



ETHICS AND PROFESSIONAL RESPONSIBILITY REFRESHER

Presented by:

Cynthia Nakao

Deputy District Attorney

Professional Responsibility Advisor

Los Angeles County District Attorney's Office



"Certain materials contained in this presentation are included the fair use copyright exemption of 17 U.S.C. 107. This presentation under has been prepared according to the multimedia fair use guidelines. These materials are restricted from further duplication, distribution or use."

Microsoft Office XP Professional Clip Art

NDA

PepsiCo

Mediabum.com

Anheuser-Busch, Budweiser

The Simpsons Fox Broadcasting Matt Groening

"My Cousin Vinny"

General Office Memorandum

GENERAL OFFICE MEMORNDUM 16-107

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JACKIE LACEY 
District Attorney

SUBJECT: APPOINTMENT OF PROFESSIONAL RESPONSIBILITY ADVISOR

DATE: NOVEMBER 29, 2016



BASICS

 **Competent and diligent representation**

 **Legal updates**

- ABA Model Rules 1.1

ROLE OF A PROSECUTOR

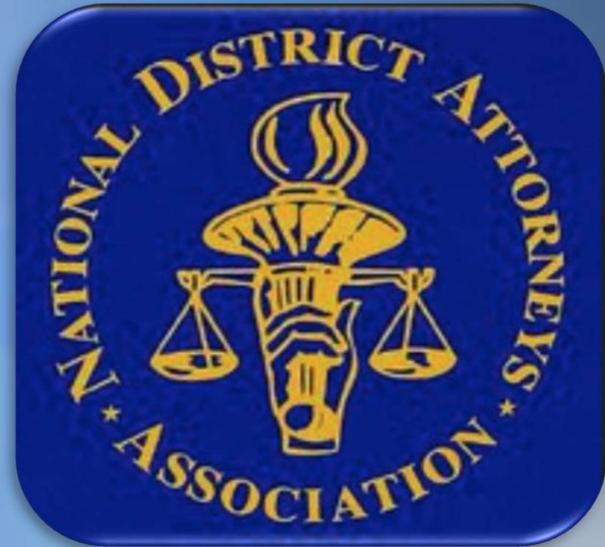


NDAA

PROSECUTION STANDARDS

 “The primary responsibility of prosecution is to see that justice is accomplished.”

- *NDAA Prosecution Standards 1.1*



FUNCTION OF A PROSECUTOR

“The duty of a prosecutor is to seek justice, not merely to convict.”

- ABA Standards for Criminal Justice 3-1.2(c)



RESPONSIBILITY OF A PROSECUTOR



Minister of Justice



Not just an advocate



Procedural Justice



Guilt = Sufficient Evidence

- ABA Model Rule 3.8, Comment [1]

YOU SET THE TONE



Earnest and vigor



Hard blows



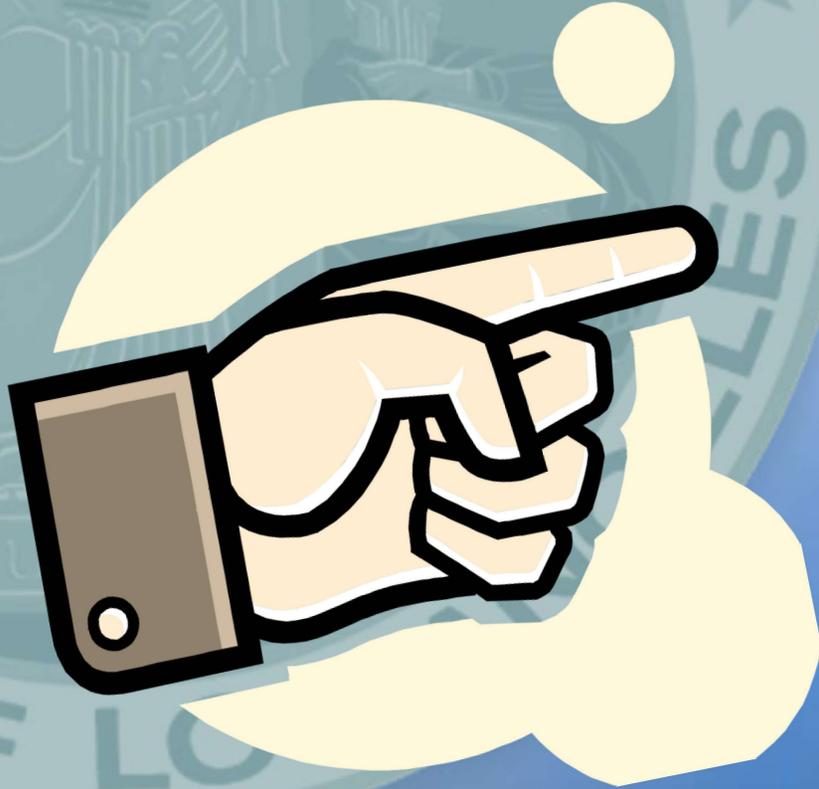
No foul blows



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

MediaBum.com

ACCUSATIONS OF ETHICAL VIOLATIONS OCCUR:



WHEN:

WHO:

WHY:

SOURCES

-  **Federal and State Constitution**
-  **Case law**
-  **State Statutes**



CALIFORNIA STATUTES

 **Penal Code**

 **California Rules of Professional Conduct**

 **Business & Profession Code**

 **Rules of Court**

- **State and County**

SOURCES

 **Standards/Opinions**

 **ABA, NDAA, LADA**

 **Lifelines**





Legal Policies Manual



**General Office Memorandum
(GOM)**



Special Directive (SD)

