

# ETHICS

# SOURCES FOR ETHICAL GUIDANCE

- The United States and California Constitutions and the cases that interpret them:
  - Brady v. Maryland (1963) 373 U.S. 83
  - Griffin v. California (1965) 380 U.S. 609
  - Batson v. Kentucky (1986) 476 U.S. 79
- California Rules of Professional Conduct
- Statutory Rules (PC§1054 *et seq.*)
- Caselaw Related to Trial Practice
- Office Policies and Procedures Manual

# Business & Profession Code § 6068

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state

# Policies and Procedures

All prosecutors employed by this office will be guided by this Manual, the California Rules of Professional Conduct, office and County policy and procedure memoranda, the State Bar Act in Business and Professions Code sections 6000–6228, and case law regarding professional responsibility.

# **POLICY AND PROCEDURE #1-04**

## **ETHICAL DUTIES**

All members of the District Attorney's Office shall treat members of the public, victims and witnesses of crime with respect, courtesy, honesty, compassion, and dignity.

## COMMENT FOLLOWING RULE 3.8 Special Responsibilities of a Prosecutor

“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.\*”

# **POLICY AND PROCEDURE #1-04**

## **ETHICAL DUTIES**

A prosecutor must not personally prosecute a case where he or she personally has a reasonable doubt regarding the defendant's guilt.

# **POLICY AND PROCEDURE #1-04**

## **ETHICAL DUTIES**

The San Mateo County District Attorney's Office requires that all of its members exercise their duties with the highest degree of ethics and integrity without regard to race, color, national or ethnic origin, age, religion, disability, sex, sexual orientation or gender identity and expression.

# RULE 3.1

(a) A lawyer shall not:

- (1) Bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal without probable cause and for the purpose of harassing or maliciously injuring any person.  
(Further amplified Rule 3.8)

(b) A lawyer for the defendant in a criminal proceeding . . . May nevertheless defend the proceeding by requiring that every element of the case be established.

# CHARGING – RULE 3.8

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

## OFFICE POLICY 1-04

A prosecutor shall maintain his or her objectivity in exercising the charging decision. A prosecutor shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by a reasonable probability that there is admissible evidence to prove the defendant guilty beyond a reasonable doubt.

# § 1054.1. Information to be Disclosed by Prosecution

- (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
- (b) Statements of all defendants.
- (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
- (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
- (e) Any exculpatory evidence.
- (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

## § 1054.7. Time for Disclosures; Motion for Denial or Regulation of Disclosures

Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter.

# DISCOVERY

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

Under Brady, and its progeny, the prosecution has a constitutional duty to disclose to the defense material exculpatory evidence, including potential impeaching evidence. The duty extends to evidence known to others acting on the prosecution's behalf, including the police.

People v. Superior Court (Johnson), 61 Cal. 4th 696

# DISCOVERY

## RULE 3.8

- (d) make timely disclosure to the defense of all evidence or information known\* to the prosecutor that the prosecutor knows\* or reasonably should know\* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;\* and
- Broader than Brady (there is no requirement that the evidence be material only that it “tend to negate / mitigate”)

# POLICY AND PROCEDURE #1-04

## ETHICAL DUTIES

- A prosecutor discloses all exculpatory evidence in a case.  
Brady v. Maryland (1963) 373 U.S. 83, 87.

# DISCOVERY

## RULE 3.8

(f) 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

# DISCOVERY

## RULE 3.8

(2) [I]f 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.

# DISCOVERY

## RULE 3.8

(g) 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.

# PENAL CODE SECTION 141

- (c) A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of [Section 1170](#) for 16 months, or two or three years.

# HOW TO GUARD AGAINST MISCONDUCT?

- Make sure that your discovery practices comply with the requirements of the law?
  - Brady v. Maryland
  - PC 1054 et seq
- Institute processes which make sure that you have the necessary materials you need to comply with your obligations . . . DO NOT BE PASSIVE.
- DOCUMENTATION IS CRITICAL . . . You need to what has been provided and when it has been provided.
- Dealing with a boilerplate request – Require clarification
- Do not let allegations go unanswered / Require the defense makes a record
- Find a Supervisor if it proceeds from there
- Ask for a special hearing or an opportunity to respond a finding.
- Ask the Court to make a finding

# POLICY AND PROCEDURE #1-04 ETHICAL DUTIES

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No member of the office shall exhibit bias or discriminatory conduct.

