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NO.83308-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

NATHANIEL ISH, Petitioner.

CLERK

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FILED  
SUPREME COURT  
STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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## I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in the public perception of prosecuting attorneys and of the criminal justice system.

## II. ISSUE PRESENTED

Whether the phrase "prosecutorial misconduct" should be reserved for conduct by a prosecutor that is intended to violate the Constitution or another legal or ethical requirement, and the term "prosecutorial error" should be used for all other missteps?

## III. ARGUMENT

Modern society increasingly recognizes the power of words. Language that was utilized, without malice, in past years may now appear offensive. Legislatures, courts, and professional organizations are all taking action to replace obsolete, offensive, or misused terms with more appropriate references.<sup>1</sup>

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<sup>1</sup>See, e.g., Laws of 2010, ch. 94, §§ 1 and 2(4) (replaces the terms "developmentally disabled" and "mentally retarded" in numerous statutes with "more appropriate references").

Recently, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) have urged courts to distinguish between "attorney misconduct" and "attorney error".<sup>2</sup> These resolutions are consistent with recent appellate court opinions which hold that the phrase "prosecutorial misconduct" should be reserved for deliberate violations of a rule or practice, versus for a misstep of a type all trial lawyers make from time to time.<sup>3</sup>

WAPA urges this Court to implement the rule recommended by NDAA and the ABA in Washington. This step will ensure that the public will not lose faith in its public servants and its court system. For as Hawaii Supreme Court Justice Nakayama recognizes, the word "misconduct" carries pejorative connotations that are not associated with the word "mistake".

[Courts] must be mindful that words pregnant with meaning carry repercussions beyond the pale of the case at hand. The public face of the prosecutor – and her service to a broad community of interests – ensures that her actions will be scrutinized by those who are bound to misinterpret her "misconduct" in court as an automatic rebuke of her professionalism, trustworthiness, or competence. The stain to

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<sup>2</sup> See National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), [http://www.ndaa.org/pdf/prosecutorial\\_misconduct\\_final.pdf](http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf) (last visited May 28, 2010); American Bar Association Criminal Justice Section Report to the House of Delegates 111A, [http://www.abanet.org/leadership/2009/annual/summary\\_of\\_recommendations/One\\_Hundred\\_Eleven\\_A.DOC](http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Eleven_A.DOC) (last visited May 26, 2010).

<sup>3</sup> See, e.g., *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 26-27 n. 2 (2007).

her representation will come regardless of whether the taint was deserved.

*State v. Maluia*, 107 Haw. 20, 108 P.3d 974, 987 (2005) (Nakayama, J., dissenting). This taint to the prosecutor's reputation extends to the court system itself, undermining the public's perception that criminal defendants receive justice.

**A. History of the Phrase "Prosecutorial Misconduct"**

The term "prosecutorial misconduct" is of relatively recent vintage. The first United States Supreme Court case to use the phrase was *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963). In this case, the Court recognized that some lower courts opined that error may be based upon a concept of prosecutorial misconduct. Such a claim was said to arise when the government makes a conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege. In other words, such a claim did not arise out of mere negligence or out of "simple" trial error. The Court, applying this understanding to the facts of the case, stated that the record, which included advance notice to the prosecutor that the witnesses intended to invoke their privilege against self-incrimination, did "not support any inference of prosecutorial misconduct." *Namet*, 373 U.S. at 188.

Four years after *Namet*, this Court used the phrase “prosecutorial misconduct” for the first time. The case wherein the phrase was utilized, *State v. Nelson*, 72 Wn.2d 269, 432 P.2d 857 (1967), involved a conscious error on the part of the prosecutor— namely the calling of a witness whom the prosecutor knew would claim the Fifth Amendment privilege against self-incrimination – solely as a means of getting the government's theory of the case before the jury. Not only did the prosecutor know that the witness would assert the privilege from the first trial of the defendant, the prosecutor’s questions were designed to place before the jury the evidence that resulted in the reversal on appeal, of the defendant’s first conviction. *Nelson*, 72 Wn.2d at 281-283.

