

**PRELIMINARY REPORT\***  
**By Prof. Laurie Levenson, Loyola Law School, Los Angeles**  
**STUDY OF CALIFORNIA DISTRICT ATTORNEY OFFICES**

**Introduction**

As requested by the Commission, we have been conducting a study of District Attorney Offices to assess the policies and practices of the offices, and the impact of prosecutorial misconduct on wrongful convictions. The study has several components:

1. A survey of District Attorney Offices, including an evaluation of their training procedures, caseloads, supervision, mechanisms for responding to prosecutorial misconduct, discovery practices, complaints against offices, and the impact of civil service status.
2. Evaluation of prosecutorial misconduct cases in California for 2000-2005 to identify problem areas of incompetence and misconduct.
3. Follow-up interviews with District Attorney personnel to determine the information sought by the Commission.

**Current Status of Survey**

We have now distributed two surveys to all District Attorney Offices. We have tabulated results from the initial survey and are awaiting results from the second. We are also in the process of conducting follow-up interviews.

We have completed an evaluation of prosecutorial misconduct cases from 2000-2005. The results of that evaluation are included with this report. We are in the process of completing our evaluation of prosecutorial misconduct and incompetent complaints for 1995-1999.

**Initial Findings**

**I. Training Programs on Ethics**

District Attorney Offices, regardless of size, report that they have extensive training programs on ethics for their Deputy District Attorneys (DDAs). These training programs include the following subjects: discovery, charging decisions, use of informants, eyewitness identifications, jury selection, closing arguments and use of confessions. However, not all District Attorney Offices cover all of these subjects. In

---

\* This is an ongoing study. Statistical findings, conclusions and recommendations are subject to change. This study should not be cited or quoted without express permission of its author.

particular, offices are not uniform in providing training on the use of informants and eyewitness identifications.

There is an abundance of training materials available for DDAs. A summary of the materials and their use is provided in the chart below.

**Ethics Training Materials**

	Majority of Offices	Isolated Offices
CDAA Training Programs	X	
IACJ		X
County Training Materials		X
NDAA		X
San Diego DA Brief Book	X	
AG Case Digest	X	
Internal Office Policies	X	
CDAA: “Professionalism: A Sourcebook of Ethics and Civil Liability Principles for Prosecutors”	X	

The length and frequency of training programs depends on the size of offices. For the large District Attorney Offices with more than 200 DDAs, training that has some ethics component is conducted monthly. Typically, there will be 2-3 hours of ethics training each year for all DDAs, although ethics issues are also integrated in discussions of a wide variety of trainings presented to the DDAs. The length of training for new DDAs ranges from three days to two weeks and includes a review of the ethical obligations of prosecutors.

Survey responses indicate that DAs believe that “more overall training for prosecutors” would be “helpful” in preventing wrongful conviction. However, DAs were mixed in their responses to whether changes in the manner of training would be effective. For example, DAs are hesitant to conduct joint training with defense counsel because there is an adversarial tone that has developed between the two, especially with regard to the issue of discovery. Prosecutors feel that defense counsel often do not meet their own discovery obligations, but are quick to accuse prosecutors of engaging in misconduct. However, DAs do agree that sharing of training sessions and materials among DAs is an effective tool in teaching new and experienced prosecutors.

*Recommendations:*

Training directors are open to new strategies to enhance District Attorney training sessions. Given the problems with improper closing arguments (as addressed in Section IX below), one possibility is the increased use of videos and simulated exercises to prepare DDAs to respond properly during the argument phase of cases.

Additionally, it would be helpful for CDAA to use its regular publication, “Prosecutor’s Brief,” to educate prosecutors regarding issues of prosecutorial misconduct. Currently, this publication does not address these issues. Keeping DAs posted regarding these issues could help avoid similar incidents in other offices.

