

The California Prosecutor

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INTEGRITY, INDEPENDENCE, LEADERSHIP



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The California Prosecutor 2011

Integrity, Independence, Leadership

EXECUTIVE SUMMARY

Prosecutors have a very unique role: Prosecutors represent society—all of the members of society, including victims and defendants. In this regard, prosecutors have a duty to ensure the fairness of criminal proceedings. The United States Supreme Court noted in *Berger v. United States*:

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.¹

Because of this role, the ethical standards imposed upon prosecutors are extraordinary; prosecutorial misconduct is not tolerated. In fact, the *Berger* Court recognized that while it is a prosecutor's recognized duty to "use every legitimate means available to bring about a just [conviction]," he or she may not use "improper methods calculated to produce a wrongful conviction."²

Over the last few years, there seems to have been a concerted effort to discredit the prosecutorial profession. A few news organizations, including the *Chicago Tribune* and *USA Today*, have issued results of unscientific surveys that attempt to demonstrate that prosecutorial misconduct is a significant issue in the federal courts as well as in some state courts. None of these surveys has been able to uncover any but the rarest instances of intentional misconduct by prosecutors, state or federal.

Most of these reports succumb to their own inaccuracies and die a natural death. One recent report, however, has managed to gain some public traction. The Northern California Innocence Project's Veritas Initiative conducted and published a "study" referred to generally as the "NCIP Report." This initial lengthy document, *Preventable Error: A Report on Prosecutorial Misconduct in California, 1997–2009*, was followed up by an "addendum" of the same data: the *First Annual Report: Preventable Errors—Prosecutorial Misconduct in California 2010*.³

1. *Berger v. United States* (1935) 295 U.S. 78, 88.

2. *Id.* [Emphasis added.]

3. The Veritas Initiative, the "investigative watchdog" entity of the Northern California Innocence Project, published two connected reports. The first was authored by Kathleen M. Ridolfi and Maurice Possley: *Preventable Error—A Report on Prosecutorial Misconduct in California 1997–2009*, released on October 4, 2010; it is referred to in this document as the NCIP Report. The second publication, written by Maurice Possley and Jessica Seargeant, amended and updated the first report; *First Annual Report: Preventable Error—Prosecutorial Misconduct in California, 2010* (March 2011) shall be quoted to as the NCIP *First Annual Report*.

The NCIP Report's portrayal of misconduct is grossly exaggerated, characterizing mere mistakes and errors as "misconduct" and classifying cases where such errors occur in the same categories as those involving intentional misconduct.

Upon analysis, the NCIP Report, like many of its ilk, is not a study in the scientific tradition. Rather, it is an unscientific survey of published cases and media stories conducted by law school students. Riddled with inaccuracies, misleading information, and unprofessional analyses, it makes recommendations for reform based upon questionable data. Not only does this report ignore the historical context of time-tested principles and how they apply to the modern judicial and prosecution function, it is singularly lacking in any understanding of how a District Attorney's Office actually operates and the training provided to deputy district attorneys. Lastly, it fails to anticipate the consequences to the justice system were its recommendations adopted.

The NCIP Report itself received only spotty coverage in the California media, perhaps due to its readily apparent lack of credibility. When the few news organizations that covered the story actually checked on the information contained in the NCIP Report, they quickly learned that the claims were largely inflated.

Prosecutorial misconduct is an important issue to the public served by the justice system. It is taken very seriously by District Attorneys, United States Attorneys, and Attorneys General throughout the nation. These criminal justice professionals have taken extraordinary measures to ensure misconduct does not happen in the first place and, on the rare occasion where it does happen, to discipline the prosecutor involved and right any wrong engendered by such conduct.

Under established case law, the "use of deceptive or reprehensible methods to attempt to persuade either the court or the jury" supports a finding of misconduct regardless of whether the outcome of the trial is affected.⁴ While most prosecutors embrace their role and the standards to which they are held as they strive for justice in their cases, there are occasionally those few who disregard this duty. Such intentional wrongdoing in order to manipulate the progress or outcome of a case is a very serious matter and is rightfully grounds for personnel action, State Bar prosecution, and potential civil or criminal prosecution.

Allegations and the consequences of misconduct are serious, and, therefore, a prosecutor facing such allegations is entitled to a hearing before a trial court and a factual determination of whether or not he or she has committed misconduct. Admittedly, the NCIP Report has identified a small number of cases where prosecutors have committed such egregious acts—cases where intentional acts of prosecutorial misconduct have been found. The report creates an incorrect impression about the frequency with which such misconduct occurs, reaching beyond the stated time period to include additional occasions. In the instances where intentional misconduct has been found, the prosecutors have been justifiably removed from their positions, sanctioned by the State Bar, faced civil or criminal actions, and had the related convictions reversed.

The NCIP Report's portrayal of misconduct is grossly exaggerated, characterizing mere mistakes and errors as "misconduct" and classifying cases where such errors occur in the same categories as those involving intentional misconduct.⁵ While it is true that misconduct

4. *People v. Gionis* (1995) 9 Cal.4th 1196, 1214–1216; *People v. Roldan* (2005) 35 Cal.4th 646, 719; *People v. Adanandus* (2007) 157 Cal.App.4th 496, 514–515.

5. A review of the NCIP Report methodology reveals its sources of information to include media reports.

may occur as a result of unintentional activity, without bad faith, the actions of a prosecutor support a finding of misconduct *only if the criminal trial was rendered unfair as a result.*⁶

During a criminal trial, a case is developed through the presentation of evidence. Subjective decisions and judgment calls by prosecutors must be made under rapidly evolving circumstances, and, as a result, mistakes may be made. As in the practice of other professions, perfection is unrealistic, and a defendant is not entitled to a “perfect” trial; she or he is entitled to a fair trial.⁷ In the event an error is made by a prosecutor during trial, the court has many options for minimizing its effect such as by barring evidence, instructing the jury, or allowing certain remedial actions by opposing counsel. As long as the error does not result in the deprivation of a fair trial, no legal misconduct exists.

The importance of the distinction between error and misconduct is so significant that in 2010, the House of Delegates of the American Bar Association adopted the following resolution:

RESOLVED, That the American Bar Association urges trial and appellate courts, in criminal cases, when reviewing the conduct of prosecutors to differentiate between “error” and “prosecutorial misconduct.”⁸

The ABA Report that accompanies the resolution noted that,

[a] finding of “prosecutorial misconduct” may be perceived as reflecting intentional wrongdoing, or even professional misconduct, even in cases where such a perception is entirely unwarranted, and this Resolution is directed at this perception.⁹

The NCIP Report fails to make the distinction between error and misconduct. That failure, in effect, sensationalizes the report’s “findings” and serves to vilify the public prosecutor.

Legal misconduct is a subject that prosecutors do not shy away from. They know that it deserves thoughtful discussion. They also know that a thoughtful discussion should be based on what prosecutors always insist on, the actual law and the actual facts.

The NCIP Report is wrong. This response clarifies the many instances in which the NCIP Report is wrong, in not only the data it relies on, but, most importantly, in the recommendations it advocates. Those recommendations would undermine the independence of the California prosecutor. They would further the goal of organized groups of defense lawyers to weaken District Attorney Offices and make prosecutors more amenable to their demands. As a byproduct, they would impose enormous costs on the taxpayers who fund the criminal justice system. Most importantly, the public safety of Californians would be compromised.

WHO IS A PROSECUTOR?

Among the best trained attorneys in the world, California prosecutors dedicate themselves to the highest ethical standards in the profession. Their independence ensures that neither

6. *People v. Hill* (1998) 17 Cal.4th 800. [Emphasis added.]

7. *In re Pratt* (1980) 112 Cal.App.3d 795.

8. ABA Resolution 100B, adopted August 9–10, 2010. <<http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf>>.

9. *Id.* at 1.

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riches and influence nor passion in the streets dictate the outcomes of criminal and civil cases. These prosecutors hold the powerful accountable. At the same time, they protect the weak and seek justice for the poor, the oppressed, and those whose voices are not always strong enough to be heard. It is not unusual for prosecutors in the same District Attorney's Office to be pursuing a corrupt politician or white collar criminal protected by a battery of defense lawyers, while their colleagues are in the courtroom next door giving voice to a victim of domestic violence or to an abused child.

American prosecutors are professionals concerned solely with justice. Their decisions are free from political partisanship. Their dedication is to the Constitution and the laws of the land. American prosecutors do not apologize for seeking justice for victims of crimes. Nor are they reticent in pursuing the guilty with all the legal means at their disposal. The justice system depends on independent prosecutors.

INTEGRITY

As a whole, California prosecutors maintain the highest caliber of ethics in the law, conducting themselves according to standards that have evolved over decades to guide their discretion and ensure that justice is done. Criminals must be brought to justice; civilized society requires it as part of the social compact. Prosecutors ensure that the guilty are properly punished under the law, while observing the due process requirements of our constitution and vigilantly guarding against doing any harm to the innocent.

Most District Attorney's Offices prominently display a written code of ethics and, as a matter of policy, require deputy district attorneys to conduct themselves accordingly. The following Prosecutor Code of Ethics from the Tulare County District Attorney's Office is offered as a sample:

Prosecutor Code of Ethics

As a prosecutor, I pledge myself to truth and the protection of the community. I will safeguard lives and property. I will protect the peaceful against violence. I will protect the weak and the innocent against deception, oppression, and intimidation. I will respect the constitutional rights of all people to liberty, equality, and justice.

I will not tolerate crime and will relentlessly prosecute criminals. I will strive to convict the guilty and to exonerate the innocent. I will never support unnecessary force or violence. I will maintain confidences and confidential information pursuant to the law and the regulations of my office. I will maintain courage and calm in the face of danger, scorn, or ridicule.

I will enforce the law courteously and appropriately without malice, fear, or favor. I will never accept gratuities in the exercise of my professional discretion.

I will be honest in thought and deed in my personal life, as in my profession. I will be exemplary in obeying the law of the land. I will demonstrate self-restraint and be constantly mindful of the welfare of others.

I recognize the badge of my office as a symbol of public trust. I accept it as an honor to be held so long as I am true to the ethics of prosecution.

In California, ethics training is constant and continuous throughout a prosecutor's career. It is provided both in-house at the various county offices and at statewide seminars and conferences sponsored by the California District Attorneys Association as well as the National District Attorneys Association. As attorneys at law, prosecutors must maintain the same Continuing Legal Education credits in the area of ethics as any other attorney and must pass the same professional responsibility exam.

As expanded on by the 1998 court in *People v. Hill*,

A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."¹⁰

Prosecutors are well aware that they are measured by a more exacting standard. That is why they place such emphasis on integrity in training, office administration, and in court.

Integrity is one of the values that prosecutors take most seriously. One reason the NCIP Report is so disturbing to prosecutors in California is not because it says negative things about them. Scurrilous remarks from defense attorneys or their spokespersons are part of the life of a prosecutor. Rather, what is most disturbing about the actions of the NCIP is that they can make an accusation so recklessly. Charging someone with wrongdoing based only upon credible evidence is part and parcel of being a prosecutor. It is taken very seriously from the first charging document prepared under the watchful eye of a senior prosecutor to the sign off on a complex murder information. Not so, apparently, for the authors of the NCIP Report. They make charges based not upon evidence but rather on speculation, exaggeration, and even known falsehoods.

In this regard, it is striking how willing the authors of the NCIP Report are to contend that the absence of evidence is no bar to reaching a conclusion of culpability. For example, on pages 2 and 3 of the report, they allege, without any proof whatsoever, that the instance of prosecutorial misconduct, even in their report, is understated. Prosecutors know better than to make charges without evidence.

INDEPENDENCE

The Principle of Absolute Immunity Is Necessary to Preserve the Historical Independence of the American Prosecutor

The role of the American prosecutor is unique to our system of justice. An independent gatekeeper to the criminal justice system, the prosecutor determines whether a criminal case is pursued and whether a person will face charges for criminal conduct. In this function, the prosecutor's position is unlike any other in the world. The prosecutor is the chief law enforcement officer of the county. As a member of the Executive Branch of government, the prosecutor initiates criminal cases and conducts the prosecution. It is he or she who represents the People and who is the attorney and advocate for the citizens of his or her jurisdiction.

10. *People v. Hill* (1998) 17 Cal.4th 800, 820, quoting *Berger v. United States* (1935) 295 U.S. 78, 80.

Prosecutors make thousands of decisions every day, all over the state and country. Those decisions are critical. They can be difficult and must often be made quickly; but they are made without bias and without favoritism. And they are made without fear of retaliation for an official act or exercise of judgment. In some countries, prosecutors are regularly targeted with bribes or bullets. Not so in the United States. That does not work here, because the historical independence of American prosecutors keeps them immune from such influences. Our highest courts have recognized throughout our history that, like judges, prosecutors must be able to do their jobs without fear that a mistake or misunderstanding will subject them to efforts to ruin them financially and professionally. The protections of immunity help ensure the independence of prosecutors and the judiciary.

The Historical Basis for Prosecutorial Independence

The American prosecutor, like so many of our enduring democratic institutions, developed as a reaction to systems that favored the rich and powerful.

The office of the prosecutor grew out of at least three distinct influences. The first was the English Attorney General, essentially local advisors for the Crown. The second was the Dutch Schout, which was an office that acted as Sheriff but was also vested with prosecution powers. The third was the French who made the office of the prosecutor a public office rather than a private power. This last influence was most important.

Before the development of the public prosecutor on the American continent, prosecutors were private attorneys who represented the feudal rich in disputes between powers and private concerns. Under those systems, prosecutors were hired by each side. They were not elected or appointed. The United States recognized the need for an independent elected prosecutor who could enforce the law for all members of society rather than the privileged few.

Three factors drove the migration of the office from a private one to a public one:

1. The notion of a privileged class was rejected and the principles of representative government were adopted. No longer were the courts reserved only for the rich to settle their private disputes.
2. There was a shift from centralized powers to local jurisdictions. In those early years of the republic, there were real issues concerning the questions of distance and proximity. Those on the frontier needed a means to govern effectively without relying on a remote government situated days and weeks of travel away.
3. With an expanding population and geography, there was a public demand for law enforcement and public safety. America was young, robust, and growing—public safety had to be a priority. Even the most remote settlement needed the rule of law to survive.