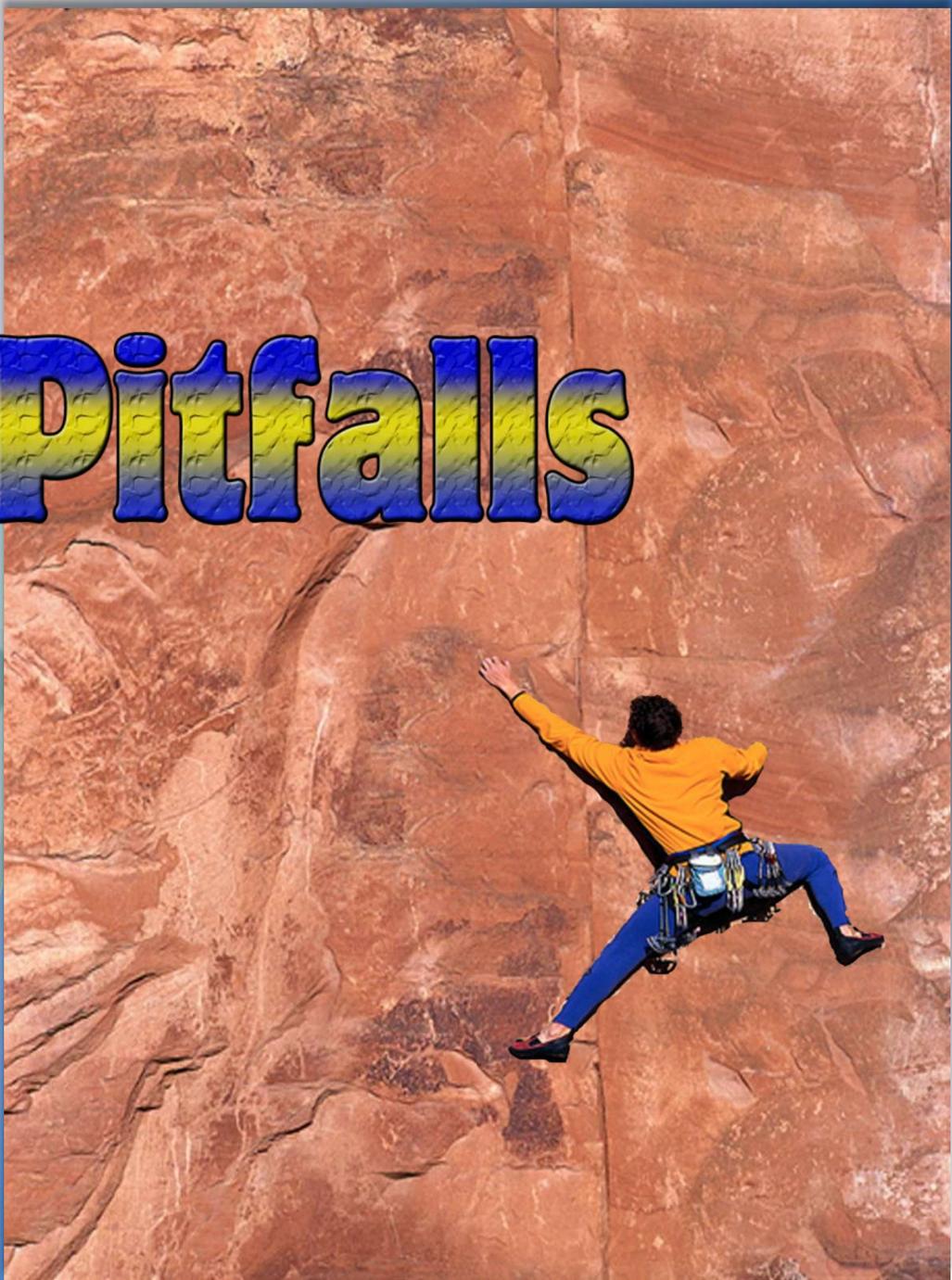


Personnel Policies



NEW Brady policy

Ethical Pitfalls



CALIFORNIA RULE

**NO PROBABLE CAUSE –
NO CRIMINAL CHARGES**

**Once you become aware of no
probable cause, must promptly
advise the court.**

- CRPC 5-110

CHARGING PROBABLE CAUSE



Do not institute, cause to institute or permit the pendency of criminal proceedings when no probable cause exists.

- ABA Prosecutor Function Standards 3-39

TEST

 **Sufficient evidence to warrant filing of charges &**

 **Sufficient evidence to convict the accused of the charges**

*Los Angeles County District Attorneys Office, Legal Policies Manual
section 2.01 (2005)*

IMPROPER CHARGING



Leverage



Civil Liability



Selectivity

*Los Angeles County District Attorney's Office, Legal
Policies Manual, section 2.01 (2005)*

IMPROPER CHARGING

-  **Outside pressure**
-  **Facilitate investigation**
-  **Interfere with political elections**

*Los Angeles County District Attorney's Office,
Legal Policies Manual, section 2.01 (2005)*

CANDOR



TRUTH & JUSTICE

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



ABA Standard 3-2.8

TRUTH & JUSTICE



A lawyer shall not knowingly offer evidence that the lawyer knows to be false.

