”

• ABA Model Code Professional Responsibility, EC 7-13: “The responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.” (See In re Sakarias (2005) 35 Cal.4th 140, 159 [quoting EC 7-13].)

• Commentary to ABA Standards for Criminal Justice, Prosecution Function (3d ed.1993) standard 3-1.2, p. 4: “Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor’s obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.”

• California case law also establishes the general duty of the prosecutor to act as a guardian of the defendant’s rights. (People v. Trevino (1985) 39 Cal.3d 667, 6817 [the prosecutor has a dual role

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6 Prior to a 2001 amendment, subdivision (f) of Business and Professions Code section 6068 provided that attorneys had a duty to “abstain from all offensive personality.” This language was cited in prosecutorial misconduct cases, including Hill and Espinoza, supra. (People v. Hill, supra, 17 Cal.4th at 819-820; People v. Espinoza, supra, 3 Cal.4th 806, 819–820.) However, the Ninth Circuit declared the “all offensive personality” language unconstitutionally vague, and the legislature subsequently removed it. (United States v. Wunsch (9th Cir. 1996) 84 F.3d 1110; Stats.2001, c. 24 (S.B.352) §§ 1 & 4.)

7 Trevino was disapproved on other grounds in People v. Johnson (1989) 47 Cal.3d 1194, 1216–1221.
“as the defendant's adversary and as a guardian of the defendant's constitutional rights”]; People v. Sherrick (1993) 19 Cal.App.4th 657, 660 [same]; Morrow v. Superior Court (1994) 30 Cal.App.4th 1252, 1254 [same]; People v. Daggett (1990) 225 Cal.App.3d 751, 759 [“It is a prosecutor’s duty to see that those accused of crime are afforded a fair trial.”].)
PART I.
GENERAL STANDARDS

Standard 3- 1.1 The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Standard 3- 1.2 The Function of the Prosecutor

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

Standard 3-1.3 Conflicts of Interest

(a) A prosecutor should avoid a conflict of interest with respect to his or her official
(b) A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor.

(c) A prosecutor should not, except as law may otherwise expressly permit, participate in a matter in which he or she participated personally and substantially while in private practice or nongovernmental employment unless under applicable law no one is, or by lawful delegation may be, authorized to act in the prosecutor's stead in the matter.

(d) A prosecutor who has formerly represented a client in a matter in private practice should not thereafter use information obtained from that representation to the disadvantage of the former client unless the rules of attorney-client confidentiality do not apply or the information has become generally known.

(e) A prosecutor should not, except as law may otherwise expressly permit, negotiate for private employment with any person who is involved as an accused or as an attorney or agent for an accused in a matter in which the prosecutor is participating personally and substantially.

(f) A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

(g) A prosecutor who is related to another lawyer as parent, child, sibling, or spouse should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. Nor should a prosecutor who has a significant personal or financial relationship with another lawyer participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer, unless the prosecutor's supervisor, if any, is informed and approves or unless there is no other prosecutor authorized to act in the prosecutor's stead.

(h) A prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses unless requested by the accused person or witness to make such a recommendation, and should not make a referral that is likely to create a conflict of interest. Nor should a prosecutor comment upon the reputation or abilities of defense counsel to an accused person or witness who is seeking or may seek such counsel's services unless requested by such person.

Standard 3-1.4 Public Statements
(a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

(b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard.

Standard 3-1.5 Duty to Respond to Misconduct

(a) Where a prosecutor knows that another person associated with the prosecutor's office is engaged in action, intends to act or refuses to act in a manner that is a violation of a legal obligation to the prosecutor's office or a violation of law, the prosecutor should follow the policies of the prosecutor's office concerning such matters. If such policies are unavailing or do not exist, the prosecutor should ask the person to reconsider the action or inaction which is at issue if such a request is aptly timed to prevent such misconduct and is otherwise feasible. If such a request for reconsideration is unavailing, inapt or otherwise not feasible or if the seriousness of the matter so requires, the prosecutor should refer the matter to higher authority in the prosecutor's office, including, if warranted by the seriousness of the matter, referral to the chief prosecutor.

(b) If, despite the prosecutor's efforts in accordance with section (a), the chief prosecutor insists upon action, or a refusal to act, that is clearly a violation of law, the prosecutor may take further remedial action, including revealing the information necessary to remedy this violation to other appropriate government officials not in the prosecutor's office.

PART II.
ORGANIZATION OF THE PROSECUTION FUNCTION

Standard 3-2.1 Prosecution Authority to be Vested in a Public Official

The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.
Standard 3-2.2 Interrelationship of Prosecution Offices Within a State

(a) Local authority and responsibility for prosecution is properly vested in a district, county, or city attorney. Wherever possible, a unit of prosecution should be designed on the basis of population, caseload, and other relevant factors sufficient to warrant at least one full-time prosecutor and the supporting staff necessary to effective prosecution.

(b) In some states, conditions such as geographical area and population may make it appropriate to create a statewide system of prosecution in which the state attorney general is the chief prosecutor and the local prosecutors are deputies.

(c) In all states, there should be coordination of the prosecution policies of local prosecution offices to improve the administration of justice and assure the maximum practicable uniformity in the enforcement of the criminal law throughout the state. A state association of prosecutors should be established in each state.

(d) To the extent needed, a central pool of supporting resources and personnel, including laboratories, investigators, accountants, special counsel, and other experts, should be maintained by the state government and should be available to assist all local prosecutors.

Standard 3-2.3 Assuring High Standards of Professional Skill

(a) The function of public prosecution requires highly developed professional skills. This objective can best be achieved by promoting continuity of service and broad experience in all phases of the prosecution function.

(b) Wherever feasible, he offices of chief prosecutor and staff should be full-time occupations.

(c) Professional competence should be the basis for selection for prosecutorial office. Prosecutors should select their personnel without regard to partisan political influence.

(d) Special efforts should be made to recruit qualified women and members of minority groups for prosecutorial office.

(e) In order to achieve the objective of professionalism and to encourage competent lawyers to accept such offices, compensation for prosecutors and their staffs should be commensurate with the high responsibilities of the office and comparable to the compensation of their peers in the private sector.
Standard 3- 2.4 Special Assistants, Investigative Resources, Experts

(a) Funds should be provided to enable a prosecutor to appoint special assistants from among the trial bar experienced in criminal cases, as needed for the prosecution of a particular case or to assist generally.

