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***Policy Directive***  
***Protocol for Allegations of Prosecutorial Misconduct***

**Discussion**

It is the policy of the Office of District Attorney to never allow a false accusation of Prosecutorial Misconduct ("PM") to go unanswered. Prosecutors should always deny a false allegation on the record even if the initial accusation was made *in-camera*. Even frivolous, perfunctory, or repetitive defense claims of PM should be answered on the record.

As always, we are guided by the United States Supreme Court's articulation of a prosecutor's professional responsibility:

***"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...He/She may prosecute with earnestness and vigor—indeed he/she should do so. But, while he/she may strike hard blows, he/she is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."*** (*Berger v. United States* (1935) 295 US 78, 88.)

**Definition: Prosecutorial Misconduct**

"Prosecutorial misconduct" is a broad term used to describe serious incidents of professional misconduct as well as relatively insignificant, well-intentioned, or even innocent or negligent acts. While PM may be alleged in numerous contexts, the oral allegation of PM is frequently alleged during trial on the following bases:

- Comment on Defendant's failure to testify ("*Griffin* error");
- Comment on Defendant's silence after *Miranda* admonishment ("*Doyle* error");
- Comment on Defendant's refusal to participate in police interview;
- Stating personal opinions;
- Vouching for the credibility of prosecution witnesses;
- Intentional use of false testimony;
- Reference to facts not in record;
- Eliciting, or attempting to elicit, inadmissible evidence;
- Failure to correct false testimony of a prosecution witness;
- Coercion of defense witnesses or undue interference in a defense witness' decision to testify;
- Arguing that defense counsel had an "obligation" to present evidence;
- Misstatement of the law or evidence;
- *Brady* or Discovery Violation per PC 1054.1;
- Post-verdict revelation to jurors of evidence ruled inadmissible by the Court.

This list of examples of PM is not exhaustive. (See, *California Criminal Law Procedure and Practice*, 2012 § 2.45, for more complete list.)

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### Protocol

#### Oral Allegation of PM

Commonly, accusations of PM are made during the People's closing argument referencing "misconduct" or "PM." Such objections may be strategic efforts calculated to interrupt the flow of argument. The Court often summarily overrules such objections without further prosecution argument and permits argument to continue. In the event the Court does *not* immediately overrule the defense objection, use the protocol below:

1. REQUEST AN IMMEDIATE FINDING THAT THE PM ACCUSATION IS MERITLESS: Upon the oral allegation of PM, request the Court find no PM committed and request that such findings are recorded on the record and in the minutes.
  - a. COURT IMMEDIATELY FINDS PM OBJECTION MERITLESS: Upon the Court finding the claim of PM is meritless, order the transcript and route to the Chief of the Trial Integrity Unit (TIU) for banking and possible ethics referral of the defense attorney.
  - b. NO FURTHER ACTION NEEDED. Discontinue protocol upon a finding that the accusation is meritless. Do not proceed to Step '2' below.
2. REQUEST FORMAL HEARING: In the absence of an immediate judicial finding absolving the ADA of all PM, request the Court conduct a formal hearing on the record using the following script:

***"Your Honor, an allegation of prosecutorial misconduct has been made against the Prosecution Team. In order to properly respond, I need to know the specific nature of the allegation and any facts supporting the alleged misconduct. Additionally, I ask for a reasonable time period in which to respond. If no basis can be given by the defense, I ask for the allegation to be stricken and that defense counsel be admonished of his/her duty of candor under California Rule of Professional Conduct 5-200(a) and (b) and Bus. and Prof. Code §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."***
3. NOTIFY YOUR SUPERVISOR: Another prosecutor will represent you at the hearing requested above. Prepare a written memorandum of the facts and allegations. Assist your representative in preparing an opposition and be prepared to testify if necessary. **DO NOT REPRESENT YOURSELF AT THE HEARING.**
4. OBTAIN A RULING THAT NO PM WAS COMMITTED: At the conclusion of the formal hearing, request the Court find no PM committed and record the same on the court record and in the minutes. Order the transcript and route to the Chief of TIU for banking and possible further ethics referral of the defense attorney.