ABA Model Rule 3.3(a)(3)

TRUTH

JUSTICE



TRUTH & JUSTICE

 **A lawyer shall not knowingly make a false statement of fact or law to a tribunal.**

ABA Model Rule 3.3(a)(1)

TRUTH

JUSTICE



BRADY OBLIGATION



Must disclose evidence favorable to a defendant which is either exculpatory or impeaching and is material to either guilt or punishment

Brady v. Maryland, 373 U.S. 83 (1963)

MATERIAL EVIDENCE

 **Reasonable probability result of the proceeding would have been different had the evidence been disclosed.**

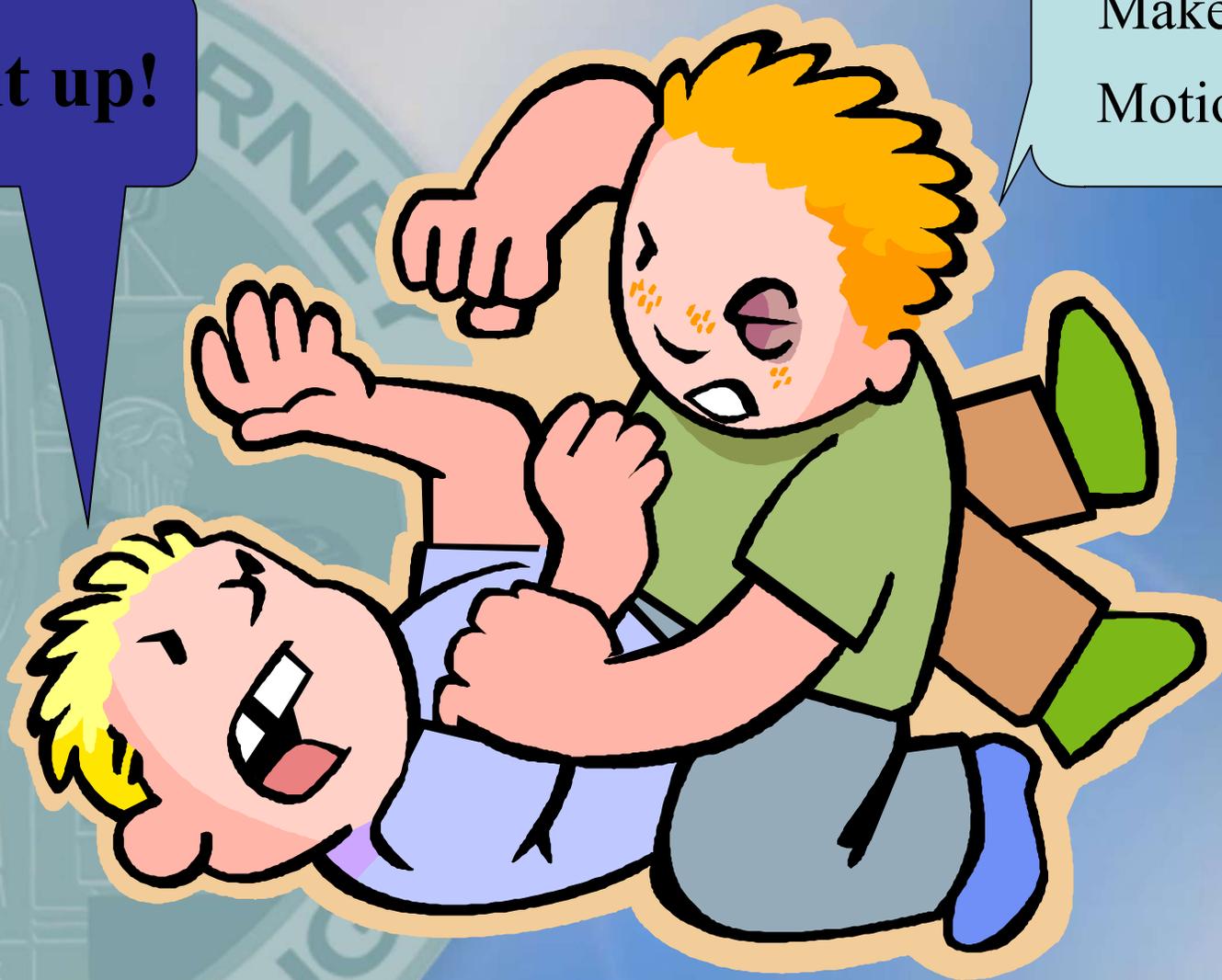
 **Reasonable probability: Probability sufficient to undermine confidence in the outcome.**

*U.S. v. Bagley, 473 U.S.
667,682 (1985)*



Give it up!

Make a
Motion!



Disclose

DUTY TO DISCLOSE

 If the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.

United States v. Agurs, 427 U.S. 97, 107 (1976)

IMPEACHMENT EVIDENCE

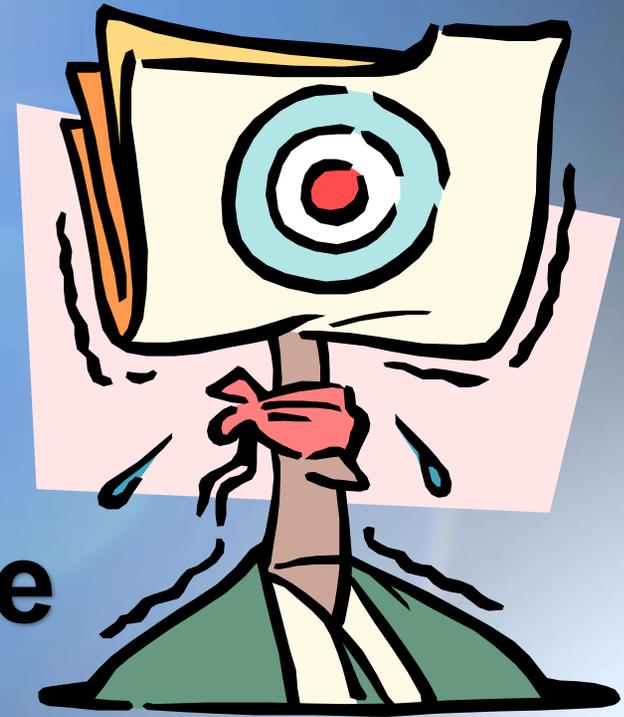
-  Types (CA. Evid. Code section 780):
 - **Prior inconsistent statements**
 - **Promises, offers & inducements**