(b) Funds should be provided to the prosecutor for the employment of a regular staff of professional investigative personnel and other necessary supporting personnel, under the prosecutor's direct control, to the extent warranted by the responsibilities and scope of the office; the prosecutor should also be provided with funds for the employment of qualified experts as needed for particular cases.

Standard 3- 2.5 Prosecutor's Handbook; Policy Guidelines and Procedures

(a) Each prosecutor's office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law.

(b) In the interest of continuity and clarity, such statement of policies and procedures should be maintained in an office handbook. This handbook should be available to the public, except for subject matters declared "confidential," when it is reasonably believed that public access to their contents would adversely affect the prosecution function.

Standard 3- 2.6 Training Programs

Training programs should be established within the prosecutor's office for new personnel and for continuing education of the staff. Continuing education programs for prosecutors should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs.

Standard 3- 2.7 Relations With Police

(a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.

(b) The prosecutor should cooperate with police in providing the services of the prosecutor's staff to aid in training police in the performance of their function in accordance with law.
Standard 3- 2.8 Relations With the Courts and Bar

(a) A prosecutor should not intentionally misrepresent matters of fact or law to the court.

(b) A prosecutor's duties necessarily involve frequent and regular official contacts with the judge or judges of the prosecutor's jurisdiction. In such contacts the prosecutor should carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions, ethical codes, and applicable law require between advocates and judges.

(c) A prosecutor should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

(d) A prosecutor should not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecutor's position and not disclosed by defense counsel.

(e) A prosecutor should strive to develop good working relationships with defense counsel in order to facilitate the resolution of ethical problems. In particular, a prosecutor should assure defense counsel that if counsel finds it necessary to deliver physical items which may be relevant to a pending case or investigation to the prosecutor the prosecutor will not offer the fact of such delivery by defense counsel as evidence before a jury for purposes of establishing defense counsel's client's culpability. However, nothing in this Standard shall prevent a prosecutor from offering evidence of the fact of such delivery in a subsequent proceeding for the purpose of proving a crime or fraud in the delivery of the evidence.

Standard 3- 2.9 Prompt Disposition of Criminal Charges

(a) A prosecutor should avoid unnecessary delay in the disposition of cases. A prosecutor should not fail to act with reasonable diligence and promptness in prosecuting an accused.

(b) A prosecutor should not intentionally use procedural devices for delay for which there is no legitimate basis.

(c) The prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly. The prosecutor should
be punctual in attendance in court and in the submission of all motions, briefs, and other papers. The prosecutor should emphasize to all witnesses the importance of punctuality in attendance in court.

(d) A prosecutor should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance.

(e) A prosecutor, without attempting to get more funding for additional staff, should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the interests of justice in the speedy disposition of charges, or may lead to the breach of professional obligations.

Standard 3-2.10 Supercession and Substitution of Prosecutor

(a) Procedures should be established by appropriate legislation to the end that the governor or other elected state official is empowered by law to suspend and supersede a local prosecutor upon making a public finding, after reasonable notice and hearing, that the prosecutor is incapable of fulfilling the duties of office.

(b) The governor or other elected official should be empowered by law to substitute special counsel in the place of the local prosecutor in a particular case, or category of cases, upon making a public finding that this is required for the protection of the public interest.

Standard 3-2.11 Literary or Media Agreements

A prosecutor, prior to conclusion of all aspects of a matter, should not enter into any agreement or understanding by which the prosecutor acquires an interest in literary or media rights to a portrayal or account based in substantial part on information relating to that matter.

PART III.
INVESTIGATION FOR PROSECUTION DECISION

Standard 3-3.1 Investigative Function of Prosecutor

(a) A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility
to investigate suspected illegal activity when it is not adequately dealt with by other agencies.

(b) A prosecutor should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or to prosecute. A prosecutor should not use other improper considerations in exercising such discretion.

(c) A prosecutor should not knowingly use illegal means to obtain evidence or to employ or instruct or encourage others to use such means.

(d) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.

(e) A prosecutor should not secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.

(f) A prosecutor should not promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative and enforcement program.

(g) Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person.

Standard 3-3.2 Relations With Victims and Prospective Witnesses

(a) A prosecutor should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews. Payments to a witness may be for transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

(b) A prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a prosecutor to so advise a witness whenever the prosecutor knows or has
reason to believe that the witness may be the subject of a criminal prosecution. However, a prosecutor should not so advise a witness for the purpose of influencing the witness in favor of or against testifying.

(c) The prosecutor should readily provide victims and witnesses who request it information about the status of cases in which they are interested.

(d) The prosecutor should seek to insure that victims and witnesses who may need protections against intimidation are advised of and afforded protections where feasible.

(e) The prosecutor should insure that victims and witnesses are given notice as soon as practicable of scheduling changes which will affect the victims' or witnesses' required attendance at judicial proceedings.

(f) The prosecutor should not require victims and witnesses to attend judicial proceedings unless their testimony is essential to the prosecution or is required by law. When their attendance is required, the prosecutor should seek to reduce to a minimum the time they must spend at the proceedings.

(g) The prosecutor should seek to insure that victims of serious crimes or their representatives are given timely notice of: (i) judicial proceedings relating to the victims' case; (ii) disposition of the case, including plea bargains, trial and sentencing; and (iii) any decision or action in the case which results in the accused's provisional or final release from custody.

(h) Where practical, the prosecutor should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the prosecutor prior to the decision whether or not to prosecute, to pursue a disposition by plea, or to dismiss the charges.

Standard 3-3.3 Relations With Expert Witnesses

(a) A prosecutor who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, he prosecutor should explain to the expert his or her role in the trial as an impartial expert called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(b) A prosecutor should not pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert
will give or the result in the case.

Standard 3-3.4 Decision to Charge

(a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.

(b) Prosecutors should take reasonable care to ensure that investigators working at their direction or under their authority are adequately trained in the standards governing the issuance of arrest and search warrants and should inform investigators that they should seek the approval of a prosecutor in close or difficult cases.

(c) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.

(d) Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should be required to present the complaint for prior approval to the prosecutor, and the prosecutor's action or recommendation thereon should be communicated to the judicial officer or grand jury.

