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NO. 91660-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

CORY SUNDBERG, Respondent.

Filed *E*
Washington State Supreme Court
DEC - 9 2015
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Clerk

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 this Court should utilize the term "prosecutorial error" rather than "prosecutorial misconduct" for non-malicious legal errors?

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.¹

Recently, the American Bar Association and the Legal Defense Fund issued a "Joint Statement on Eliminating Bias In the Criminal Justice

¹See, e.g., *Olver v. Fowler*, 161 Wn.2d 655, 657 n. 1, 168 P.3d 348 (2007) (substituting the term "committed intimate relationship" for "meretricious" because of the negative connotations associated with the word "meretricious"); RCW 44.04.280 (replacing the terms "developmentally disabled" and "mentally retarded" in numerous statutes with "more appropriate references").

System” (July 2015)² (hereinafter “Eliminating Bias Report”). This July 2015 document seeks to address the “crisis of confidence” in America’s criminal justice system. Eliminating Bias Report, at 1. The report urges “immediate action at the micro level to begin the process of rebuilding trust and confidence in the criminal justice system.” *Id.* at 3. Recommendation 11 is relevant to the fourth question raised in the State’s petition for review³:

We must recognize that not every lawyer has the judgment and personal qualities to be a successful prosecutor, administer justice and be willing to acknowledge the possibility of implicit bias. Prosecutors who routinely engage in conduct or make decisions that call into question the fairness or integrity of their offices should be removed from office if they cannot be trained to meet the high standards expected of public officers. At the same time, the terms “prosecutorial misconduct” and “police misconduct” should be used with greater care. Even the best prosecutors will make mistakes, much like the best defense lawyers and judges do. There is good reason to limit the characterization of “misconduct” to intentional acts that violate legal or ethical rules.

Eliminating Bias Report, at 5.

WAPA agrees that not every attorney can be a successful prosecutor. WAPA also agrees that the injudicious use of the phrase “prosecutorial misconduct” contributes to a public perception that the criminal justice system is broken.

²A copy of the joint statement may be found in appendix A.

³*State v. Sundberg*, No. 91660-8, Petition for Review at 3.

The American Bar Associations 2015 statement echoes its 2010 Recommendation that urged courts to distinguish between “attorney misconduct” and “attorney error.”⁴ This recommendation and the resolution issued by the National District Attorneys Association are consistent with a number of 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.⁵

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

⁴ 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 (last visited Nov. 29, 2015); American Bar Association Recommendation adopted by the House of Delegates (Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b_authcheckdam.pdf (last visited Nov. 29, 2015).

⁵ See, e.g., *State v. Leutsch*, 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).

professionalism, trustworthiness, or competence. The stain to 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 first used the phrase “prosecutorial misconduct” in *State v. Nelson*, 72 Wn.2d 269, 432 P.2d 857 (1967). *Nelson* 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:⁶

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⁶These numbers were generated using the following LEXIS Advance search: “prosecutorial misconduct.”

	Published Washington Appellate Court Cases	Unpublished Washington Appellate Court Cases
1970s	34	n/a
1980s	93	n/a
1990s	136	295
2000s	162	1017
2010s	132	645

Included in the hundreds of appellate court opinions are countless judgment calls made under the stress and pressure of trial.⁷ 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 judges⁸ and all

⁷Washington 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.

⁸The 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 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.

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 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 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 recognize 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.”).

In the past, 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 (August 2009) (hereinafter "Report to the House of Delegates").⁹ 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 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

⁹A copy of this document may be found in Appendix D.

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^[10]

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.^[11]

¹⁰The Court of Appeals recognizes 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.

¹¹An 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).

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

See also Id., at 3-4.

In Washington, an appellate court's finding that a prosecutor engaged in "misconduct" will result in a "sanction" from the Bar. Shortly after the Court of Appeals issued its unpublished opinion in this matter, the WSBA Office of Disciplinary Counsel sent the trial deputy prosecuting attorney a letter based solely upon its review of the Court of Appeals' opinion.¹² While this letter¹³ states that it is "not a finding of misconduct or discipline," the Office of Disciplinary Counsel believes that "good cause" exists for retaining the opinion and its letter in the trial deputy prosecuting attorney's file for at least five years. No opportunity is provided to the trial prosecutor to challenge the Disciplinary Counsel's action or to submit a response to accompany any release of the letter.