The phrase “prosecutorial misconduct” slowly but relentlessly moved beyond the calling of a witness to the stand who the prosecutor knew would invoke his or her privilege against self-incrimination, to any error committed during closing argument or cross-examination. The following table demonstrates, by decade, how frequently the phrase “prosecutorial misconduct” appears in publicly available opinions:

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	Published Washington Appellate Court Cases <sup>1</sup>	Unpublished Washington Appellate Court Cases <sup>2</sup>
1970's	27	n/a
1980's	88	n/a
1990's	111	300
2000's	139	1023

1. These numbers were generated using the following LEXIS search: opinion("prosecutorial misconduct") and not(unpublished).

2. These numbers were generated using the following LEXIS search: opinion("prosecutorial misconduct"). The numbers in the prior column were then subtracted from the numbers generated in this search.

Included in the hundreds of appellate court opinions are countless judgment calls made under the stress and pressure of trial.<sup>4</sup> A judgment call that an appellate court later determines on appeal to have been made in error is only labeled as "misconduct" when made by a prosecutor. The same pejorative term is not used when such errors are made by trial judges<sup>5</sup> and all

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<sup>4</sup>Washington appellate courts have denominated errors made by prosecutors in rebuttal argument "misconduct." See, e.g., *State v. Moreno*, 132 Wn. App. 663, 671, 132 P.3d 1137 (2006). Rebuttal arguments generally must be delivered moments after the defense argument ends. The prosecuting attorney's inability to reflect upon the propriety of his or her words, to consult with a colleague, or to review the latest slip opinion, makes it unlikely that any misstatement was a deliberate effort to violate a rule or practice.

<sup>5</sup>The phrase "judicial misconduct" has been reserved by Washington appellate courts for judicial discipline cases. See, e.g., *In re Hammermaster*, 139 Wn.2d 211, 985 P.2d 924 (1999); *In re Disciplinary Proceeding Against Deming*, 108 Wn.2d 82, 736 P.2d 639 (1987). Even in cases where judges have lied to jurors, have sua sponte violated the public's constitutional right to open courtrooms, or have engaged in improper ex parte investigations, the opinions have focused on the effect of the error rather than the culpability of the judge. See, e.g., *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) (reversing conviction due to judge's violation of the defendant's constitutional right to a public trial, by the judge sua

other attorneys; rather, the term "misconduct" is reserved for dishonest and deceitful acts made in bad faith.

**B. Mounting Dissatisfaction with the Phrase "Prosecutorial Misconduct"**

Within the last decade a number of appellate courts have expressed dissatisfaction with the term "prosecutorial misconduct." The Pennsylvania Supreme Court recently stated that

The phrase "prosecutorial misconduct" has been so abused as to lose any particular meaning. The claim either sounds in a specific constitutional provision that the prosecutor allegedly violated or, more frequently, like most trial issues, it implicates the narrow review available under Fourteenth Amendment due process. *See Greer v. Miller*, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) ("To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.") (internal quotation marks omitted); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) ("When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them."). However, "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson*, 467 U.S. 504, 511, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984). The touchstone is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). If the defendant thinks the

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sponte closing jury selection to the public; phrase "judicial misconduct" does not appear in opinion); *State v. Romano*, 34 Wn. App. 567, 662 P.2d 406 (1983) (vacating sentence due to a judge's improper ex parte investigation about a pending proceeding; phrase "judicial misconduct" does not appear in opinion). This practice protects both the defendant's rights and the judge's reputation.

prosecutor has done something objectionable, he may object, the trial court rules, and the ruling-not the underlying conduct-is what is reviewed on appeal.

*Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008).

The Hawaii Supreme Court, the Connecticut Supreme Court, and the Minnesota Court of Appeals all recently recognized the unfairness of labeling every mistake made by a prosecutor as “misconduct.” See *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Maluia*, 107 Haw. 20, 108 P.3d 974, 979-981 (2005); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009).

Essentially these three courts

agree that there are varying degrees of prosecutorial misconduct. We also recognize that most cases presenting allegations of “prosecutorial misconduct” to this court do not involve prosecutors who intend to eviscerate the defendant's constitutional and statutory rights; instead, they involve situations, like the instant case, in which the law is not entirely clear and where the prosecutor makes a judgment call as to whether a particular question or argument is proper.

