

## FORUM COLUMN

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and Daniel Ballon**

If a California prosecutor commits such egregious misconduct that a death sentence is reversed, you would expect the State Bar to investigate that prosecutor. If the California Supreme Court also finds that same prosecutor guilty of misconduct in three other cases, you would think that the prosecutor would be disciplined. Think again.

Shawn Hill was convicted and sentenced to death for killing Stuart Margetts. In his appeal, Hill cited 36 instances of misconduct by the prosecutor at trial. The California Supreme Court ultimately concluded that the prosecutor had indeed "committed serious, blatant, and continuous misconduct at both the guilt and penalty phases of trial."

The court noted the prosecutor's "patent misstatements of the facts in closing arguments," "improper references to alleged facts outside the record," "misstatements of the law" and threats to charge a defense witness with perjury should he testify.

The court held that the prosecutor's "pervasive campaign to mislead the jury on key legal points" and the "overall prejudice to defendant's fair trial rights" required that the death sentence be vacated. The court also pointed out that three prior appellate court decisions had found that this same prosecutor had committed misconduct.

But a search of California State Bar records reveals that this prosecutor still has "no public record of discipline." Nor is this an aberration. We recently reviewed all of the California death penalty cases reversed for prosecutorial misconduct. We were able to identify the prosecutors in six out of eight cases. Five have "no public record of discipline," and one is a sitting judge. As members of the Bar, we should all be embarrassed by this.

In every case, a prosecutor's duty is to seek justice, not merely win at all costs. When seeking the ultimate punishment of death, in particular, prosecutors should be held to the highest ethical standards. But cases like Hill's show that there are systemic problems in the criminal justice system that allow prosecutorial misconduct to go unchecked. These problems are only exacerbated in death penalty cases.

Death penalty cases place prosecutors under even more pressure than typical murder cases. Generally, there is close public scrutiny, and every prosecutor is aware that his or her office has devoted substantial resources to the task of attaining a death sentence. Thus, prosecutors are often compelled not just to secure a conviction, but also to secure a death verdict.

They have to do more than simply present the facts to the jury and let it decide whether a crime occurred and if the defendant is guilty. They must also convince the jury that the defendant is so morally culpable that he deserves to die. Prosecutors, therefore, advocate for death. If the jury votes for life, it is considered a "loss." Indeed, the very nature of the decision the jury must make in a death penalty case makes it easier for prosecutors to commit misconduct. It also magnifies the misconduct's impact.

Inflammatory evidence and emotional appeals are likely to have a great effect on the

jurors' assessment of the defendant, regardless of any curative instructions from the court. Research shows that most jurors do not understand the key instructions in death penalty cases to begin with. Inaccurate legal arguments are likely to substantially mislead the jury about its role and/or the consequences of its choices. Thus, prosecutorial misconduct that might be harmless as to the question of guilt can have a decisive impact in the penalty phase, producing what might be termed "wrongful death sentences."

The pressures of a death penalty case and the greater payoff from misconduct in these cases make it all the more tempting (consciously or subconsciously) for prosecutors to deviate from ethical and professional standards.

Despite these well-known risks and documented examples, there has yet to be any significant, comprehensive attempt by the legal profession to address or even discuss the unique ethical issues that arise in death penalty cases. In part, this is because prosecutors continue to argue that prosecutorial misconduct is a rarity. However, it is not a case of a few bad apples. Prosecutorial wrongdoing in death penalty cases is a systemic problem that needs a systemic solution.

There is a disturbing lack of sanctions for documented intentional misconduct. Within the courts, there is virtually no effective mechanism to prevent or punish prosecutorial transgression. Civil lawsuits are ineffective because prosecutors, in most cases, are immune even when their misbehavior is intentional and egregious.

Professor Bennett Gersham, an expert on prosecutorial misconduct, has observed that courts generally do not discipline prosecutors because the job of the court is simply to decide cases. Indeed, a judge testifying about professional responsibility recently told the California Commission on the Fair Administration of Justice that judges are reticent to discipline attorneys because they do not believe it is their role.

In California, judges are only required to report prosecutors to the State Bar when misconduct results in a reversal of judgment. Application of the "harmless error" rule means that very few cases fall under the mandatory reporting duty. Almost universally, the courts only reverse the judgment if the evidence against the defendant is weak.

Indeed, some forms of highly questionable behavior by prosecutors are not legally considered "misconduct" unless prejudice is shown. Consequently, the mandatory reporting of a prosecutor for improprieties depends more on the amount of evidence against the defendant, rather than on the nature of the prosecutor's behavior.

Even more disturbing, research recently presented by Professor Kathleen Ridolfi to the CCF AJ shows that, even in the small number of cases that do fall under the mandatory reporting requirement, almost none were reported to the Bar.

In those cases where the wrongdoing was reported, the Bar has rarely imposed discipline. One prosecutor in a death penalty case reversed for misconduct was temporarily suspended for failure to pay his dues. The discipline reports are regularly filled with sanctions imposed on attorneys who mishandle client funds. With a record like this, one might reasonably conclude that the State Bar cares more about money than about ensuring the integrity of the justice system.

The CCF AJ will soon begin issuing recommendations on professional responsibility, including guidelines on both prosecutorial misconduct and ineffective assistance of counsel. Hopefully, the commission will, at the very least, recommend a system for tracking prosecutorial transgression so that repeat offenders may be identified.

The CCF AJ should also recommend that the mandatory reporting rule be expanded to

cover all intentional misbehavior and that the State Bar more vigorously pursue discipline for misconduct in death penalty cases.

If the state of California is to continue executing individuals in the name of "the People," then the least we can do is hold our public officers, the prosecutors, to the ethical standards of our profession.

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