**II. Supervision of Deputy District Attorneys**

Supervision of DDAs varies by size of office. For example, in smaller offices, there is constant interaction among the DDAs. The larger offices are more formalized and structured in their supervision structure. We are still compiling the DDA to supervisor ratio.<sup>1</sup> Self-reporting by the District Attorney’s Offices indicates that prosecutors believe that supervision is important to preventing incidents of prosecutorial misconduct.

The following chart represents the responses by District Attorney Offices regarding how valuable they believe increased supervision of DDAs and reduced caseload would be in preventing claims of prosecutorial misconduct.

**Impact of Caseload and Supervision**  
[Range of helpfulness (0 = not helpful; 5 = extremely helpful)]

	0	1	2	3	4	5
Increased supervision				X		
Reduced caseload					X	

As for actual number of supervisors in comparison to DDAs, this also varies according to size and organization of office. The final report for the Commission will contain an organizational chart of supervision for the reporting offices. Typically, there is at least one supervisor of some level for every 10 DDAs.

Attorney caseloads can also affect the performance of DDAs. It is not unusual for DDAs in larger offices to carry a load of 30-50 cases. A reduced caseload would provide DDAs the ability to better prepare their cases, increase their supervision of law enforcement, and ensure that the DDAs’ legal obligations, including those of discovery, are met.

**III. Discovery Practices**

There are a range of discovery practices by District Attorney Offices in California. Smaller District Attorney Offices tend to have more open discovery policies. Here are initial results of our study, although additional time is needed to collect additional information to validate these responses. Two District Attorneys offices report

---

<sup>1</sup> Preliminary results indicate a supervisory ration of 1:11 in many District Attorney offices, but these results vary according to size and organization of the office.

“open file” discovery. The majority of others report very open discovery, except for those files and information that imperil witnesses and informants.

**Discovery Practices  
Large Offices (> 200 DAs)**

	Yes	No
Written Discovery Policy	X	
Written Brady Policy	X	
Written Policy Regarding Access to Police Disciplinary Records	X	
Brady Committee	X	
Procedures for Tracking Dishonest Police Officers	X	
Computer Database to assist with Brady Requests	LADA	X
Brady Materials Provided Before Guilty Pleas		X
Other Discovery Practices to Ensure Brady Compliance <sup>2</sup>	X	

**Discovery Practices  
Small Offices**

	Yes	No
Written Discovery Policy	X	
Written Brady Policy	X	
Written Policy Regarding Access to Police Disciplinary Records	X	X
Brady Committee		X
Procedures for Tracking Dishonest Police Officers	X	X
Computer Database to assist with Brady Requests		X
Brady Materials Provided Before Guilty Pleas	X	
Other Discovery Practices to Ensure Brady Compliance <sup>3</sup>	X	

Prosecutors report that they are well aware of their discovery obligations. However, they report frustration with obtaining complete and accurate reports from law enforcement officials and with what they perceive as gamesmanship in the way that some defense counsel handle discovery.

The larger DA Offices have moved toward a model of a Committee that reviews *Brady* requests. Tracking of officers with credibility problems is done through subpoena searches or, where resources allow, by separate databases. In smaller offices, tracking of *Brady* and impeachment materials is less formal. Senior prosecutors informally advise DDAs regarding *Brady* requests.

<sup>2</sup> Some offices provide a “Hotline” for *Brady* questions. The CDAA also has a statewide hotline to answer a range of ethics questions, including those related to discovery. The Los Angeles District Attorney’s Office has created a comprehensive *Brady* policy and a Brady Compliance Division. See Appendix A.

<sup>3</sup> Many offices have routine discussions of *Brady* issues at weekly staff meetings.

*Recommendations:*

It is critical that prosecutors have an efficient means to discover whether an officer in their cases has credibility problems that should be disclosed to the defense. Accordingly, automated systems need to be developed for DA Offices to maintain and share such information. It is also helpful for offices to have written *Brady* policies. Open file policies are the most effective means to avoid *Brady* violations, although these too rely on prosecutors obtaining cooperation from law enforcement. Finally, prosecutors should be monitored for their compliance with *Brady*. This can be accomplished by using discovery compliance as a standard for evaluating prosecutors for promotion and for treating intentional *Brady* violations as serious acts of misconduct.

