

The PROSECUTOR

Measuring Prosecutorial Actions

An Analysis of Misconduct versus Error

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Rampant Prosecutorial Misconduct

The New York Times, Jan. 4, 2014

The Untouchables: America's Misbehaving Prosecutors, And The System That Protects Them

The Huffington Post, Aug. 5, 2013

Misconduct by Prosecutors, Once Again

The New York Times, Aug. 13, 2012

PROSECUTORIAL MISCONDUCT has become national news. To a layperson, the term “prosecutorial misconduct” expresses “intentional wrongdoing,” or a “deliberate violation of a law or standard” by a prosecutor.¹

The newspaper articles cited at left describe acts that would clearly fall within a layperson’s definition of prosecutorial misconduct. For example, the article “Rampant Prosecutorial Misconduct” discusses *United States v. Olsen*, where federal prosecutors withheld a report that revealed sloppy work on the part of the government’s forensic scientists, resulting in wrongful convictions.² ³ The article “The Untouchables: America’s Misbehaving Prosecutors, and the System that Protects Them,” discusses *State v. Thompson*, where prosecutors, among other acts of misconduct, withheld blood evidence that would have exonerated the defendant.⁴ ⁵ The article “Misconduct by Prosecutors, Once Again,” discusses *People v. Bedi*, where the prosecutor withheld information that the district attorney’s office paid a key witness \$16,640 for hotel bills and \$3,000 in cash, facts the prosecutor knew but never disclosed to the defense.^{6,7}

In the legal field, “prosecutorial misconduct” is a term of art that describes a wide spectrum of actions, ranging from innocent mistakes to malicious conduct.⁸ It is not equivalent to a finding of professional misconduct (e.g., an ethical violation).⁹ It does not even require that the prosecutor commit the act that gives rise to the misconduct finding. Any persons acting in cooperation with or under the prosecutor’s control can commit misconduct attributable to the prosecutor. Nor does it require that the prosecutor act in a malicious, knowing, intentional or reckless manner.¹⁰

When the court labels an act “prosecutorial misconduct,” however, it “may be perceived as reflecting intentional wrongdoing, or even professional misconduct, even

in cases where such a perception is entirely unwarranted... .”¹¹ The danger inherent in the court’s overbroad use of the term “prosecutorial misconduct” is twofold. First, in cases where there is an innocent mistake or poor judgment on the part of the prosecutor, the term “prosecutorial misconduct” unfairly stigmatizes that prosecutor. A layperson may assume that the prosecutor intentionally committed a wrongdoing or deliberately violated a law or ethical standard.

In those cases where the prosecutor has, in fact, committed misconduct, the term “prosecutorial misconduct” may not impose a harsh enough degree of stigmatization. If a layperson actually understands the legal term “prosecutorial misconduct,” he or she may diminish the egregiousness of the prosecutor’s actions. Certainly, other prosecutors, who are used to seeing the term used for even the most honest of mistakes, may not realize the gravity of the conduct committed by their fellow prosecutor.

AMERICAN BAR ASSOCIATION RECOMMENDATION 100B

Prosecutors and courts share a responsibility in delineating between misconduct and error. Prosecutors have not done enough to persuade district and appellate courts to distinguish between prosecutorial misconduct and error, and courts have failed to recognize that their decisions have implications beyond the court of law.

In Recommendation 100B, the ABA recognized a distinction between prosecutorial misconduct and error. It urged courts, when reviewing claims that a prosecutor has violated a constitutional or legal standard, “to choose the term that more accurately describes prosecutorial conduct while fully protecting a defendant’s rights.”¹²

¹ <http://www.merriam-webster.com/dictionary/misconduct>.

² The Editorial Board of the *The New York Times*, “Rampant Prosecutorial Misconduct,” January 4, 2014, available at http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html?_r=0#.

³ *United States v. Olsen*, 704 F.3d 1172 (2013).

⁴ Radley Balko, “The Untouchables: America’s Misbehaving Prosecutors, and the System that Protects Them,” *Huffington Post*, August 5, 2013, available at http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html.

