

3/29/2018

PROSECUTORIAL ETHICS

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WHY ARE ETHICS IMPORTANT FOR PROSECUTORS?

- Integrity of convictions
- Fairness to all parties
- Protection of innocent
- Acting ethically is just the right thing to do

TODAY'S GOALS

This is designed to be a basic overview, not in depth discussion.
Feel free to ask questions.
When in doubt about an ethical issue, ask your colleagues and go to source materials.

3/29/2018

TODAY'S TOPICS

Professional Rules of Conduct for Attorneys
State Bar Disciplinary Process
Civil Obligations of Prosecutors
Discovery Rules for Prosecutors
Some New Items to Consider

DUTIES OF PROSECUTORS

Primary sources of powers/responsibilities of district attorney are found in Cal Constitution and Government Code
All criminal prosecutions conducted in the name of the People of the State of California (Gov. Code §160(b))
DA is chief law enforcement officer in the county; primary duty is investigation and prosecution of criminal cases (Gov. Code §26300)
DA has duty to seek justice, not merely to convict

ETHICAL ISSUES FOR ATTORNEYS: CONSTITUTIONAL ISSUES

Constitutional Principles → particularly important for prosecutors
Berger v United States (1935) 295 US 78, 88
Fundamental constitutional rights related to rights of criminal defendants
4th Amendment
5th Amendment
6th Amendment
14th Amendment

ETHICAL ISSUES FOR ATTORNEYS: STATUTORY REQUIREMENTS

California Business and Professions Code §6068 → rules for all attorneys in CA
 §6068(a) → support the federal and state constitutions and laws
 §6068(b) → maintain respect to courts and judicial officers
 §6068(c) → maintain only actions as appear to be legal and just
 §6068(d) → employ only means consistent with truth and never seek to mislead a judicial officer
 §6068(f) → outside of obligation to prosecute defendant, treat attorneys, parties, witnesses respectfully
 §6068(g) → do not encourage an action that is personally motivated
 §6068(h) → cooperate during disciplinary investigations and proceedings

ETHICAL RULES FOR ATTORNEYS: STATUTORY REQUIREMENTS

Penal Code §1054 et seq → discovery obligations in criminal cases
 Business and Professions Code §6101 → conviction of crime involving moral turpitude as grounds for suspension/disbarment
 Business and Professions Code §6103 → willfully disobeying court order or violating duties of attorney as grounds for suspension/disbarment
 Business and Professions Code §6106 → acts of moral turpitude, dishonesty, corruption as grounds for discipline (even if not committed in work as attorney and even if no criminal conviction)
 Business and Professions Code §6120 → misdemeanor for attorney to deceive or collude with intent to deceive the court or any party

ETHICAL RULES FOR ATTORNEYS: CONTEMPT

Contempt power is part of inherent power of court to ensure judicial proceedings are conducted in an orderly manner
 Direct vs indirect contempt
 Attorney's failure to appear without valid excuse is punishable as direct contempt

ETHICAL RULES FOR ATTORNEYS: RULES OF PROFESSIONAL CONDUCT

"The California Rules of Professional Conduct are intended to regulate professional conduct of attorneys licensed by the State Bar through discipline. They have been adopted by the Board of Trustees and approved by the California Supreme Court pursuant to statute to protect the public and to promote respect and confidence in the legal profession. The rules and any related standards adopted by the Board are binding on all members of the State Bar." (www.calsbar.org)

ETHICAL RULES FOR ATTORNEYS: RULES OF PROFESSIONAL CONDUCT

- Rule 1.100 → assisting, violating or inducing violations
- Rule 2.100 → communication with a represented party
- Rule 2.400 → partial and discriminatory conduct
- Rule 3.110 → failure to act competently
- Rule 3.120 → relationship with other party's lawyer
- Rule 5.400 → disavowing criminal, administrative, or disciplinary charges
- Rule 5.110 → special responsibilities of a prosecutor
- Rule 5.120 → trial publicity
- Rule 5.220 → trial conduct
- Rule 5.320 → suppression of evidence

ETHICAL RULES FOR ATTORNEYS: RULES OF PROFESSIONAL CONDUCT

- Rule 5.360 → contact with officials
- Rule 5.310 → prohibited contact with witnesses
- Rule 5.320 → contact with jurors

STATE BAR DISCIPLINARY PROCESS

"I'm not planning on being disciplined by the State Bar. Why is this important for me to know?"
 Prosecutors are increasingly scrutinized for their decisions.
 Sometimes, the state bar gets involved.
 Example: Orange County DDA and discovery of "trial over" information.
 Example: Santa Clara DDA and failure to turn over SARI video.
 Growing trend of bar complaints by criminal defendants against prosecutors.

STATE BAR DISCIPLINARY PROCESS

State Bar Office of Chief Trial Counsel
 Intra-Bar review of allegations of attorney misconduct.
 Enforcement of rules governing matters referred by board that find charges and prosecute.
 Cases in State Bar Court of investigations are confidential, adversarial charges filed.
 State Bar Council: 5 hearing judges and 3 judges serving as appellate panel.
 Trial:
 Hearing by single hearing judge.
 2 phases: credibility and mitigation.
 Rules of proof: clear and convincing evidence.
 Hearing judge must render a written opinion.