IMPEACHMENT EVIDENCE

-  Types (CA. Evid. Code section 780):
 - **Felony convictions and past criminal conduct**
 - **Parole or probation status**
 - **Reputation for untruthfulness**

“I DIDN’ T KNOW”

- ⚖️ **Actual possession**
- ⚖️ **Constructive possession**
- ⚖️ **Avoidance**
- ⚖️ **Duty to preserve**



ACTUAL POSSESSION

 Includes evidence you possess and your office possesses

 Files, police reports, promises or offers



CONSTRUCTIVE POSSESSION



Includes exculpatory evidence possessed by and known to law enforcement agencies participating in the investigation of the case.

Kyles v. Whitney, 514 U.S. at 437 (1995)

CONSTRUCTIVE POSSESSION



Duty to learn of favorable evidence known to other prosecution and investigating agencies.



Failure of police to disclose is no excuse.

Kyles v. Whitney, 514 U.S. at 437 (1995)

AVOIDANCE



“A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution’s case or aid the accused.”

ABA Standards, 3-3.11(c)

AVOIDANCE



Duty to Search

- Diligent and honest effort

United States v. Thornton, 1 F.3d 149, 158 (3d Cir. 1993)

DUTY TO PRESERVE

 **Do not destroy evidence in prosecution's possession that appears exculpatory.**

DUTY TO PRESERVE



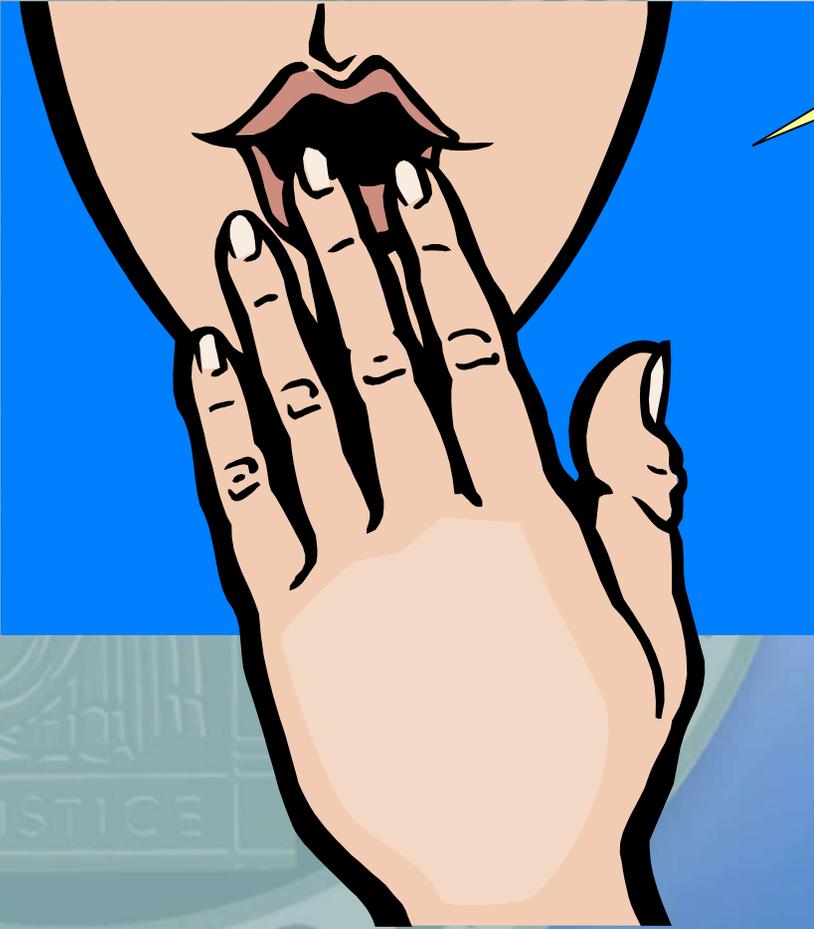
Test:

- **Materiality: Apparently exculpatory and unable to obtain comparable evidence by other reasonably available means.** *Trombetta, 467 U.S. 479, 488-89 (1984)*

- **Bad faith**

Youngblood, 488 U.S. 51, 58 (1988)

Oops!



Failure to disclose does not automatically cause a constitutional violation.

When in Doubt



Disclose or,



Ex Parte with court



Court makes ruling

WORK PRODUCT

 Legal research, records, correspondence, or reports of memorandum, to the extent that they contain the opinions, theories, or conclusion of the prosecutions



- *National Prosecution Standard 55.2*

EXPERT WITNESSES



Discovery obligation does not change

TRIAL CONDUCT



KEEP IN MIND

 In court, a member shall employ means only consistent with the truth.

 CRPC 5-200

OPENING STATEMENT

- ⚖ **Statement of the issues &**
- ⚖ **Evidence you intend to offer**
 - **Good faith**
 - **Available**
 - **Admissible**

- ABA Standard 3/5.5

WITNESSES



ETHICAL PITFALLS

-  **Where D's witness wants to testify and then is unwilling.**
-  **D's due process right to compel and present witnesses (6th and 14th)**
 - Your (mis)conduct is substantial cause in depriving testimony, and D was unable to present witness

CAVEATS

 **Do not tell witness or their attorney that they will be prosecuted for any crimes revealed or committed during their testimony;**

CAVEATS

 Do not warn witnesses that they will “suffer untoward consequences in other cases if they testify for the defense.”