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.

¹²A copy of the Office of Disciplinary Counsel's letter is contained in appendix E.

¹³The exact nature of this letter and the authority under which Disciplinary Counsel sent it is unclear. ELC 5.8 provides a mechanism for issuing advisory letters by a review committee. Disciplinary counsel does not serve on a review committee. *See* ELC 2.4. The review committee would only issue such a letter after providing the attorney whose conduct is at issue an opportunity to respond. *See generally* ELC 5.3 and 5.7.

[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 (last visited Nov. 29, 2015).¹⁴ *Accord* American Bar Association Recommendation adopted by the House of Delegates (Aug. 9-10, 2010).

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"); *Leutschaft*, 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.

D. The Trial Prosecutor's Closing Argument in this Case was Not Misconduct.

The trial prosecutor made, at most, a good faith mistake in arguing

¹⁴A copy of this resolution may be found in appendix C.

that the defendant did not meet his burden of proof regarding the affirmative defense due to a “lack of evidence.” CP 86 (WPIC 4.01). The trial prosecutor’s rebuttal argument was limited to identifying the unanswered questions. The trial prosecutor did not ask the jury to assume that the defendant did not call Paul Wood to the stand out of a fear that Wood’s testimony would have not been favorable.

A prosecutor could reasonably believe that the missing witness doctrine applied to this case. Substantial legal authority supports the trial prosecutor’s belief that the doctrine applied to the defendant’s case. *See generally State v. Sundberg*, No. 91660-8, Amended Supplemental Brief of Petition. The facts support a good faith belief that the doctrine applied to the defendant’s case.

The “missing witness,” Paul Wood, was never named by the defendant until after the State rested. *See* RP 60, 216. The missing witnesses’ name, Paul Wood, is a fairly common name¹⁵ rendering it impossible for the State to locate the “Paul Wood” the defendant claimed had borrowed his overalls in time for rebuttal.

Paul Wood, if he actually existed, had non-incriminating favorable testimony to offer. Obviously, the defendant would benefit the most by Paul

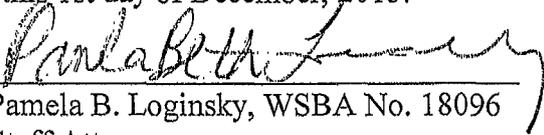
¹⁵A Whitepages search results in 33 profiles for “Paul Wood” in Washington state. *See* <http://www.whitepages.com/name/Paul-Wood/WA> (last visited Nov. 29, 2015).

Wood admitting ownership of the methamphetamine found in the overalls. The Fifth Amendment right of self-incrimination is not a blanket foreclosure of testimony. *State v. Lougin*, 50 Wn. App. 376, 381, 749 P.2d 173 (1988). The claim may be asserted only as to certain questions. *State v. Levy*, 156 Wn.2d 709, 732, 132 P.3d 1076 (2006). One can easily think of questions that Paul Wood could answer without directly incriminating himself that would be favorable to the defendant. Mr. Wood could corroborate the defendant's claim that he borrowed the defendant's overalls a few days prior to the defendant's arrest, without stating that he left methamphetamine in the bib pocket. Mr. Wood could corroborate the defendant's testimony that he worked on the shed on the defendant's elderly foster father's property.

IV. CONCLUSION

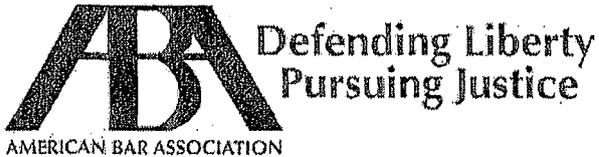
This Court should adopt the more accurate and neutral "prosecutorial error" to describe those missteps made by prosecutors that were not intended to violate the Constitution or any other legal or ethical requirement. This Court should, if it finds the trial prosecutor improperly relied on the missing witness rule in his rebuttal closing argument, that this was an "error" rather than "misconduct."

Respectfully submitted this 1st day of December, 2015.