*Maluia*, 108 P.3d at 979. Accord *Leutschaft*, 759 N.W.2d at 418 (“there is an important distinction to be made between prosecutorial misconduct and prosecutorial error”); *Fauci*, 917 A.2d at 982-83 (“A judgment call that we later determine on appeal to have been made improperly should not be called “misconduct” simply because it was made by a prosecutor.”).

Just last year, this Court recognized that the phrase “prosecutorial misconduct” is not an accurate term for the errors or mistakes that are alleged by most criminal defendants:

“Prosecutorial misconduct” is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct.

*State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009).

While this Court’s statement in *Fisher* is a welcomed attempt to educate the public as to the meaning of the phrase “prosecutorial misconduct”, “[a] public finding that an attorney engaged in ‘misconduct’ operates as a sanction with adverse impact on that person’s reputation, whether or not so intended.” American Bar Association Criminal Justice Section Report to the House of Delegates 111A, at 2 [http://www.abanet.org/leadership/2009/annual/summary\\_of\\_recommendations/One\\_Hundred\\_Eleven\\_A.DOC](http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Eleven_A.DOC) (last visited May 26, 2010) (hereinafter “Report to the House of Delegates”).<sup>6</sup> See also *Fauci*, 917 A.2d at 983-84 n. 2 (“To label what is merely improper as misconduct is a harsh result that brands a prosecutor with a mark of malfeasance when his or her actions may

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<sup>6</sup>A copy of this document may be found in Appendix A.

be a harmless or honest mistake.”); *Maluia*, 108 P.3d at 980-81 (“We are aware. . . that a finding of ‘prosecutorial misconduct’ may be understood by some to automatically connote ‘a rebuke of [the prosecutor’s] professionalism, trustworthiness, or competence.’”).

The imposition of this unintentional sanction presents both substantive and procedural concerns.

Substantively, not every lawyer who has engaged in impermissible behavior deserves to be sanctioned for “misconduct” by being identified in a published opinion or otherwise. Sometimes, the conduct does not violate an established standard or conduct or law. Other times, the conduct may violate the applicable rule or law but the lawyer did not engage in the conduct with the requisite level of culpability – such as intent or knowledge – to warrant a sanction. It would be unwise for a court to issue an opinion finding that the particular lawyer engaged in “misconduct,” thereby sanctioning the lawyer in effect for conduct that was not sanctionable.

Procedurally, the concern is that judicial findings of attorney misconduct are not invariably preceded by a fair proceeding with notice and a fair opportunity to be heard. This is of particular significance because many of these informal findings of misconduct are not subject to appeal. Further, even where appellate remedies exist and result in reversal of an attorney sanction, the lower court opinion sanctioning a lawyer for “misconduct” remains available for public scrutiny.[<sup>7</sup>]

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<sup>7</sup>The Court of Appeals recently held that trial courts cannot sanction defense attorneys for missing hearings without providing them with notice and an opportunity to be heard. *See State v. Jordan*, 146 Wn. App. 395, 190 P.3d 516 (2008). Since most claims of prosecutorial misconduct are made for the first time on appeal, the prosecutor is deprived of any opportunity to provide evidence regarding his or her state of mind.

Moreover, a judicial finding of misconduct has consequences not only for an attorney's reputation, but for potential further proceedings against the lawyer. Notably, the Department of Justice's Office of Professional Responsibility requires an internal investigation of the lawyer's conduct when a court finds that a lawyer engaged in misconduct.<sup>[8]</sup>

Report to the House of Delegates, at 2-3 (footnotes and citations omitted).

*See also Id.*, at 3-4.

**C. "Prosecutorial Error" is a More Accurate Term**

The procedural and substantive concerns of inadvertently imposing a sanction upon an attorney by labeling innocent errors as "misconduct" can be easily avoided through a change of nomenclature.

[T]he American Bar Association and NDAA urges trial and appellate courts reviewing the conduct of prosecutors, while assuring that a defendant's rights are fully protected, to use the term "error" where it more accurately characterizes that conduct than the term "prosecutorial misconduct."