In re Martin, 44 Cal.3d 1, 30-31 (1988)

MORE CAVEATS

 **Do not cause or allow the arrest of a witness before he or she has testified.**

 *In re Martin, 44 Cal.3d at 31*

 **Do not personally advise a defense witness of 5th Amendment rights.**



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

ABA Standards 3-5.7(c)



Can be reversible error.

People v. King, 266 Cal.App.2d 437, 463-64 (1968)

IMMUNITY



**Ethical duty to
“safeguard the
system against
treachery.”**

U.S. v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th
Cir 1993)



SELECTIVITY

- **“A prosecutor may not selectively grant or refuse immunity ‘with the deliberate intention of distorting the judicial fact finding process.’”**

– People v. Hunter, 49 Cal.3d 957, 975 (1989); U.S. v. Herman, 589 F.2d 191, 1204 (3d Cir. 1978)

WITNESS EXAMINATION

- ⚖ **Fair**
- ⚖ **Objectively**
- ⚖ **Due regard for the reasonable privacy of the witness**

- ABA Standard 3-5.7(a)

PRESENTING TANGIBLE EVIDENCE

- ⚖️ **No inadmissible evidence**
- ⚖️ **No objectionable questions**

PRESENTING TANGIBLE EVIDENCE

- ⚖️ **No impermissible comments**
- ⚖️ **No premature display of exhibits**
 - ABA Standard 3-5.6(b) & (d)

DDA AS WITNESS

- ⚖️ **Early stage of investigation**
- ⚖️ **Trial preparation**

DDA AS WITNESS

- ⚖️ **Defense tactic**
- ⚖️ **Motion to disqualify you/office**
- ⚖️ **Subpoena you**

LAWYERS AS WITNESS

Assess the situation

- Basis for the motion/sub
- Fishing
- Jerk
- Motion to Quash Subpoena

CROSS-EXAMINATION



Good faith quest for truth

ABA Standard, Comment to 3-5.7; NDAA Standard 77.5

IN OTHER WORDS . . .

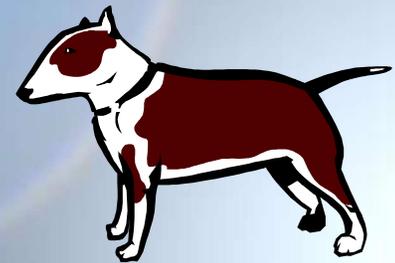
- ⚖ **Should not offer inadmissible evidence**
- ⚖ **Should not ask legally objectionable questions**

ABA Standards for Criminal Justice Prosecutor Function, 3-5.6(b)

WERE THEY LYING?

⚖️ Asking on cross examination to comment on the credibility of an earlier witness.

⚖️ Improper question = misconduct



ANALYSIS



Jury's function to determine credibility questions.

People v. Foster, (2003) 111 Cal.App.4th 379, 384

ANALYSIS



Opinion evidence on witness' credibility is inadmissible.

U.S. v. Sanchez-Lima, (9th Cir. 1998) 161 F.3d 545, 548

ANALYSIS



Asking improper question is misconduct.

People v. Smithey, (1999) 20 Cal.4th 936, 960-61

UNFOUNDED QUESTIONS

 **No innuendo
through questions**

 **Good faith belief in
the factual predicate
implied in the
question**



ABA Standard, Comment to 3-5.7

CLOSING ARGUMENT



**Always
Be
Closing**



THE UNIVERSITY OF CHICAGO



CLOSING ARGUMENT

-  **Unproven facts/facts outside the record**
-  **Personal opinion/personal attacks**

CLOSING ARGUMENT

-  **Sympathy, passion, prejudices**
-  **Misstatement/mislead**
-  **Griffin error**
-  **Doyle error**



Judge Kozinski on prosecutorial misconduct

By Eugene Volokh July 17, 2015

Sunday Review | EDITORIAL

Rampant Prosecutorial Misconduct

By THE EDITORIAL BOARD JAN. 4, 2014

In the justice system, prosecutors have a duty to bring charges to bring, and since 97 percent of those decisions are almost always the prosecutor's. That is why it is so important for prosecutors to be held accountable. This obligation is embodied in the Supreme Court's decision in *Brady v. Maryland*, which required prosecutors to disclose exculpatory evidence that could materially affect the outcome of the trial.

Yet far too often, state and federal prosecutors violate this constitutional duty, and far too rarely are they held accountable. Last month, Alex Kozinski, the chief judge of the Ninth Circuit Appeals for the Ninth Circuit, issued a ruling that exposed a systemic failure in recent memory. "There are too many violations abroad in the land," Judge Kozinski said in his ruling against a man who argued that the government had withheld evidence in his case. "Only judges can prevent this kind of prosecutorial misconduct."