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Appendix A

American Bar Association and Legal Defense Fund, "Joint Statement on Eliminating Bias in the Criminal Justice System," (July 2015)



JOINT STATEMENT ON ELIMINATING BIAS IN THE CRIMINAL JUSTICE SYSTEM

July 2015

The American Bar Association and the NAACP Legal Defense and Educational Fund, Inc., have long and proud traditions of fighting for civil rights, human rights and equal justice. Although, over the years, we have celebrated much progress in these arenas, we are now confronted by a troubling and destabilizing loss of public confidence in the American criminal justice system. The growing skepticism about the integrity of the criminal justice system is driven by real and perceived evidence of racial bias among some representatives of that system. This crisis of confidence must be addressed, and the time to act is now.

While we believe that the overwhelming percentage of law enforcement officers, prosecutors and judges are not racist, explicit bias remains a real factor in our country – and criminal justice system – and implicit or unconscious bias affects even those who may believe themselves to be fair. Indeed, as Supreme Court Justice Anthony Kennedy once observed (in the 2001 case of *Board of Trustees v. Garrett*), prejudice may arise from not just overt “malice or hostile animus alone,” but also “insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in respects from ourselves.”

One would have to have been outside of the United States and cut off from media to be unaware of the recent spate of killings of unarmed African American men and women at the hands of white law enforcement officers. Several of these killings, like those of Walter Scott in South Carolina, 12-year-old Tamir Rice in Ohio and Eric Garner in New York, have been captured by citizen video and viewed nationwide. More recently, the in-custody death of Freddie Gray sparked days of unrest in Baltimore, which ended only when the officers (who were of multiple races) were charged by the local prosecutor.

Given the history of implicit and explicit racial bias and discrimination in this country, there has long been a strained relationship between the African-American community and law enforcement. But with video cameras and extensive news coverage bringing images and stories of violent encounters between (mostly white) law enforcement officers and (almost exclusively African-American and Latino) unarmed individuals into American homes, it is not surprising that the absence of criminal charges in many of these cases has caused so many people to doubt the ability of the criminal justice system to treat individuals fairly, impartially and without regard to their race.

That impression is reinforced by the statistics on race in our criminal justice system. With approximately 5 percent of the world's population, the United States has approximately 25 percent of the world's jail and prison population. Some two-thirds of those incarcerated are persons of color. While crime rates may vary by neighborhood and class, it is difficult to believe that racial disparities in arrest, prosecution, conviction and incarceration rates are unaffected by attitudes and biases regarding race.

And, to the extent that doubts remain, the U.S. Department of Justice's recent investigation of law enforcement practices in Ferguson, Missouri, should put them to rest. In Ferguson, the Justice Department found that the dramatically different rates at which African-American and white individuals in Ferguson were stopped, searched, cited, arrested and subjected to the use of force could not be explained by chance or differences in the rates at which African-American and white individuals violated the law. These disparities can be explained at least in part by taking into account racial bias.

Given these realities, it is not only time for a careful look at what caused the current crisis, but also time to initiate an affirmative effort to eradicate implied or perceived racial bias – in all of its forms – from the criminal justice system.

As lawyers, we have a very special role to play. As the Preamble to the American Bar Association Model Rules of Professional Conduct states,

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

What must we do? The answer lies in making both macro and micro changes in our criminal justice system.

At the macro level, Congress and state legislatures must look at the vast array of laws that criminalize behaviors that pose little, if any, danger to society. We have over-criminalized conduct throughout the United States and have come inappropriately to rely on the criminal justice system to address problems of mental health and poverty. We have adopted unnecessary zero-tolerance policies in schools that inappropriately require police officers to take the place of teachers and principals and become behavioral judges. We need fewer criminal laws, and fewer circumstances in which police, prosecutors and judges are called upon to deal with social, as opposed to criminal, issues.

Overcriminalization is such a significant problem that virtually every careful observer of criminal justice in America, conservative or liberal, recognizes it. This consensus presents a unique opportunity to unflinchingly confront the need to improve our justice system.

Decriminalization is, however, not a short-term solution to the current crisis of confidence. Every day, law enforcement officers, prosecutors and judges are making discretionary decisions in a country where, literally, any person could be arrested for something if government officials focused sufficient time and energy on him or her.