Standard 3-3.5 Relations with Grand Jury

(a) Where the prosecutor is authorized to act as legal advisor to the grand jury, the prosecutor may appropriately explain the law and express an opinion on the legal significance of the evidence but should give due deference to its status as an independent legal body.

(b) The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

(c) The prosecutor's communications and presentations to the grand jury should be on the record.

Standard 3-3.6 Quality and Scope of Evidence Before Grand Jury

(a) A prosecutor should only make statements or arguments to the grand jury and only present evidence to the grand jury which the prosecutor believes is appropriate or authorized under law for presentation to the grand jury. In appropriate cases, the prosecutor may present witnesses to summarize admissible evidence available to the prosecutor which the prosecutor believes he or she will be able to present at trial. The
prosecutor should also inform the grand jurors that they have the right to hear any available witnesses, including eyewitnesses.

(b) No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.

(c) A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

(d) If the prosecutor believes that a witness is a potential defendant, the prosecutor should not seek to compel the witness's testimony before the grand jury without informing the witness that he or she may be charged and that the witness should seek independent legal advice concerning his or her rights.

(e) The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he or she will exercise the constitutional privilege not to testify, unless the prosecutor intends to judicially challenge the exercise of the privilege or to seek a grant of immunity according to the law.

(f) A prosecutor in presenting a case to a grand jury should not intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, or abuse the processes of the grand jury.

(g) Unless the law of the jurisdiction so permits, a prosecutor should not use the grand jury in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information.

(h) Unless the law of the jurisdiction so permits, a prosecutor should not use the grand jury for the purpose of aiding or assisting in any administrative inquiry.

Standard 3-3.7 Quality and Scope of Evidence for Information

Where the prosecutor is empowered to charge by information, the prosecutor's decisions should be governed by the principles embodied in Standards 3-3.6 and 3-3.9, where applicable.
Standard 3-3.8 Discretion as to Noncriminal Disposition

(a) The prosecutor should consider in appropriate cases the availability of noncriminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

Standard 3-3.9 Discretion in the Charging Decision

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative or the factors which the prosecutor may properly consider in exercising his or her discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in the apprehension or conviction of others; and

(vii) availability and likelihood of prosecution by another jurisdiction.

(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in
which he or she has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(f) The prosecutor should not bring or seek charges greater in number of degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

(g) The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused's relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.

Standard 3-3.10 Role in First Appearance and Preliminary Hearing

(a) A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused. A prosecutor should not fail to 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.

(b) The prosecutor should cooperate in good faith in arrangements for release under the prevailing system for pretrial release.

(c) The prosecutor should not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.

(d) The prosecutor should not seek a continuance solely for the purpose of mooting the preliminary hearing by securing an indictment.

(e) Except for good cause, the prosecutor should not seek delay in the preliminary hearing after an arrest has been made if the accused is in custody.
(f) The prosecutor should ordinarily be present at a preliminary hearing where such hearing is required by law.

Standard 3-3.11 Disclosure of Evidence by the Prosecutor

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

PART IV.
PLEA DISCUSSIONS

Standard 3-4.1 Availability for Plea Discussions

(a) The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea.

(b) A prosecutor should not engage in plea discussions directly with an accused who is represented by defense counsel, except with defense counsel's approval. Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant, although, where feasible, a record of such discussions should be made and preserved.

(c) A prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.

Standard 3-4.2 Fulfillment of Plea Discussions

(a) A prosecutor should not make any promise or commitment assuring a defendant or defense counsel that a court will impose a specific sentence or a suspension of sentence; a prosecutor may properly advise the defense what position will be taken concerning
disposition.

(b) A prosecutor should not imply a greater power to influence the disposition of a case than is actually possessed.

(c) A prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.

Standard 3-4.3 Record of Reasons for Nolle Prosequi Disposition

Whenever felony criminal charges are dismissed by way of nolle prosequi (or its equivalent), the prosecutor should make a record of the reasons for the action.

PART V.
THE TRIAL

Standard 3-5.1 Calendar Control

Control over the trial calendar should be vested in the court. The prosecuting attorney should advise the court of facts relevant in determining the order of cases on the court's calendar.

Standard 3-5.2 Courtroom Professionalism

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.

(b) When court is in session, the prosecutor should address the court, not opposing counsel, on all matters relating to the case.

(c) A prosecutor should comply promptly with all orders and directives of the court, but the prosecutor has a duty to have the record reflect adverse rulings or judicial conduct which the prosecutor considers prejudicial. The prosecutor has a right to make respectful requests for reconsideration of adverse rulings.

(d) Prosecutors should cooperate with courts and the organized bar in developing codes
of professionalism for each jurisdiction.

Standard 3-5.3 Selection of Jurors

(a) The prosecutor should prepare himself or herself prior to trial to discharge effectively the prosecution function in the selection of the jury and the exercise of challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors, investigatory methods of the prosecutor should neither harass nor unduly embarrass potential jurors or invade their privacy and, whenever possible, should be restricted to an investigation of records and sources of information already in existence.

(c) The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. A prosecutor should not intentionally use the voir dire to present factual matter which the prosecutor knows will not be admissible at trial or to argue the prosecution's case to the jury.

Standard 3-5.4 Relations With Jury

(a) A prosecutor should not intentionally communicate privately with persons summoned for jury duty or impaneled as jurors prior to or during trial. The prosecutor should avoid the reality or appearance of any such communications.

(b) The prosecutor should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After discharge of the jury from further consideration of a case, a prosecutor should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service. If the prosecutor believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.

Standard 3-5.5 Opening Statement

The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in
good faith will be available and admissible. A prosecutor should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

Standard 3-5.6 Presentation of Evidence

(a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

(b) A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) A prosecutor should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.

(d) A prosecutor should not tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

Standard 3-5.7 Examination of Witnesses

(a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

(b) The prosecutor's belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination. A prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully.

(c) A prosecutor should not call a witness in the presence of the jury who the prosecutor knows will claim a valid privilege not to testify.

(d) A prosecutor should not ask a question which implies the existence of a factual
predicate for which a good faith belief is lacking.

Standard 3-5.8 Argument to the Jury

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Standard 3-5.9 Facts Outside the Record

The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Standard 3-5.10 Comments by Prosecutor After Verdict

The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.