Opinions

Exposing corrupt prosecutors

The Opinion Pages | EDITORIAL

To Stop Bad Prosecutors, Call the Feds

Los Angeles Times

SATURDAY DEC. 3, 2016

MOST POPULAR LOCAL SPORTS ENTERTAINMENT POLITICS OPINION PLACE AN AD

LOCAL / L.A. Now

Prosecutors who withhold or tamper with evidence now face felony charges



The office of Orange County Dist. Atty. Tony Rackauckas was removed from one of its most high-profile cases: the prosecution of mass murderer Scott Dekraai. The judge said prosecutors



PROSECUTORIAL MISCONDUCT

About 52,900 results



Scholarly articles for **prosecutorial misconduct statistics**

The relationship between **prosecutorial misconduct** ... - Joy - Cited by 130

Prosecutorial Misconduct and Constitutional Remedies - Henning - Cited by 114

The Ethical Prosecutor's **Misconduct** - Jonakait - Cited by 61

Prosecutorial Misconduct | California Innocence Project

<https://californiainnocenceproject.org/issues-we-face/prosecutorial-misconduct/> ▼

Prosecutorial misconduct occurs when a **prosecutor** breaks a law or a code of professional ethics in the course of a prosecution. ... First foremost, it is the **prosecutor's** job to seek justice and present the judge and jury with facts and legal arguments that result in the conviction of the guilty defendant.

Rampant Prosecutorial Misconduct - The New York Times

www.nytimes.com/2014/01/05/opinion/.../rampant-prosecutorial-misconduct.html ▼

Jan 4, 2014 - According to the Center for Prosecutor Integrity, multiple studies over the past 50 years show that courts punished **prosecutorial misconduct** in ...

[PDF] An Epidemic of Prosecutor Misconduct - Center for Prosecutor Integrity

www.prosecutorintegrity.org/wp-content/.../EpidemicofProsecutorMisconduct.pdf ▼

Prosecutor misconduct can assume many forms, including: 50 E. Ann Carson and William J. Sabol, Prisoners in 2011, Bureau of Justice **Statistics**, 9, Table 9 ...

[PDF] Crossing the Line: Responding to Prosecutorial Misconduct - NACDL

<https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17388> ▼

Of those 2,130 cases, 443 resulted in findings that **prosecutorial misconduct** actually ... highlight the important issue of **prosecutorial misconduct** and the need for ...

U.S. judges see 'epidemic' of prosecutorial misconduct in state - LA ...

www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html ▼

Jan 31, 2015 - Federal judges called upon state Atty. Gen. Kamala D. Harris to respond to reports of a pattern of **prosecutorial misconduct** going undisciplined ...

Prosecutorial Misconduct – What's to be Done? A Call to Action ...

<https://wrongfulconvictionsblog.org/.../prosecutorial-misconduct-whats-to-be-done-a...> ▼

May 20, 2012 - But **prosecutorial misconduct** and **miscde** happen, and they happen more frequently.



PROSECUTORIAL MISCONDUCT IN CALIFORNIA

About 141,000 results



Scholarly articles for **prosecutorial misconduct california**

... error: A report on **prosecutorial misconduct in California** ... - Ridolfi - Cited by 17

Prosecutorial Misconduct: Law, Procedure, Forms - Lawless - Cited by 96

Prosecutorial Misconduct and Constitutional Remedies - Henning - Cited by 114

Prosecutorial Misconduct in California Law

www.shouselaw.com/prosecutorial-misconduct.html ▼

Victim of 'Prosecutorial Misconduct'? California criminal defense lawyers explain how to use it to your advantage for a new trial or other remedies.

Prosecutorial Misconduct | California Innocence Project

<https://californiainnocenceproject.org/issues-we-face/prosecutorial-misconduct/> ▼

What is **Prosecutorial Misconduct**? **Prosecutorial misconduct** occurs when a prosecutor breaks a law or a code of professional ethics in the course of a ...

California to Crack Down on Prosecutorial Misconduct - Law Blog - WSJ

blogs.wsj.com/law/2016/10/07/california-to-crack-down-on-prosecutorial-misconduct/

Oct 7, 2016 - A new California ethics rule would require prosecutors to turn over more evidence to defendants in criminal cases.

Prosecutorial Misconduct is Now a Felony in California - Hit & Run ...

reason.com/blog/2016/10/06/prosecutorial-misconduct-is-now-a-felony ▼

Oct 6, 2016 - Previously, **prosecutorial misconduct** in California was only a misdemeanor. Courts were statutorily required to report misconduct to the state ...

Is California's new law a model for curbing prosecutorial misconduct ...

www.csmonitor.com/.../Is-California-s-new-law-a-model-for-curbing-prosecutorial-m... ▼

Oct 5, 2016 - Prosecutors in California who intentionally withhold or tamper with evidence may now face felony charges as a result of a new law signed by ...

U.S. judges see 'epidemic' of prosecutorial misconduct in state - LA ...

www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html ▼

Federal judges accuse California bar of turning a blind eye to an 'epidemic' of **prosecutorial misconduct**. The hearing seemed largely routine until a state ...

CONSEQUENCES OF PROSECUTORIAL MISCONDUCT

-  **Admonishment by court**
-  **Bad prosecutor instruction to jury**
-  **Exclusion of evidence**

CONSEQUENCES OF PROSECUTORIAL MISCONDUCT



Mistrial



Reversed on appeal



Professional discipline



Civil/criminal liability

STATE BAR COMPLAINT

Personnel Policies Manual section 12-06

- Responsibilities of the DDA when you receive a State Bar inquiry/investigation
- Must immediately inform their direct supervisor in writing

CALL ME



The Office may assist in responding to the State Bar in the initial stages of the inquiry/investigation.