National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), [http://www.ndaa.org/pdf/prosecutorial\\_misconduct\\_final.pdf](http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf) (last visited May 28, 2010).<sup>9</sup> *Accord* Report to the House of Delegates.

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<sup>8</sup>An appellate court's finding that a deputy prosecuting attorney engaged in "misconduct" will result in some internal investigation, albeit less formal than that called for in the federal system. *See generally* National District Attorneys Association, National Prosecution Standards, Std. 1-1.6 (3rd ed. 2009); RCW 36.27.040 ("The prosecuting attorney shall be responsible for the acts of his or her deputies and may revoke appointments at will."); RPC 5.1 (supervisory lawyers should make reasonable efforts to ensure that the conduct of subordinate lawyers conform to the Rules of Professional Responsibility).

<sup>9</sup>A copy of this resolution may be found in appendix B.

The action called for by these two respected organizations is already a reality in at least two jurisdictions. *See Fauci*, 917 A.2d at 982-83 n.2 (substituting the term “prosecutorial impropriety” for honest mistakes; surveying cases that use a term other than “misconduct”); *Leutschaf*, 759 N.W.2d at 418 (recognizing the “valid distinction” between “prosecutorial error” and “prosecutorial misconduct”, and using the term “prosecutorial error”). WAPA urges this Court add Washington to the list of jurisdictions that restricts the use of the term “prosecutorial misconduct” to a deliberate violation of a rule or practice that is made in bad faith.

#### IV. CONCLUSION

This Court should adopt the more accurate and neutral “prosecutorial error” to describe those missteps made by prosecutors that were not intended to violate the Constitution or any other legal or ethical requirement.

Respectfully submitted this 28th day of May, 2010.

  
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# APPENDIX A

AMERICAN BAR ASSOCIATION  
CRIMINAL JUSTICE SECTION  
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association urges courts to distinguish between  
2 attorney misconduct and attorney error, and prior to the issuance of any order, opinion or  
3 finding that an attorney engaged in misconduct, courts first give the attorney a fair  
4 opportunity to address any charge of misconduct, and find that the attorney's act or  
5 omission was purposeful, knowing or intentional or otherwise violated an applicable  
6 disciplinary rule or law; and  
7  
8 FURTHER RESOLVED, That disciplinary agencies should not deem a finding of  
9 misconduct in an order, opinion or ruling by a court determinative of a disciplinary  
10 violation.

## REPORT

Courts, with an important role to play in regulating the conduct of lawyers, have a range of options to deter and punish improper behavior short of a public finding of misconduct. Courts may communicate directly with the lawyer, refer the lawyer's conduct to the lawyer's office or report the suspected violation to a disciplinary body. The court may fine the lawyer, or disqualify him or her from the case.<sup>1</sup> It may reprimand the lawyer orally on or off the record, including in a published opinion.<sup>2</sup> Where appropriate as a response to an attorney's or judge's behavior, a public finding of misconduct may be an effective and efficient deterrent. However, its use should be limited to appropriate circumstances where there is a sufficient process and a determination that the conduct action or omission was purposeful, knowing or intentional or otherwise violated the applicable disciplinary rule or law. This resolution urges courts to carefully consider options to regulate the conduct of attorneys and be circumspect in the use of the term "misconduct."

A public finding that an attorney engaged in "misconduct" operates as a sanction with adverse impact on that person's reputation, whether or not so intended. This is both a substantive and procedural concern applicable to all lawyers and judges.<sup>3</sup>

Substantively, not every lawyer who has engaged in impermissible behavior deserves to be sanctioned for "misconduct" by being identified in a published opinion or otherwise. Sometimes, the conduct does not violate an established standard of conduct or law. Other times, the conduct may violate the applicable rule or law but the lawyer did not engage in the conduct with the requisite level of culpability—such as intent or knowledge—to warrant a sanction. It would be unwise for a court to issue an opinion finding that the particular lawyer engaged in "misconduct," thereby sanctioning the lawyer in effect for conduct that was not sanctionable.

