

**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

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regrettable, for example, that prosecutorial misconduct is a factor in a significant number of cases of the wrongfully convicted,<sup>1</sup> and the cases finding prosecutorial misconduct are both large in number and current.<sup>2</sup> 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 mistrial<sup>3</sup>) 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

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<sup>1</sup> 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/pm/>

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

<sup>3</sup> *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*, 4<sup>th</sup> 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

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## 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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## 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.