– PPM 12-06

PERSONNEL POLICIES MEMORANDUM 12-06

- ⚖️ **State Bar investigation progresses**
- ⚖️ **PPM 12-06 discusses step for formal legal representation**

SELF-REPORT

- ⚖ **Duty to self report within 30 days of knowledge of:**
 - **Conviction reversed in whole or in part for prosecutorial misconduct**

SELF-REPORT

- ⚖️ **Duty to self report within 30 days of knowledge of:**
 - **Imposition of any judicial sanction “except for sanctions for failure to make discovery or monetary sanction of less than one thousand dollars.”**

- Business and Professions Code section 6068(o)(3) and (7)

RESPONDING TO ACCUSATIONS OF MISCONDUCT



Basis



Timing



Off your game



Request a hearing



REQUEST A HEARING

-  **Clean up the record**
-  **Do not leave the record silent**
-  **Defend yourself**
-  **Seek judicial finding of no misconduct**



REQUEST A HEARING

 **Order of hearing**

 **If no hearing, make a record**



CIVIL LIABILITY



Every person, who under color of law, causes any person to be deprived of rights, privileges, or immunities secured by the Constitution and laws is liable to the injured party.

42 U.S.C. 1983

ABSOLUTE IMMUNITY



Performing functions intimately associated with judicial proceedings and with the judicial phase of the criminal proceedings.

Imbler v Pachtman, 424 U.S.409 (1976)

ABSOLUTE IMMUNITY

-  **Absolute immunity defeats a suit at the outset.**
-  **Will have immunity.**

EXAMPLES OF ABSOLUTE IMMUNITY

-  **Filing/rejecting**
-  **Going to trial**
-  **Interviewing and evaluating evidence for trial**

EXAMPLES OF ABSOLUTE IMMUNITY



**Search warrant application
& presenting evidence in
support of search warrant.**

QUALIFIED IMMUNITY

-  **Function not intimately associated with judicial proceedings**
-  **Pre-filing investigations**
-  **Administrative acts**

QUALIFIED IMMUNITY



Media statements



**Declarations under penalty
of perjury**



Legal advice to police

QUALIFIED IMMUNITY

-  “Protects all but the plainly incompetent or those who knowingly violate the law.”
-  Liability, if any, will depend on the circumstances and motivations of your actions, as established at trial.

Burns v. Reed, 500 U.S. 478, 494-95 (1991)

NO IMMUNITY

 **Unauthorized acts**

 **Acts outside the scope of
your duties**

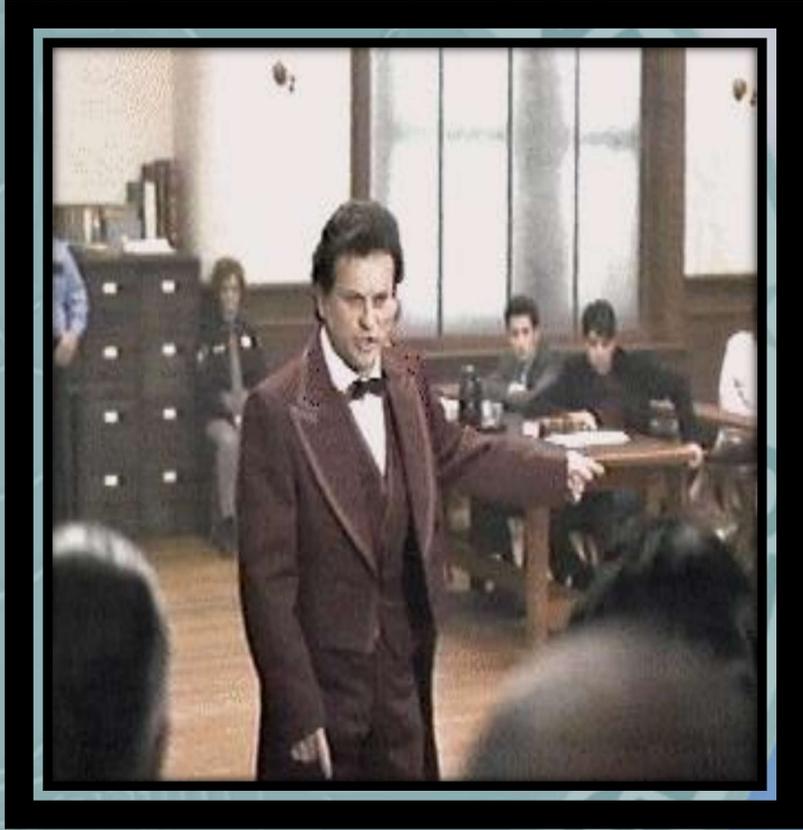
STANDARD OF PROFESSIONALISM



The prosecutor should conduct himself with a high level of dignity and professionalism.