Public safety is still the highest priority of government, both as specified in the state constitution and in virtually every survey and poll done of its citizens. Prosperity, education, happiness itself (which is an express constitutional objective) depends on public safety. And the development of the American prosecutor was directly tied to the need and demand for public safety.

With the advent of the public prosecutor, the face of the justice system changed. No longer was the crime committed only against an individual. The offense was against the state; it was an assault on the comfort and safety of all the citizens. As such, society became the ultimate victim and the prosecutor's role was to represent society. The actual victim was no longer a party to the proceedings, but a witness. The duty of the prosecutor was to carry the case forward against the accused on behalf of all the people, not just one individual. In order to do that effectively, the prosecutor had to be independent and not subject to private whims and vengeful acts of those who disagreed with his or her decisions.

The first office of a public prosecutor was established in Connecticut in 1704. The statute read:

Hence forth there shall be in every countie a sober, discreet and religious person appointed by the Countie Courts to be Attorney for the Queene, to prosecute and implead in the lawe all criminal offenders, and to doe all other things necessary or convenient as an attorney to suppress vice and immorality. [Original spelling.]¹¹

Other colonies soon followed.

In 1828, Andrew Jackson was elected president. His election had a profound influence on the development of the independent American prosecutor. During the Jackson administration, the movement to decentralize the power of government significantly accelerated. It led to the creation of many local offices holding the powers of government, and to those offices becoming elective. This movement to locally elected offices included the judiciary. Originally the prosecutor's office was a branch of the judiciary. However, with the spread of Jacksonian Democracy, the migration of the office of the public prosecutor from the judiciary to the executive branch became an irreversible trend. Between 1850 and 1912, all (then 48) states established elected prosecutors. All but two (Delaware and Rhode Island) had locally elected District Attorneys.

It is the elective status of local District Attorneys and their historical independence that preserves the democratic ideals of our constitution in the justice system. Accountability is indispensable in helping to preserve democracy. Just as the California prosecutor's oath of duty is to defend the constitution of the United States and the State of California, a prosecutor's loyalty is to the truth and the law. Any action that undermines that independence dilutes what is essential to the effectiveness of self-governance. Efforts to modify or eliminate the immunity the American prosecutor needs to do his or her job without fear damages one of the very foundations on which our justice system depends.¹²

Protecting the Independence of the American Prosecutor

No truly effective justice system can exist unless extraordinary efforts are made to protect the independence of the prosecutor. As recognized in the seminal United States Supreme Court case of *Imbler v. Pachtman*, "The office of the public prosecutor is one which must be administered with courage and independence."¹³

11. Connecticut (1704) 4 Colonial Records 468, State of Connecticut <<http://www.ct.gov/csaof/cwp/view.asp?a=1795&q=285512>> (accessed July 5, 2011).

12. See Jacoby, Joan E. *The American Prosecutor in Historical Context* [Jacoby served as executive director of the Jefferson Institute for Justice Studies, Washington D.C.] and Jon Meacham. *American Lion: A Biography of President Andrew Jackson*.

13. *Imbler v. Pachtman* (1976) 424 U.S. 409, 423, quoting *Pearson v. Reed* (1935) 6 Cal.App. 277, 287.

No truly effective justice system can exist unless extraordinary efforts are made to protect the independence of the prosecutor.

Many interests are continually vying for advantage and supremacy in any society. Those interests vary greatly many possess considerable power. The range of interests can span the spectrum from great corporations and individuals seeking or protecting wealth to self-interested persons with a “cause” he or she believes transcends the limits of the law. Some are tempted to commit criminal acts. None want to be prosecuted. None want to be held accountable for their crimes. To those wishing to operate outside the law, there is great danger in an independent prosecutor. From those who view the law as a hindrance to their ambitions, there would be great danger to a prosecutor whose independence was not protected by the laws of immunities for official acts.

Without protecting the independence of the prosecutor, every case would be influenced by the “apprehension of consequences” for a failure to obtain a conviction. That, in turn,

“would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.”¹⁴

If a prosecutor (or judge) had to face the risk of financial ruin, harassment by unfounded litigation, or even professional disenfranchisement for taking a risk, for trying but failing in a prosecution, can it be seriously contended that the time-tested independence of prosecutors would not be lost? To take on the rich and powerful would be to risk professional suicide. To pursue someone famous and popular—an actor or an athlete who has violated the law, for example—would be to invite retaliation, a barrage of lawsuits, and harassment by referrals to the Bar Association.

And, if such harassment can take place for a positive action, it can take place for a negative action. Saying “No” to those who want someone prosecuted, whatever their motivations, would present its own set of dangers to the prosecutor. Every experienced prosecutor has had situations presented in which no one, not sheriff, council member, or police had the courage to tell the person pressing the issue that a case was not going to happen. It frequently falls to the prosecutor to be the one to say, “No.” If that discretion is lost by a weakening of a prosecutor’s independence, then one can truly hear the death knell of an institution vital to the survival of democracy.

Although the prosecutor ranks are filled by the best and brightest of the legal profession, frequently prosecutors enter District Attorney Offices at the beginning of their legal careers. The arc of their careers will move them from misdemeanors through low-level felonies and on to more serious cases. Each step of the way involves decisions, cases, courts, witnesses, evidence, and questions, questions, questions, and more questions.

Trial work is a prosecutor’s life. Some love it; some excel at it; all must do it. And it starts in the first weeks of a prosecutor’s career and continues unabated until retirement. For trial prosecutors, there is little time for reflection. Cases are governed by strict time lines and burdens of proof. Even so, the pay and benefits are not as high as many attorneys in private practice may earn—a fact that is true not only at the beginning of one’s career but continuing on for the most senior prosecutor on staff.

Prosecutors strive to avoid mistakes, but as in all professions, error is inevitable. However, these mistakes do not always mean that a defendant was unfairly convicted or that the person making the mistake was engaging in intentional misconduct.

14. *Id.* at 424, quoting *Pearson v. Reed*.

It is well to remember the prosecutor is not the only professional participating in a criminal case. Our system of justice provides a person charged with a crime with the best in defense attorneys, and virtually unlimited funds for defense investigators and independent forensic testing of evidence. Furthermore, a hardworking, intelligent judiciary provides oversight for all cases. And then, after all that, if there is a conviction, there are available multiple levels of appellate review for these defendants.

It is appropriate that these courts of review, some of which are populated by entire panels of judges who, along with their law clerks, read and analyze the entire record of a case, can conclude that a finding of guilt was not really affected by a minor mistake in the form of an argumentative question or an oblique reference to a religious practice in a closing argument—and that most mistakes can be corrected. There is such a thing as **harmless error**.

The practice of law outside the classroom is indeed a human institution, but our system of justice provides many, many layers of protection for a person accused of a crime. The prosecutor's role is defined and his or her powers constrained already by the other important participants in the criminal justice system. Removing immunity adds nothing to the protection of the accused. Adequate protections are already in place.

And what of that rare time when someone acts badly?

The 2009 United States Supreme Court in *Van de Kamp v. Goldstein* referred to a 1949 decision to make its point:

A half-century ago Chief Judge Learned Hand explained that a prosecutor's absolute immunity reflects "a balance" of "evils." "[I]t has been thought in the end better," he said, "to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."¹⁵

The NCIP Report ignored the actual holding of *Imbler v. Pachtman*, and cited instead from a minority (concurring) opinion of Justice White for the proposition that prosecutors should not enjoy absolute immunity from civil liability when presenting the State's case.¹⁶

The *Imbler* case itself is an example of how a prosecutor seeking justice would be subjected to the constant threat and fear of civil liability without the absolute immunity that the United States Supreme Court held to be necessary and well founded in common law.

Fifteen years after the murder, Imbler was charged, convicted, and sentenced to death. The United States Supreme Court heard argument and held that the trial prosecutor could not be sued for his actions in prosecuting and convicting Mr. Imbler.

Imbler sought damages because evidence was brought to light—by the prosecutor—as being potentially exculpatory after Imbler's appeals were final. The evidence called into question the veracity of one of the four eyewitnesses who identified Imbler as the murderer. An evidentiary hearing by the California Supreme Court resulted in this same witness retracting his identification and stating that he had not only lied about the identification but also embellished his own background to make himself more believable. The California Supreme Court unanimously rejected the testimony of the recanting witness and denied the Writ of Habeas Corpus. Six years after the denial of the writ by the California Supreme Court,

15. *Van de Kamp v. Goldstein* (2009) 555 U.S. 335, quoting *Gregoire v. Biddle* (1949) 177 F.2d 599, 581.

16. NCIP Report, *supra*, at fns. 194 and 195.

a Federal District Court granted habeas, which was upheld by the Ninth Circuit Court of Appeals. The State of California elected not to retry Imbler on the charges.

In bringing the habeas to the California Supreme Court, Imbler's attorney stated that the prosecutor was an example of "the highest tradition of law enforcement and justice" and demonstrated a "devotion to duty."¹⁷ In the same brief, Imbler's attorney turned around and accused the prosecutor of knowingly soliciting false testimony and suppressing evidence. This illogical attack (and divergent factual findings by the State and Federal courts) did not escape the High Court's notice when Mr. Imbler later filed suit against the same prosecutor for violations of his civil rights under United States Code title 42, section 1983.

In its holding, the United States Supreme Court confirms the necessity of absolute immunity to preserve the public policies protecting the criminal justice system, and the requirement of an independent prosecutorial system that is not vulnerable to second guessing by untrained lay persons and the animosity of those accused. It did not escape their attention that such a policy also served to protect the rights of the accused in the *Imbler* case. It pointed to the facts of the underlying case that gave rise to the section 1983 action to demonstrate that the prosecutor might have had significant concern in bringing to light the facts that called into question the testimony of one eyewitness. Without immunity, bringing those facts to the attention of the courts would have opened him up to civil liability for a case that was closed.

The Court's rationale for absolute immunity for prosecutors in common law, and as codified in statutes, is clearly stated in *Imbler*:

Courts that have extended the same immunity to the prosecutor have sometimes remarked on the fact that all three officials – judge, grand juror, and prosecutor, exercise a discretionary judgment on the basis of evidence presented to them. [Citations.] It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi-judicial" as well.¹⁸

The office of public prosecutor is one that must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case.... The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy that should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.¹⁹

17. *Imbler, supra*, at 413.

18. *Id.* at 423, fn. 20.

19. *Id.* at 423–424.

Over Regulation Can Compromise the Independence of the Prosecutor

Independence can also be lost by needless regulation. Adding unnecessary training and reporting requirements to an already heavy case load is to engage in the same kind of over regulation that may sound good in theory but in real life paralyzes action.

It is not unusual for new regulations and so-called reforms to be offered for any perceived problem no matter how rare. Sometimes an aberration leads to an undesirable result. The modern reaction is to propound and adopt rules that promise to prevent a reoccurrence.

However, there are at least three inevitable results to over regulation of prosecutors. The first is paralysis because of the fear of consequences. The second is the inevitable compromise of effectiveness and the law of unintended consequences; the people harmed the most by compromising prosecutorial effectiveness are the victims of crime. The third is that the cost of any error will be so prohibitive as to deter all but the wealthy from serving as a district attorney.

LEADERSHIP

The California prosecutor has a distinguished history of providing leadership. The confidence and support of the public is the most important foundation for an effective criminal justice system. Time after time, the California prosecutor, in small counties and large, have led the charge to bring to justice those who have violated the public trust, whether rogue police officer or corrupt politician. At the same time, prosecutors have fashioned new methods for ensuring that the most vulnerable in our society, such as children and the elderly, are protected and have access to the courts.

A decade ago, the voters passed the Three Strikes Law and other public safety initiatives by overwhelming majorities. Prosecutors heard this call for justice. By aggressively enforcing these laws, as enacted by the People and the Legislature, crime in California has been reduced. The savings in costs to the criminal justice system of repeatedly re-arresting and re-prosecuting career criminals has been immediate and immense. That Californians are safer now than they were a decade ago is thanks to the efforts of thousands of prosecutors in California. Most importantly, innocent victims have been saved who would have been otherwise lost without the strength of prosecutors leading the efforts against incorrigible criminals.

California Prosecutors Have Been Innovative

Better techniques have been created and pursued by prosecutors—Child Abuse Response Teams and Sexual Assault Response Teams; making courts more child friendly; meeting the need for sensitive physical examinations of rape victims; and protecting sexual assault victims from invasions of privacy. The Victims' Rights movement has been able to look to prosecutors to lead efforts for real reform in the justice system that for too long ignored victims' rights and was indifferent to the impact of crime on members of the public. In similar manner, prosecutors have provided leadership in making courts more accessible to minorities and women.

In pursuit of the value of diversity, District Attorney's Offices in California have been providing women and minorities with opportunities to excel in litigation.

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Other programs like Drug Courts and Veteran's Court have been created and supported by prosecutors in order to save the lives of those trapped by addiction or trauma in a revolving door of self-destruction.

New and creative forensic procedures were adopted and led by prosecutors—from Child Interview Teams to DNA evidence to providing indisputable evidence of guilt and, where appropriate, to clearing the innocent. Without the leadership and expertise of innovative prosecutors, it could have been decades later that DNA evidence would be used in actual court cases.

Prosecutors are the leading criminal justice officials in the State of California, and they are incredibly effective. Efforts to undermine the effectiveness and authority of prosecutors, such as the error-prone NCIP Report, surely hurt individual prosecutors who are doing their job of protecting the public—but the ultimate impact is on the safety and well-being of all citizens.

CLAIMS OF PROSECUTORIAL MISCONDUCT

Prosecutorial Misconduct—What It Is and What It Is Not

Under federal law, a prosecutor commits misconduct when his or her conduct

infects the trial with such unfairness as to make the conviction a denial of due process.... **Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.**" [Emphasis added.]²⁰

Minor mistakes and simple errors do not constitute prosecutorial misconduct.

