

Prosecutorial Error

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Why Prosecutorial Error?

- Calling it prosecutorial misconduct immediately inflames both the prosecutor and the other prosecutor sitting on the bench. ‘Prosecutorial Error’ has become the newly favored phrase. Use it and get better results with less resistance.

What does a prosecutor do that makes them different?

- Prosecutors have a general duty of fairness. The prosecutor “may prosecute with earnestness and vigor - - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.” (*Berger v. United States*, (1935) 295 U.S. 78, 88)

Berger v. United States, (1935) 295

U.S. 78, 88

- The prosecutor “is the representative... of a sovereignty whose... interest in a criminal prosecution is ***not that it shall win a case, but that justice shall be done.***” Because the prosecutor had misstated evidence, bullied witnesses, put words into the mouth of a witness and intimated facts he knew were false, the Court overturned the conviction.

What does a prosecutor do that makes them different?

- The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.

– *American Bar Association*

Criminality v. Ethics

- “We should not forget that criminality is one thing--a matter of law--and that . . . ethics . . . are another. Their relations have puzzled the best of men.” (*Jordan v. DeGeorge*, (1951) 341 U.S. 223, 241-242) [Discussing the ethics of assassinating a bad person]

PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009

- *Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009* is the most comprehensive, up-to-date, quantitative and actionable study on the extent of prosecutorial misconduct in California, how the justice system identifies and addresses it, and its cost and consequences, including the wrongful conviction of innocent people.

PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009

- 707 cases in which courts explicitly found that prosecutors committed misconduct.
- In about 3,000 of the 4,000 cases [examined], the courts rejected the prosecutorial misconduct allegations, and in another 282, the courts did not decide whether prosecutors' actions were improper, finding that the trials were nonetheless fair.

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- In the vast majority—548 of the 707 cases—courts ***found misconduct*** but nevertheless upheld the convictions, ruling that the ***misconduct was harmless***—that the defendants received fair trials notwithstanding the prosecutor’s conduct.
- About 80% of cases: “no harm, no foul”

PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009

- The Misconduct Study shows that those empowered to address the problem—California state and federal courts, prosecutors and the California State Bar—repeatedly fail to take meaningful action. ***Courts fail to report prosecutorial misconduct*** (despite having a statutory obligation to do so), ***prosecutors deny that it occurred***, and the ***California State Bar almost never disciplines it***.

PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009

- Significantly, of the **4,741 public disciplinary actions** reported in the *California State Bar Journal* from January 1997 to September 2009, only **10** involved prosecutors, and **only six of these were for conduct in the handling of a criminal case.**

**PREVENTABLE ERROR: A REPORT ON
PROSECUTORIAL MISCONDUCT IN CALIFORNIA
1997–2009**

- **Only 1% of identified prosecutors who committed misconduct were disciplined**

PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009

- In the subset of the 707 cases in which NCIP was able to identify the prosecutor involved (600 cases), **67 prosecutors—11.2 percent—committed misconduct in more than one case.** Three prosecutors committed misconduct in four cases, and two did so in five.

PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009

- In short, as the Misconduct Study concludes, some prosecutors continue to engage in misconduct, sometimes multiple times, almost always without consequence.

Since it won't stop, what do we do?

- We protect our client's right to a fair trial
- The most important lesson to be learned: If you fail to object, you waive your appellate rights and the prosecutor gets away with it (usually).
- The second most important lesson - **FEDERALIZE !!!!!**
- Lesson three - ask for an admonition as you object.

Bad faith not required

- Remember, bad faith is not required for a finding of prosecutorial error (*People v. Hill* (1998) 17 Cal.4th 800, 820).
- Outrage is sometimes useful, but one might get farther with a calm objection.