We must therefore take immediate action at the micro level to begin the process of rebuilding trust and confidence in the criminal justice system and fulfilling the promise of equal justice.

Prosecutors play an important and vital role within the criminal justice system and should be leaders in this effort. We have begun what we anticipate will be a series of conversations focused on identifying ways in which prosecutors can play a more powerful role in addressing the problem of racial bias our justice system. Our organizations arranged an off-the-record discussion that included prosecutors and other participants in the criminal justice system committed to equal justice. We emerged from our discussion with a commitment to advancing the reforms listed below. We regard these reforms as necessary investments that are essential to strengthening public confidence in the rule of law and the legitimacy of our justice system.

1. We need better data on the variety of interactions between law enforcement and citizens. Earlier this year FBI Director James Comey – himself a former federal prosecutor – acknowledged that gathering better and more reliable data about encounters between the police and citizens is “the first step to understanding what is really going on in our communities and our country.” Data related to violent encounters is particularly important. As Director Comey remarked, “It’s ridiculous that I can’t know how many people were shot by police.” Police departments should be encouraged to make and keep reports on the racial identities of individuals stopped and frisked, arrested, ticketed or warned for automobile and other infractions. Police departments should report incidents in which serious or deadly force is used by officers and include the race of the officer(s) and that of the civilian(s). This will certainly require investment of funds, but that investment is key to a better future. We cannot understand what we cannot measure, and we cannot change what we cannot understand.

2. Prosecutors should collect and publicly disclose more data about their work that can enable the public to obtain a better understanding of the extent to which racial disparities arise from the exercise of prosecutorial discretion. While this data collection will also require investment of funds, it is essential to achieving the goal of eliminating racial bias in the criminal justice system.

3. Prosecutors and police should seek assistance from organizations with expertise in conducting objective analyses to identify and localize unexplained racial disparities. These and similar organizations can provide evidence-based analyses and propose protocols to address any identified racial disparities.

4. Prosecutors' offices, defense counsel and judges should seek expert assistance to implement training on implicit bias for their employees. An understanding of the science of implicit bias will pave the way for law enforcement officers, prosecutors and judges to address it in their individual work. There should also be post-training evaluations to determine the effectiveness of the training.

5. Prosecutors' offices must move quickly, aggressively, unequivocally – and yet deliberately – to address misconduct that reflects explicit racial bias. We must make clear that such conduct is fundamentally incompatible with our shared values and that it has an outsized impact on the public's perception of the fairness of the system.

6. Prosecutors' offices and law enforcement agencies should make efforts to hire and retain lawyers and officers who live in and reflect the communities they serve. Prosecutors and police should be encouraged to engage with the community by participating in community forums, civic group meetings and neighborhood events. Prosecutors' offices should build relationships with African-American and minority communities to improve their understanding about how and why these communities may view events differently from prosecutors.

7. There should be a dialogue among all the stakeholders in each jurisdiction about race and how it affects criminal justice decision-making. In 2004, the ABA Justice Kennedy Commission recommended the formation of Racial Justice Task Forces – which would consist of representatives of the judiciary, law enforcement and prosecutors, defenders and defense counsel, probation and parole officers and community organizations – to examine the racial impact that policing priorities and prosecutorial and judicial decisions might produce and whether alternative approaches that do not produce racial disparities might be implemented without compromising public safety. There is little cost associated with the assembly of such task forces, and they can develop solutions that could be applicable to a variety of jurisdictions provided that the various stakeholders are willing to do the hard work of talking honestly and candidly about race.

8. As surprising as it might seem, many people do not understand what prosecutors do. Hence, prosecutors' offices, with the help of local and state bar associations, should seek out opportunities to explain their function and the kinds of decisions they are routinely called upon to make. Local and state bar associations and other community organizations should help to educate the public that the decision *not* to prosecute is often as important as the decision *to* prosecute; that prosecutors today should not be judged solely by conviction rates but, instead, by the fairness and judgment reflected in their decisions and by their success in making communities safer for all their members; and that some of the most innovative alternatives to traditional prosecution and punishment – like diversion and re-entry programs, drug and veteran courts and drug treatment – have been instigated, developed and supported by prosecutors.