**IV. Internal Audit Procedures and Results**

The majority of offices do not have an internal audit procedure. The Santa Clara District Attorney’s Office has an innocence project coordinator. However, that individual has looked only at the issue of whether DNA testing would exonerate defendants who were convicted before recent changes in the law. In Los Angeles, private counsel Gigi Gordon was appointed by the Superior Court to review cases following the Rampart incident.<sup>4</sup> Her study revealed problems in the manner police conducted their investigations and their withholding of critical information from prosecutors.

**V. Complaint Procedures**

There is no uniform policy for District Attorney Offices for tracking and investigating complaints against DDAs. Initial responses indicate the following:

**Formal Procedures for Tracking and Investigating Complaints**

	Yes	No
Citizen complaints	20%	80%
Inmate complaints	20%	80%
Complaints from judges	40%	60%
Adverse appellate decisions	20%	80%
Complaints from law enforcement	20%	80%
Internal complaints from other DDAs	40%	60%

Typically, complaints are reviewed by senior personnel in the District Attorney’s Office, in conjunction with the immediate supervisor of the prosecutor at issue. If there has been a violation of policy, prosecutors can be disciplined. It is rare for a prosecutor to be formally disciplined and/or referred to the State Bar for prosecutorial misconduct. State Bar records indicate that there were only three disciplinary hearings against DDAs

---

<sup>4</sup> See Appendix B.

in California from 1995 to the present, and that only one of those actually addressed the issue of prosecutorial misconduct.<sup>5</sup>

DAs report that Civil Service protection is not a major impediment against disciplining DDAs. The Civil Service Commission has been described as “an additional vetting mechanism that ensures that all departments act in a fair and consistent manner.” Moreover, there is sufficient flexibility for DAs to reassign a problem prosecutor so that the individual will not be in a position to repeat his or her misconduct.

One major gap in the disciplinary system is the decision by DA offices not to keep a record of complaints of misconduct. Therefore, it is very difficult to track problem DAs other than by the reputation of that individual in a given office.

*Recommendations:*

Federal prosecutor offices frequently have a “citizen’s complaint” coordinator to keep track of complaints against governmental agencies and prosecutors. A similar approach could be used by DDAs. Additionally, there should be a mechanism in each DA office to track DDAs accused of misconduct.

**VI. Misconduct Issues Confronting Prosecutors**

Prosecutors were surveyed for the type of misconduct allegations filed against their office and the frequency of those allegations. The following chart provides preliminary results.

**Prosecutorial Misconduct Allegations**

	< 1/yr.	Approx. 1/yr.	> 1/mo
Discovery violations	50%		50%
Knowing use of false testimony	75%	25%	
Batson/Wheeler violations	50%	50%	
Lost or destroyed evidence	50%	50%	
Conflicts of interest	75%	25%	
Use of false confessions	100%		
Use of tainted eyewitness identifications	75%	25%	
Coercive plea bargaining	100%		
Coaching of witnesses	75%	25%	
Grand jury misconduct	100%		
Unfair pretrial publicity	100%		
Overzealous charging	50%	50%	

<sup>5</sup> See Appendix C. The one case involved Brooke Powell Halsey, Jr. who was suspended for four years for six acts of misconduct, including withholding *Brady* evidence and making misrepresentations to the court.

**VII. Causes of Wrongful Convictions**

Prosecutors were surveyed as to their perceptions of the causes of wrongful convictions. There is a general perception that defense counsel’s allegations of prosecutorial misconduct have become so routine that it is almost meaningless to tabulate those claims because so many are without merit. Deputy District Attorneys strongly believe that the defense bar routinely brings such claims as part of their approach to the adversarial system. Nonetheless, prosecutors have identified some areas as being more of a problem than others. Below are the tabulated results:

**Causes of Wrongful Conviction**

[0 = not a problem, 1 = minor problem, 3 = significant problem, 5 = serious problem]