Making a mistake in how a question is formed in the middle of a trial may be an error, but it is not "the use of deceptive or reprehensible methods," and it is not prosecutorial misconduct, any more than a judge giving the wrong jury instruction is judicial misconduct. In the latter instance, the mistake of the judge is called judicial error, not misconduct. It certainly does not open the judge to civil liability and the possible loss of his or her license to practice law or the loss of judicial office. The NCIP seemingly would like to impose such effects on prosecutors who ask the wrong question or make other minor mistakes even though the errors have absolutely no impact on the trial.

The NCIP Report contends "deceptive or reprehensible" methods were used by prosecutors in 707 cases over a period of time that is presented in their title and elsewhere in the report as being between 1997 and 2009²¹ but in reality cover a period dating back over a quarter of a century. Moreover, the report contends that the conduct in these cases was "deliberate."²² Both contentions are wrong.

Federal claims of prosecutorial misconduct, on the other hand, are evaluated from the perspective of the defendant's rights and whether those rights were violated; these claims do not generally focus on whether the prosecutor's conduct could be considered reprehensible

20. Hill, *supra*, at 819, quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 820, see also *Gionis, supra*, at 1214 and *People v. Samayoa* (1997) 15 Cal. 4th 795, 841.

21. NCIP Report at 24.

22. *Id.* at 24.

or deceptive, or whether the conduct was intentional.²³ Whether the prosecutor acts with any bad faith or nefarious intent is generally irrelevant to an analysis of prosecutorial misconduct under federal law.²⁴ Most serious commentators accept that the correct terminology, in instances where neither bad faith nor deceptive conduct is involved, is “error,” not “misconduct.”²⁵

One of the most misleading claims made by the NCIP Report is that courts “explicitly” found prosecutorial misconduct in more than 700 cases where a court, analyzing a claim of prosecutorial misconduct, found the prosecutor erred in some way. A court’s finding that a prosecutor erred, by itself, is not a finding of prosecutorial misconduct, even if the court makes such a finding when examining a prosecutorial misconduct claim. It simply does not meet the legal definition under either state or federal law. As such, the NCIP Report is actually a compilation of cases where prosecutors “erred,” not a study of “prosecutorial misconduct.”

A striking example is the California Supreme Court’s decision in *People v. Chatman*.²⁶ The NCIP Report held this decision up as a case in which a court found a prosecutor had committed prosecutorial misconduct, but, in fact, the court ruled harmless error.²⁷

In *Chatman*, the defense alleged that the prosecutor had committed prosecutorial misconduct by intentionally asking a defendant questions that would elicit inadmissible evidence.²⁸ While it may have been clear to the authors of the NCIP Report that this was an instance of misconduct, it certainly was not clear to the California Supreme Court. The first thing the court did was to note,

[W]e question whether this issue is properly considered one of misconduct. “Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct. Defendant’s real argument is that the evidence was inadmissible.”²⁹

The court then added, “[N]othing in the record suggests [the prosecutor] sought to present evidence he knew was inadmissible, especially given that the court overruled defendant’s objections and, as discussed below, the applicable law was unsettled at the time of trial.”³⁰ However, the court then went on to say,

23. *People v. Bolton* (1979) 23 Cal.3d 208, 213–214; *Hill, supra*, at 822–823.

24. *Id.*

25. See e.g., American Bar Association Recommendation 100B, adopted August 9–10, 2010 <<http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf>> (accessed July 6, 2011).

26. *People v. Chatman* (2006) 38 Cal.4th 344.

27. *Id.*; NCIP Report, Appendix B: Harmless Cases by Jurisdiction: 111.

28. *Chatman, supra*, at 379.

29. *Id.* at 379–380, emphasis in original, quoting *People v. Bonin* (1988) 46 Cal.3d 659, 689 and *People v. Scott* (1997) 15 Cal.4th 1188, 1218.

30. *Id.* at 380.

Numerous claims of prosecutorial misconduct are made, but when they are analyzed one by one, they are found not to be misconduct at all.

[W]hether we label the issue misconduct or the erroneous admission of evidence does not greatly matter, for defendant's argument is essentially identical under either characterization. Because the cases generally discuss the issue under the rubric of misconduct, we will do so also.³¹

The *Chatman* court then examined the defendant's litany of claims of prosecutorial misconduct in determining whether the evidence was properly admitted. The court rejected all of the defendant's contentions that the prosecutor's questions were improper.³²

The court did, however, thoroughly discuss argumentative questions and found a question asked by the prosecutor was, in fact, argumentative.³³ The defendant had not objected to the question when asked, however, so he was precluded from challenging this question on appeal.³⁴

This case is the NCIP Report in a nutshell. Numerous claims of prosecutorial misconduct are made, but when they are analyzed one by one, they are found not to be misconduct at all. Even the one question found (after much lawyerly discussion) to have been argumentative does not turn out to have been serious enough to have solicited even an objection from the defense attorney. So its impact on the trial was non-existent. For even such a minor mistake in the form of a question, the NCIP Report would apparently subject prosecutors to the possibility of being sued, having their names published in some sort of public condemnation procedure or their careers investigated by the Bar Association.

This case, which was relied upon by the NCIP as a case in which the court explicitly found prosecutorial misconduct, is a far cry from the "deceptive and unfair tactics" the NCIP claims their study shows are being used to obtain convictions.³⁵ No explicit finding of prosecutorial misconduct was ever made. The finding would more appropriately be termed a minor "prosecutorial error."

Confusing *Brady* Error with Prosecutorial Misconduct

Additionally, the NCIP Report designates, as prosecutorial misconduct, instances where a prosecutor failed to disclose exculpatory evidence—"Brady error."³⁶ A *Brady* violation occurs when evidence favorable to the accused, either because it is exculpatory or because it is impeaching, is either willfully or intentionally suppressed by the state and, as a result, the accused suffers prejudice.³⁷ While willfully withholding exculpatory evidence constitutes *Brady* error, so does the inadvertent failure to disclose the evidence.³⁸ Moreover, the prosecutor's duty to turn over exculpatory evidence "extends even to evidence known only to police investigators and not to the prosecutor."³⁹

31. *Id.*

32. *Id.* at 380–383.

33. *Id.* at 384.

34. *Id.* at 384, fn. 14.

35. NCIP Report at v.

36. NCIP Report at 25; *Brady v. Maryland* (1963) 373 U.S. 83.

37. *Strickler v. Greene* (1999) 527 U.S. 263, 281–282.

38. *People v. Salazar* (2005) 35 Cal.4th 1031, 1043.

39. *Id.* at 1042.

Brady error can occur despite the best intentions of the prosecutor, if the police investigators have evidence and fail to disclose that evidence to the prosecutor.

Not every discovery violation amounts to prosecutorial misconduct either. For instance, in *People v. Hicks*,⁴⁰ a case relied on in the NCIP Report as a case where a court “explicitly” found misconduct, the court actually explicitly stated the failure to timely disclose information did not amount to prejudicial misconduct.

In *Hicks*, a narcotics sales case, the defendant complained that the prosecutor’s discovery had not put him on notice that an officer would testify that the defendant had hand-to-hand contact with a party that the prosecutor theorized had provided the narcotics. After he was convicted, the defendant appealed, claiming prejudicial prosecutor misconduct.

The court of appeal rejected that argument, concluding the prosecutor erred by failing to ensure compliance with the discovery provisions of Penal Code sections 1054 et seq., but found any error harmless. The court noted that the prosecution’s theory obviously included the transfer of the narcotics and a marked \$20 bill between the defendant and the suspect party, and other evidence conclusively showed the bill had been transferred.

The court never expressly made a finding of misconduct. First, there is no indication in the case as to what specifically the statement was and whether or not the statement was in the possession of the prosecutor or just the officer. More importantly, however, the court expressly stated “even assuming that the prosecutor’s failure to disclose [the officer’s] statement amounted to misconduct ... we find any misconduct harmless.” Yet the report relies on this case as one in which the court *expressly* found misconduct. The NCIP Report on this case, as well as numerous others, is clearly misleading and contrary to what the court actually held.

Confusing *Batson/Wheeler* Errors with Prosecutorial Misconduct

The NCIP Report also includes cases it classifies as prosecutorial misconduct that are *Batson/Wheeler*⁴¹ error, not misconduct. These are cases in which courts granted a *Batson/Wheeler* motion brought against a prosecutor, a motion that requires a court to make a finding that the prosecutor impermissibly used a perceived group bias to exercise a peremptory challenge to exclude a juror.

The process of a *Batson/Wheeler* motion is quite simple. First an attorney raises a challenge that a party is using peremptory challenges in an impermissible manner. Then the court must decide if the challenging party has raised a colorable claim. If so, the party being challenged must then rebut the claim that the challenges are being exercised impermissibly by explaining the actual reasons he or she excused the perspective juror. The court resolves any factual disputes and makes a final decision of whether the peremptory challenges were exercised in a permissible manner.⁴²

40. *People v. Hicks*, 2005 WL 1671814. Listed in the NCIP Report at 112.

41. *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258.

42. *People v. Lenix* (2008) 44 Cal.4th 602, 612.

The law in this area has been unsettled for a number of years, and courts themselves do not always agree on what is *Batson/Wheeler* error and what is the requisite proof of its existence. Historically, when challenges were made to the trial court's ruling on appeal, the trial court's factual determinations were given great deference.⁴³

More recently, however, courts have held that when a defendant's *Batson/Wheeler* motion is denied and the defendant challenges the ruling on appeal, the appellate courts must make a comparison of the reasons given by the prosecutor to excuse certain jurors to other jurors who were not excused—to decide if the reasons were genuine or pretextual. Where a juror is excused for a stated reason by a prosecutor, but another juror with a similar characteristic is not excused, appellate courts are instructed to consider this as evidence that the prosecutor's stated reason was inadequate. This comparison must be done by the appellate court even when the comparison was not done by the trial court.⁴⁴

On appeal, however, the appellate court has only the record of what happened in the trial court. Where an appellate court is addressing an argument that was not raised in the trial court, the record is often not fully developed, leaving the appellate court at a distinct disadvantage to review the factual decision of the trial court. For this very reason, the California Supreme Court had rejected this type of analysis before the United States Supreme Court required it.⁴⁵ Because of the possibility of an undeveloped record, the California Supreme Court noted that engaging in comparative juror analysis for the first time on appeal was unreliable.⁴⁶

In the past, when the reason underlying a prosecutor's decision to excuse one juror but keep another was neither raised as an issue in the trial court nor brought to the prosecutor's attention, it should surprise no one that the prosecutor did not tend to make an adequate record of the reason. Now the United States Supreme Court requires this type of comparative analysis on appeal, and the California Supreme Court has noted, "[b]oth court and counsel bear responsibility for creating a record that allows for meaningful review."⁴⁷ The rules have finally been made clearer. The fact that a prosecutor failed in the past to keep more detailed records is not cause to accuse him or her of misconduct.

Even panels of Supreme Court Justices have disagreed on how the law is to be applied in this area, and the case law and precedent changes, as it often does. **Mistakes of this kind are simply not prosecutorial misconduct.**

The NCIP Report's repeated failure to properly identify what is and what is not prosecutorial misconduct can be traced to a lack of the use of basic academic standards in its study.

43. *Hernandez v. New York* (1991) 500 U.S. 352, 364–365.

44. *Snyder v. Louisiana* (2008) 552 U.S. 472; *Lenix*, *supra*, at 607.

45. *People v. Johnson* (2003) 30 Cal.4th 1302, 1318, 1324.

46. *Id.*

47. *Lenix*, *supra*, at 621.

THE NCIP REPORT LACKED LEGAL OR ACADEMIC STANDARDS

Another disturbing aspect of the NCIP Report is the lack of academic standards adhered to in the research attending the project. Although the NCIP Report was issued under the auspices of a putative academic institution and purports to establish statistical truths, it becomes clear under analysis that it is full of errors and mistakes. What is equally clear is that the failure to adhere to any conventional standards in the research that went into this report caused much of the inaccuracy.

The errors in the NCIP Report cover the entire spectrum from the misidentification of parties and cases to factual inaccuracy and the misreading of legal opinions. As shown below, the report does not meet the most basic standard to be admissible in a court of law. Although the report contains a chapter titled “methodology,” there is no discussion of checking for mistakes or of random samples being examined for accuracy. Adequately documented details about where the purported facts come from and who is responsible for them is not mentioned so as to allow for objective peer review.

One of the most significant failures of the NCIP Report is that the prosecutors themselves were never consulted. The very subjects of the report were never invited to provide clarifying information or context, or to contribute to the discussion.

The NCIP Report’s Use of Statistics

These academic failures are apparent in what passes for analysis in the report, and are accompanied by statistics that seem impressive until one examines the contentions more objectively.

A chief deputy district attorney from Sacramento summarized the statistical sleight-of-hand played by NCIP:

Like the mythical shepherd boy in the Boy Who Cried Wolf, the Northern California Innocence Project report on prosecutorial misconduct in California⁴⁸ rails at a problem that simply does not exist. In the NCIP’s First Annual Report, an addendum to the original study, the authors would have you believe that prosecutorial misconduct is underreported, under-investigated by the state bar, and hidden from public view because of a lack of transparency.⁴⁹ The reality, however, is that Californians have every reason to have faith in the administration of criminal justice in this state, and should be proud of their elected and appointed prosecutors.

The Innocence Project presents their argument without placing the facts in a proper context. The report states that their search of criminal cases in California between 1997 and 2010 found 800 cases of prosecutorial misconduct,⁵⁰ resulting in 202 cases “where convictions were reversed, mistrials declared, or evidence

48. See fn. 3.

49. See generally, NCIP First Annual Report at 16–17.

50. *Id.* at 17.

barred.”⁵¹ Presumably, the other 598 cases did not require a reversal, mistrial, or evidence exclusion as the reviewing court found justice had not been denied.

Initially, the public needs to understand that prosecutorial misconduct can take many forms and can take place at any stage of a criminal case, from the initial investigation until final judgment.⁵² One cannot gain an appreciation of the scope of the issue without understanding the vast number of cases prosecuted yearly in California, each carrying with it the potential for prosecutorial misconduct. This complete failure by the Innocence Project to place the cases they cite within a proper context is an embarrassingly unprofessional lapse by the authors.