9. To ensure accountability, the public should have access to evidence explaining why grand juries issued “no true bills” and why prosecutors declined to prosecute police

officers involved in fatal shootings of unarmed civilians. The release of grand jury evidence, as in Ferguson, is one way to promote the needed accountability.

10. Accountability can also be promoted by greater use of body and vehicle cameras to create an actual record of police-citizen encounters. With the proliferation of powerful firearms in our communities, law enforcement departments reasonably seek equipment that enable them to protect themselves and their communities when called upon to confront armed and dangerous individuals seeking to engage in criminal or terrorist acts. However, while it is appropriate to arm our police and train them in the use of ever-more powerful weapons, it is equally important to train our law enforcement officers in techniques designed to de-escalate tense situations, make accurate judgments about when use of force is essential and properly determine the appropriate amount of force required in each situation.

11. We must recognize that not every lawyer has the judgment and personal qualities to be a successful prosecutor, administer justice and be willing to acknowledge the possibility of implicit bias. Prosecutors who routinely engage in conduct or make decisions that call into question the fairness or integrity of their offices should be removed from office if they cannot be trained to meet the high standards expected of public officers. At the same time, the terms “prosecutorial misconduct” and “police misconduct” should be used with greater care. Even the best prosecutors will make mistakes, much like the best defense lawyers and judges do. There is good reason to limit the characterization of “misconduct” to intentional acts that violate legal or ethical rules.

12. Prosecutors, judges and defense counsel must pay more attention to the collateral consequences of convictions. In many jurisdictions, after an individual is convicted of an offense and completes his or her sentence (by serving time, paying a fine or completing probation or parole), the individual nevertheless faces a life sentence of disqualification and deprivation of educational, employment, housing and other opportunities. This runs counter to the interests we all share in rehabilitation of the offender and positive re-integration into and engagement with the communities in which they live. In many cases, prosecutions can be structured to limit some of the most pernicious of these consequences, provided that the lawyers and the courts take the time and care to examine alternative disposition options. Prosecutors, judges and defense counsel should join together to urge legislatures and administrative agencies to reconsider the laws and regulations that impose these collateral consequences and determine whether they can be modified to provide more opportunities for former offenders without compromising public safety.

The American criminal justice is unquestionably at a moment of crisis. But there are many steps we, as members of the bar, can and should take quickly to begin to turn the ship of justice around and ensure that the system delivers the blind justice that it promises. If we commit ourselves to confronting and eliminating the racial biases that now exist, we can restore the much-needed public confidence in our criminal justice system. As Supreme Court Justice Thurgood Marshall once exhorted in accepting the Liberty Medal Award in

1992, "America can do better." Indeed, "America has no choice but to do better."

Both the American Bar Association and the Legal Defense Fund will continue to convene meetings with prosecutors and other law enforcement groups to support the reforms we have identified. We also will work to support and advance a robust dialogue among prosecutors and leaders in the profession about how best to eliminate racial bias from our justice system.

William C. Hubbard,
President, American Bar Association

Sherrilyn Ifill
President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.

The following individuals participated in the discussion that led to this joint statement:

Sidney Butcher
Assistant State's Attorney, Baltimore City State's Attorney's Office

John Chisholm
District Attorney, Milwaukee County

Kay Chopard Cohen
Executive Director, National District Attorneys Association

Angela Davis
Professor of Law, American University Washington College of Law

Mathias H. Heck
Prosecuting Attorney, Montgomery County, OH

Belinda Hill
First Assistant District Attorney, Harris County, TX

David F. Levi
Dean, Duke University School of Law

Myles Lynk
Professor of Law, Arizona State University College of Law

Wayne McKenzie
General Counsel, New York City Department of Probation

John Pfaff
Professor of Law, Fordham University

Matthew Frank Redle

County and Prosecuting Attorney, Sheridan, WY

Stephen A. Saltzburg

Professor of Law, George Washington University Law School

Cyrus Vance, Jr.