Common areas of misconduct

- False statements of fact or law (S.B. Rule 5-200 subd. (b)(c) and (d))
- Silence after Miranda (*Doyle v. Ohio* (1976) 426 U.S. 610)
- The choice not to testify (*Griffin v. California* (1965) 380 U.S. 609)
- The exercise of the right to counsel (*Wainwright v. Greenfield* (1986) 474 U.S. 284)
- Comment on the failure to produce evidence (*People v. Gaines* (1997) 54 Cal.App.4th 821, 824-828)
- Telling the jury the Prosecutor cannot appeal (*People v. Nolan* (1932) 126 Cal.App. 623, 641)

bad faith is prevalent in most prosecutorial error

- Saving the most damaging prosecution evidence for rebuttal (*People v. Carter* (1957) 48 Cal.2d 737.
- Saving the balance of the closing argument for after the defense argument (*People v. Robinson* (1995) 31 Cal.App.4th 494, 505.)
- Shifting the burden of proof (*People v. Varona* (1983) 143 Cal.App.3d 566)
- Name calling (*Nolan, Bell, Pitts, People v. Podways* (1935) 6 Cal.App.2d 71, 73 (Calling defense counsel a clown), *People v. Herring* (1993) 4 Cal.4th 43 (telling the jury the lawyer client's are all rapists, murderers, etc.)

bad faith is prevalent in most prosecutorial error

- Trivializing reasonable doubt: “**for a reasonable fee, I will give you a reasonable doubt**” (*People v. O’Farrell* (1958) 161 Cal.App.2d 13, 19)
- Racism: “**The leading case invalidating an exercise of prosecutorial discretion is the nearly century-old decision** in *Yick Wo v. Hopkins*, [(1886) 118 U.S. 356] . . . *Yick Wo* was the first and last time the United States Supreme Court struck down a prosecution for the invalid selection of a target.” Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1539-40 (1981).

CUMULATIVE ERROR

- “To determine whether an admonition would be effective, we consider the statements in context.” (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030)
- “Many of the instances cited above were mild, and if considered singly, would be inconsequential. However, this court must consider their cumulative effect.” (*People v. Pitts* (223 223 Cal.App.3d 606, 815)

Morrow v. Superior Court (1994)

30 Cal.App.4th 1252

- Prosecution in which the prosecutor allegedly used her investigator to eavesdrop on a courtroom conversation between defendant and his attorney
- The prosecutor and investigator both exercised their privilege against self-incrimination
- Motion to Dismiss (Outrageous Conduct) Denied.

Morrow v. Superior Court (1994)

30 Cal.App.4th 1252

- The appeals court held that the trial court erred in denying the motion to dismiss on the ground of lack of prejudice. When conduct such as this occurred, the prosecution may not successfully oppose a motion to dismiss on the ground that no prejudice has been shown.

Morrow v. Superior Court (1994)

30 Cal.App.4th 1252

- It has been said, and it is doubtless true, that ***the "... courtroom is a temple of justice."*** (citation) A prosecutor may not use the courtroom as a place to intentionally and surreptitiously listen to, i.e., eavesdrop upon, a defendant's conversation with his attorney. Indeed, eavesdropping on an attorney-client conversation is inappropriate anywhere and cannot be tolerated.

Morrow v. Superior Court (1994)

30 Cal.App.4th 1252, 1255

- "[T]he prosecutor is not only the defendant's adversary, but is also the '... guardian of the defendant's constitutional rights....' []"
- These rights include the right to remain silent and the right to counsel. Exercise of these rights necessarily embraces the attorney-client privilege. []
- "[I]f an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney." []
- The intentional breach of the prosecutor's duty is the antithesis of his or her obligation.