Procedurally, the concern is that judicial findings of attorney misconduct are not invariably preceded by a fair proceeding with notice and a fair opportunity to be heard. This is of particular significance because many of these informal findings of misconduct are not subject to appeal. Further, even where appellate remedies exist and result in reversal of an attorney sanction, the lower court opinion sanctioning a lawyer for "misconduct" remains available for public scrutiny.

Moreover, a judicial finding of misconduct has consequences not only for an attorney's reputation, but for potential further proceedings against the lawyer. Notably, the

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<sup>1</sup> See, e.g., *Laser v. Ford Motor Co.*, 239 F. Supp. 2d 1022 (D. Mont. 2003), *aff'd in part, rev'd in part*, 399 F.3d 1101 (9th Cir. 2005) (fine and disqualification); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) (compulsory legal education").

<sup>2</sup> See, e.g., *Fla. Breckenridge, Inc. v. Solvay Pharms., Inc.*, 174 F.3d 1227, 1232 (11th Cir. 1999); *United States v. Modica*, 663 F.2d 1173 (2d Cir. 1981).

<sup>3</sup> In this report, "attorney" or "lawyer" refers to all lawyers including judges.

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Department of Justice's Office of Professional Responsibility requires an internal investigation of the lawyer's conduct when a court finds that a lawyer engaged in misconduct.<sup>4</sup>

## Prosecutorial Misconduct

The term "prosecutorial misconduct" is not synonymous with intentional, purposeful or knowing misconduct by the individual attorney. Rather, "prosecutorial misconduct" which has been called a "term of art,"<sup>5</sup> is defined by federal and state case law, and is generally alleged by a defendant who seeks a judicial remedy for prosecutorial or other governmental misconduct. It may give rise to a reversal of a conviction.<sup>6</sup> For some claims of prosecutorial misconduct, courts necessarily make findings of a prosecutor's knowledge, intent or motive.<sup>7</sup> In many cases, however, the state of mind of the individual prosecutor is not relevant to the claim. For example, the prosecutor has an obligation pursuant to *Brady v Maryland* and its progeny to disclose exculpatory evidence to the defense. This includes the obligation to make reasonable efforts to review the police files to learn of any favorable evidence. Where the police withheld evidence from the individual prosecutor, a court may reverse a conviction for "prosecutorial misconduct" regardless of the prosecutor's knowledge, purpose or intent. That judicial finding should not be taken as a sanction against the individual prosecutor unless the prosecutor's act or omission rises to the appropriate level of personal culpability. In other words, courts should be careful not to collapse the distinction between the governmental misconduct to challenge a conviction and the professional conduct of the individual lawyer.<sup>8</sup>

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<sup>4</sup> The Department of Justice requires that whenever there is a judicial finding of misconduct, the matter be reported to the Office of Professional Responsibility by Department employees.  
<http://www.usdoj.gov/opr/proc-hdl.html> (2004 OPR Annual Report).

<sup>5</sup> Steve Weinberg, Center for Public Integrity, A Question of Integrity: Prosecutors dispute the significance of 'prosecutorial misconduct,' June 26, 2003,  
<http://projects.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=34> (last visited Nov. 16, 2008)  
(quoting former Chief Justice of the Delaware Supreme Court Norman Veasey).

<sup>6</sup> The standard for reversal is dependent upon the nature of the misconduct. For a *Brady* claim, this constitutional violation will result in reversal if there is a "reasonable probability that the outcome would have been different." *United States v. Bagley*, 473 U.S. 667 (1985). For most non-constitutional claims, there is a harmless error analysis, expressed in various ways including whether the "misconduct considered as a whole impaired the defendant's right to a fair trial." In some cases, such as bad faith prosecution or egregious error a court will apply a constitutional standard, that is, whether the error is harmless beyond a reasonable doubt. See, e.g., *State v. Caron*, 218 N.W. 2d 197, 200 (Minn. 1974).