PART VI.
SENTENCING

Standard 3-6.1 Role in Sentencing

(a) The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.
(b) Where sentence is fixed by the court without jury participation, the prosecutor should be afforded the opportunity to address the court at sentencing and to offer a sentencing recommendation.

(c) Where sentence is fixed by the jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but the prosecutor should avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

Standard 3-6.2 Information Relevant to Sentencing

(a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. The prosecutor should disclose to the court any information in the prosecutor's files relevant to the sentence. If incompleteness or inaccurateness in the presentence report comes to the prosecutor's attention, the prosecutor should take steps to present the complete and correct information to the court and to defense counsel.

(b) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
Rule 3.8 Special Responsibilities of a Prosecutor
(Commission's Proposed Rule Following Review of Public Comments)

A prosecutor in a criminal case shall:

(a) refrain from commencing or 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, unless the tribunal has approved the appearance of the accused in propria persona;

(d) comply with all constitutional obligations, as defined by relevant case law, regarding the 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 proceeding, criminal proceeding, or civil proceeding related to a criminal matter to present evidence about a past or present client unless the prosecutor reasonably believes:

1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;

2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and

3) there is no other reasonable alternative to obtain the information;

(f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including 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.

(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:

1) promptly disclose that evidence to an appropriate court or authority, and

2) if the conviction was obtained in the prosecutor's jurisdiction,

i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

ii) 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.
Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.

[1A] The term “prosecutor” in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor’s office who are responsible for the prosecution function.

[1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. "Reasonable efforts" include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.

[2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused’s voluntary cooperation in an ongoing law enforcement investigation.

[2A] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable
care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor’s jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor’s jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a “reasonable belief,” as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, or notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.

[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]
First Annual Report:
Preventable Error — Prosecutorial Misconduct in California 2010

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Contents

About Veritas Initiative .................................................. v
About The Northern California Innocence Project (NCIP) ......................... v
Ncip Advisory Board ........................................................................ v
Introduction ............................................................................. 1
Overview of Findings ................................................................... 3
Analysis ....................................................................................... 5
   A. Harmful Error ....................................................................... 5
   B. Harmless Error ...................................................................... 8
Multiple Offenders ........................................................................ 11
Courts and California State Bar ..................................................... 14
Conclusion ................................................................................... 16
Endnotes ...................................................................................... 18
Appendix A: 2010 Harmful Cases by Jurisdiction ............................... 21
   State Cases ............................................................................ 21
   Federal Cases ........................................................................... 22
Appendix B: 2010 Harmless Cases by Jurisdiction .............................. 23
   State Cases ............................................................................ 23
   Federal Cases ........................................................................... 24
Appendix C: Cases Uncovered in 2010 but Decided in Previous Years ............... 25
Harmful State Cases. .................................................................................. 25
Harmful Federal Cases .................................................................................. 25
Harmless State Cases ................................................................................... 25
Harmless Federal Cases ................................................................................. 26

List of Charts

Percentage of Cases Handled by Multiple Offenders: .................................. 11
Multiple Offenders Comparison .................................................................. 12
Prosecutorial Misconduct Research ............................................................. 16
United States District Court Jurisdiction Map: ......................................... 22
ABOUT VERITAS INITIATIVE
The Veritas Initiative is the research and policy arm of the Northern California Innocence Project at Santa Clara University School of Law. It is devoted to advancing the integrity of the justice system through research and data-driven reform. By shining a light on the justice system, The Veritas Initiative intends to serve as a catalyst for change.

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 that can inform policy recommendations aimed at ensuring the integrity of our justice system.

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VERITAS INITIATIVE
Introduction


This comprehensive study of judicial court findings detailed more than 700 cases of prosecutorial misconduct in California. The report analyzed how the justice system identifies and addresses prosecutorial misconduct and its cost and consequences, including the wrongful conviction of innocent people. The study revealed how those best positioned to address the problem—the state and federal courts, prosecutors and the California State Bar repeatedly had failed to do so.

This follow-up report details court findings of prosecutorial misconduct in 2010 and updates statistical data statewide dating back to 1997.

These findings ranged from egregious misconduct, such as concealing evidence favorable to a defendant, to reckless or unintentional misconduct that in some was ameliorated at trial by judicial admonition or a special jury instruction.
Overview of Findings

The 2010 study examined California state and federal court rulings alleging prosecutorial misconduct, as well as a limited number of trial court decisions. This is a summary of the findings:

- In 102 cases, courts found that prosecutors committed misconduct. Courts found 130 instances of misconduct in those 102 cases.
- In 26 of the cases, the finding resulted in the setting aside of the conviction or sentence, mistrial, or barring of evidence.
- In 76 of the cases, the courts nevertheless upheld the convictions, ruling that the misconduct did not alter the fundamental fairness of the trial.
- In 31 other cases, the courts refrained from making rulings on the allegations of prosecutorial misconduct, instead holding that any error would not have undermined the fairness of the trial or that the issue was waived.

This is a summary of the total findings from 1997–2010:

- In more than 800 cases, courts found that prosecutors committed misconduct.
- In 202 cases, the finding resulted in setting aside of conviction or sentence, mistrial or barring of evidence.
- In 614 cases, the courts found that the misconduct did not affect the fairness of the trial.
- In 282 other cases, the courts did not make a finding of misconduct, instead holding any error would not have changed the outcome or the issue was waived.
- In the more than 800 cases of misconduct, 107 prosecutors were found to have committed misconduct more than once, two were cited for misconduct four times, two were cited five times and one prosecutor was cited for misconduct six times. Prosecutors who committed misconduct in multiple cases accounted for nearly one-third of all cases of misconduct.
Analysis

A. Harmful Error

“Although the trial court’s exasperation was understandable in light of its observations that [Los Angeles deputy district attorney Robert] Hight had repeatedly and purposely made false statements to jurors during both defendant’s trial and other trials,” the trial court’s failure permitted “the prosecutor to violate defendant’s constitutional rights without a guaranty that the constitutional violations would be corrected on appeal. Even crediting the trial court’s confidence in appellate reversal, defendant’s liberty interests were potentially harmed, in that, had the court dealt with Hight’s misconduct before the jury, defendant may have been acquitted and would have been released from custody rather than remaining incarcerated.”

