



ETHICS

PROSECUTORIAL MISCONDUCT VS. PROSECUTORIAL ERROR

- To the extent People v. Jones (1997) 15 Cal. 4th 119, 187, 188, People v. Padilla (1995) 11 Cal. 4th 891, 942, People v. Berryman, supra, 6 Cal. 4th at page 1073, and People v. Bonin (1988) 46 Cal. 3d 659, 702 hold or suggest a showing of bad faith is required to establish prosecutorial misconduct in argument to the jury, those cases are inconsistent with Bolton and its progeny and are overruled. **We observe that the term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.**



CALIFORNIA STATE BAR PROCEEDINGS



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FACTOR IN AGGRAVATION

(d) intentional misconduct, bad faith or dishonesty;

FACTOR IN MITIGATION

(b) good faith belief that is honestly held and objectively reasonable;

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 (with emphasis on Rule 3.8)
- Statutory Rules (PC§1054 *et seq.*, BP§6068, etc.)
- Caselaw Related to Trial Practice
- Office Policies and Procedures Manual

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**

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.

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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.

Business &
Profession
Code § 6068

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

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

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.

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.*”

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.

“Good cause” is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

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: Post-Conviction

(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 – Required Actions By Prosecutor



(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.



RULE 3.8 – Required Actions By Prosecutor

(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 § 1424.5

Intentional Withholding of Relevant, Exculpatory Evidence

(1) Upon receiving information that a prosecuting attorney may have deliberately and intentionally withheld relevant, material exculpatory evidence or information in violation of law, **a court may make a finding, supported by clear and convincing evidence, that a violation occurred.** If the court finds such a violation, the court shall inform the State Bar of California of that violation if the prosecuting attorney acted in bad faith and the impact of the withholding contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.



PENAL CODE §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 ensure that you have the necessary materials you need to comply with your obligations . . . DO NOT BE PASSIVE. Keep in mind constructive possession.
- DOCUMENTATION IS CRITICAL . . . You need to know 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 that there was no misconduct.

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!!!!



ASSEMBLY BILL 3070 (IF PASSED INTO LAW)

Effective January 1, 2022

- Upon objection to a challenge – Must state reasons for peremptory challenges.
- A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity . . .

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

ASSEMBLY BILL 3070 cont.

The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

- (A) The prospective juror was inattentive, or staring or failing to make eye contact.
- (B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
- (C) The prospective juror provided unintelligent or confused answers.

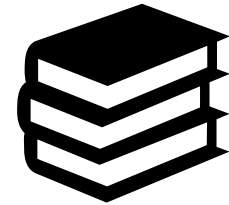
SENTENCING

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 – *DOYLE* ERROR

Doyle v. Ohio (1976) 426 U.S. 610

- Doyle v. Ohio holds that the prosecution may not penalize a defendant for invoking Miranda rights during interrogation by using the invocation against the defendant at trial.

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.”

...

[I]t 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.

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.

WITHOUT ETHICS THERE IS NO JUSTICE



Our finding that the prosecutorial misconduct does not warrant reversal of appellant's conviction should not be viewed as condoning the deputy district attorney's conduct. On the contrary, we consider his actions highly improper and extremely serious, particularly in light of the fact that he has been the subject of at least one published opinion in which a criminal conviction had to be reversed in large measure because of his misconduct.

Section 6086.7 of the Business and Professions Code provides that when we reverse a conviction because of prosecutorial misconduct we must refer the matter to the State Bar for investigation with regard to the appropriateness of initiating disciplinary action against the attorney. Even though we do not believe that reversal is in order, and despite the fact that section 6086.7 took effect after trial of this case, this attorney's conduct cannot be ignored.

People v. Ryner (1985) 164 Cal. App. 3d 1075, 1084

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 – GENERAL RULE

- (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



PERMISSIBLE CONTACT WITH MEDIA GENERAL RULE

- (1) the claim, offense or defense involved and, except when prohibited by law,
- (2) the identity of the persons* involved;
- (3) information contained in a public record;
- (4) that an investigation of a matter is in progress;
- (5) the scheduling or result of any step in litigation;
- (6) a request for assistance in obtaining evidence and information necessary thereto;
- (7) a warning of danger concerning the behavior of a person*





SPECIAL RULES FOR CRIMINAL CASES

(7) [I]n a criminal case, in addition to paragraphs (1) through (6):

- (i) the identity, general area of residence, and occupation of the accused;
- (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;*
- (iii) the fact, time, and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

MIRANDA (Rule 3.8)

[M]ake 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;

COMMENT

Paragraph (c) **does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent.** Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.



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;

RULE 3.4 (APPLIES TO DEFENSE AS WELL)

FAIRNESS TO OPPOSING PARTY

- (a) Unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal evidence
- (b) Suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably* incurred by a witness in attending or testifying;
 - (2) reasonable* compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable* fee for the professional services of an expert witness;
- (e) Advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;
- (f) Knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or**
- (g) In trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

RESOURCES

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

