The Prosecutor

To Err is Human

A New Outlook on "Prosecutorial Misconduct"

By Shawn E. Minihan

The Honorable Justice Alexander George Sutherland described a prosecutor as a "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."[1]

To govern impartially does not, however, require that a prosecutor check his/her zeal at the door. "He 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."[2]

A prosecutor's role is fraught with unexpected difficulties. A prosecutor must make countless legally and factually complex decisions in determining how to make an opening statement, question witnesses and conduct closing arguments. The fact that a prosecutor errs in making a decision should not warrant the moniker of "misconduct." There is a distinction between "prosecutorial error" and "prosecutorial misconduct."

Appellate courts across the nation have generally not delineated between "prosecutorial error" and "prosecutorial misconduct." But, based upon the definitions of "misconduct" and "error" found in case law, there is a distinction to be made between the two types of conduct.

"Misconduct" versus "error"

Black's Law Dictionary defines "misconduct" as "a dereliction of duty; unlawful or improper behavior."[3] It also defines it as "An attorney's dishonesty or attempt to persuade a court or jury by using deceptive or reprehensible methods."[4]

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Section 8.4(c) of the Model Rules of Professional Conduct ("MRPC") defines professional misconduct as "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." MRPC 8.4(d) defines professional misconduct as "engag[ing] in conduct that is prejudicial to the administration of justice."

"Willful" versus "error"

There are a number of examples of willful acts of misconduct in criminal law. Even after the court ordered him to stop, the prosecutor repeatedly called the defendant a liar;[5] where the prosecutor told the jury that it is "every mother's nightmare [to find] ... some black, military guy on top of your daughter;"[6] where the prosecutor urged the jury to think about Mother's Day and how the victim would never be a mother;[7] and where the prosecutor withheld evidence from the defendant.[8]

The term "error" is more appropriate in situations where the prosecutor has simply made a mistake. Black's Law Dictionary defines "error" as "[a]n assertion or belief that does not conform to objective reality; a belief that what is false is true or that what is true is false; mistake."[9] A second definition defines "error" in the context of a judge's decision as "[a] mistake of law or of fact in a tribunal's judgment, opinion or order."[10]

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There are a number of examples where the prosecutor has committed an error, but the error does not appear to be willful. For example, where the prosecutor erred in following the proper procedure for impeaching a witness,[11] misstated the evidence,[12] misstated the law,[13] or argued facts not in evidence.[14]

Courts have recognized a difference between "misconduct" and "error"

Some courts have recognized a distinction between "misconduct" and "error." In *People v. Jasso*, the California Court of Appeals found that "the concept of 'prosecutorial misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind.[15] A more apt description of the transgression is prosecutorial error."[16]

In *State v. Leutschaft*, the State took issue with the term prosecutorial misconduct, arguing that the term misconduct "implies ethical violations," and suggested that the court view the issue as "prosecutorial error."[17] The Mississippi Court of Appeals agreed, ruling that:

> …there is an important distinction to be made between prosecutorial misconduct and prosecutorial error. The former implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression. The latter, on the other hand, suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time.[18]

It should be noted that not all states have agreed with this distinction. The Washington Supreme Court, in a footnote in *State v. Ish* — noting the Amicus brief from the Washington Association of Prosecuting Attorneys that called for using the term "error" instead of "misconduct" — stated, "While certainly some errors are unintentional and some instances of prosecutorial misconduct are more egregious than others, we decline to start drawing fine lines between error and misconduct."[19]

The term "impropriety" as an option

Some courts have also used the term "impropriety" to describe prosecutorial mistakes. The root of the word "impropriety" is improper, which is defined as "[i]ncorrect; unsuitable; irregular."[20]

The Kansas Supreme Court, in *State v. Breedlove*, referred to the prosecutor vouching for a witness as an "impropriety."[21] The Court wrote, "This trial began with an erroneous ruling on a witness sequestration motion and concluded with a number of improprieties in the prosecutor's closing argument."[22]

The Connecticut Supreme Court, in *State v. Fauci*, also used the term "impropriety."[23] The *Fauci* court noted that "[p]rosecutors make countless discretionary decisions under the stress and pressure of trial. 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."[24] The court continued: "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 and honest mistake."[25] The court found that "al[t]hough our analysis does not change, this new terminology better reflects the actions of a prosecutor..."[26] The *Fauci* court cited a string of other states that use the term "prosecutorial impropriety."[27]

It should be noted that the term "improper" is also defined as "[f]raudulent or otherwise wrongful."[28]

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1 *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 13314 (1935).
2 *Berger*, 295 U.S. at 88.
3 Black's Law Dictionary 418 (Pocket ed. 1996).
4 Black's Law Dictionary 418 (Pocket ed. 1996).
5 *State v. Pabst*, 268 Kan. 501, 996 P.2d 321 (2000).
6 *State v. Rogan*, 91 Hawaii 405, 412, 984 P.2d 1231, 1238 (1999).
7 *State v. Henry,* 273 Kan. 608, 619, 44 P.3d 466 (2002).
8 *State v. Grey*, 46 Kan.App.2d 988, 268 P.3d 1218 (2012).
9 Black's Law Dictionary, 62 (2009).
10 Black's Law Dictionary, 621 (2009).
11 *In re Ontiberos*, 295 Kan. 10, Syl. 9-10, 287 P.3d 855 (2012).
12 *State v. Graham*, 277 Kan. 314, 979 P.3d. 143 (2004).
13 *State v. Baker*, 287 Kan. 345, 365, 197 P.3d 421 (2008); *State v. Naputi*, 293 Kan. 55, 62, 260 P.3d 86 (2011).
14 *State v. Chanthaseng*, 293 Kan. 140, 147-48, 261 P.3d 889 (2011).
15 *People v. Jasso*, 211 Cal.App.4th 1354, 150 Cal.Rptr.3d 464 (2012).
16 *Jasso*, 150 Cal.Rptr.3d at 472.
17 *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn.App. 2009).
18 *Leutschaft*, 759 N.W.2d at 418.
19 *State v. Ish*, 170 Wash.2d 189, FN 6, 241 P.3d 389 (2010).
20 Black's Law Dictionary,826 (2009).
21 *State v. Breedlove*, 288 Kan. 39, 50, 200 P.3d 1225 (2009).
22 *Breedlove*, 288 Kan. at 50.
23 *State v. Fauci*, 282 Conn. 23, 917 A.2d 978 (2007).
24 *Fauci*, 917 A.2d at FN 2.
25 *Fauci*, 917 A.2d at FN 2.
26 *Fauci*, 917 A.2d at FN 2.
27 *Fauci*, 917 A.2d at FN 2.
28 Black's Law Dictionary, 761 (7th Edition 1999).

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.

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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 misconduct 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.