

# **OCDA POLICY FOR REPORTING STATE BAR CONTACTS, FINDINGS OF PROSECUTORIAL MISCONDUCT AND REQUESTS FOR REPRESENTATION**

## **I. PURPOSE**

The purpose of this policy is to define the responsibilities of a prosecutor who is either the subject of an investigation or inquiry by the State Bar in his or her professional capacity as a prosecutor; or against whom the State Bar has instituted formal charges or proceedings regardless of their nature; or who is required to make a report to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o).<sup>1</sup> This policy also outlines the processes by which a State Bar investigation, inquiry, proceeding or instance of self-reporting by a prosecutor will be reviewed by the Orange County District Attorney's Office (OCDA) for purposes of determining whether to seek County provided representation for the benefit of that prosecutor. The purpose of this policy is also to define the responsibilities of a prosecutor when a court of competent jurisdiction has sustained a finding of prosecutorial misconduct against him or her, regardless of whether that finding required or resulted in a contact with the State Bar.

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<sup>1</sup> California Business & Professions Code, section 6068, subdivision (o) provides, in pertinent part, that as follows: "It is the duty of an attorney to...report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity; (2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity; (3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000); (4) The bringing of an indictment or information charging a felony against the attorney; (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type; (6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere; (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

## **II. SCOPE**

This policy applies to all OCDA prosecutors if any one of the following four events occurs:

- 1) A prosecutor is contacted by the State Bar regarding an alleged violation of the California Rules of Professional Conduct (CRPC) or of the law in his or her professional capacity as a prosecutor; or
- 2) A prosecutor is notified that the State Bar has instituted formal charges or proceedings against him or her; or
- 3) A prosecutor is obligated to make a report to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o); or
- 4) A court of the State of California or the United States sustains a finding of prosecutorial misconduct by an OCDA prosecutor, regardless of whether that finding required or resulted in a contact with the State Bar.

## **III. POLICY**

### **A. Prosecutor's Duty to Report in Writing**

#### **1. Duty to Report State Bar Inquiry or Obligation to Self-Report**

Every prosecutor is required to inform his or her direct supervisor, in writing, if he or she is contacted by the State Bar regarding an alleged violation of the CRPC or of the law by him or her in his or her professional capacity as a prosecutor or if he or she is obligated to self-report an occurrence to the State Bar pursuant to Business and Professions Code section 6068. The prosecutor's written notice to his or her supervisor must contain the timing, nature, and substance of his or her contact with the State Bar or obligation to self-report. If the contact from the State Bar is in writing, the prosecutor shall include a copy of that writing in his or her report as well.

The prosecutor's written notice to his or her direct supervisor shall be made within two business days of his or her contact with the State Bar or his or her knowledge of his or her obligation to self-report to the State Bar, whichever is earlier, unless otherwise authorized by his or her direct supervisor.

## **2. Duty to Report Notice of Formal Proceedings**

Every prosecutor who receives notice from the State Bar that formal charges or proceedings have been instituted against him or her, regardless of their nature, must inform his or her direct supervisor of that notification in writing. The prosecutor's written notice to his or her supervisor must contain the timing, nature and substance of the notification he or she received from the State Bar. If the notice of the formal charges or proceedings been memorialized in writing by the State Bar, the prosecutor shall include a copy of that writing in his or her report as well.

The prosecutor's written notice to his or her direct supervisor pursuant to this section shall be made within two business days of his or her receipt of notice from the State Bar of the initiation of formal charges or proceedings, unless otherwise authorized by his or her direct supervisor.

The duty imposed by this section applies in any instance in which a prosecutor has received notice of the initiation of formal charges or proceedings by the State Bar against him or her, regardless of whether those charges or proceedings pertain to alleged conduct by the prosecutor in his or her professional capacity as a prosecutor. This duty also applies regardless of whether the prosecutor has already made written notice pursuant to paragraph III., A., 1, *supra*, or not.

## **3. Duty to Report Sustained Finding of Prosecutorial Misconduct**

Every prosecutor who receives notice that a court of the State of California, a court of the United States, or a court of any other state or territory of the United States, has sustained a



finding of prosecutorial misconduct by him or her, must inform his or her direct supervisor of that finding. The prosecutor's written notice to his or her supervisor must contain the date of the finding, the case name, case number, the jurisdiction, the identity of the defense attorney and judge and a description of the nature and substance of the finding. If the finding of prosecutorial misconduct has been memorialized by the court in a written opinion, the prosecutor shall include a copy of that opinion in his or her report as well.

The prosecutor's written notice to his or her direct supervisor pursuant to this section shall be made within two business days of his or her receipt of notice of the sustained finding of prosecutorial misconduct, unless otherwise authorized by his or her direct supervisor.

#### **4. Duty to Report Change in State Bar Licensee Status**

Any prosecutor who receives notice that his or her licensee status with the State Bar will be changed or has changed, for any reason, from "active" to "disbarred," "suspended," "resigned," "inactive" or any other status must inform his or her direct supervisor, in writing. The prosecutor's written notice to his or her direct supervisor pursuant to this section shall be made immediately upon his or her receipt of notice of the impending change or change in licensee status. The prosecutor's written notice to his or her supervisor must contain the timing, nature and substance of the notification he or she received. The duty imposed by this section applies in any instance in which a prosecutor has received such notice.

#### **5. Failure to Make Timely and Complete Notice**

A prosecutor's failure to make a timely and complete written notification to his or her supervisor may constitute a violation of this policy and may result in discipline. It may also result in a delay or denial in seeking approval for representation for the benefit of that prosecutor.