<sup>7</sup> See, e.g., *U.S. v. Johnson* 171 F.3d 139 (2d Cir. 1999) (prosecution may show good faith reason for conduct); *Lee v. U.S.*, 432 U.S. 23 (1977) (barring retrial when prosecutor misconduct is motivated by bad faith...) See generally Bennett Gershman, PROSECUTORIAL MISCONDUCT 2d ed., 2008.

<sup>8</sup> Courts may consider the use of the term "government misconduct" rather than "prosecutorial misconduct" for circumstances where the court does not intend to sanction the individual attorney.

Further, conduct determined to be “prosecutorial misconduct” may be the result of an innocent mistake by the individual attorney and does not rise to the level of culpability required by an applicable rule or law. For example, a prosecutor may have unintentionally misquoted words uttered by a witness. The mistake may give rise to reversal of a conviction for prosecutorial misconduct but this finding should not give rise to a sanction for the individual prosecutor unless the conduct violates a disciplinary standard or law. As the Prosecutors’ Deskbook points out, allegations of prosecutorial misconduct should not be confused with ‘prosecutorial error’.<sup>9</sup>

Not only is there a substantive concern about the appropriate use of the term “misconduct,” but there is a fundamental procedural one as well. Public findings of attorney misconduct are not invariably preceded by a fair proceeding. In part, this is because the judicial inquiry is often focused solely on the alleged conduct irrespective of the individual prosecutor’s state of mind. For example, in addressing a motion for a new trial based on an alleged *Brady* violation, it is unnecessary for the court to determine whether the evidence in question was withheld intentionally or inadvertently, and the prosecutor who was allegedly responsible for failing to produce the evidence may therefore have no motivation or opportunity to establish that he or she simply made an innocent mistake.

In a similar vein, it is not unusual for claims of prosecutorial misconduct to be raised for the first time on appeal. Oftentimes, prosecutors do not have the opportunity to contest the finding, particularly when the issue is first raised and decided on appeal.

Consequently, this resolution emphasizes the need for a fair process to determine whether the conduct is appropriately termed “misconduct” that violates the applicable rule or law. Without such a process, a finding of misconduct operates as a sanction of the individual. This consequence is compounded by the fact that in most jurisdictions, a finding of lawyer “misconduct,” unaccompanied by a formal sanction, is not appealable.<sup>10</sup>

#### Criminal Defense and Civil Lawyer Misconduct

Criminal defense lawyers and civil litigators have similar concerns about the content, process and consequences of a finding of “misconduct.” Criminal defense lawyers are infrequently the subject of judicial findings of misconduct.<sup>11</sup> Sometimes, criminal defense lawyers are publicly chastised for their conduct but it is not labeled

<sup>9</sup> THE PROSECUTOR’S DESKBOOK: ETHICAL ISSUES AND EMERGING ROLES FOR 21<sup>ST</sup> CENTURY PROSECUTORS.” See, e.g., *State v. Leutschaf*, 759 N.W. 2d 414 (Minn. 2009) (acknowledging distinction between “prosecutorial misconduct” and “prosecutorial error”).

<sup>10</sup> See, e.g., *Nisus Corp. v. Perma-Chink Sys., Inc.*, 497 F.3d 1316 (Fed. Cir. 2007); Carla R. Pasquale, *Can An Attorney Appeal a District Court’s Order Finding Professional Misconduct?*, 77 Ford. L Rev. 219 (2008).

<sup>11</sup> See, e.g., *State v. Burnett*, 13 Kan. App 2d 60 (1988); *State v. Smith* 871 S.W. 667 (Tenn. 1994); *People v. Owens* 183 P.3d 568 (Colo.App.2007).

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“misconduct.” More commonly, defense counsel’s conduct is challenged through appellate claims of ineffective assistance of counsel.

Criminal defense lawyers who are the subject of judicial findings of “misconduct” should be afforded a fair opportunity to contest the allegation and the substantive nature of the charged conduct. Judicial commentary that there is a “distinct possibility” of defense attorney misconduct” or a mention of “defense attorney misconduct” as the grounds to deny a defendant’s motion for a new trial, provide insufficient process to determine whether that attorney should be sanctioned.<sup>12</sup>

Civil litigators have longstanding concerns about judicial findings and informal sanctions of lawyers without procedural protections of notice and a right to be heard. This concern includes, but is broader than, the use of the term “misconduct.”