#### Written Allegation of PM

**NOTIFY YOUR SUPERVISOR**: Where necessary, your supervisor will arrange for another prosecutor to represent you at the hearing. Prepare a written memorandum of the facts and allegations. Assist your representative in preparing an opposition and be prepared to testify if necessary. **DO NOT REPRESENT YOURSELF AT THE HEARING.**

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### Legal Resource Guide

#### WRONGFUL OR BAD FAITH ACCUSATIONS OF PROSECUTORIAL MISCONDUCT

An accusation of misconduct must be supported by facts. In the absence of proof that an ADA violated the law, rule of professional conduct, or a court order, the defense attorney him/herself has committed misconduct by making a spurious accusation either intentionally or recklessly. (See, Bus. and Prof. Code §6068(d) and California Rule of Professional Conduct 5-200(a) and (b).) Such accusations are designed to intimidate, malign, or distract the prosecution.

When the Prosecution is presented with such tactics, whether intentional or reckless, consider "going on the offensive" by requesting the court find that the *accuser* has committed misconduct. At a minimum you may ask that the accuser be admonished as to his or her duty of candor<sup>1</sup>. If the false accusation is egregious, you may invite the court to consider sanctions or even contempt proceedings. (See generally, *Vaughn v. Muni. Court* (1967) 252 Cal.App.2d 348, 358; *In re Ciraolo* (1969) 70 Cal.2d 389, 394.) While you may accuse your opponent of misconduct, contempt power belongs to the court and you may not "move" to have your opponent held in contempt. Order a transcript of any Court admonishment or findings against the defense and route to TIU for banking on the 'S' Drive. The following points and authorities may be helpful:

#### Duty to Never Mislead the Court

"An attorney has the unqualified duty to refrain from acts which mislead the court; representation to the court of facts known to be false is presumed intentional and a violation of an attorney's duties as an officer of the court under B&P Section 6068." (*Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.)

#### Duty of Candor and Honesty

Consider asking the court to find that your opponent violated the duty to be candid and never mislead a judge. (Cal. Rule of Professional Conduct 5-200; B&P Code Section 6068(d).) A lawyer speaking in court is virtually under oath. (*Mosesian v. State Bar* (1972) 8 Cal.3d 60)

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<sup>1</sup> Of course, the Prosecution's own Duty of Candor mandates the concession of clear incidents of prosecutorial misconduct. (See, Bus. and Prof. Code §6068(d) and California Rule of Professional Conduct 5-200(a) and (b).) If the ADA is unsure whether he/she has committed PM, confer with a supervising ADA at your earliest opportunity.

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Duty to Respect the Court and Maintain Just Causes

Consider asking for findings that the duty to respect the court in B&P Code section 6068(f) and the duty to maintain just causes in section 6068(e) were violated.

Personal Attacks in front of the Jury can Constitute Misconduct

"Personal attacks on opposing parties and their attorneys, whether outright or by insinuation, constitute misconduct. (citation) Such behavior only serves to inflame the passion and prejudice of the jury, distracting them from fulfilling their solemn oath to render a verdict based solely on the evidence admitted at trial. (citation) Lack of civility between counsel, moreover, only breeds public disrespect for the judicial process." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal. App. 3d 1220, 1246.)

Sanctions — Only if the Accusations are Outrageous and Patently False (Must Obtain Approval from a Chief of the Criminal Division before Requesting)

Consider asking the court to sanction the defense attorney for deceitful conduct and for breach of the statutory and ethical duties that were violated. A minimum sanction is an order requiring the defense attorney to report a finding of misconduct to the State Bar Association as required by B&P Section 6068(o)(3).

Gross Carelessness and Negligence can Constitute Misconduct:

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 a breach of moral turpitude. (*Doyle v. State Bar* (1976) 15 Cal.3d 973, 978; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.)

\*\* Refer to a growing library of cases, pleadings, and banked transcripts on the 'S'-Share Drive under "Trial/Notebook/Sanctions" against specific defense counsel. Repeated baseless PM allegations may warrant an anticipatory *Motion In-Limine* alerting the Court to the behavior as a prophylactic measure before trial.

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