District Attorney of New York County

Appendix B

American Bar Association Recommendation
adopted by the House of Delegates (Aug. 9-10,
2010)

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 9-10, 2010

RECOMMENDATION

RESOLVED, That the American Bar Association urges trial and appellate courts, in criminal cases, when reviewing the conduct of prosecutors to differentiate between “error” and “prosecutorial misconduct.”

REPORT
(Revised)

The American Bar Association recognizes that judicial scrutiny of claims of “prosecutorial misconduct” in criminal cases is essential to the integrity of a system of criminal justice and to the prevention of wrongful convictions and urges courts to decide such claims fully and fairly without regard to possible collateral effects of a ruling on the attorneys or any third party. 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. But, the term is not the equivalent of a finding of professional misconduct on the part of a prosecuting attorney. Nor does every finding of “prosecutorial misconduct” involve a finding that the prosecutor has engaged in misconduct (as opposed to agents acting in cooperation with, or under the prosecutor’s control) or that any actions or omissions on the part of the prosecution involved maliciousness, knowing, intentional or even reckless wrongdoing. “Prosecutorial misconduct” is a term understood to apply to a wide range of claims, some of which may be sustained by the mere unintentional and good faith failure of a police agency to provide to the prosecutor information favorable to the accused to which the accused is entitled. Nevertheless, a finding of “prosecutorial misconduct” may be perceived as reflecting intentional wrongdoing, or even professional misconduct, even in cases where such a perception is entirely unwarranted, and this Resolution is directed at this perception.

When a prosecutor makes an inadvertent or innocent mistake or a police agency violates its responsibilities without the knowledge of a prosecutor, the effect on a defendant may be the same as if intentional prosecutorial misconduct occurred and must be accompanied by a fully appropriate remedy, but the term “error” may more accurately describe the prosecutor’s actions. Recommendation 100B, with the full support of the National District Attorneys’ Association and the National Association of Criminal Defense Lawyers, recognizes that there can be a difference between misconduct and error, and it urges courts, when reviewing claims that prosecutors have violated a constitutional or legal standard, to choose the term that more accurately describes prosecutorial conduct while fully protecting a defendant’s rights.

Even conscientious lawyers sometimes make mistakes. These mistakes can be small – e.g., misspelling the name of a case or citing in a brief the wrong page of an opinion – or large – e.g., turning over privileged documents in response to a discovery request. When a lawyer commits an error, the lawyer or the lawyer’s client may suffer an adverse consequence depending on the nature of the error and its effect on an adversary or court. When prosecutors make mistakes, the damage can be especially significant. It is

100B

regrettable, for example, that prosecutorial misconduct is a factor in a significant number of cases of the wrongfully convicted,¹ and the cases finding prosecutorial misconduct are both large in number and current.² The American Bar Association, the National District Attorney's Association, and the National Association of Criminal Defense Lawyers have consistently made efforts to improve lawyer performance by promoting continuing legal education, publishing books and articles to assist lawyers in performing at the highest levels, and offering opinions on issues of professional responsibility that educate lawyers as to their responsibilities and provide guidance to avoid professional mistakes. The reality that lawyers are not perfect does not mean that lawyers should not be held accountable for their mistakes.

Professional prosecutor offices today take pride in the professional reputation of their lawyers. The leadership in these offices seek to eliminate mistakes and errors that infringe a defendant's rights. Yet, even the most diligent office and the most careful lawyer sometimes make mistakes. An important part of the defense function in criminal cases is to assure that there is meaningful review of these mistakes, whether intentional or not. Often the only meaningful avenue is post-conviction review of claims of error and "prosecutorial misconduct, because the facts supporting such claims often are discovered after direct review has ended. Post-conviction review has been essential to assuring due process of law and to provide a mechanism to expose wrongful and erroneous convictions.