– People v. Hester, Second District Court of Appeal

In November 2010, more than a quarter century after Bobby Joe Maxwell, also known as the “Skid Row Stabber,” was convicted and sentenced to life in prison, the Ninth Circuit U.S. Court of Appeals ordered prosecutors to release him or give him a new trial because of prosecutorial misconduct.

In a decision written by Appeals Judge Richard Paez, the court found that the prosecution had failed to turn over impeachment evidence to Maxwell’s lawyers and failed to correct false testimony from its star witness, infamous jailhouse informant Sidney Storch.

“The prosecution’s failure to disclose this impeachment evidence undermines confidence in the outcome of Maxwell’s trial...” Judge Paez wrote.

“The prosecution’s failure to correct Storch’s false testimony... was prejudicial,” the judge said.

The prosecutor on the case was then-Los Angeles deputy district attorney Sterling Norris. The appeals court said that Norris failed to disclose evidence of benefits given to Storch and when
Storch lied about them, Norris failed to correct the false testimony. The finding was the second case in which Norris has been cited for misconduct.

The decision ordering a new trial for Maxwell or his release (which is being appealed by the prosecution) is among 26 court rulings in 2010 identified by the Veritas Initiative where prosecutorial misconduct was deemed harmful—that is, the conduct undermined the credibility of the convictions, caused mistrials to be declared or evidence to be barred.

Misconduct in these cases included failure to turn over evidence favorable to the defense, presenting false evidence, engaging in improper examination, making false and prejudicial arguments, violating defendants’ Fifth Amendment right to silence, and discriminating against minorities in jury selection. In all, there were 34 findings of misconduct in the 26 cases, including six findings that prosecutors failed to turn over favorable evidence to the defense.

In some cases, the rulings came in the midst of trials and in others, the rulings came years after conviction.

The ruling in the Maxwell case said that the prosecution’s failures were a violation of the provisions of *Brady v. Maryland*, a 1963 court decision that requires prosecutors to turn over evidence that is favorable to a defendant, as well as evidence that can be used to impeach prosecution witnesses.

Maxwell was arrested in 1979 and charged with the murders of 10 men in downtown Los Angeles. After a nine-month trial, Maxwell was convicted of two counts of murder and one count of robbery, largely on the testimony of Storch, who said Maxwell had confessed to him in prison after his arrest, and a palm print found on a public bench near the body of one of the victims.

“Here, the prosecution itself admitted that the evidence against Maxwell was weak, that Maxwell had consistently maintained his innocence, and that the police testimony about the date of the palm print was speculative,” Judge Paez wrote.
“The prosecution failed, however, to disclose multiple pieces of impeachment information that could have been used to undermine the credibility of Storch,” the judge said.8

Among other harmful error rulings in 2010:

■ An estimated 700 to 1,000 drug prosecutions were dismissed or dropped because prosecutors in the San Francisco District Attorney’s Office failed to disclose damaging information about a police drug lab technician.9 In May, Superior Court Judge Anne-Christine Massullo found that prosecutors violated the constitutional rights of a vast number of defendants by failing to tell defense attorneys about problems relating to the lab technician who was engaged in cocaine-skimming. The judge found that a memo written by deputy district attorney Sharon Woo, expressing concerns about the lab technician being a less than reliable witness, showed that prosecutors “at the highest levels of the District Attorney’s Office”10 knew about the problems, but the information was never disclosed to attorneys for defendants whose cases involved the technician’s work. The failure “to produce information actually in its possession regarding [the technician] and the crime lab is a violation of the defendants’ constitutional rights,” the judge declared.11 The judge was highly critical of the District Attorney’s Office for failing to have in place procedures designed to obtain and produce information for defense attorneys. The San Francisco District Attorney’s Office has since instituted policies regarding evidence disclosure.

■ The Second District Court of Appeal reversed Eric Hester’s convictions for forcible rape and forcible sodomy after Los Angeles County deputy district attorney Robert Hight committed multiple acts of misconduct during his closing argument.12 “The prosecutor committed prejudicial misconduct by arguing matters not in evidence, mischaracterizing the evidence, appealing to the jury’s passion and prejudice, and suggesting that the jury convict [the] defendant to prevent him from committing future crimes,” the court said.13 The appeals court noted that Hight’s comments were “factually unsupported, completely improper arguments [that] went directly to the core of the case and ‘tip[ped] the scales of justice’ in favor of the prosecution.”14 The appeals court also chastised the trial court for allowing Hight’s misconduct saying, “the [trial] court had essentially given up on attempts to correct Hight”15 and “the public’s interest in fair trials and the conservation of…
resources is poorly served by a policy of refusing to take corrective action in response to known prosecutorial misconduct.”

- In Santa Clara County, Felix Valdovinos was granted a new trial by the Ninth Circuit U.S. Court of Appeals, which held that deputy district attorney Javier Alcala had failed to disclose evidence. Valdovinos was convicted in 1998 of murder and sentenced to 25 years to life in prison. The appeals court cited the prosecution’s “repeated failure” to disclose evidence, some of which cast doubt on eyewitness identifications of Valdovinos.

- The fall-out continued in the federal prosecutions brought against executives of Broadcom Corporation. In 2009, U.S. District Judge Cormac Carney dismissed the charges against Broadcom former chief financial officer William Ruehle and company co-founder Henry T. Nicholas III on the grounds that the prosecutor, Andrew Stolper, intimidated witnesses. In 2010, Carney dismissed additional charges against Nicholas, as well as a coerced guilty plea entered by Nancy Tullos, former Broadcom human resources director. Carney also vacated the guilty plea of Broadcom co-founder Henry Samueli.

The 26 cases, including a description of each, the jurisdiction where the case was filed and the names of the prosecutors whose conduct was the cause of the rulings, can be found at www.veritasinitiative.org.

B. Harmless Error

“The prosecutor’s conduct was inexcusable. The prosecutor denied ‘bad faith on my part,’ but even inexperienced trial attorneys understand the obligation to advise counsel and the court before introducing evidence the trial court specifically had excluded after a hearing on its admissibility.”

— People v. Mullenix, Fourth District Appellate Court

Courts found misconduct in 76 other cases, but declined to set aside the verdicts, finding the misconduct did not deprive the defendants of a fair trial. The courts deemed the misconduct “harmless.”
The harmless error doctrine, originally intended for the narrow purpose of preventing retrials for small technical mistakes, has been broadly expanded to uphold even constitutional violations. In the landmark case of *Chapman v. California*, the United States Supreme Court held 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.”