Take a look at the number of persons arrested only for felonies⁵³ in the available statistics between 1997 and 2009. A review of the numbers shows an average of 308,632 felony arrests per year.⁵⁴ Prosecutorial misconduct could occur at any time after this stage⁵⁵ but to again lessen the numbers in favor of the Innocence Project, let us only examine those felony arrests that actually result in filed charges, or approximately 256,000 per year.⁵⁶ To skew these numbers in favor of the Innocence Project even further, this author will not count federal prosecutions in California, but rather now we are limiting this response only to felony arrests that resulted in criminal charges being filed in state court.⁵⁷

The Innocence Project examined criminal cases between 1997 and 2010.⁵⁸ The report does not indicate that misdemeanor or federal prosecutions were eliminated from their inquiry. In that 14-year period of time, approximately 3,584,000 felony cases were filed in state courts throughout California. In these roughly 3.5 million cases, the Innocence Project found 800 cases of “prosecutorial misconduct.” In mathematical terms, this means that prosecutorial misconduct occurred in only .022 percent of all criminal cases. In layman’s terms, this means that one case of prosecutorial misconduct occurred in every 4,480 felony criminal cases in state courts.⁵⁹

Consider also that prosecutorial misconduct can be fixed, often by the trial court when it happens or is identified, or later by an appellate court. All California criminal cases are subject to stringent review: by individual prosecuting offices statewide that police themselves through training and quality control, by trial court judges, by appellate court judges, and by the state bar.

51. *Id.* at 16.

52. See David Sherman, “Defining Prosecutorial Misconduct” (Spring 2011) 33 CDAA *Prosecutor’s Brief* 3:20.

53. This response will just concentrate on felony cases in California. The reader should be mindful of the fact, however, that prosecutorial misconduct can also occur in misdemeanors, and since more misdemeanors occur in California than felonies, using only these numbers is an advantage to the skewed implications of the Innocence Project.

54. California Department of Justice statistics, Table 37, Dispositions of Adult Felony Arrests, 1975–2009.

55. E.g. in an investigative search warrant, in questioning of suspects and witnesses by prosecutors or their agents, or violations of the rule of law cited in *Brady v. Maryland* (1963) 373 U.S. 83.

56. Derived by subtracting the number of law enforcement releases and the number of complaints denied from the average yearly felony arrest number of 308,632.

57. Adding in misdemeanors and federal prosecutions would more than double the numbers in the universe of cases where prosecutorial misconduct could occur in California.

58. NCIP *First Annual Report* at 17.

59. Consider that your odds of the earth suffering a cataclysmic collision with an asteroid in the next 100 years is one in 5,000 <www.funny2.com/odds.htm> (accessed July 6, 2011).

The real question that should be asked here is not, "Why is there so much prosecutorial misconduct in California?" Instead, it should be, "Why is there so little prosecutorial misconduct in California?" The answer, of course, is that California's prosecutors are highly-trained professionals with a passion for justice, wherever justice may take them. Prosecutors operate under stringent standards, embracing the recognition that doing their job correctly requires them to do it ethically and honorably.

A senior prosecutor holding a supervising position in the Tulare County District Attorney's Office pointed out that the NCIP Report unsuccessfully attempted to parlay a lack of statistics regarding State Bar action against prosecutors into a perceived failure of the California Bar Association—when nothing could be further from the truth:

With a total of six cases of public discipline for prosecutors handling criminal cases in close to 13 years of reporting, it would seem like the clear statement by the California State Bar is that prosecutors have held themselves to a much higher standard than is the practice for the remaining members of the Bar (who totaled 4,736 cases of public discipline over that same time frame).

Rather than interpreting the numbers as a monument to the integrity of the public prosecutor, the NCIP Report demands quota-style discipline. At the same time, it fails to recognize that the vast number of publically reported cases have nothing to do with courtroom practice. An overwhelming number were found to be breaches in the disciplined attorney's fiduciary duties. Failure to comply with mandated actions by the State Bar and convictions for crimes of moral turpitude come in a distant second and third as a basis for discipline.

The NCIP Report claims only six prosecutors have been publicly disciplined for handling criminal cases out of 4,741 cases from January 1997 to September 2009 (or 12-and-a-half year's worth of cases). The inference is that 4,735 criminal defense attorneys were sanctioned for misconduct relating to the defense of their client while similar conduct by prosecutors was simply ignored by the State Bar.

*A review of the California Lawyer Discipline Report found online June 6, 2011, listed 102 attorneys who were named as having received some form of public discipline between April–June 2011. Discipline ranged from **Public Reproval** (10), **Probation** (14), **Suspensions** (51), and **Resignations** (10) to a report of 27 attorneys who were **Disbarred**. (See Table on page 24.)*

*Of the 10 cases where the State Bar chose **Public Reproval**, only one involved misconduct in handling a criminal defense. This one case was the only one out of the 102 cases where attorneys were found to have committed misconduct in the course of a criminal defense. This particular criminal defense attorney directed his investigator to interview a co-defendant without authorization of the co-defendant's attorney. The other nine cases of Public Reproval were the result of five convictions (four for multiple DUIs in association with accidents and one for an assault with a stun gun); four cases involving a breach of fiduciary duties; and, finally, a single case where an attorney threatened a State Bar action against opposing counsel in order to gain advantage in a civil dispute (there was also a breach of fiduciary duty for failing to file motions timely in this particular case).*

In addition, 14 attorneys were placed on Probation for misconduct. Of the 14 cases, eight were for a breach of fiduciary duty, with one compounding the breach by providing false information to a lien holder; three were for convictions (two cases of multiple DUIs, one relating to a conviction for failing to pay income tax); and the final three for failing to comply with the State Bar disciplinary procedure.

Fifty-one attorneys were Suspended for misconduct: 31 for a breach of fiduciary duty; seven for criminal convictions; 10 for failure to comply with prior disciplinary actions of the State Bar; four for misconduct in the civil practice of law; one for improper interaction with the State Bar (in addition to a breach of fiduciary duties in that particular case); and one for prosecutorial misconduct (this was the only prosecutor who received any form of public discipline).

Of the 27 attorneys who were reported to have been Disbarred during this period, 18 failed in their fiduciary duties; six failed to comply with orders of the State Bar in prior attempts to discipline; three were disbarred following convictions for crimes of moral turpitude (child molest, grand theft, interstate fraud); and one was disbarred for a misrepresentation of his firm (a sole practitioner claiming to be a member of a 10-lawyer firm) and his relationship with loan officers and ability to ensure clients would get loans.

The motivations that drive intentional actions requiring public discipline simply do not exist for the public prosecutor since the public prosecutor is not in the business of making a profit and cannot increase his or her income by the various forms of larceny that constitute the basis of a vast majority of misconduct subject to State Bar discipline.

State Bar Discipline Report (April-June 2011)

	<u>PR</u>	<u>Prob</u>	<u>Susp</u>	<u>Disbarment</u>	<u>Total</u>
Breach of Fiduciary Duty	4*	8*	31*	18	61*
Criminal Convictions	5	3	7	3	18
Failure to Comply with State Bar	0	3	10*	5	18*
Improper Interaction with Bar	0	0	1*	0	1*
Misconduct in Civil Practice	1*	1*	4	1	7*
Misconduct in a Criminal Defense	1	0	0	0	1
Misconduct in Prosecution of Case	0	0	1	0	1
Total Cases	10*	14*	51*	27	102

** Multiple categories of discipline*

The NCIP Report, Were It Offered into Evidence, Would be Rejected in a Court of Law

Science that is based in faulty facts and procedures and promotes specialized interests and individual agendas is commonly referred to as “junk science.” Because bad science may lurk behind even impressive degrees, courts hold gate-keeper hearings to prevent the introduction of unreliable science into the deliberations and judgments of courts and juries.⁶⁰ Principled experts do not make conclusions admissible of their own accord. A statement such as, “I say I am an expert, therefore, what I say must be true” does not meet the foundational requirements for consideration as evidence in a court of law.

The authors of the NCIP Report maintain expert status; however, there is nothing in the report that establishes their expertise in the field of law. There are no qualifications proffered that entitle them to speak with authority on the matters of prosecutorial procedure, evidence, trial advocacy, judicial review, or any of the subjects their report covers.

Federal Rule of Evidence section 702 and the *Kumho Tire* case, as well as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶¹ establish the standard for the admissibility of studies such as the NCIP Report. Before considering testimony, the court decides if the scientific theory / method relied upon by a party (1) has been peer reviewed; (2) has a low error rate; (3) is testable; and (4) is generally accepted in the scientific community.

By adopting peer review as a benchmark for legal acceptance of scientific knowledge, the court validated the idea that science must be of sound, independently reviewed, unbiased methodology before it can be real science, and it also agreed that the only cure for bad science is vigorous cross-examination.

Nowhere in the NCIP Report has peer review been mentioned. The NCIP’s stated mission is clearly biased to favor the defense. The error rate for the report is extremely high. The methodology is not detailed enough to be “testable”: It fails to meet minimum legal standards of reliability.

THE NCIP REPORT CONSISTENTLY MISREPORTED CASE HOLDINGS AND FINDINGS

The authors of the NCIP Report never contacted the subjects of their research to make the most basic inquiries. They did not call the prosecutors they accused of malfeasance or the District Attorney’s Offices that prosecuted the cases they cited. These failures contributed to an erroneous report.

Equally disturbing is how often the holdings and findings in cases were incorrectly represented. Patterns of incorrect information appear to be clear, and the misrepresentations of cases seems intentional and meant to paint a false picture of the incidence of prosecutorial misconduct.

The authors of the NCIP Report maintain expert status; however, there is nothing in the report that establishes their expertise in the field of law. There are no qualifications proffered that entitle them to speak with authority on the matters of prosecutorial procedure, evidence, trial advocacy, judicial review, or any of the subjects their report covers.

60. *Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 U.S. 137, 153.

61. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 597.

Misrepresentations About the *Sodersten* Case

In the executive summary of the report, the first case discussed was the *Sodersten*⁶² case. The authors contend that the case involved prosecutorial misconduct and that an appellate court found that this “misconduct” resulted in an innocent man dying in prison. The court transcript establishes that nothing could be further from the truth.

The *Sodersten* case did not involve prosecutorial misconduct, and no court, neither the trial court nor the appellate court, found that *Sodersten* was innocent. The court of appeal expressly noted, “We do not know—and need not determine— whether petitioner killed Julie Wilson.”⁶³

The selection of the *Sodersten* case for inclusion in the summary was itself strange. In a very real sense, the emphasis on this case undermines the arguments for “reform” advocated by the authors of the report.

To discuss *Sodersten*, the authors had to go outside the stated time period the report was supposed to cover, and reach back more than a quarter of a century to a trial that took place in 1984. But even here, the NCIP authors chose the wrong case.

The following facts are glossed over or, worse, ignored in the report.

1. There was never a finding of prosecutorial misconduct in the *Sodersten* case by either the trial court or the appellate court. The court of appeal noted, “[W]hether the nondisclosure was intentional is immaterial, and we do not decide that question.”⁶⁴ The August 23, 2004, Tulare County court case denying the habeas petition found: “It is the view of this court that petitioner has failed to establish willful misconduct by the prosecution,”⁶⁵ and “This court is unable to discern a pattern of willful failure to provide discovery or the ... tapes.”⁶⁶

Even a cursory look at the trial record would have found that the case did not involve prosecutorial misconduct. In fact, none of the headnotes in the official reports cite prosecutorial misconduct as being involved in the case.

The trial court held two lengthy habeas hearings 18 years after the trial, and issued written rulings that confirmed that not only was there no prosecutorial misconduct, but the evidence allegedly not turned over to the defense would have **harmed**—not helped—the defense.

Nowhere in the rather lengthy appellate decision is a finding that the prosecutor engaged in any misconduct. And even though the superior court found no misconduct and the appellate court found no misconduct, according to the NCIP Report, the authors decided to highlight the case as a “stark example.”⁶⁷

62. *In re Sodersten* (2007) 146 Cal.App.4th 1163; see also fn. 73 of this paper.

63. *Id.* at 1236.

64. *Id.* at 1226.

65. Tulare County Superior Court Case # 39404, Ruling Denying the Petition for Writ of Habeas Corpus (August 23, 2004) 3.

66. *Id.* at 4.

67. It would appear that the *Sodersten* defense attorney was consulted, although the prosecutor was never contacted by the authors.

2. Regarding the *Sodersten* case, the NCIP Report cites, as proof of prosecutor misconduct, two tapes as being intentionally withheld despite the fact the appellate court acknowledged these tapes were not known to the prosecutor or his investigator. The court of appeal noted, “[E]ven Cline and his investigator were unaware of them.”⁶⁸ These were police tapes found years later in a police file. Some of the strongest language of the appellate court decision is used regarding this evidence.

This fact was never mentioned in the NCIP Report.

3. The prosecutors involved have consistently maintained over the years that the other two tapes (of court-familiarity sessions with a minor witness) were actually turned over to the defense, and that the cross-examination of the witness by the defense attorney showed he had the tapes. The defense attorney, during the trial, referred to where and when the familiarity sessions occurred in his cross-examination.⁶⁹ Unfortunately, decades after the trial, the documentation that the tapes were turned over could not be provided. So the courts, based upon a lack of documentary proof, were compelled to find that the tapes had not been received. Should failure to document the delivery of discovery in a 25-year-old case be labeled misconduct? Clearly no reasonable person could do so. And no one did.

The appellate court, in accepting the superior court’s finding that the defendant never received any of the tapes, characterized this as a “neglected or ignored” duty and a “dereliction of ... duty by law enforcement and prosecutorial authorities.”⁷⁰ The court made clear that the lack of discovery was a systemic failure and that the defendant “most certainly did not receive a fair trial.”⁷¹ Strong language. But while these words clearly condemn the underlying conduct as unacceptable, the appellate court did not find that it rose to the level of prosecutorial misconduct, as discussed above.

4. The trial court found that the tapes would have hurt the defense, not helped them. The appellate court went to great lengths to establish the materiality of the tapes, but if one is going to hold this case up as prime example of the innocent being imprisoned, should not it at least have been mentioned that the actual trial judge, who had heard all the testimony in the trial and then heard all the testimony in both habeas proceedings, found just the opposite?