Know the Law – Be Prepared

- Use motions in limine as preemptive strikes against misconduct
- Object
- Ask for curative instructions
- Federalize your objections
- Keep objecting (cumulative error)

Examples of Prosecutorial Error

- Recent and not-so-recent examples of emerging types of prosecutorial error

ASKING THE JURORS TO PUT THEMSELVES IN THE POSITION OF THE VICTIM

- In final argument, the DA argued the "golden rule," that the jury put itself in the victim's position and imagine what the victim experienced. The DA also argued to the jury about the impact of the crime on the victim's family. This is prosecutorial misconduct, and the C/A so finds. Moreover, the judge refused to give any admonition to the jury. The C/A reverses. *People v. Vance*; 2010 DJ DAR 15289; DJ, 9/29/10; C/A 1st, Div. 2

Asking one witness if another is lying

- "We conclude that the prosecutor's "were they lying" questions were improper, i.e., objectionable, because they sought defendant's inadmissible lay opinion about the officers' veracity, invaded the province of the jury to determine the credibility question, and were irrelevant to any issue in the case. (*People v. Zambrano* (2004) 124 Cal. App. 4th 228)

Quantifying proof beyond a reasonable doubt

- *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 involved a PowerPoint presentation in which six of eight puzzle pieces were added one by one until all of an image of the Statue of Liberty was visible except the face and the torch. The prosecutor then argued (over objection) that everyone would know at this point beyond a reasonable doubt that it was a picture of the Statue of Liberty even without the rest of the pieces.

Quantifying proof beyond a reasonable doubt

- The DA was essentially arguing that proof beyond a reasonable doubt may be found by just a few pieces of evidence, and was encouraging the jurors to jump to a conclusion. In addition, the DA was quantifying proof beyond a reasonable doubt, suggesting that having 6 of the 8 pieces was enough, meaning that 75% would suffice.
- Harmless error, of course.

Prosecution Witnesses

- A prosecuting attorney may not order a prosecution witness to refrain from talking with the defendant or his counsel. The courts are empowered to direct the prosecution to annul such illegal command or suffer the sanctions of contempt. (*Schindler v. Superior Court* (1958) 161 Cal. App. 2d 513,520; *Walker v. Superior Court* (1957) 155 Cal.App. 2d 134, 140.)

The better a job you do, the more likely you are to be threatened

- "It is scarcely open to question that threats by counsel in the courtroom to kick opposing counsel in the ankle, to hit him in the face, and to disrupt his vacation plans amount to unprofessional conduct. A fortiori, they amount to unprofessional conduct when coming from a public prosecutor. []" (*People v. Kelley* (1977) 75 Cal.App.3d 672, 688.)

Retesting Samples

- Is it misconduct to ask an expert if the defense retested a sample when the DA knows we did and are not using the results? Probably, in the wake of *People v. Wallace* (2008) 44 Cal. 4th 1032 [error not prejudicial]
- But see *People v. Zamudio* (2008) 43 Cal.4th 327, which does not say the DA may comment; it says the defense attorney waived the right to appeal the comment because he did not object to the question

Intentional lies

- A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. [] (*N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1114-1116 (9th Cir. 2001).)

- Summing it all up

A Tough Roe To Hoe

- In any criminal case, ***jurors will be likely to view the prosecutor in a more favorable light than defense counsel....*** 'The assistant district attorney is the representative of an elected, presumably popular public official, and the mere ***fact that he is a state employee may create a sense of trust and an expectation of fairness*** that a defense counsel would find ***difficult to match through the most strenuous exertion of his charm.***' (*People v. Guzman* (1988) 45 Cal.3d 915, 979, fn. 3 (dis. opn. of Mosk, J.)

Good Summary Case

- **Bad faith** by the prosecutor is not required for a reversal for prosecutorial misconduct. It is prosecutorial misconduct to **misstate the evidence and the law, refer to facts not in evidence, and to be derisive and rude towards defense counsel.** It is prosecutorial misconduct to **argue to the jury that there must be evidence on which to base a reasonable doubt,** since the defendant may rely on the failure of the prosecutor's case. It is also prosecutorial misconduct to **threaten to prosecute defense witnesses for perjury if they do not testify consistently with a statement given to the police;** it is intimidation of witnesses. (*People v. Hill* (1998) 17 Cal.4th 800)

Final Advice

- Do your best, be vigilant, be prepared – error happens constantly, deal with it properly and immediately.
- Object, federalize, ask for curative instructions and keep objecting - - and you will have done all you can to preserve your client's right to a fair trial.

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