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.” The California Supreme Court has ruled 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.”

As the Veritas Initiative pointed out in *Preventable Error: 1997–2009*, in some of the cases the misconduct deemed harmless error was virtually the same, or in some cases worse, than misconduct that resulted in reversals. In other words, where courts find strong evidence pointing to the defendant’s guilt, a prosecutor’s misconduct, no matter how egregious, will not lead to reversal of the case. In California, unless a case is reversed, there is no requirement that the misconduct be reported to the State Bar. This trend continued in 2010.

In *Preventable Error: 1997–2009*, about 78 percent of the findings of misconduct were deemed harmless. In 2010, that ratio continued with 76 of the 102 cases—or 75 percent—falling into the harmless error category. These violations included violating defendants’ rights to silence, improperly questioning witnesses and defendants, presenting false evidence, and making improper arguments to juries. In all, there were 96 findings of misconduct in the 76 cases. One-half of the findings—48 in total—were for improper argument that included arguing facts not in evidence, misstating the law, appealing to the passion and prejudice of jurors and improperly vouching for prosecution witnesses.
Among the 2010 harmless rulings:

■ In Santa Clara County, two prosecutors were cited for misconduct in the same case—one for giving improper testimony, the other for wrongly commenting on the defendant’s decision not to testify.29 Defendant Leobardo Blancarte was tried for a second time on murder and other charges after the first case was set aside due to judicial error. Blancarte elected not to testify. Deputy district attorney Mark Duffy, who prosecuted the first trial, was called as a witness in the second trial by trial prosecutor deputy district attorney David Pandori. Duffy expressed his opinion that Blancarte was lying when he claimed during the first trial that the gun discharged accidentally. The California Appellate Court said, “In this case, Mr. Duffy was an officer of the court even though he sat in the witness chair. Moreover, as an experienced prosecutor he knew, or certainly should have known, that his comment was an improper and gratuitous opinion.”30 In closing argument, Pandori on two occasions—once after being reprimanded by the trial judge—commented on Blancarte’s decision not to testify in violation of established law barring comment on a defendant’s invocation of their Fifth Amendment right against self-incrimination. The Court said it was “inconceivable” that Pandori did not know that he was violating the prohibition.31 The Appellate Court ruled that all of the misconduct was “cured” by an instruction from the trial judge and therefore the misconduct of both prosecutors was harmless.

■ The Ninth Circuit U.S. Court of Appeals found that Los Angeles deputy district attorney Garrett Worchell made an improper argument in the burglary trial of Eun Suk Joo.32 The court found that the prosecutor “was not only essentially testifying as an unsworn witness, he was also testifying falsely.”33 The conviction was affirmed because the misconduct was ruled harmless error.

■ In Orange County, the California Appellate Court upheld the murder conviction of Rachel Mullenix, even though deputy district attorney Sonia Balleste engaged in multiple instances of improper conduct.34 The court noted that the trial judge “did indeed express exasperation with the prosecutor several times, and on one occasion observed outside the presence of the jury, ‘it just seems to me the (prosecutor) is willing to go to any length, whether it’s permissible or impermissible to try to convict this defendant… There is no reason to continually, intentionally violate the rules.”35
Multiple Offenders

Determining the names of prosecutors cited for misconduct continues to require hunting through court records and transcripts. At the time *Preventable Error: 1997–2009* was published in October 2010, a review of appellate opinions where courts found misconduct revealed that prosecutors were identified in only 80 cases and in 49 of those cases, the prosecutors were referred to only by last name.36

A review of cases in 2010 shows that in 98 cases where courts issued written rulings, prosecutors were named in just 13 cases and only by last name in eight of those cases.

The failure to fully identify prosecutors found to have engaged in misconduct has specific adverse consequences. Deterrence is undermined because prosecutors engaging in misconduct are rarely held up to public scrutiny. Further, determining what, if any, consequences there were to prosecutors in specific cases of misconduct becomes extremely difficult.

At the time of publication of *Preventable Error: 1997–2009*, Veritas Initiative researchers had identified prosecutors in 600 of the more than 700 cases where misconduct had been found by courts. That analysis showed 67 prosecutors had more than one finding of misconduct.37

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**Percentage of Cases Handled by Multiple Offenders:** This chart details how the percentage of prosecutorial misconduct cases handled by multiple offenders increased after the Veritas Initiative identified more prosecutor names. Researchers have now identified over 99% of the prosecutors in the cases where a court found prosecutorial misconduct.
With about 99 percent of the prosecutors now identified, the Veritas Initiative has identified the names of 677 prosecutors. Research shows that 107 were found to have committed misconduct more than once. The 107 prosecutors were cited in 251 cases. This means that a relatively small number of prosecutors were responsible for about one-third of all of the cases of misconduct.

Two prosecutors have been cited four times and two prosecutors—Contra Costa County deputy district attorney David Brown (including three harmful error cases) and Orange County deputy district attorney Jerry Schaffer — have been cited five times (all harmless error). Orange County deputy district attorney Michael Flory has been found to have committed misconduct six times—one for harmful error and five times for harmless error.

Multiple Offenders Comparison: This chart compares the number of multiple offenders reported in Preventable Error: 1997–2009 and the number reported in Preventable Error: 2010 Update. The Veritas Initiative previously identified prosecutors in 600 cases or approximately 84% Since the October publication of Preventable Error, the Veritas Initiative has identified the prosecutors in 824 cases which is over 99%.
Some prosecutors with previous multiple findings of misconduct added to their totals in 2010, while other prosecutors became multiple offenders with findings of misconduct in 2010. They include:

- San Mateo deputy district attorney Alfred Giannini was cited for misconduct that led to the setting aside of a conviction—the third case where his conduct has led to a reversal or a mistrial since 1999. In San Francisco County in December, a judge ordered a new trial for Caramad Conley, convicted in 1994 of murder and sentenced to life in prison. Superior Court Judge Marla Miller found that the prosecution had failed to disclose to the defense evidence of payments to a police informant. Giannini, the prosecutor in the case and then a San Francisco deputy district attorney, has denied he knew about the payments. Former police chief Earl Sanders has contended he informed Giannini. In 1999, the California Appellate Court reversed the murder conviction of Leonard Ricardo because Giannini engaged in discriminatory jury selection. In 2004, San Mateo County Superior Court Judge Stephen Hall granted a mistrial in a quadruple murder case after finding that Giannini had failed to disclose evidence to defense attorneys.

