

# Daily Journal

CORPORATION

**By Ryan Oliver**

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LOS ANGELES - A commission appointed by the state Senate recommended Thursday that trial judges report egregious examples of prosecutorial and defense-attorney misconduct, regardless of whether the actions affect the outcome of cases.

The recommendation issued by the California Commission for the Fair Administration of Justice was made as part of a slate of proposed reforms designed to reduce the rate of wrongful convictions.

Ventura County District Attorney Gregory Totten, one of two prosecutors on the commission who dissented from the recommendation, said defense attorneys could exploit the reporting rule as a routine strategy to disrupt criminal trials.

The report comes days after Gov. Arnold Schwarzenegger vetoed three bills based on recommendations by the commission. The bills would have required police to make electronic recordings of their interrogations in violent felony and homicide cases, established a task force to study best practices in the use of police lineups and photo arrays, and barred convictions based on the "uncorroborated testimony" of prison informants.

California law mandates reporting of misconduct to the State Bar only when the actions result in the modification or reversal of a judgment.

The commission reasons in its report that such a limitation makes little sense because a criminal case often hinges on factors, such as the strength of the evidence, that have nothing to do with the seriousness of the misconduct.

The report cites a study by Santa Clara University law professor Cookie Ridolfi which found that, of 443 California cases in which a claim of prosecutorial misconduct was sustained, only 53 cases, or 12 percent, resulted in a judgment reversal.

In the remaining 88 percent of cases, discipline is left to the prosecutors' employing agencies in an internal process that the commission says is largely hidden from the public. No track record outside the office is available to identify repeat offenders, the report says.

The commission also says many judges fail to report attorneys even in the cases they are required to. The report concludes that the lack of reporting results largely from a deep-seated reluctance by judges to blow the whistle on lawyers appearing before them, as well as a lack of faith in the State Bar's disciplinary system.

The commission considered calling for a law requiring judges to report any finding of misconduct by a prosecutor. But members were concerned that judges may get around this by failing to make formal findings of misconduct.

The report advises that judges receive more training on their reporting obligations and be given a better understanding of how the State Bar's disciplinary system works.

The report also outlines specific examples of egregious conduct. Some of those include lying to the court, willful suppression of exculpatory evidence, willful unlawful disclosure of victim or witness information and engaging in unlawful discrimination.

In his dissenting opinion, Totten stated that, in his experience, prosecution officers hold their attorneys to a high standard and that internal safeguards are sufficient to weed

out bad prosecutors. He also argues that several of the examples of egregious misconduct, such as suppression of exculpatory evidence and unlawful discrimination, are subjective and evolving areas of the law.

"The commission's recommendation to create a new rule is neither necessary nor will it accomplish its intended purpose," he wrote.

San Mateo County District Attorney Jim Fox also dissented. Neither Totten nor Fox could be reached for comment.

The 22-member commission is chaired by former attorney general John Van de Kamp and comprises a broad spectrum of prosecution, police, defense and victim representatives. Van de Kamp could not be reached for comment.