# JURY SELECTION

Batson / Wheeler – It is improper to exercise a peremptory challenge based on an individual's membership (perceived or actual) in a constitutionally cognizable group.

What are you really concerned about???

- Anti-Police / Prosecution sentiments
- Racial Injustice
- Identifying with Defendant

THEN ASK ABOUT IT!!!!

# SENTENCING

## Consistency vs. Individualized Treatment

- Why is this case distinguishable or not from a typical case?
- California Rules of Court
  - Rule 4.414 (Criteria Affecting Probation)
  - Rule 4.421 (Circumstances in Aggravation)
  - Rule 4.423 (Circumstances in Mitigation)

# RULE 3.3 Candor Toward the Tribunal

- (a) A lawyer shall not
  - (1) Knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.
  - (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel or knowingly misquote to a tribunal the language of a book statute, decision or other authority (CITE AND DISTINGUISH)
  - (3) Offer evidence that the lawyer knows to be false.

# POLICY AND PROCEDURE #1-04 ETHICAL DUTIES

“A prosecutor shall not mislead the court or counsel.  
(California Rules of Professional Conduct, Rule 5-200).”

## CLOSING ARGUMENT

Griffin v. California (1965) 380 U.S. 609

For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

## CLOSING ARGUMENT cont.

[W]hen prosecutors engage in jury intimidation instead of relying on the evidence presented, they strike a “foul blow” and take advantage of their unique function by “greatly demean[ing] the office they hold and the People in whose name they serve.”

...

[H]owever, it is prosecutorial misconduct to “make arguments to the jury that give [the jury] the impression that “emotion may reign over reason,” and to present “... inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response.”

People v. Sanchez (2014) 228 Cal.App.4th 1517, 1529.

# Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly\* assist, solicit, or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

## Rule 8.4 Misconduct cont.

(c) engage in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law;

# CONDUCT DURING TRIAL

‘It is, of course, misconduct for a prosecutor to “intentionally elicit inadmissible testimony.” [Citations.]’ [Citation.] Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected.” (People v. Smithey (1999) 20 Cal.4th 936, 960 [86 Cal. Rptr. 2d 243, 978 P.2d 1171].) However, a prosecutor cannot be faulted for a witness's nonresponsive answer that the prosecutor neither solicited nor could have anticipated. (People v. Valdez (2004) 32 Cal.4th 73, 125 [8 Cal. Rptr. 3d 271, 82 P.3d 296].)

People v. Tully (2012) 54 Cal.4th 952, 1035

## **CONDUCT DURING TRIAL cont.**

When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated.

Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.

People v. Panah (2005) 35 Cal.4th 395, 462.

# **CONDUCT DURING TRIAL cont.**

It is misconduct, however, "for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.]"

People v. Crew (2003) 31 Cal.4th 822, 839.

# LAWYER AS A WITNESS

## RULE 3.7

(a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:

(3) the lawyer has obtained informed written consent\* from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

# **POLICY AND PROCEDURE #1-04**

## **ETHICAL DUTIES**

A prosecutor shall not testify as a witness in a case in which the San Mateo County District Attorney's office is prosecuting except when acting in compliance with all applicable ethical and legal rules and with the approval of the District Attorney or his or her designee. (California Rules of Professional Conduct, Rule 5-210).

# CONTACT WITH JURORS

## RULE 3.5

(g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known\* to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror **or to influence the juror's actions in future jury service.**

# CONTACT WITH THE MEDIA

## RULE 3.6

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows\* or reasonably should know\* will

(i) be disseminated by means of public communication  
and

(ii) have a substantial\* likelihood of materially prejudicing an adjudicative proceeding in the matter.

# CONTACT WITH THE MEDIA

## RULE 3.6 Cont.

- (e) exercise reasonable\* care to prevent persons\* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons\* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

# **POLICY AND PROCEDURE #1-04**

## **ETHICAL DUTIES**

A prosecutor shall not try his or her case in the media or attempt to take any unlawful or unethical advantage in the trial of an accused

# Rule 3.8 Special Responsibilities of a Prosecutor

## Communications with Unrepresented Defendants

The prosecutor in a criminal case shall:

(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 unless the tribunal\* has approved the appearance of the accused in propria persona;

# RESOURCES

- Ethics Hotline 1-800-238-4427 (1-800-2ETHICS)
- Online Ethics Resources: [www.calbar.ca.gov/ethics](http://www.calbar.ca.gov/ethics)