⁵ *State v. Thompson*, 825 So.2d 552 (2002).

⁶ Michael Powell, “Misconduct by Prosecutors, Once Again,” *New York Times*,

August 18, 2012., available at <http://www.nytimes.com/2012/08/14/nyregion/new-charge-of-prosecutorial-misconduct-in-queens.html>.

⁷ The author has no personal knowledge of the above cases. The author is using these examples to explain the nature of prosecutorial misconduct and not giving an opinion on the facts surrounding the underlying cases.

⁸ ABA House of Delegates, Recommendation 100B, *1 (2010), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf>.

⁹ ABA House of Delegates, Recommendation 100B, *1 (2010).

¹⁰ ABA House of Delegates, Recommendation 100B, *1 (2010).

¹¹ ABA House of Delegates, Recommendation 100B, *1 (2010).

¹² ABA House of Delegates, Recommendation 100B, *1 (2010).

Recommendation 100B was adopted with the full support of not only the ABA and the National District Attorneys Association, but also the National Association of Criminal Defense Lawyers.¹³ It states:

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.”¹⁴

DELINEATING BETWEEN MISCONDUCT AND ERROR

Recommendation 100B begs the question: how do we create a system that delineates between misconduct and error? The Office of Professional Responsibility (OPR) for the U.S. Department of Justice, which is tasked with investigating federal prosecutors who may have acted improperly, has tackled a similar question.¹⁵

The OPR created a framework for dealing with its own attorneys that courts can employ to both delineate between prosecutorial misconduct and error and to aid in measuring prosecutorial misconduct based on the degree of harm to the defendant.

It should be noted, in most instances, under the OPR framework, the term “professional misconduct” is akin to the term “prosecutorial misconduct.” Because OPR created this framework to judge its own employees, the framework has been broadened to include violations of DOJ regulation and policy.

The OPR has defined professional misconduct as when an attorney “intentionally violates or acts in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy.”¹⁶

The OPR has divided professional misconduct

into four categories:

- **The first, and most egregious, category** includes those situations where a prosecutor intentionally violates a clear and unambiguous obligation or standard imposed by law, applicable rule or professional conduct.¹⁷

A prosecutor’s act is intentional when the prosecutor acts with the purpose of obtaining a result that an obligation (e.g., an ethical rule) unambiguously prohibits, or when the prosecutor engages in conduct with knowledge that the probable consequence of such action is prohibited by such obligation.¹⁸

The danger inherent in the court’s overbroad use of the term “prosecutorial misconduct” is twofold. First, in cases where there is an innocent mistake or poor judgment on the part of the prosecutor, the term “prosecutorial misconduct” unfairly stigmatizes that prosecutor.

- **The OPR’s second category includes** those situations where the prosecutor recklessly disregards a duty to comply with an obligation or standard. A prosecutor acts with reckless disregard when he or she knows, or should know, of an obligation, and that there is a substantial likelihood he or

¹³ ABA House of Delegates, Recommendation 100B, *1 (2010).

¹⁴ ABA House of Delegates, Recommendation 100B, *1 (2010).

¹⁵ U.S. DOJ, Office of Professional Responsibility, “Analytical Framework,” July 6, 2005, available at <http://www.justice.gov/opr/framework.pdf>.

¹⁶ U.S. DOJ, Office of Professional Responsibility, “Analytical Framework,” July 6, 2005, *1.

¹⁷ U.S. DOJ, Office of Professional Responsibility, “Analytical Framework,” July 6, 2005, *1.

¹⁸ U.S. DOJ, Office of Professional Responsibility, “Analytical Framework,” July 6, 2005, *2.

¹⁹ U.S. DOJ, Office of Professional Responsibility, “Analytical Framework,” July 6, 2005, *3.

²⁰ U.S. DOJ, Office of Professional Responsibility, “Analytical Framework,” July 6, 2005, *1.

²¹ U.S. DOJ, Office of Professional Responsibility, “Analytical Framework,” July 6, 2005, *3.