- The finding of misconduct by Sterling Norris in the “Skid Row Stabber” case is the second such ruling for Norris. In 2004, the Ninth Circuit U.S. Court of Appeals set aside the murder conviction and life prison sentence of Timothy Gantt also due to Norris’ failure to turn over evidence to the defense.

- In Los Angeles County, Superior Court Judge Arthur Lew ordered a new trial for defendants Demoria Jackson and Devin Murphy after ruling that deputy district attorney Grace Rai committed misconduct by referring in closing argument to evidence that had been barred by court order. The finding is the third case in which Rai has been cited for misconduct since 1997. In 2006, the California Appellate Court said Rai engaged in improper examination, disobeyed a court order and elicited inadmissible evidence, but said the misconduct was harmless error. In October 2008, the Second District Appellate Court reversed the murder conviction of Mark Alan Broughton, finding that Rai committed serial misconduct that included asking improper questions, eliciting inadmissible evidence and hearsay, disobeying court orders, and making improper arguments.
Courts and California State Bar

Under state law, courts are required to report to the California State Bar any case where prosecutorial misconduct results in the modification—such as a reversal—of a judgment in a case.\textsuperscript{46} Attorneys are required to report to the bar if their misconduct causes a reversal.\textsuperscript{47}

Courts and prosecutors are under no obligation to report the misconduct findings if convictions are affirmed and as a result, misconduct in these cases is rarely addressed by attorney disciplinary authorities.

California Business and Professions Code Section 6086.7(a) 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.”\textsuperscript{48}

Business and Professions Code Section 6068 mandates circumstances in which an attorney must report instances of misconduct to the State Bar:

“It is the duty of an attorney:... (o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of... (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.”\textsuperscript{49}

Despite these mandates, there remains little evidence that courts are meeting even this limited reporting obligation. The reporting statute for courts does not afford a court the discretion to choose not to report misconduct it deems not egregious: it specifically 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.”\textsuperscript{50} The statute evidences recognition that \textit{any} conduct on which a modification
or reversal is based, even in part, is serious enough to require notification of the State Bar concerning potential disciplinary investigation.

From 1997 through 2010, the Veritas Initiative has found evidence that courts noted in public rulings their intent to report misconduct on only eight occasions, two of those in 2010.

The State Bar has declined to release records of any reports by the courts and attorneys pursuant to the state’s reporting laws, citing bar privacy provisions. The State Bar also has declined to reveal if courts and attorneys failed to comply with the reporting laws.51

From 1997 to date, seven prosecutors have been disciplined publicly in California for misconduct in handling of criminal cases.52 No prosecutors were disciplined publicly by the State Bar in 2010. Private reprimands are not considered public discipline.
Conclusion

The Veritas Initiative believes that the number of misconduct cases identified between 1997 and 2010 is an undercount. Trial level findings of misconduct that are not reflected in appellate court rulings cannot be reviewed without searching every case file in every courthouse in the state.

This is highlighted by the subsequent identification of additional findings of misconduct between 1997 through 2009 that were not part of the Preventable Error: 1997–2009 report. These cases, 18 of which were findings of misconduct that was harmful error, were identified through information provided by attorneys, citizens, and the media.

As a result, to date, the Veritas Initiative has identified 202 cases between 1997 and 2010 where convictions were reversed, mistrials declared or evidence barred.

Prosecutorial Misconduct Research: This chart adds on the cases decided in 2010 (and any older cases uncovered since Preventable Error: 1997–2009 was published) to those decided between 1997–2009 giving the total number of prosecutorial misconduct cases found by Veritas Initiative researchers as of the end of 2010.
Not all of these cases were subject to the reporting provisions of the Business and Professions Code. For instance, if a mistrial is declared or evidence barred due to misconduct, these cases would not be reportable under the reporting statute because there were no judgments modified. Accordingly, under California law, only 151 of the more than 800 cases of misconduct required review by the California State Bar. The Veritas Initiative believes the reporting statute should be expanded so that any misconduct that results in a mistrial or other sanction such as barring of evidence would be reportable.

The Veritas Initiative believes the system of accountability should be improved. Reporting by the courts and prosecutors should be transparent so that the public can determine if the reporting laws are being obeyed. The reporting of misconduct by courts should be made in public documents. Anything short of public filings leaves the State Bar in the dark about misconduct and stymies attempts to ensure the law is not being flouted.

Further, the State Bar should examine all cases of misconduct—harmful and harmless error. The Bar has said it does not scrutinize harmless error cases, even though the Veritas Initiative research shows that some misconduct in harmless error cases is virtually the same as misconduct in harmful error cases.

For a complete list of our recommendations, please visit www.veritasinitiative.org.

Most prosecutors are ethical and follow the rules. But prosecutorial misconduct remains a critical issue for the integrity of the criminal justice system. Judges and the California State Bar should act to report and discipline, where necessary, misconduct by prosecutors. To do otherwise fosters improper conduct, undercuts the public trust and unfairly casts a cloud over those prosecutors who do their jobs properly.

The Veritas Initiative has now identified over 800 cases of prosecutorial misconduct in California between 1997 and 2010, and will continue to investigate this crucial issue.
Endnotes

3. Maxwell v. Roe, 628 F.3d 486 (9th Cir. 2010).
4. Id. at 512.
5. Id. at 511.
7. Maxwell, 628 F.3d at 512.
8. Id.
9. Interview with Christopher F. Gauger, Managing Attorney, Research Unit, San Francisco County Public Defender (Feb. 2011).
11. Id. at 17 (emphasis in original).
13. Id. at 1.
14. Id. at 10.
15. Id. at 11.
16. Id.
17. Valdovinos v. McGrath, 598 F.3d 568 (9th Cir. 2010).
18. Id. at 580.
22. Findings and Order to Dismiss the Information with Prejudice, United States v. Dr. Henry Samueli, SACR 08-00156-CJC (C.D. Cal. 2010).
27. Ridolfi and Possley, supra note 1 at 22-23.
28. Id. at 19.
30. Id. at 4.
31. Id. at 7.
32. Joo v. Cate, 382 Fed.Appx. 622 (9th Cir. 2010).
33. Id. at 626.
35. Id. at 1.
36. Ridolfi and Possley, supra note 1 at 50.
37. Id. at 57.
39. Ricardo v. Rardin, 189 F.3d 474 (9th Cir. 1999).
41. Maxwell, 628 F.3d 486 (9th Cir. 2010).
42. Gantt v. Roe, 389 F.3d 908 (9th Cir. 2004).
   a. A court shall notify the State Bar of any of the following:

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

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

   3. The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).
4. The imposition of any civil penalty upon an attorney pursuant to Section 8620 of the Family Code.