In point of fact, the judge who presided over the trial, and then 18 years later heard all the habeas proceedings and the motions concerning the missing tapes, specifically found that evidence of the defendant’s guilt was so overwhelming, a jury would have convicted him anyway.⁷²

What is clear is that the authors of the NCIP Report appear to accept the representations of a biased party, *Sodersten*’s defense lawyer, without including the case decision, much less the entire record of the case. The NCIP attacks on District Attorney Phil Cline were exaggerated and unfair.

68. *Sodersten*, *supra*, at 1224.

69. *Id.*

70. *Id.* at 1218, 1236.

71. *Id.* at 1218, 1219.

72. Tulare County Superior Court Case #39404 Second Order Denying Petition, 3.

The authors of the NCIP Report failed to contact the prosecutors about any of the cases they cited. This was a grievous oversight. Had the authors been more interested in the truth, they would have at least asked about the details underlying cases before reaching a conclusion.

The authors of the NCIP Report failed to contact the prosecutors about any of the cases they cited. This was a grievous oversight. Had the authors been more interested in the truth, they would have at least asked about the details underlying cases before reaching a conclusion. Reporters from legal papers contacted many of the prosecutors so carelessly named in the report, including the *Sodersten* prosecutor. When they did, they found out the truth.⁷³

But Phil Cline is not the only one unfairly maligned by the NCIP. Countless other prosecutors have been singled out and accused of misconduct when none occurred.

73. The following is the factual context of the 1984 *Sodersten* case, which involved the brutal rape and murder of a young mother witnessed by her two children, both under age five: The case was assigned to the prosecutor a month before trial in 1986. He had been a prosecutor about six years. It was being handled up until then by another prosecutor who eventually was appointed to the bench where he honorably served for more than 20 years until he retired. He currently still hears cases on assignment. In preparing for trial, the young prosecutor conducted practice sessions with a five-year-old girl witness. The sessions were done in a courtroom so she could understand how court worked. Ironically, the prosecutor had the sessions taped specifically so he could prove nothing improper occurred during the interviews. In fact there was no other reason to tape the interviews. The prosecutor has always maintained that the tapes were turned over to the defense, but by the time of the habeas proceedings, 18 years later, did not have documentary proof that he did so. One possible reason he did not, is that a quarter-century ago, when the events occurred, in many counties the policy for document discovery turnovers was informal. The prosecution just gave the defense everything it had. For these prosecutors, it was the simplest of policies, or so they thought. Few would be so trusting in this day and age. Years later, another defense attorney who had brought a habeas proceeding was given full access to the prosecution file, as is usually done, and he ended up contending that those two tapes were not received by the original defense attorney.

The authors of the NCIP Report failed to read the trial transcripts or written motions concerning these tapes. Had they done so, they would have discovered that the original defense attorney (disbarred in 2000), in cross-examination of the minor, actually referred to the interview sessions and where they occurred. This was very significant proof that the tapes had indeed been turned over.

In the opinion of the trial judge, it is likely that the defense knew the tapes would hurt his case rather than help it, and that is the reason he never played them for the jury. However, because the prosecution had no documentation in the decades-old file that the tapes were turned over, the trial court found in the habeas proceedings held years later that they had not been received by the defense.

There were two other tapes, the so-called "Lester Williams" tapes, which were made surreptitiously by police officers and were found years later in a police file. As previously indicated, even the appellate court acknowledged that neither the prosecutor nor his investigator knew of the existence of these tapes. Yet these two tapes were more central to the appellate decision than the child's tapes.

In 2004, two lengthy habeas hearings concerning all four tapes were heard in superior court by the judge who had presided over the trial 18 years earlier. He specifically found there was no intentional withholding of the tapes from the defense. He specifically found there was no prosecutorial misconduct. He went on to reject the opinion of a defense expert who listened to the tapes 12 years or so after they were made and opined that the girl's testimony was unduly tainted by how the sessions were conducted. He further found that if the tapes had been used by the defense they would have hurt, not helped, the defense. He pointed out how much emphasis the prosecutor put into telling the child witness to tell the truth. He denied the habeas writs.

In 2007, the appellate court issued a ruling that made findings in contravention of the rulings of the trial judge. At this point, they were looking back at a case more than 20 years old, and clearly intended to substitute the judgment of the trial judge with their own. They can do so, and they did. And clearly, they were disturbed by the finding that the defense never had any of the FOUR tapes, and they disagreed with the trial court over their materiality. Still, one cannot just ignore the findings of the trial judge who heard all the evidence both at trial and in the habeas proceedings. In fact, his ruling is more persuasive as to materiality and is very convincing that this person would have been convicted by a jury in any event.

And one certainly cannot ignore there was never any evidence that anything was ever intentionally withheld from the defense, and that prosecutorial misconduct was never an element in this case.

Results of a Sampling of Cases Cited in the NCIP Report

Prosecutorial Misconduct: Federal Law

Under federal law, a prosecutor commits misconduct when his or her conduct, willful or not, with knowledge or not, “infects the trial with such unfairness as to make the conviction a denial of due process.”⁷⁴

Prosecutorial Misconduct: State Law

Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law **only** if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”⁷⁵

As noted above, and elsewhere in this document, state and federal courts use a specified standard of review to determine whether prosecutorial misconduct has in fact occurred. The NCIP Report lists a significant number of cases where the above state and federal definitions of misconduct were clearly not met.

Significantly, according to the NCIP Report, in 548 of the 707 cases of alleged misconduct, state and federal magistrates found that no injustice occurred and upheld the convictions.

The analysis portion of the report purports to have identified 707 cases where courts specifically “found” that prosecutors had committed misconduct.⁷⁶ The 707 cases are listed by jurisdiction in the report under Appendix A, Harmful Cases by Jurisdiction, and Appendix B, Harmless Cases by Jurisdiction.

The NCIP analysis lists examples out of the purported 707 cases where courts had explicitly found prosecutorial misconduct. Out of the 548 cases in Appendix B that the report lists as carrying a finding of prosecutorial misconduct, 11 cases are listed as examples of harmless cases where the courts nevertheless found misconduct. The remaining 537 cases are simply listed by case citation (or newspaper name and date) and jurisdiction without further reference or analysis to specific misconduct findings.

A mere sampling of the 707 cases from various counties raises concern as to the validity of the report’s blanket assertions.

People v. Massey: No Misconduct Found

(Cited in NCIP Report, Appendix B: Harmless Cases by Jurisdiction.)

In *People v. Massey*,⁷⁷ a jury had found that the defendant was a sexually violent predator. He was committed to the custody of the California Department of Mental Health pursuant to the Sexually Violent Predators Act. On appeal, the defendant argued that the prosecution committed misconduct when, during examination, the prosecutor asked the defendant if the victims had been lying. The *Massey* court analyzed the purported misconduct under both state and federal definitions listed above. The court affirmed the judgment:

74. *Hill, supra*, at 819, quoting *Gionis, supra*, at 1214; *Espinoza, supra*, at 820.

75. *Id.*, quoting *Espinoza, supra*, at 820; *Samayoa, supra*, at 841.

76. NCIP Report at 16.

77. *People v. Massey* 2005 WL 775869.

- “[D]efendant claims these questions constitute misconduct because “[i]t is improper for [a] prosecutor to cross examine a defendant on whether a prosecution witness has lied.”
- “Although the questions were improper, it does not necessarily flow that the prosecution committed misconduct.”
- “[W]e find no prosecutorial misconduct.”

People v. Hutto: Questions on Defendant’s Custodial Status, While Improper, Were Not Misconduct Warranting Mistrial
(Cited in NCIP Report, Appendix B: Harmless Cases by Jurisdiction.)

In *People v. Hutto*,⁷⁸ Defendant Hutto appealed his jury conviction contending, among other assertions, that the prosecutor committed misconduct by eliciting information regarding his custodial status. Noting the prosecutor’s inquiry as brief and isolated, the *Hutto* court analyzed the misconduct allegation under both the state and federal definition of misconduct. With the exception of striking Hutto’s prior prison enhancement, the judgment was affirmed.

- “A prosecutor’s intemperate behavior violates the Federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to persuade either the court or the jury.”
- “[T]he [prosecutor’s] brief questions regarding Hutto’s custodial status did not create the potential for impairment of the presumption of innocence that might arise were such information *repeatedly* conveyed to the jury.”
- “To the extent Hutto claims that prosecutorial misconduct occurred in violation of federal due process, *we perceive none on this record* which would have warranted the grant of a mistrial.” [Emphasis added.]

People v. Fanady: Questions Not Characterized as Prosecutorial Misconduct
(Cited in NCIP Report, Appendix B: Harmless Cases by Jurisdiction.)

In *People v. Fanady*,⁷⁹ the defendant was convicted of crimes arising from committing sexual acts on young boys. Fanady appealed, alleging that the prosecutor committed misconduct when asking Fanady on the stand if he thought the prosecution witnesses were lying. The *Fanady* court noted:

- “[T]he court brought up an issue on its own motion. The court stated that the prosecutor may cross-examine defendant on the veracity of other witnesses, but the court thought that asking ‘were they lying’ questions is dangerous ground, noting that this was an area that had not yet been decided by the California Supreme Court. The court told the prosecutor that if she asked a question such as, ‘are you calling him a liar?’ the court would sustain an objection to that form of a question.”

78. *People v. Hutto* 2005 WL 1021253.

79. *People v. Fanady* 2007 WL 155179.

- “[A]lthough the prosecutor disobeyed the court’s order, the questions were a legitimate form of the ‘were they lying’ questions as set forth in *Chatman* and thus any error in disobeying the trial court’s order was harmless.”
- “[T]he questions asked here were allowable inquiries.”
- “There is no reason to categorically exclude all such questions.”
- “The prosecutor’s questions were improper only because they disregarded the court’s instructions.”

The *Fanaday* court affirmed the judgment. And while no prosecutor should condone the failure to obey a court order, the conduct in this case did not meet the legal definition of prosecutorial misconduct.

The NCIP Report alleges that prosecutorial misconduct “encompasses a wide range of improper tactics in criminal cases”⁸⁰ yet fails to differentiate between inadvertent (or potentially inadvertent) conduct, and deliberate, intentional conduct by a prosecutor aimed at gaining an unfair advantage over the accused. This faulty analysis runs throughout the sampling of cases from NCIP’s list of “misconduct” cases.

***People v. Alders*: Inadvertent Error**

(Cited in NCIP Report, Appendix B: Harmless Error Cases by Jurisdiction.)

In *People v. Alders*,⁸¹ Defendant Alders was convicted by a jury of driving under the influence causing bodily injury, and driving with a suspended or revoked license. Alders filed an appeal, claiming prosecutorial misconduct. The contentions of Alders’ misconduct claim were that the prosecutor made statements to the jury in his opening and closing arguments regarding Alders’ prior driving-under-the-influence convictions. Such convictions were the basis for his suspended license. The *Alders* court found no misconduct in the prosecutor’s opening statement. Later in the trial, the prosecutor and defense counsel had entered into stipulations regarding the prior convictions in an effort to avoid stating the nature of the defendant’s convictions. Following the allegedly offending statement in closing argument, the defendant’s motion for mistrial was denied, the trial court finding the error inadvertent. In the court’s words:

- “Defendant argues the prosecution should not have told the jury about defendant’s prior convictions related to driving under the influence. However, because the prosecutor did nothing wrong, there was no basis for granting the motion.”
- “Although the prosecutor [also] erred by mentioning that section 23152, subdivision (b), pertains to driving while under the influence, we conclude the trial court did not err in denying the motion for mistrial on that basis.”
- “The prosecutor apologized, claiming the comment simply ‘slipped’ out.”
- “It appears the prosecutor’s error was innocuous in the overall scheme of things.”

80. NCIP Report at 24.

81. *People v. Alders* 2001 WL 133803.

People v. Barron: Prosecutorial Error Not Characterized as Misconduct
(Cited in NCIP Report, Analysis of Cases Alleging Prosecutorial Misconduct.)

Cited among cases where courts have found prosecutorial misconduct, *People v. Barron*⁸² is an example of prosecutorial error mischaracterized by NCIP as prosecutorial misconduct. In *Barron*, the defendant appealed following a jury conviction. Barron argued that the prosecutor committed misconduct during closing argument by commenting on a police officer's lack of motive to lie, and again when commenting on the defendant's opportunity to dispose of a knife before arrest. The *Barron* court found that the comment regarding the knife was not mischaracterized and not misconduct, but did find "error" with the comment on the officer's veracity. The court utilized the above cited state and federal definitions when analyzing the accusations of prosecutorial misconduct. The court found no prejudice and affirmed the judgment:

"The prosecutor's comments on the police officers' lack of a motive to lie, and on defendant's opportunity to get rid of the knife before his arrest, did not constitute misconduct. The prosecutor's comment expressing her personal opinion supportive of Officer Campagna's veracity was error, but that error, even in combination with the error in excluding impeachment evidence aimed at Detective Rodriguez, could not have affected the outcome of the trial."

People v. Larsen: Improper Characterization of the Evidence by a Prosecutor Not Prejudicial Misconduct

(Cited in NCIP Report, Appendix B: Harmless Cases by Jurisdiction.)

Prosecutors are "'given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences... to be drawn therefrom.'"⁸³ A sampling of the cases in Appendix B brings to light *People v. Larsen*,⁸⁴ a case cited by the NCIP as one in which the court found prosecutorial misconduct. *Larsen* necessitates review as it shows how a prosecutor's drawing of an inference during argument, although deemed unsupported by the evidence adduced at trial by the appellate court, does not meet the definition of prosecutorial misconduct under the state and federal standards.

Larsen appealed after his conviction for continuous sexual abuse of a child. In closing argument, the prosecutor emphasized the victim's statement that she was positive that the defendant was her abuser. He stated, "She lived with him. She had contact with him on a daily basis, almost, when he was at the house. *She knows what he looks like, she knows what he smells like, she knows him.* She is intimately familiar with him." The court found that there was no evidentiary foundation for arguing what the defendant smelled like.