The resolution is not intended to suggest that courts always fail to distinguish between more or less culpable mistakes. Courts are sometimes careful to draw a distinction when they uphold claims of "prosecutorial misconduct," primarily because the underlying doctrine demands it. There are occasions where only intentional misconduct will require a remedy (e.g. whether the prosecutor intentionally provoked a mistrial³) and courts will necessarily make a finding in that regard. However, in other matters, entirely accidental failures, and even failures by persons other than the prosecutor, may require a remedy for the accused (e.g. *Brady* violations). In such cases, courts have often not found it necessary to resolve claims to specify whether the actions or omissions were those of the

¹ See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 959 (2004) (prosecutorial misconduct present as a cause in 42% of cases of proven wrongful convictions.) See also "Harmful Errors – Investigating America's Local Prosecutors," a project of the Center for Public Integrity, reporting *inter alia* that

Since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges, reversing convictions or reducing sentences in over 2,000 cases. In another 500 cases, appellate judges offered opinions—either dissents or concurrences—in which they found the misconduct warranted a reversal. In thousands more, judges labeled prosecutorial behavior inappropriate, but upheld convictions using a doctrine called "harmless error."

<http://projects.publicintegrity.org/pmi/>

² See generally, Bennett Gershman, *Prosecutorial Misconduct* (West 2008); Joseph F. Lawless *Prosecutorial Misconduct: Law *Procedure*Forms*, 4th Ed. (LEXIS 2008). See also "Harmful Errors – Investigating America's Local Prosecutors," *supra* n. 1.

³ *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed2d 416 (1982); *United States v. Millan*, 17 F.3d 14 (2d Cir. 1994); see generally, Joseph F. Lawless, *Prosecutorial Misconduct: Law*Procedure*Forms*, 4th Ed. §11.07 (LEXIS 2008).

prosecutor or were merely a mistake or an accident. In some cases the record may not be sufficient for a court to have confidence that it can determine the level of culpability associated with any error, although the court is capable of providing an appropriate remedy without need to make the culpability determination.

The resolution asks judges to protect a defendant's rights fully and to provide whatever remedies the law requires when a defendant's rights have been violated.

As long as the court fully protects the rights of a defendant, the court should also differentiate "error" from "misconduct" where appropriate.

Respectfully Submitted,
Charles Joseph Hynes, Chair
Criminal Justice Section
August 2010

100B

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Joseph Charles Hynes, Chair

1. Summary of Recommendation(s).
This Recommendation 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.
2. Approval by Submitting Entity.
The recommendation was approved by the Criminal Justice Section Council on April 10, 2010.
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?
None that we are aware of at this time.
5. What urgency exists which requires action at this meeting of the House?
Even conscientious lawyers sometimes make mistakes. These mistakes can be small – e.g., misspelling the name of a case or citing in a brief the wrong page of an opinion – or large – e.g., turning over privileged documents in response to a discovery request. When a lawyer commits an error, the lawyer or the lawyer’s client may suffer an adverse consequence depending on the nature of the error and its effect on an adversary or court. The reality that lawyers are not perfect does not mean that lawyers should not be held accountable for their mistakes. Holding lawyers accountable is of vital importance to public confidence in the bar. It is important, however, that lawyers be held appropriately accountable.
6. Status of Legislation. (If applicable.)
Not applicable
7. Cost to the Association. (Both direct and indirect costs.)
None
8. Disclosure of Interest. (If applicable.)
No known conflict of interest.

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 2010 House of Delegates agenda it is being circulated to the following:
Standing Committee on Legal Aid and Indigent Defendants
Judicial Division
Litigation Section
Individual Rights and Responsibilities Section
Coalition for Justice
Council on Ethnic and Racial Justice
Young Lawyers Division
Government and Public Sector Lawyers Division
Standing Committee on Ethics and Responsibility
Standing Committee on Lawyers' Professional Responsibility
Standing Committee on Professional Discipline
State and Local Government Law
Administrative Law

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)

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100B

EXECUTIVE SUMMARY

A. Summary of Recommendation.

This Recommendation 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.

B. Issue Recommendation Addresses.

It addresses and 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.”

C. How Proposed Policy Will Address the Issue.

The recommendation calls upon judges to protect a defendant’s rights fully and to provide whatever remedies the law requires when a defendant’s rights have been violated, but to consider whether “error” more accurately describes a prosecutor’s conduct than “misconduct.” There is good reason for prosecutors, their offices and the public to know whether or not a court has merely found error and provided a remedy or whether a court has found culpable conduct associated with that error.

D. Minority Views or Opposition.

None.

Appendix C

National District Attorneys Association, Resolution Urging
Courts to Use "Error" Instead of "Prosecutorial
Misconduct" (Approved April 10 2010)



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."