STATE BAR DISCIPLINARY PROCESS

Options if charges found true:
 Admonition.
 Public or private reprimand.
 Recommended suspension of suspension by California Supreme Court.
 Suspension can be with or without probationary period.
 Discipline more severe than public/private reprimand must be approved by California Supreme Court.

STATE BAR DISCIPLINARY PROCESS WORDS TO THE WISE

If you get a letter from the Bar, don't ignore it. It will not go away!
You have a duty to cooperate. Failure to do so is itself grounds for discipline.
(BP 5406810)
Let your supervisor know

CIVIL LIABILITY OF PROSECUTORS

Most common cause of action against prosecutors → 42 USC 1983
Person acting "under color of" state law can be held liable for depriving individual of
his/her constitutional rights
Plaintiff must prove 3 elements
Official action under state law
Causation
Violation of right protected by Constitution or federal law
Malicious prosecution under section 1983 → prosecution must have been
conducted with intent to deprive person of a federal right

CIVIL LIABILITY OF PROSECUTORS

When sued in their individual capacities under section 1983, prosecutors can
assert two kinds of immunity.
Absolute immunity → applies when the "prosecutor acts as an advocate in
initiating a prosecution and in presenting the state's case"; defeats case at the
outset
Qualified immunity → applies when prosecutor performs discretionary
functions in the scope of their official capacity

DISCOVERY RULES FOR PROSECUTORS

Prosecutor must disclose material exculpatory evidence to a criminal defendant.

Most important rule of discovery: *Brady v. Maryland* (1963) 373 US 83, *People v. Eastford* (1975) 14 Cal3d 339.

Also part of California criminal discovery statute (Penal Code §1054.1(e)).

WHAT IS MATERIAL EXCULPATORY EVIDENCE???

DISCOVERY RULES FOR PROSECUTORS: TYPES OF MATERIAL EXCULPATORY EVIDENCE

Material evidence that negates the defendant's culpability.

Material evidence that directly opposes the defendant's guilt.

Material evidence that indirectly opposes the defendant's guilt.

Material evidence that supports defense testimony.

Material evidence that supports a defense motion that would weaken prosecution case.

Material evidence that impeaches the credibility of material prosecution witnesses.

TYPES OF MATERIAL EXCULPATORY EVIDENCE

What types of evidence impeaches credibility of material prosecution witnesses?

Contrary or conflicting statements.

False reports.

Inaccurate statements/reports.

Evidence which contradicts prosecution's statements/reports.

Promises/offers/inducements.

Felony convictions of prosecution witnesses.

TYPES OF MATERIAL EXCULPATORY EVIDENCE

Evidence impeaching credibility of prosecution witnesses (continued)

- Moral turpitude misconduct of prosecution witnesses
- Misdemeanor convictions involving moral turpitude
- Pending charges against material prosecution witnesses
- Parole/probation status of witness
- Reputation for untruthfulness
- Alcohol drug use
- Gang membership
- Bias toward defendant

MATERIAL EXCULPATORY EVIDENCE

What is "material"?

Evidence is "material" when there is a *reasonable probability* that its disclosure would produce a different result.

It is not enough that the evidence could possibly cause a different result.

Who is a "material witness"?

Witnesses whose testimony is critical to the outcome of the trial and whose absence would leave the prosecution's evidence legally insufficient to support a conviction.

DISCOVERY RULES FOR PROSECUTORS: OTHER THINGS TO REMEMBER

- Prosecutor must correct false testimony of prosecution witness
- Prosecutor decides what evidence is exculpatory and must be disclosed (defense attorney doesn't get access to files to make determination for himself)
- Prosecutor must disclose exculpatory evidence even absent request from defense
- Prosecutor may not delegate duty to disclose exculpatory evidence to law enforcement agency
- Duty to disclose exculpatory evidence continues after defendant convicted/sentenced

WHEN IN DOUBT, DISCLOSE!!!

WHOSE RECORDS DO WE SEARCH FOR EXCULPATORY EVIDENCE?

Prosecutor must search the records of the "prosecution team" for exculpatory evidence.

Who is the "prosecution team"?

The prosecutor's office

The investigating agency in the case

Any agencies or persons assisting investigation/prosecution

Agencies closely tied to the prosecution

WHOSE RECORDS DO WE SEARCH FOR EXCULPATORY EVIDENCE?

Limits on scope of prosecutor's responsibility

Does not extend to unrelated files

Does not extend to uninvolved staff

Does not extend to non-investigatory/prosecutorial staff

WHOSE RECORDS DO WE SEARCH FOR EXCULPATORY EVIDENCE?

What about information in peace officer personnel records?

Alford v. Superior Court (2003) 29 Cal.4th 1033

People v. Superior Court (Johnson) (2014) 228 Cal.App.4th 1046

ALADS v. Superior Court (2017) 13 Cal.App.5th 413

STATUTORY DISCOVERY OBLIGATIONS

Penal Code §1054.1 sets forth statutorily required categories of prosecution discovery
Names and addresses of witnesses, including rebuttal witnesses
Statements of defendants
Real evidence
Witness's felony convictions
Ecological evidence
Witness statements
Reports of prosecution witness statements
Prosecution expert witnesses

SOME NEW ITEMS TO CONSIDER

2017 → amended version of California Rule of Professional Conduct 5.110
Approved by California Supreme Court in November 2017
California Penal Code §101(c)
State person eligible officers

QUESTIONS/COMMENTS??