The Attorney General conceded that there was no direct evidence with respect to the defendant's body odor, but argued that the prosecutor's comment was a reasonable inference based on the fact that the victim had lived in the same residence with the defendant for years. The court rejected this argument and found the comment to be an improper characterization of the evidence.

The allegations noted above were analyzed by the court using the federal and state definitions of prosecutorial misconduct. The court affirmed the judgment:

82. *People v. Barron* 2009 WL 3923160.

83. *People v. Gamache* (2010) 48 Cal.4th 347, 371 [*People v. Stanley* (2006) 39 Cal.4th 913, 951-952], rehearing denied (Apr. 22, 2010), cert. denied (U.S. 2010) 131 S.Ct. 591.

84. *People v. Larsen* 2002 WL 31873618.

- “Appellant contends the prosecutor committed prejudicial misconduct when he asked appellant whether another witness had testified falsely and by arguing facts not in evidence. The record fails to support [appellant’s] claim of prejudicial misconduct.”
- “[W]e conclude that this brief, solitary reference to appellant’s body odor was de minimis when viewed in the context of the overwhelming evidence of appellant’s guilt.”
- “The prosecutor’s improper characterization of the evidence thus was harmless.”
- “On the issue of failure to object to prosecutorial misconduct, we conclude that the omission of such objections does not reflect ineffective assistance of counsel for the simply [sic] reason that there was no prejudicial misconduct.”

The NCIP Report goes on to categorize the 707 cases of misconduct into two types: improper witness examination and improper argument.⁸⁵ Under the “witness examination” type, the report alleges that prosecutors’ direct questioning of their own witnesses or challenging of defense witnesses through cross examination is improper when such questioning “misleads the jury or unfairly prejudices the defendant.”⁸⁶ The report noted that “While questioning resulting in the introduction of inadmissible evidence can be unintentional; this is often not the case.”⁸⁷ This blanket assertion is unsupported by data and, as demonstrated above, fails to otherwise distinguish between questioning resulting in error that is inadvertent, as opposed to intentional misconduct.

People v. Barboza: Statement Made by Prosecution Witness Not Prejudicial
(Cited in NCIP Report, Appendix B: Harmless Error Cases by Jurisdiction.)

Another case cited in Appendix B as a “Harmless Case” where misconduct was nevertheless claimed to have been found, is *People v. Barboza*.⁸⁸ In *Barboza*, the defendant appealed following a jury conviction for possession of a firearm by a felon, possession of drug paraphernalia, and resisting, obstructing, or delaying a peace officer. Two female prosecution witnesses reported that the defendant had exposed himself to them, and they ended up becoming identification witnesses in the trial for the above listed charges. The court allowed the two female witnesses to testify but ordered there should not be any mention of Barboza exposing himself to them. The court directed the prosecutor to admonish his witnesses. The prosecutor apparently did not admonish the detective he called to testify regarding identification of the defendant by the female witnesses. The prosecutor asked the detective about his contact with the female witnesses: Specifically, why he was sent to interview them. The detective replied, “I was assigned a Penal Code 314 [indecent exposure] case.” The trial court struck the answer and ordered the jury to disregard it.

The appellate court affirmed the judgment, agreeing with the trial court, which in denying Barboza’s motion for mistrial stated: “I do not find there’s been a miscarriage of justice. I do not find a reference to Penal Code Section 314 is automatically prejudicial” The appellate court concluded, “It follows from the foregoing discussion that the alleged errors, to the extent they were errors, were not prejudicial either individually or cumulatively.”

85. NCIP Report at 24.

86. *Id.*

87. *Id.* at 26.

88. *People v. Barboza* 2003 WL 21310573.

Further categorizing specific types of prosecutorial misconduct, the NCIP Report presents statistical data purporting to show that, out of the 707 cases of misconduct, 444 of them involved improper argument by the prosecutor. The report states that “there are a multitude of ways in which prosecutors use improper methods in opening or closing arguments to try to persuade the jury to convict the defendant.”⁸⁹

Again, this statement is not supported by authority or data, and no attempt is made to analyze intentional misconduct as distinct from statements made without any intention to mislead by a prosecutor during argument.

***People v. Banks*: Statement by Prosecutor Noted as Potentially Lacking Intent to Mislead Yet Categorized as Misconduct**

(Cited by NCIP Report, Appendix B: Harmless Cases by Jurisdiction.)

As noted in the example that follows, even some courts are quick to categorize inadvertent errors as “misconduct.” In *People v. Banks*,⁹⁰ the court found:

- “Defendant contends it was misconduct for the prosecutor to tell the jury he had well over a month to dispose of evidence when in fact he had been arrested the day after the offenses. We agree.”
- “It may not have been the prosecutor’s intent to mislead the jury, but her comment clearly could have had that effect, by suggesting defendant had more than a day to get rid of inculpatory evidence.”
- “In our view, had the prosecutor not made the offending comment, it is not reasonably probable defendant would have obtained a more favorable result.”

In other words, the evidence of guilt outweighed the impact of a harmless comment. The court affirmed the judgment.

***People v. Wrest*: Invoking Religious Authority**

(Although cited in the NCIP Report’s analysis, *Wrest* was not listed in either of the Appendices.)

In analyzing cases involving improper argument by prosecutors, the NCIP Report asserts, “It is misconduct for the prosecutor to invoke religious authority.”⁹¹ Citing the case of *People v. Wrest*,⁹² the report maintains that prosecution reliance on religious authority in support of the death penalty “tends to diminish the jury’s sense of responsibility for its verdict and to imply than [sic] another, higher law should be applied.”⁹³ References to religious topics by the prosecutor found in *Wrest* were the following:

- “I could talk to you about Scripture and verse from the Old Testament that supports capital punishment. But I’m not.”
- “I’m not going to talk about the fact of whether the death penalty could provide someone with the opportunity to repent at the time of death or whether a long stay in prison will allow somebody to find God or find rehabilitation.”⁹⁴

89. NCIP Report at 24.

90. *People v. Banks* 2005 WL 1303552.

91. NCIP Report at 30.

92. *People v. Wrest* (1992) 3 Cal.4th 1088.

93. *Id.* at 31, quoting *Wrest, supra*, at 1107.

94. *Wrest, supra*, at 1106.

The *Wrest* court held, “When considered in context, however, the prosecutor’s remarks were not prejudicial The same can be said of the prosecutor’s brief reference to Scripture, which was totally undeveloped in the course of the argument.”⁹⁵ The court noted that even assuming error or misconduct, each of appellant’s examples of allegedly improper argument could have been cured by a timely admonition had he objected at trial.⁹⁶

***People v. Estrada*: Aggressive Cross-Examination and Comment During Argument Is Not Prosecutorial Misconduct**

Included within the NCIP Report is another case that warrants inquiry. Cited as a case where prosecutorial misconduct was found, yet ruled harmless, *People v. Estrada*⁹⁷ sheds bright light on the convenient and limited analysis used in the methodology of the NCIP Report. In *Estrada*, the defendant was convicted of second-degree robbery. The defendant appealed, claiming several instances of prosecutorial misconduct. While on the witness stand under cross-examination, the defendant alleged that it was prosecutorial misconduct for the prosecutor to accuse her of lying to another judge and ask if she would lie when such a lie suited her purpose. The trial court had sustained an objection to these questions.

The appellate court analyzed the questions at issue under the state and federal definition of prosecutorial misconduct and found no violation, concluding that the prosecutor may have been overly aggressive but it was not “egregious, deceptive, or reprehensible conduct.” The defendant went on to allege instances of prosecutorial misconduct in the prosecutor’s aggressive questioning of her, along with an accusation of misconduct when the prosecutor accused her of “stalling” in order to formulate an answer to the prosecutor’s question. While the court did feel the prosecutor “went too far” with the last comment, the misconduct allegations did not meet the requisite definitions, and the judgment was affirmed. Excerpts from the court ruling follow:

- “We find neither a federal nor state violation by the above cross examination. While the prosecutor may have been overly aggressive, he was attempting to show that defendant was willing to lie to a court (and thus to a jury) in order to achieve a benefit.”
- “We must assume that any witness being aggressively cross examined is going to feel a measure of derision. That does not necessarily translate into impropriety.”
- “At one point, defendant asked the prosecutor to repeat a question. He responded by accusing her of stalling so she could formulate an answer. He made a comment about how defendant might lie to the judge during sentencing but should not lie to the prosecutor. The trial court sustained a defense objection. The prosecutor went too far here, essentially arguing the case by phrasing his comments as questions.”
- “In spite of this, we find no egregious, deceptive, or reprehensible conduct. In aggressively cross-examining defendant, the prosecutor was trying to call into question her claim of how she reacted to the claimed rape. This portion of the cross-examination consumed but a moment in an ongoing give and take between the prosecutor and defendant. The prosecutor was not trying to deceive the jury. Instead, he was challenging defendant to try to explain her conduct.”

95. *Id.* at 1107.

96. *Id.* at 1105.

97. *People v. Estrada* 2002 WL 1883373.

A recurring theme found in many of the cases listed in the NCIP Report is defense counsel's failure to object to questions or argument made by the prosecutor.

- "We find no misconduct and no impact on the outcome of the trial."
- "Finally, defendant claims misconduct in the following comments by the prosecutor during his jury argument: 'We've heard evidence about all kinds of things including a rape but the only issue is whether a robbery occurs and whether she did it, and if he's as confident as he says and wants you to believe about our failure of proof that there was a robbery and that his client did it, he would have stood up and said there was no robbery, there's no evidence of it, good night, and sit down, but he spends 45 minutes telling you why there is no robbery and why the People have failed to prove there was a robbery.'"
- "[T]he prosecutor's comment is within the bounds of acceptability."

Curable Error

A recurring theme found in many of the cases listed in the NCIP Report is defense counsel's failure to object to questions or argument made by the prosecutor. The *Wrest* case above is a clear example of a court's assertion that an error can be cured by a timely admonition, with the court noting, "No objection was made to any of these instances at trial; appellant fails to demonstrate that, assuming misconduct, an admonition would have been an ineffective remedy."⁹⁸

In *People v. Cooper* (cited in the NCIP Report, Appendix B as a harmless case), the court noted,

We have no quarrel with defendant's basic proposition, namely, that misconduct occurs when a prosecutor misstates the law. [Citation.] To the extent that the prosecutor's comments implied that the jury could not consider why logical witnesses were not called, misconduct occurred. [Citation.] However, the court's comments to the jury cured any error.⁹⁹

People v. Ray: Factually Incorrect Error Waived by Defense Counsel's Failure to Object
(Cited in NCIP Report, Appendix B: Harmless Cases by Jurisdiction.)

- "[T]he prosecutor incorrectly stated that defense counsel fabricated the testimony."
- "[Appellant] Ray waived his claim concerning this misconduct by failing to object and seek an appropriate admonition in the trial court. [Citation.] The trial court could have informed the jury that the prosecutor's attack on defense counsel was factually incorrect and improper."¹⁰⁰

People v. McCall: Error Cured by Timely Objection and Admonishment
(Cited in NCIP Report, Appendix B: Harmless Cases by Jurisdiction.)

- "Defendant contends that the prosecutor committed misconduct when she mentioned the term 'homicide' on two occasions when she was questioning witnesses."¹⁰¹

98. *Wrest, supra*, at 1108.

99. *People v. Cooper* 2004 WL 407156.

100. *People v. Ray* 2002 WL 64543.

101. *People v. McCall* 2001 WL 1382746.

- “[D]uring a break in the proceedings, defense counsel noted the court’s pretrial admonition not to mention the term ‘homicide.’ The trial court told the prosecutor, ‘I’m assuming, Ms. Houser, that you forgot I ordered you not to do that.’ The prosecutor answered, ‘Yes.’”¹⁰²
- “The trial court admonished the prosecutor and instructed the jury that statements made by the attorneys during trial were not evidence. In light of the entire record, defendant was not deprived of a fair trial and, therefore, reversal is not required.”¹⁰³

People v. Broyles: No Prejudicial Prosecutorial Misconduct Found; No Objection by Defense Counsel

(Cited in NCIP Report, Appendix B: Harmless Cases by Jurisdiction.)

- “Defendant contends that the prosecutor committed prejudicial misconduct by stating ‘facts’ about defendant’s connection with Missouri that were not part of the evidence. He contends that further misconduct occurred when, in final argument, ‘the prosecutor relied on the definition of circumstantial evidence provided in CALJIC No. 2.01, by distinguishing between an unreasonable and reasonable interpretation of the evidence.’ And recognizing that no objection was interposed to either of these assignments of misconduct, defendant alternatively contends that trial counsel rendered constitutionally ineffective assistance by failing to object. We find no merit in defendant’s contentions.”¹⁰⁴
- “Had defense counsel objected and requested a curative admonition, such admonition would have [e]nsured that the evidence would be disregarded.”¹⁰⁵

THE NCIP REPORT’S USE OF THE TERM “PROSECUTORIAL MISCONDUCT” IS IMPROPER AND MISLEADING

As we have stated, a major flaw in the NCIP Report, and its 2010 addendum, is the misuse of the term “prosecutorial misconduct.” Like many phrases in the field of law, “prosecutorial misconduct” has a specific legal meaning that does not directly correlate with the term as understood by the general public. The report does not restrict the use of the term “prosecutorial misconduct” to its true legal definition. As a result, the report is able to grossly exaggerate the frequency of misconduct that occurs in criminal prosecutions in California, and portray the State Bar and state prosecutor’s offices as accepting of bad behavior. It can only be assumed that the Innocence Project, funded originally to exonerate the factually innocent by providing DNA testing where appropriate, attempts to ensure its continued existence and funding by creating the misperception that wrongful conduct by prosecutors is rampant.

102. *Id.*

103. *Id.*

104. *People v. Broyles* 2003 WL 1984557.

105. *Id.*

The NCIP Report erroneously claims that courts made “specific findings of misconduct”¹⁰⁶ in 707 criminal cases, then it divides those cases into two distinct categories. The first category, “Harmful Error” is represented to include cases where “misconduct was found and where the finding resulted in courts setting aside convictions or sentences, declaring mistrials, or barring evidence.”¹⁰⁷ The second category, “Harmless Error,” is represented to include cases where misconduct was found, but the court upheld the conviction because the error did not interfere with the fundamental fairness of the trial. These representations are false and misleading.