- NDAA Standard 6.1

DECORUM

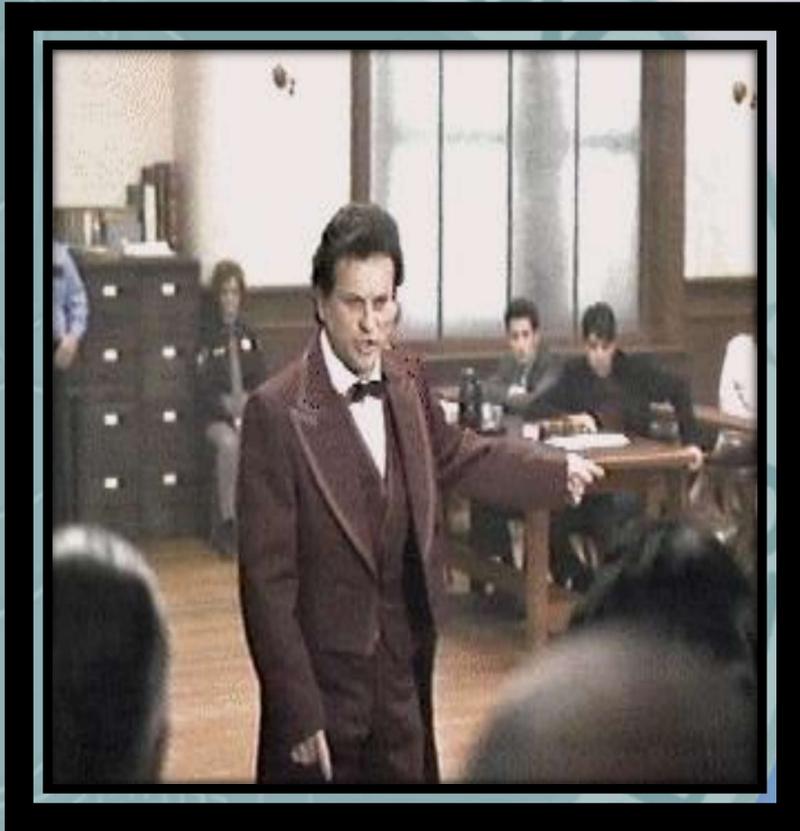


"My Cousin Vinny" Joe Pesci, 1992, TM and © 20th Century FOX Film Corp. All Rights Reserved

⚖️ **Punctuality**

⚖️ **Proper restraint and dignity. No disruptive conduct.**

DECORUM



"My Cousin Vinny" Joe Pesci, 1992, TM and © 20th Century FOX Film Corp. All Rights Reserved

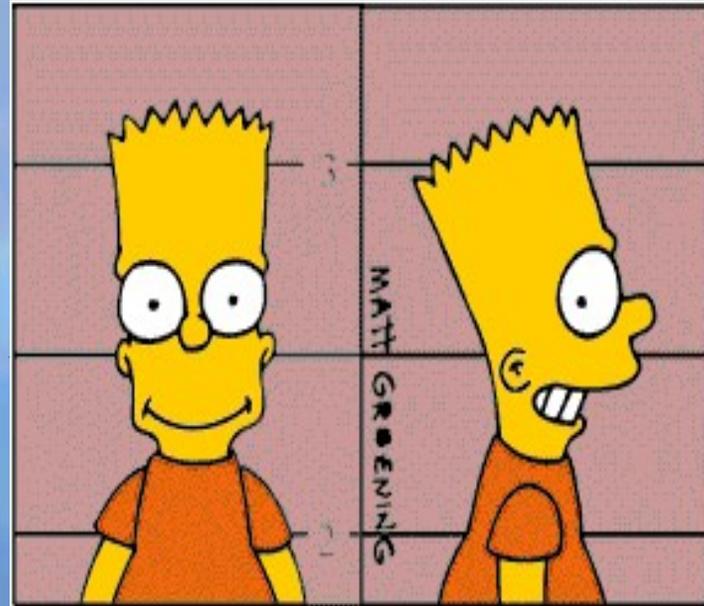
 **Treat witnesses fairly and with due consideration. Do not abuse, insult or degrade the witness.**

– *NDA Standard 6.5 (d)-(e)*

PLAY WELL WITH OTHERS

 **Avoid the expression of personal animosity toward opposing counsel regardless of personal opinion**

– *NDA Standard 6.5 (a)- (e)*

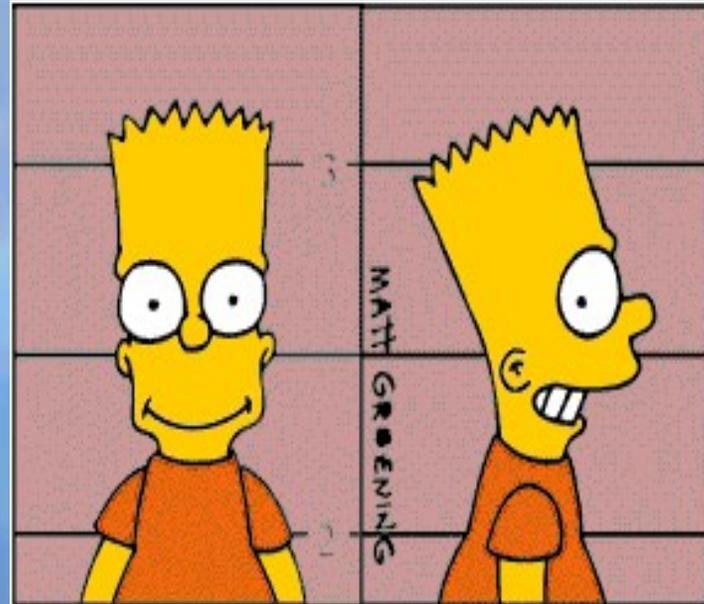


© The Simpsons/ 20th Century FOX

PLAY WELL WITH OTHERS

 **Disparagement
may be
misconduct.**

– *People v. Kelley*, 75 Cal.App.3d 672 (1975)



© The Simpsons/ 20th Century FOX



**“I’m not interested in what
you have to say.”**



**“Some of the rulings that
you’ve made are just
outrageous”**



People v. Poletti (2015) 240 Cal.App.4th 1191



“I’m hardly editorializing....”



**“My line of questioning was
frankly proper.”**



People v. Poletti (2015) 240 Cal.App.4th 1191

GOT CREDIBILITY?



Career



Reputation



Self-worth

YOU SET THE TONE



Caseload



Professional Life



Personal Life

PROACTIVE

REACTIVE

LEADERSHIP





**Justice
Is
Truth in
Action**

Benjamin Disraeli



SEYMOUR PRODUCTION