Adopted by the NDAA Board of Directors April 10, 2010, in Charleston, South Carolina.

Appendix D

American Bar Association Criminal Justice Section Report
to the House of Delegates 111A (August 2009)

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.¹ It may reprimand the lawyer orally on or off the record, including in a published opinion.² 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.³

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

¹ 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").

² 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).

³ 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.⁴

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,"⁵ 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.⁶ For some claims of prosecutorial misconduct, courts necessarily make findings of a prosecutor's knowledge, intent or motive.⁷ 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.⁸

⁴ 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).

⁵ 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=sidebars&aid=34> (last visited Nov. 16, 2008)
(quoting former Chief Justice of the Delaware Supreme Court Norman Veasey).

⁶ 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).

⁷ 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.

⁸ 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”.⁹

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.¹⁰

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.¹¹ Sometimes, criminal defense lawyers are publicly chastised for their conduct but it is not labeled

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

¹⁰ 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).

¹¹ 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.¹²

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.¹³ Typically an attorney can appeal these sanctions but the scope of appealable orders is unclear because there is no universal definition of sanctions.¹⁴ Thus, “highly damaging findings of misconduct” may remain unchallenged.¹⁵ 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.¹⁶

¹² *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).

¹³ 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.

¹⁴ 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).

¹⁵ *In re Williams*, 156 F.3d 86 (1st 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” (Rosenn, J., dissenting)).

¹⁶ 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 effect¹⁷ 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

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

¹⁷ 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).

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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.)

Ellen Yaroshefsky
Clinical Professor of Law
Jacob Burns Ethics Center
Cardozo Law School
55 Fifth Avenue
New York, NY 10003
212-790-0386 (office)
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11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

Stephen Saltzburg
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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 E

Letter from Disciplinary Counsel regarding *State v.*
Sundberg, 2015 W: 563946 (March 16, 2015)



WSBA
OFFICE OF DISCIPLINARY COUNSEL

Erica Temple
Disciplinary Counsel

direct line: (206) 727-8328
Email: ericat@wsba.org

March 16, 2015

[REDACTED]
Mason County Prosecuting Attorney
521 N 4th St
Shelton, WA 98584-1715

Re: ODC Grievance Against You
ODC File No. 15-00461

Dear [REDACTED]:

I write to advise you that the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association reviewed the court's opinion in *State v. Sundberg*, 2015 WL 563946, enclosed. The court found that you committed prosecutorial misconduct. Rule 8.4(d) of the Rules of Professional Conduct prohibits a lawyer from engaging in conduct prejudicial to the administration of justice.

We have given careful consideration as to whether further investigation or disciplinary action is warranted. Such conduct falls short of the professional behavior expected of lawyers. Although this letter is not a finding of misconduct or discipline, we wish to put you on notice that, in the future, such conduct must be avoided. Please be advised that, in making our determination, we had reviewed only the enclosed opinion. If a separate grievance relating to the case is filed or if we learn of other information bearing on the conduct in question, we may re-open the grievance or open a new file and investigate further.

Although we are dismissing this matter, we believe that good cause exists for retention of the file materials for a period longer than the three-year presumptive retention period, and we will oppose any request by you for destruction of the file under Rule 3.6(b) of the Rules for Enforcement of Lawyer Conduct until five years from the date of this letter.

Sincerely,

Erica Temple
Disciplinary Counsel

Enclosure

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; Tim Higgs; PTiller@tillerlaw.com
Subject: RE: State v. Sundberg, No. 91660-8

Received on 12-01-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]
Sent: Tuesday, December 01, 2015 3:24 PM
To: Tim Higgs <TimH@co.mason.wa.us>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; PTiller@tillerlaw.com
Subject: State v. Sundberg, No. 91660-8

Dear Clerk and Counsel:

Attached for filing is a motion for leave to file amicus curiae brief, the proposed brief, and a proof of service.

Please let me know if you should encounter any difficulty in opening these documents.

Sincerely,

Pam Loginsky
Staff Attorney
Washington Association of Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501

Phone (360) 753-2175
Fax (360) 753-3943

E-mail pamloginsky@waprosecutors.org