In many cases cited under both categories, the court never made findings of misconduct because, while there may have been errors, there was no misconduct. For example, in three of the nine San Diego County cases cited in the “Harmful Error” category, the court never found misconduct by the prosecutor.¹⁰⁸ While the convictions were reversed, in one of the cases the reversal was not based upon prosecutorial misconduct but rather on the failure of the defense attorney to object to the prosecutor’s error in misstating the law.¹⁰⁹ In that case, had there been a timely objection, the error could have been cured by the court. In another case, although the court found statutory error as a result of the prosecutor’s conduct before the grand jury, there was neither a finding of misconduct nor was a conviction or sentence set aside, a mistrial declared, or evidence barred.¹¹⁰ In the third case, the court referred to the prosecutor’s conduct as “alleged” conduct and never made a finding of misconduct or error. There, the facts admitted by the defense demonstrated the prosecutor had, in fact, disclosed the information the defense attorney alleged had been withheld.

The NCIP Report also wrongfully alleged that there were findings of misconduct in *Jacques*, a case still under review at the time the report was published, including *Jacques* within the “Harmful Error” category of cases.¹¹¹ In *Jacques*, there was debate about whether the prosecutor had turned inculpatory evidence over to the defense. Because the defense attorney had commented upon the absence of such evidence in the jury selection process, the court decided to bar the evidence in the prosecutor’s case in chief to ensure the defendant a fair trial, without regard to whether or not it had been previously disclosed.¹¹² In response to the San Diego County District Attorney’s inquiry about the propriety of including *Jacques*, author Maurice Possley responded in a letter,

We are not bound to include only those cases where the specific words “prosecutorial misconduct” are used but rather rely on judicial decision to impose sanctions ranging from reversal of conviction or sentence to granting of a new trial, to the barring [sic] evidence.

Such a response indicates a failure to recognize that courts use their discretion to bar evidence and grant new trials for many reasons unrelated to prosecutorial misconduct.

The NCIP Report’s “Harmless Error” category of misconduct cases, by definition, can only include cases involving deliberate misconduct. This is because unintentional errors support

106. NCIP Report at 10.

107. NCIP Report at 13.

108. NCIP Report, Appendix A.

109. *People v. Anzalone* (2005) 29 Cal.Rptr.3d 689 [section relating to allegation of misconduct subsequently depublished].

110. *People v. Berardi* (2007) 149 Cal.App.4th 476.

111. In the initial publication, *Jacques* was listed in the Harmless Error category of cases in Appendix B at 110; *Jacques* 2002 WL 31862703.

112. This case was ultimately removed from the online version of the NCIP Report.

a finding of misconduct *only* if the errors are “harmful.” Admittedly in the list of 28 cases from San Diego County in the “Harmless Error” category, there are two that have a finding that the prosecutor deliberately misled the jury, though no prejudice was found.¹¹³ Only one of them was a published case.¹¹⁴ In 23 of the cases, defense allegations of misconduct were rejected, with courts in some of the cases explicitly stating that there was “no misconduct.” If mistakes were made, the court rightly referred to them as “error,” not “misconduct.” Many of the cases even set forth the true definition of misconduct that the NCIP Report authors clearly chose to ignore.

The NCIP premise that a systemic problem exists in the criminal justice system with respect to prosecutorial ethics is not supported by the facts. The NCIP Report was only able to make such arguments by disregarding the legal definition of prosecutorial misconduct and imposing its own broader definitions, even then using strained interpretations of them. It was not enough to identify cases where misconduct was actually found by the court during the defined time period—because prosecutorial misconduct is exceedingly rare and, where it does exist, is dealt with effectively by the courts, the state bar, and prosecutors’ Offices throughout the state.

RESPONSE TO THE NCIP REPORT’S ADDITIONAL RECOMMENDATIONS

The NCIP Report self-proclaims its “in-depth analysis of prosecutorial accountability in California has proven the system is flawed[,]”¹¹⁵ and makes several recommendations it purports will be a first step to eliminating the problem. The report’s failure to establish meaningful standards for the data it gathered, the outright inaccuracies in properly collecting the data under these standards, and the misleading and biased presentations of the data beg the question whether any conclusion of the report warrants discussion. The report fails to recognize that the current policies were not developed in a vacuum or on a whim. Rather, the current policies developed over centuries out of necessity as reasoned responses to societal problems and compelling public interests. The NCIP Report appears to give no consideration to the reasons these policies came about or the cost to society in changing them.

Ethics Training

The report recommends development of a training course that specifically addresses ethical issues that commonly arise in criminal cases. While the report recommends additional training, it does not consider what types of training are currently being conducted. Instead, it simply recommends a training course without assessing actual training needs or the costs to counties, municipalities, and District Attorney Offices of providing the training.

District Attorneys’ Office Policies

The NCIP Report recommends District Attorney Offices adopt internal policies to track and investigate complaints of prosecutorial misconduct, and policies that do not tolerate misconduct. Again, the report fails to support its recommendation with data identifying a shortcoming. The report never examined the policies that are in place.

This recommendation appears to be a response to the inaccurate collection of data that mischaracterizes any error by a prosecutor as prosecutorial misconduct. As a result of the

113. *Gaylord* 2003 WL 21403797; *Roybal* (1998) 19 Cal.4th 481.

114. *Roybal*, *supra*.

115. NCIP Report at 78.

The report’s authors incorrectly identify a problem that does not exist. Then, they assume no policies are in place to address the problem they mistakenly identified because they see no action taking place to address the nonexistent problem.

What the review of the cases listed in the NCIP Report actually shows is that, despite the thousands of split-second decisions made daily, very few errors are made, and even fewer that affect the fairness of a defendant's trial.

mischaracterization of this data, the report's authors incorrectly identify a problem that does not exist. Then, they assume no policies are in place to address the problem they mistakenly identified because they see no action taking place to address the nonexistent problem.

On the rare occasions when prosecutorial misconduct does occur, District Attorney Offices take action to address the problems, as does the State Bar of California when appropriate.

Expansion of the Reporting Requirements

The NCIP Report recommends expanding the courts' reporting requirement to report to the State Bar any case of "egregious" misconduct, regardless of whether the case resulted in reversal. Also, the report alleges that courts are not meeting the existing reporting requirements and argues for greater transparency in the reporting of misconduct claiming, "[T]hat it is virtually impossible to assess judicial compliance with the obligation to report misconduct to the State Bar and to notify attorneys found to have committed misconduct."¹¹⁶ If the NCIP Report is unable to assess judicial compliance, it obviously raises questions as to the accuracy of its conclusion that courts are underreporting cases of prosecutorial misconduct. This recommendation is, once again, likely a response to the report's flawed categorizing of data, which causes the NCIP Report to overstate the number of cases of reportable prosecutorial misconduct.

Throughout California, every court day, prosecutors make thousands of split-second decisions on whether to object, on what grounds to object, what question to ask next, how to respond to a defense attorney's argument, and so forth. Errors will occur. What the review of the cases listed in the NCIP Report actually shows is that, despite the thousands of split-second decisions made daily, very few errors are made, and even fewer that affect the fairness of a defendant's trial.

Additionally, reporting every mistake a prosecutor makes, or even the "egregious" misconduct the suggested rule change incorporates, would do more harm than good. The "egregious" standard is vague and, without more specificity, almost meaningless. The adversarial system employed in courts as part of our justice system is designed both to protect a defendant's rights and to seek the truth. Sometimes defense counsel make claims of misconduct against a prosecutor during the course of a trial; such accusations are often designed to quell a prosecutor's zeal in the courtroom. Yet, as the California Supreme Court has noted, "[z]ealous advocacy in pursuit of convictions forms an essential part of the prosecutor's proper duties"¹¹⁷

The public has a right to expect the prosecutor to meet and overcome opposing counsel's attacks in the courtroom in order to seek justice. The proposed rule would make these groundless attacks more commonplace and more burdensome for the prosecutor. Additionally, it would require courts to continually adjudicate matters not related to the case before the court, both distracting the court and slowing the proceedings. Moreover, increasing the reporting requirements may very well hinder the important work of the State Bar. As the sampling of the cases cited shows, the vast majority do not meet the report's claimed standard of "using deceptive and unfair tactics to secure convictions." However, all reports require investigation. If the vast number of reports do not involve the reprehensible conduct of which the authors purport to complain, then legitimate investigations will be delayed as frivolous complaints are investigated, and resources will be spread too thin to conduct proper investigations.

116. NCIP Report at 80.

117. *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 747, quoting from *People v. Vasquez* (2006) 39 Cal.4th 47, 65.

Inclusion of the Prosecutors' Names in Opinions

The NCIP Report claims "[i]n some cases, [prosecutors] may have no idea that a court ruled they committed misconduct[.]"¹¹⁸ and contends that including names in opinions will help alleviate this problem. Ironically, the citation the report uses to support this contention refers to a conversation with a prosecutor about a case where the court did *not* find prosecutorial misconduct. The report simply does not identify any logical basis for its conclusion.

Regardless, the report fails to identify how its suggestion of including names in opinions would solve the problem it says exists. The real objective of this recommendation seems to be the same as noted above, to quell the zeal of the prosecutor in the courtroom with the threat of public obliquity from persons unfamiliar with the case. As noted above, given the adversarial nature of the American court system, the public has a right to have a zealous advocate acting on its behalf in the courtroom.

Adoption of ABA Model Rule 3.8

The NCIP Report recommends adoption of the American Bar Association's Model Rule 3.8 in its entirety.¹¹⁹ This rule is not needed. Rule 3.8 encompasses much more than discussed in the report. The reasons espoused in the report for adopting the rule were to make it a

118. NCIP Report at 23.

119. ABA Model Rule 3.8 reads in its entirety:

Special Responsibilities Of A Prosecutor - The prosecutor in a criminal case shall:

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

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

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

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

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

(1) the information sought is not protected from disclosure by any applicable privilege;

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

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

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

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

(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.

disciplinary offense to (1) prosecute a charge without probable cause, (2) seek to have an unrepresented defendant waive rights, (3) subpoena a lawyer in a grand jury proceeding, or (4) make public comments that might harm a defendant and (5) to mandate that prosecutors disclose all exculpatory or mitigating evidence and (6) make reasonable efforts to ensure defendants know of their right to counsel. This far exceeds the scope of the NCIP Report and is better discussed elsewhere.

Prosecutors in California are already required to disclose all exculpatory and mitigating evidence. As discussed, this is mandated by the United States Supreme Court decision in *Brady v. Maryland*.¹²⁰ California Penal Code section 1054.1 requires this as well. Adoption of ABA Model 3.8 adds no additional requirements.

Model Rule 3.8 precludes a prosecutor from subpoenaing an attorney in a grand jury or other criminal proceeding to present evidence about a past or present client, unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege, the evidence sought is essential to the successful completion of an ongoing investigation or prosecution, and there is no other feasible alternative to obtain the information. The NCIP Report does not even attempt to provide evidence or otherwise reach a conclusion that this is a problem in California. Moreover, nothing else indicates that this is a problem in California. As such, this provides no basis for the adoption of the rule.

CONCLUSION

As confirmed by the court in *People v. Hill*:

A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] As the United States Supreme Court has explained, the prosecutor represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹²¹

Other attorneys must act as zealous advocates for their clients, and put their clients’ interests first, even when such interests are at odds with the best interests of society. The prosecutor, however, has both the opportunity and the obligation to seek justice every time he or she walks into a courtroom.

As the Peoples’ advocate seeking justice, the prosecutor must remain independent.

That independence allows him or her to fearlessly prosecute criminals, regardless of the criminals’ stature in society. The independence of the prosecutor provides for equal justice for the rich and the poor, for the powerful and the weak, for the influential and the voiceless. The independence of the prosecutor is critical to equal justice under law.

Historically prosecutors have come under attack by various special interest groups from time to time. The reports issued by such groups are generally premised on the assumption that prosecutorial misconduct goes undetected and unreported, and prosecutors are undisciplined. This assumption allows the groups to reach their desired conclusions and ignore data that says otherwise.

120. *Brady v. Maryland* (1963) 373 U.S. 83.

121. *Hill, supra*, at 820, quoting *Espinoza, supra*, at 819–820.

The actual data shows that because of the unique situation of the prosecutor, including the ability to strive for justice, the same factors that lead to a vast majority of attorney discipline are not present with prosecutors.

The NCIP Report in particular not only ignores the data that refutes the authors' desired claims, it uses a faulty collection of incomplete and imprecise data to reach conclusions that promote its own agenda. The report refers to the legal definition of prosecutorial misconduct, but then ignores this standard and the court's actual rulings when collecting its data.

The report claims that it compiled only cases where courts explicitly found prosecutorial misconduct. As we have shown, a mere sampling of the cases relied upon by the NCIP Report proves this is not the case.

As a result of its flawed data collection, the NCIP not only assumes a problem that does not exist, it makes recommendations on the basis of its assumptions and flawed data. The recommendations give no consideration to the historical background underlying the necessity of the current policies.

Any proper discussion of policy changes such as eliminating immunity must discuss the reasons for the current policy. The NCIP Report does not. Its recommendations, if implemented, would create unequal justice without any corresponding benefits.

Prosecutors are offended by this attack on their integrity, but are more concerned that the recommendations of the NCIP Report would intertwine the Innocence Project's agenda with the prosecutor's obligation to seek equal justice for all people. The public has a right to expect prosecutors to go into the competitive court environment every day, diligently and fearlessly seeking justice for all. The recommended actions in the NCIP Report would make this impossible—and possibly upset the scales of justice.

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The following is derived from the CDAA publication *Professionalism: A Sourcebook of Ethics and Civil Liability Principles for Prosecutors* (2016), Chapter X: "Defending and Making Accusations of Misconduct," by Bryn Kirvin and Gary W. Schons. Some material was borrowed from CDAA articles written by David Sherman: "Defining Prosecutorial Misconduct," *Prosecutor's Brief* (Spring 2011); "Standing Orders' Prevent Prejudice to the People," *Prosecutor's Brief* (Spring 2011); "Prosecutorial Misconduct: What to Do If You Are Wrongly Accused," *Did You Know* (July 2002).