²² U.S. DOJ, Office of Professional Responsibility, “Analytical Framework,” July 6, 2005, *4.

²³ U.S. DOJ, Office of Professional Responsibility, “Analytical Framework,” July 6, 2005, *3.

²⁴ *State v. Rogan*, 91 Hawaii 405, 412, 984 P.2d 1231 (1999).

²⁵ *Com. v. Lafferty*, 315 Pa. Super. 241, 244, 461 A.2d 1261, 1263 (1983).

²⁶ *State v. Pabst*, 268 Kan. 501, 505, 996 P.2d 321 (2000).

she will violate the obligation, but nonetheless engages in the conduct.¹⁹ The OPR, and courts, should only consider the first two categories as misconduct.²⁰

• *The OPR's third category includes* those situations where the prosecutor exercises poor judgment. The OPR defines poor judgment as a situation where, when faced with alternatives, a prosecutor chooses a course of action in “marked contrast” to what the OPR would consider good judgment. “[A]n attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding.”²¹

• *The OPR's final category includes* those situations where the attorney has made a mistake. A mistake results from an excusable human error, despite the attorney's use of reasonable care. Whether a prosecutor's error is excusable depends upon the facts surrounding the error, including:

- 1) the attorney's opportunity to plan, and to reflect upon the possible and foreseeable consequences of, a course of conduct
- 2) the breadth and magnitude of the responsibilities borne by the attorney
- 3) the importance of the conduct in light of the attorney's overall responsibilities and actions
- 4) the extent to which the error is representative of the attorney's usual conduct.²²

The OPR, and courts, should not consider the last two categories as misconduct.²³

COURTS ALREADY CONSIDER THE DEGREE OF A PROSECUTOR'S CULPABILITY

It should be noted that, when considering prosecutorial misconduct, trial and appellate courts already engage in the weighing of a prosecutor's culpability. For example, the Hawaii Supreme Court requires that a court consider the “nature of the conduct” of the prosecutor.²⁴ The Pennsylvania Supreme Court requires that a court consider “whether the prosecutor violated a direct order of the court” and “whether there was a pattern of repeated objectionable remarks.”²⁵ The Kansas Supreme Court requires that a court weigh whether a prosecutor's comments are gross and flagrant or show ill will.²⁶ Implementation of the OPR framework is simply a refinement of the analysis already required by many courts in the United States.

CONCLUSION

Courts should recognize the distinction between prosecutorial misconduct and error. Courts should also adopt a framework to distinguish between the varying levels of culpability of a prosecutor, which will aid courts in weighing the prosecutor's culpability against the harm to a defendant. Additionally, refining the terms “prosecutorial misconduct” and “prosecutorial error” will assist the public in fully understanding the gravity of the prosecutor's actions.

To Err is Human

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Improper, not unlike the term “misconduct,” can imply a willful act, not simply an erroneous one. Although “impropriety” more accurately describes the first prong of the prosecutorial misconduct test (as compared to misconduct), “impropriety” is less accurate than error, which is required to be proven in order to establish the first prong of a prosecutorial misconduct claim.

GROSS AND FLAGRANT AND ILL WILL

Although a majority of the “prosecutorial misconduct” cases are, in actuality, prosecutorial error, prosecutorial mis-

conduct is still relevant. The term “misconduct” expresses a willful act; it involves dishonesty, a forbidden act, a dereliction of duty, and/or an act that is prejudicial to the administration of justice. If the court finds that the prosecutor's acts were willful — that they were gross and flagrant or showed ill will — a prosecutor should be deemed to have committed misconduct.

CONCLUSION

Simply put, prosecutors are not immune from mistakes. A mistake by a prosecutor, however, does not warrant the moniker of “misconduct.” When a prosecutor commits an error, it should be deemed as such: a “prosecutorial error.” When a prosecutor does, in fact, commit misconduct, he/she should wear that label, without the stigma being watered down by also including situations where a prosecutor has simply committed an error.