In civil litigation, a wide range of sanctions exist in state and federal courts for discovery failures and other litigation conduct. Sanctions may be imposed pursuant to a judge’s inherent power to regulate attorney conduct as well as in accordance with powers granted by specific rules of procedure, and local court rules. For example, in the federal system, Federal Rules of Civil Procedure 11 and 37 authorize sanctions proceedings. “Sanctions” may include formal sanctions such as monetary fines and nonmonetary directives based upon specific findings.<sup>13</sup> Typically an attorney can appeal these sanctions but the scope of appealable orders is unclear because there is no universal definition of sanctions.<sup>14</sup> Thus, “highly damaging findings of misconduct” may remain unchallenged.<sup>15</sup> Even when the appellate court reverses the sanction judgment, the original district court opinion containing sharply worded findings of misconduct remain for public scrutiny.

Also, a court may make factual determinations based upon its observation of the attorney’s behavior. Judges may express disapproval of the lawyer’s candor, professionalism or conduct and conclude that an attorney is guilty of “blatant misconduct.” Such “findings of misconduct” by a court are not typically appealable because these are not deemed “orders.” These “findings” are often contained within other rulings.<sup>16</sup>

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<sup>12</sup> *State v. Smith* 871 S.W. 667 (Tenn. 1994) (“distinct possibility” of defense attorney misconduct); *People v. Owens*, 183 P.3d 568 (Colo. App. 2007) (finding willful violation of court order).

<sup>13</sup> Fed R. Civ. P 11, for example, requires that a judge imposing sanctions “must describe the sanctioned conduct and explain the basis for the sanction” in an order.

<sup>14</sup> Comment, Robert B. Tannenbaum, *Misbehaving Attorneys, Angry Judges, And the Need for a Balanced Approach to the Reviewability of Findings of Misconduct*, 75 U. Chi. L. Rev. 1857 (2008).

<sup>15</sup> *In re Williams*, 156 F 3d 86 (1<sup>st</sup> Cir. 1998) (attorneys may only appeal orders, including findings “expressly identified as a reprimand” of the attorney’s conduct, thereby leaving “highly damaging findings of misconduct” (Roseann, J., dissenting).

<sup>16</sup> See, e.g., *Advo System Inc. Walters* 110 F.R.D. 426 (E.D. Mich. 1986) (lack of notice for lawyer accountability for “pursuit of baseless litigation” contained within Rule 11 order); Jeffrey A. Parness, *The*

Not all impermissible conduct rises to the level of “misconduct” deserving of a sanction in a published opinion. For example, Rule 3.3(a) (1) forbids a lawyer from “knowingly” making a false statement of fact. An inadvertent false statement is not permitted, and must be corrected if discovered, but it is also not “misconduct” sanctionable under the disciplinary rule. Likewise, lawyers are required to comply with discovery obligations, so that a civil litigator, (or any other lawyer) who fails to comply with an applicable civil or criminal discovery provision has acted impermissibly, regardless of whether the lawyer acted intentionally, recklessly, negligently or inadvertently. But unless the lawyer acted with the level of culpability justifying a sanction, it would be unfair for a court to issue an opinion finding that the particular lawyer engaged in “misconduct,” thereby sanctioning the lawyer in effect for conduct that was not sanctionable.

#### Judicial Misconduct

Similar concerns exist for the judiciary. Sometimes, appellate courts make findings that a trial judge engaged in “misconduct” that do not necessarily correlate to the standards in the relevant code of conduct or law. The trial judge in such circumstances is unlikely to have an opportunity to contest and address the conduct. Just as for other lawyers, a public finding that a judge engaged in “misconduct” should be limited to circumstances where the judge’s conduct was sanctionable before the relevant judicial commission or a court of law and where a fair process is afforded the judge to contest the findings.

#### Disciplinary Committees

Finally, disciplinary committees that undertake examination of the lawyer’s conduct should not afford collateral estoppel effect<sup>17</sup> or otherwise determine that a judicial statement or declaration that an attorney has engaged in “misconduct” establishes a disciplinary violation. The disciplinary process is distinct from that of a court and the attorney should be afforded appropriate protections within the relevant disciplinary authority.