Defending an Allegation of Misconduct

Criminal defense attorneys routinely accuse prosecutors of misconduct. Allegations are sometimes made presumptuously without any analysis, with the purpose of intimidating and distracting the prosecutor and even the judge and jury, or for the purpose of delay. In the heat of litigation, the defense can catch a prosecutor in an act of momentary negligence, a lapse in judgment, or just simply making a mistake—yes, prosecutors are human and fallible.

In any case, allegations of prosecutorial misconduct interrupt proceedings and waste a great deal of time. And the vast majority of the allegations prove false. But any allegation of prosecutorial misconduct, bona fide or not, is serious and must be handled in a professional and thorough manner. Prosecutors who fail to take these types of allegations seriously and rigorously defend them, risk having the bench expect and tolerate, even the most frivolous allegations. Even worse, if a prosecutor simply ignores the allegation, a judge is left to wonder if it bears a kernel of truth.

When confronted with a cutthroat defense attorney, anticipating allegations might be an effective, proactive approach and should include a motion in limine requesting the court to make standing orders that no allegation of prosecutorial misconduct or discovery violation be made in front of the jury. Likewise, no inflammatory speaking objections should be made.

Never Allow Accusations of Misconduct to Go Unanswered

Almost every allegation of prosecutorial misconduct requires a response because such an allegation is very serious and can have severe consequences for the case and the prosecutor. Prosecutors should deny false accusations on the record even if no special hearing is requested. If discussions of the alleged prosecutorial misconduct occur in chambers, the prosecutor should ensure that a court reporter makes a record then and there or later in the courtroom. The response can be minimal—but a prosecutor should make certain the record does not contain any implied admissions due to a silent record. And even where the court shuts down a frivolous accusation, a supervisor and/or an ethics advisor should be informed. A prosecutor's office may decide to make a State

Bar complaint about repeated frivolous accusations made by an attorney.

Allegations of Misconduct Require a Factual Basis

No allegation of misconduct can prevail without factual specificity. Similarly, knowledge of the accusation and the available facts is essential to successfully defeating an allegation of misconduct. Thus, it is imperative to require the defense attorney to specify the accusation and its factual basis when the accusation is first made.

A prosecutor must require defense counsel to specify the allegation(s), the alleged factual basis, the remedy sought, and the court's authority to do anything. A prosecutor may then choose to respond at that time, ask for reasonable time to respond, or make the calculated decision to make little or no response at all. A prosecutor must be certain he or she understands the actual accusation and the alleged factual support—if there is any—in order to make a clean record and to respond appropriately. It also forces defense counsel to fully articulate what sometimes can be an ill-conceived theory based on a knee-jerk reaction.

Duty of Candor

As previously stated, an accusation of misconduct must be supported by facts. Absent proof that an attorney violated the law, a rule of professional conduct, or a specific court order, making an accusation of misconduct is unprofessional in and of itself because it violates the duty of candor owed to the court under Business and Professions Code section 6068(d) and rule 5-200 of the Rules of Professional Conduct. Intent to deceive the court is a misdemeanor. (Bus. & Prof. Code § 6128(a).) Any act of dishonesty constitutes cause for disbarment or suspension. (Bus. & Prof. Code § 6106.)

Representation

Prosecutors should not represent themselves unless they have carefully considered the allegation(s), are familiar with the applicable law, have gathered the facts they need to defend themselves, are satisfied that the accusation is factually

baseless and/or without legal merit, and understand the possible consequences. If not, prosecutors run the risk of creating bigger problems.

While prosecutors accused of misconduct will understandably be the most familiar with the facts that form the basis of the allegation, prosecutors do not necessarily make their own best advocates. Often times the allegations are made in the heat of battle and after they have already locked horns with the defense and thus, are apt to overreact, which may leave the court with the impression that the prosecutor is no more professional than the defense attorney. For prosecutors who do not want someone else advocating their case for them, another practical reason to enlist the help of someone else is that it allows prosecutors to concentrate on proving their case instead of being distracted by defending an allegation of misconduct.

Furthermore, prosecutors should avoid testifying under any circumstances, especially at an evidentiary hearing involving an accusation of misconduct. No prosecutor should willingly subject himself or herself to cross-examination by the defense and, thereby, put the court in the position of having to make a credibility call between the prosecutor and the defense attorney. Despite how good the prosecutor thinks he or she will do on the witness stand, it is never a good idea.

Prosecutors should consider drafting a declaration if it is absolutely necessary to establish a particular fact that only the prosecutor can supply from his or her personal knowledge and request that the defense stipulate that it be entered into the record as evidence. If the prosecutor's testimony is absolutely necessary, the prosecutor and another attorney handling the evidentiary hearing should thoroughly prepare for the testimony in advance, if possible, just as any other witness in the case.

Suggested Responses

Allegations of misconduct can be made in writing or in court at any type of hearing and especially when the prosecutor is caught off guard. In many instances, the allegation can be handled immediately but there are others that require time for the prosecutor to gather the facts needed to appropriately defend the allegation. Any response to an allegation of misconduct should be adapted to the prosecutor's style and comfort level.

Allegations Made in Court

A standard response can be kept in a trial notebook for easy reference in the heat of battle in court. An initial response can begin with the following: *Your Honor, an allegation of*

prosecutorial misconduct has been made against (DDA/DAI/Office). In order to properly respond, I need to know what the specific allegation(s) is/are and the factual basis of the alleged misconduct. Additionally, I ask for a reasonable time period in which to respond.

Depending on the circumstances, a prosecutor may want to take a more offensive approach to defending him— or herself and add the following: *If no basis for the allegation(s) can be given, I ask for the allegation to be stricken and defense counsel reminded of his/her duty of candor under rule 5-200(A) and (B) of the Rules of Professional Conduct and Business and Professions Code section 6068(d), which state that a member shall employ such means only as are consistent with the truth and shall not seek to mislead the judge or jury by artifice or false statement of fact or law.*

If the court is seriously considering the allegation and/or wants to litigate the allegation, the prosecutor should inform his or her supervisor and/or ethics advisor at the first possible opportunity and collect the following: (1) transcripts, minutes, and orders from relevant hearings; (2) any other relevant information from the case file; and (3) the prosecutor's case progress notes that may document the relevant events.

Determine who will litigate the allegation and how it should be approached.

Allegations in Noticed Motions

A prosecutor should take an approach similar to the preceding example in responding to noticed motions that involve allegations of misconduct and should respond to them in writing. While many can be totally conclusory and without any factual basis requiring a prosecutor to simply point out that deficiency, others may be the entire basis of the motion and include false, factual allegations and improper legal conclusions that require more attention.

If a prosecutor receives a motion containing a claim of misconduct, the prosecutor should inform his or her supervisor and ethics advisor, and determine whether the prosecutor or another attorney should respond to the motion. Part of that determination hinges on whether the prosecutor will be a necessary witness. The prosecutor should also collect the following: (1) transcripts, minutes, and orders from relevant hearings; (2) a copy of the motion; (3) any other relevant information; and (4) document the relevant events if the prosecutor has not already done so.

[P]rosecutors should avoid testifying under any circumstances, especially at an evidentiary hearing involving an accusation of misconduct. No prosecutor should willingly subject himself or herself to cross-examination by the defense and, thereby, put the court in the position of having to make a credibility call between the prosecutor and the defense attorney. Despite how good the prosecutor thinks he or she will do on the witness stand, it is never a good idea.

Special Considerations When Defending an Allegation of Prosecutorial Misconduct

Knowing What Is and Is Not Misconduct and the Standard of Review

When responding to an allegation of prosecutorial misconduct, be familiar with the legal standard involved and the standard of review on appeal.

Also, simply making a good-faith argument will not prevail since prosecutorial misconduct does not require an act of bad faith—it can be the product of an innocent mistake and become misconduct if it has prejudiced the defendant in some way. Thus, in addition to explaining why there was no misconduct, a prosecutor should explain why the defendant has suffered no prejudice from what occurred. (*People v. Zapien* (1993) 4 Cal.4th 929, 967; *People v. Williams* (1997) 16 Cal.4th 153, 252 [explained by *People v. Ervine* (2009) 47 Cal.4th 745, 768 (“The people must prove facts, by a preponderance of the evidence, establishing that the destruction of evidence did not prejudice the defendant.”)]).

Prosecutors should also review copies of defense appellate briefs after having been accused of misconduct at the trial level to determine whether prosecutorial misconduct is claimed on appeal. If so, the prosecutor should contact the deputy attorney general handling the case—the prosecutor’s career is at stake since under Business and Professions Code section 6068(a)(7), an attorney must self-report to the State Bar upon the reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

Asking the Court to Make a Finding of No Misconduct

Depending on the circumstances and after the issues are litigated, a prosecutor may want to ask the court to make a

finding on the record that the prosecutor’s conduct was proper or that the prosecutor did not engage in misconduct. However, this may not be advisable if the prosecutor made a mistake, was negligent, or did not have entirely “clean hands,” which caused the court to become aggravated with the prosecutor—the request could backfire and the prosecutor would be stuck with what the court states on the record. Also, if no evidentiary hearing was held, it is difficult to ask the court to make a factual finding of any kind since there was no evidence presented. The central questions should be whether the record is clear enough without such a finding and the prosecutor is certain that the court’s response would be favorable.

Making a Counter Allegation

Under some circumstances, taking an aggressive approach may be appropriate in defending an allegation of misconduct, particularly if the defense attorney was malicious in making the accusation or is a repeat offender of frivolous accusations. A prosecutor falsely accused of misconduct should consider using an “offensive strategy” by carefully stating the baselessness of each allegation and may even seek sanctions for obvious violations of the duty of candor. In that event, a prosecutor may decide to do any or all of the following:

- Highlight the facts that demonstrate the defense attorney knew the accusations were false, or acted with reckless disregard of the truth, when he or she made them. If the facts prove that is the case, a prosecutor might ask the court to find from the evidence that the defense attorney knew the allegations were false or that he or she had no basis in fact to allege prosecutorial misconduct thereby violating: (1) the duty to be candid and never to mislead a judge as provided in Business and Professions Code section 6068(d) and rule 5-200 of the Rules of Professional Conduct; (2) the duty to respect the court in Business and Professions Code section 6068(b); and (3) the duty to maintain just causes in Business and Professions Code section 6068(c).

Even if the defense attorney’s misconduct was not willful and dishonest, gross carelessness and negligence constitute a violation of an attorney’s oath to faithfully discharge his or her duties, and such conduct involves moral turpitude. (*Doyle v. The State Bar of California* (1976) 15 Cal.3d 973, 978; *Jackson v. The State Bar of California* (1979) 23 Cal.3d 509, 513.)

A judicial finding that a frivolous or bad faith motion was made should also include an order that the unethical attorney report himself or herself to the State Bar as

required by Business and Professions Code section 6068(o)(3). The requirement is independent of the judicial reporting requirement in section 6086.7(a). A report submitted by the court pursuant to the latter section does not relieve the defense attorney of the obligation to self-report under section 6068(o)(3).

Business and Professions Code section 6086.7(a)(3) states that the court shall notify the State Bar whenever it imposes “any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).”

- Consider a mild, instructive reference to Business and Professions Code section 6128 if the nature of defense counsel’s misrepresentations is particularly deceitful or ethically reprehensible. Point out that any deceitful or collusive act by an attorney done “with intent to deceive the court or any party” is a misdemeanor. (Bus. & Prof. Code § 6128(a).) An attorney who “[w]illfully delays his client’s suit with a view to his own gain” is also guilty of a misdemeanor. (*Id.*)
- Make such educational statements carefully to avoid any implied threat unless the evidence required to prove a violation of section 6128 is overwhelming. A prosecutor’s inappropriate “threat” to prosecute can be misconduct by intimidation.
- Consider Business and Professions Code section 6106, which provides that the commission of any act involving moral turpitude, dishonesty, or corruption, whether the act is committed as an attorney or otherwise, is cause for disbarment or suspension.
- Consider Business and Professions Code section 6043.5 whenever a complaint to the State Bar is made or contemplated. It provides that every person who makes a false report to the State Bar that an attorney has engaged in professional misconduct, or who, knowing the report to be false and malicious, causes such a complaint to be filed with the State Bar is guilty of a misdemeanor.
- Ask the court to sanction the defense attorney for deceitful conduct and for breach of the statutory and ethical duties that were violated. A sanction of \$1,000

or more requires the defense attorney to report his or her misconduct to the State Bar as required by section 6068(o)(3). However, the court must impose this as a “sanction” because it is the sanction for misconduct that must be reported under that section.

- Suggest that the court issue an Order to Show Cause regarding the defense attorney’s contemptuous conduct. Remember that, in this context, the contempt power rests solely with the court. An attorney may not “move” that another attorney be cited for contempt.
- Ask the court to order copies of the reporter’s transcript and the clerk’s record of the judicial findings be transmitted forthwith to the State Bar. Then ask the court to order the defense attorney to file a copy of his or her self-reporting letter under section 6068(o)(3) in the court file on or before a specific date. If the attorney fails to do so, another violation of a statutory duty as well as a court order has occurred.

Helping the Judge Regain Control of the Courtroom

Some defense attorneys careen into a tirade of false accusations and other unprofessional conduct also aimed at the judge, which can spin the proceedings out of control if the judge gets embroiled in the situation. In such a case, it might be helpful—but at the risk of further offending the judge—to refer to Penal Code section 1044, reminding the court that it has the duty to control the proceedings in front of him or her: “It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.” (Pen. Code § 1044; see also *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387.)

The Judicial Canons also govern the court’s obligations to act when attorneys behave unprofessionally or unethically. For instance, whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge “shall” take appropriate corrective action. (Code Jud. Ethics, canon 3D(2).)

The California Attorney Guidelines of Civility and Professionalism (“Civility Guidelines” section 14), adopted by the State Bar in 2007 requires an attorney always “to act respectfully and with dignity in court ... and to maintain respect for and confidence in a judicial office by displaying courtesy, dignity and respect toward the court and courtroom personnel.”



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