## **B. Prosecutor's Request for Counsel**

### **1. Request for Counsel at the Investigative or Inquiry Stage**

In the event that the State Bar initiates an investigation or inquiry of a prosecutor regarding alleged conduct by him or her in his or her professional capacity as a prosecutor, the prosecutor may request the assistance of counsel at the expense of the OCDA to assist him or her in communications with the State Bar. The prosecutor's request for counsel must be in writing.

### **2. Request for Counsel Following Formal Charges or Proceedings**

In the event that the State Bar initiates formal disciplinary charges or proceedings against a prosecutor regarding an alleged violation of the CRPC or of the law by the prosecutor in his or her professional capacity as a prosecutor or following an instance of self-reporting pursuant to Business and Professions Code section 6068, subd. (o), the prosecutor may request the appointment of County provided counsel to represent him or her in that administrative proceeding. The prosecutor's request for counsel must be in writing.

## **C. Supervisor's Duty to Inform the Professional Responsibility Committee**

Every attorney supervisor who receives written notification from his or her subordinate attorney pursuant to paragraph III., A. 1.-4., *supra*, shall refer the matter to the Professional Responsibility Committee (PRC) and his or her direct supervisor as soon as practicable. The referral shall include the prosecutor's written notification along with any other relevant circumstances or information the supervisor deems appropriate.

## **D. PRC Review of Notifications and Requests**

The PRC shall include, the Chief Assistant District Attorney (CADA); the Special Counsel, and a Senior Assistant District Attorney, appointed by the District Attorney. The PRC is responsible for reviewing written notifications made pursuant to paragraph III., A. 1.-4., *supra*, as well as written requests for the provision of counsel made pursuant to paragraph III., B. 1. & 2., *supra*.

### **1. Review of Notifications of State Bar Contact**

Upon receiving written notification pursuant to paragraph III. A. 1.-4., *supra*, the PRC will determine what, if any, appropriate action need be taken. The action taken by the PRC may include, but is not limited to, any one or more of the following steps:

- a) directing the Professional Responsibility & Training Unit (PRTU) and/or Chief Ethics Officer to identify or administer a relevant program of continuing legal education for the benefit of the prosecutor who is the subject of the notification;
- b) directing the PRTU and/or Chief Ethics Officer to identify or administer a relevant program of continuing legal education for the benefit of a relevant segment of OCDA personnel;
- c) referring the matter to the Human Resources Department of the OCDA for further review if, in the view of the PRC, the alleged conduct could constitute a violation of the policies of the OCDA or the County of Orange, the California Rules of Professional Conduct or the law which warrant further investigation;
- d) gathering additional information to evaluate the circumstances of the notification.



## 2. Review of Requests for Counsel

The PRC will review each written request for counsel made pursuant to paragraph III. B. 1. & 2., *supra*, to determine whether or not the provision of counsel is consistent with the legal and ethical interests of the OCDA. The PRC will also review each written request for counsel made pursuant to paragraph III. B. 2. to determine whether or not the appointment of counsel is consistent with Government Code section 995.6.<sup>2</sup>

In making this determination, the PRC will consider the totality of the circumstances including, but not limited to, the information provided by the requesting prosecutor in writing, any supplemental information provided by his or her supervisor(s), any supplemental information gathered by the PRC, the allegations of the State Bar, the facts and circumstances of the case or cases in question and the conduct of the prosecutor.

Following its review, the PRC will determine whether to recommend that the OCDA provide counsel, in response to a request made pursuant to paragraph III. B. 1., *supra*, or to seek the appointment of counsel pursuant to Government Code section 995.6 for the benefit the prosecutor following a request made pursuant to paragraph III. B. 2., *supra*. The PRC shall inform the District Attorney of the PRC's recommendation as a result of its review. The District Attorney may either accept or reject the recommendation of the PRC. The PRC will inform the requesting prosecutor of the District Attorney's decision.

If the District Attorney agrees to provide representation pursuant to paragraph III. B. 1., *supra*, the OCDA will only provide such counsel during the investigative stage of a State

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<sup>2</sup> California Government Code, section 995.6 provides:

A public entity is not required to provide for the defense of an administrative proceeding brought against an employee or former employee, but a public entity may provide for the defense of an administrative proceeding brought against an employee or former employee if:

- (a) The administrative proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; and
- (b) The public entity determines that such defense would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity.

Bar inquiry. In the event that the State Bar initiates formal disciplinary charges or proceedings against the prosecutor, any OCDA provided representation must terminate. A prosecutor's request for counsel following the initiation of disciplinary charges must be made anew pursuant to paragraph III., B., 2, *supra*.

If the District Attorney recommends seeking payment for legal representation following a request made under paragraph III. B. 2, *supra*, a request will be made to the Board of Supervisors pursuant to Government Code section 995.6. The Board of Supervisors must approve the request.

### **3. Review Following Sustained Findings of Prosecutorial Misconduct**

The PRC may review any matter in which a court of the State of California, a court of the United States, or a court of any other state or territory of the United States has sustained a finding of prosecutorial misconduct by an OCDA prosecutor, regardless of whether that finding required or resulted in a contact with the State Bar. Upon review, the PRC will determine what, if any, action is appropriate including, but not limited to, those actions identified, *supra*, in paragraph III., D. 1.

### **E. Prosecutor's Responsibility Following the Appointment of Counsel**

In the event that counsel is provided to assist or represent a prosecutor pursuant to this policy, it shall be the duty of the prosecutor to inform the CADA of the procedural status of the State Bar investigation, any changes in the charges, and the final outcome or resolution of the matter.



#### **IV. Policy Limitations**

None of the terms of this policy operate to confer any rights, in whole or in part, to any OCDA employee, nor does it operate to limit any rights of the OCDA.