Respectfully submitted,

Criminal Justice Section  
Anthony Joseph, Chair  
August 2009

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*New Method of Regulating Lawyers: Public and Private Interest Sanctions During Civil Litigation for Attorney Misconduct*, 47 La. L. Rev. 1305 (1987).

<sup>17</sup> See, e.g., *In re Capoccia*, 272 A.D.2d 838, 841, 709 N.Y.S.2d 640, 644 (3d Dep’t 2000) (collateral estoppels applicable to attorney disciplinary proceedings).

## GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Anthony Joseph, chair, Criminal Justice Section

1. Summary of Recommendation(s).

The American Bar Association urges courts to distinguish between attorney misconduct and attorney error, and urges courts to refrain from declaring in any order, opinion, or other public statement that an attorney engaged in misconduct unless the court finds, after giving the attorney a fair opportunity to address any charge of misconduct, that the attorney's act or omission was purposeful, knowing or intentional or otherwise violated an applicable disciplinary rule or law. The finding of misconduct by a court shall not be considered as a finding of a disciplinary violation

2. Approval by Submitting Entity.

The recommendation was approved by the Criminal Justice Section Council at its meeting on April 4, 2009.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

ABA statements in favor of reciprocal discipline may be implicated by the recommendation that a finding of misconduct by a court shall not be considered as a finding of a disciplinary violation

5. What urgency exists which requires action at this meeting of the House?

None

6. Status of Legislation. (If applicable.)

N.A.

7. Cost to the Association. (Both direct and indirect costs.)

The recommendation's adoption would not result in direct cost to the Association.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the August 2009 House of Delegates agenda it is being circulated to the following:

Section, Divisions, Forums

All Section and Divisions

National Organization of Bar Counsel  
 Standing Committee on Ethics and Professional Responsibility  
 Standing Committee on Professionalism

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Recommendation

The American Bar Association urges courts to distinguish between attorney misconduct and attorney error, and urges courts to refrain from declaring in any order, opinion, or other public statement that an attorney engaged in misconduct unless the court finds, after giving the attorney a fair opportunity to address any charge of misconduct, that the attorney's act or omission was purposeful, knowing or intentional or otherwise violated an applicable disciplinary rule or law; and disciplinary agencies should not consider a judicial finding of misconduct in an order, opinion or other public statement to establish a disciplinary violation.

### 2. Summary of the Issue that the Resolution Addresses

The resolution addresses the concern that a public finding by a court that a lawyer or judge engaged in "misconduct" operates as a sanction with adverse impact on the person's reputation. The finding of misconduct should be preceded by a fair process and should only be made when the conduct rises to the specified level.

### 3. Please Explain How the Proposed Policy Position will Address the Issue

The standards set forth in the resolution will encourage courts to distinguish between attorney misconduct and attorney error

### 4. Summary of Minority Views

The National Association of Criminal Defense Lawyers has expressed opposition and will make a formal submission prior to the meeting. Among its concerns is that this resolution interferes with a defendant's fifth and sixth amendment rights.

## APPENDIX B



**National District Attorneys Association**  
44 Canal Center Plaza, Suite 110, Alexandria, Virginia 22314  
703.549.9222/703.836.3195 Fax  
www.ndaa.org

**Resolution urging courts to use “error” instead of “prosecutorial misconduct”**

RESOLVED that the American Bar Association and NDAA recognizes that the term “prosecutorial misconduct” has become a term of art in criminal law that is sometimes used to describe conduct by the government that violates a defendant’s rights whether or not that conduct was or should have been known by the prosecutor to be improper and whether or not the prosecutor intended to violate the Constitution or any other legal or ethical requirement.

FURTHER RESOLVED that the American Bar Association and NDAA urges trial and appellate courts reviewing the conduct of prosecutors, while assuring that a defendant’s rights are fully protected, to use the term “error” where it more accurately characterizes that conduct than the term “prosecutorial misconduct.”

Approved April 10, 2010