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

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


51. Despite several attempts to obtain information on the reporting requirements, the California State Bar has refused to release any information citing privacy procedures. Efforts to obtain proof of compliance with the Business and Professions Code are ongoing.

52. Vita Mandalla, State Bar Court No. 98-O-01482 (2000); Leo Barone, State Bar Court No. 04-O-14030 (2005); James Fitzpatrick, State Bar Court No. 95-O-18080 (2005), Brooke Halsey, State Bar Court No. 02-O-10195 (2007); Michael Freeman, State Bar Court No. 06-O-15162 (2009); Peter Waite, State Bar Court No. 06-O-11208 (2009); Benjamin Field, State Bar Court No. 05-O-00815 (2009, appeal upheld 2010).

53. Not all cases categorized as harmful by the Veritas Initiative fall under the reporting statute. Only cases in which judgments were reversed or modified must be reported to the State Bar. This does not include cases where a mistrial was declared or a new trial granted before sentencing. It also does not include cases where evidence was stricken.
Appendix A: 2010 Harmful Cases by Jurisdiction

Format of Appendix: Defendant’s Last Name, Source of Misconduct Finding* (Year of Finding).
*Sources include: Legal Database Citations, Media Reports, Court Case Numbers

State Cases

Alameda

Imperial
Love, CV 06-00640 (2010)

Kern
Bell, BF123070 (2010)

Los Angeles
Armendariz, B214389 (2010)
Blumberg, 687 F.Supp.2d 1074 (2010)
Hurd, 619 F.3d 1080 (2010)
Jackson D, TA087375 (2010)
Maxwell, 06-56093 (2010)

Orange

Riverside

Sacramento
Treadway, 106 Cal.Rptr.3d 99 (2010)

San Bernardino

San Diego
Bowles, SCN266632 (2010)

San Francisco
Conley, Trial Case #2447917 (2010)

Santa Clara
Valdovinos, 598 F.3d 568 (2010)

Tulare

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.
Federal Cases

United States Central District

Nicholas, LA Times 1/8/10 (2010)
Samueli, 08-cr-00156 (2010)
Tullos, 07-cr-00274 (2010)

United States District Court Jurisdiction Map: United States federal cases tried in California are divided between four districts: Central, Eastern, Northern, and Southern. The jurisdiction of the districts is based on the above geographical breakdown.
Appendix B: 2010 Harmless Cases by Jurisdiction

Format of Appendix: Defendant’s Last Name, Source of Misconduct Finding* (Year of Finding).
*Sources include: Legal Database Citations, Media Reports, Court Case Numbers

State Cases

Alameda
Tate, 49 Cal.4th 635 (2010)

Contra Costa
Salazar, 2010 WL 3420122 (2010)

Fresno

Glenn

Humboldt
Miller, 2010 WL 2913613 (2010)

Kern

Los Angeles
Banks, 2010 WL 1463192 (2010)
Cruz, 2010 WL 2723542 (2010)
Gibson, 2010 WL 1269678 (2010)
Hein, 601 F.3d 897 (2010)
Joo, 2010 WL 2294662 (2010)
Montes, 2010 WL 3898264 (2010)
Reed, 2010 WL 1493148 (2010)
Williams, 49 Cal.4th 405 (2010)
Young, 2010 WL 2910725 (2010)

Orange
Martinez, 2010 WL 4380115 (2010)
Mullenix, 2010 WL 1891719 (2010)
Roa, 2010 WL 3704994 (2010)

Riverside
Griffin, 2010 WL 317894 (2010)
McCray, 2010 WL 219334 (2010)
Muhummed, 2010 WL 3490030 (2010)
Nelson, D057195 (2010)
Ramirez, 2010 WL 5115972 (2010)
Roman, 2010 WL 3026211 (2010)
Sarza, 2010 WL 60911 (2010)
Trejo, 2010 WL 1732280 (2010)

Sacramento
Sumrall, 2010 WL 4493119 (2010)
Yeng, 2010 WL 2376895 (2010)

San Benito

San Diego
Bustamante, 2010 WL 2132747 (2010)

San Mateo

Santa Barbara
Barnes, 2010 WL 3246116 (2010)
Frimpong, 2010 WL 926065 (2010)

Santa Clara

Santa Cruz

Solano
Briscoe, 2010 WL 1525695 (2010)
Thomas, 2010 WL 4970867 (2010)

Sonoma
True, 2010 WL 1553770 (2010)

Stanislaus

Tuolumne

Federal Cases

United States Central District

United States Northern District
Lui, 2010 WL 4323443 (2010)
Appendix C: Cases Uncovered in 2010 but Decided in Previous Years

Format of Appendix: Defendant's Last Name, Source of Misconduct Finding* (Year of Finding).
*Sources include: Legal Database Citations, Media Reports, Court Case Numbers

Harmful State Cases

Kern

Los Angeles
Horton, 408 F.3d 570 (2005)
Miranda, 43 Cal.4th 541 (2008)

Orange
Gomez, 2001 WL 1003295 (2001)

San Diego

Santa Cruz
Avila, F16224 (2008)

Stanislaus

Yolo
Miranda, C033372 (2000)

Harmful Federal Cases

United States Central District
Hector, 04-CR-00860 (2008)
Jackson, R 03-50484 (2004)
Torres-Ramos, 06-CR-00656 (2009)

United States Southern District
Alfonso, 08-CR-2970 (2009)
Cerullo, 05-CR-1190 (2007)
Service Deli, 151 F.3d 938 (1998)
Vega, 188 F.3d 1150 (1999)

Harmless State Cases

Los Angeles

Orange
Sandoval, 2005 WL 1400163 (2005)

Sacramento
Harmless Federal Cases
United States Central District

Whitehead, 200 F.3d 634 (2000)