	0	1	2	3	4	5
Incompetent police investigations				X		
<i>Brady</i> violations		X				
Untruthful informants					X	
False confessions		X				
Mistaken identifications			X			
Overzealous prosecutors		X				
Unfair pretrial publicity	X					

**VIII. Measures to Prevent Wrongful Convictions**

Prosecutors were surveyed as to their recommendations to address prosecutorial misconduct and wrongful convictions. Below is an initial tabulation of their responses:

**Recommendations for Preventing Prosecutorial Misconduct & Wrongful Convictions**

[0 = not helpful, 1 = somewhat helpful, 3= helpful, 5= extremely helpful]

	0	1	2	3	4	5
More training for prosecutors				X		
More training on forensic science issues				X		
More training on <i>Brady</i> issues			X			
More internal oversight of prosecutors			X			
More external oversight of prosecutors		X				
More judicial oversight of prosecutors		X				
More routine audits of prosecutors’ cases		X				
More resources for prosecutors				X		
Better forensic facilities					X	
More thorough police investigations					X	
Better prepared defense counsel		X				
Better access to police disciplinary records			X			

Standardized procedures for investigating post-conviction claims of innocence				X		
Joint ethics training with defense counsel			X			
Use of special masters to investigate claims of prosecutorial misconduct	X					

*Recommendations:*

As the survey reveals, there are three approaches that may help in preventing prosecutorial misconduct: (1) Increased training, (2) More resources and better police investigations, and (3) Standardized procedures for investigating post-conviction claims of innocence.

**IX. Survey of Prosecutorial Misconduct Cases<sup>6</sup>**

Because District Attorney Offices typically do not keep statistics on the number of prosecutorial misconduct complaints filed against their office, we surveyed all California Court of Appeal decisions (published and unpublished) to determine the nature of prosecutorial misconduct problems and which jurisdictions were most affected. Appendix D contains a full report of those cases. There are, as reported below, two primary areas of prosecutorial misconduct that are raised regularly with the courts: (1) *Brady* violations, and (2) improper argument.

**A. APPELLATE DECISIONS CITING PROSECUTORIAL MISCONDUCT (2000-2005)**

**Rankings by Percentage of Felony Cases Filed<sup>7</sup>**

**1. Orange County (30)**

- a. Reversals (3)
  - i. 2000—1, 2003—2
- b. Harmless Error (27)
  - ii. 2002—3, 2003—10, 2004—7, 2005—7

**2. Los Angeles County (79)**

- a. Reversals (6)
  - i. 2000—1, 2003—2, 2004—2, 2005—1
- b. Harmless Error (73)
  - i. 2001—8, 2002—15, 2003—14, 2004—17, 2005—19

---

<sup>6</sup> See Appendix D. A more detailed study of published and unpublished cases is being conducted by Professor Kathleen Ridolfi and covers a 10-year period.

<sup>7</sup> This ranking is based upon numbers of prosecutorial misconduct cases per 1,000 felony cases filed by each District Attorney office. Percentage-wise, the number of prosecutorial claims per felony cases is less than 1%, averaging from .028% to .008%. See Appendix E.

3. **Santa Clara County (18)**
  - a. Reversals (2)
    - i. 2002—1, 2003—1
  - b. Harmless Error (16)
    - ii. 2001—1, 2002—6, 2003—3, 2004—2, 2005—4
4. **San Diego County (15)**
  - a. Reversals (2)
    - i. 2002—2
  - b. Harmless Error (13)
    - ii. 2002—5, 2003—2, 2004—4, 2005—2
5. **Alameda County (13)**
  - a. Reversals (1)
    - i. 2003—1
  - b. Harmless Error (12)
    - ii. 2001—1, 2002—2, 2003—2, 2004—2, 2005—5
6. **Riverside County (17)**
  - a. Reversals (0)
  - b. Harmless Error (17)
    - i. 2001—1, 2002—4, 2003—2, 2004—7, 2005—3
7. **Stanislaus County (4)**
  - a. Reversals (0)
  - b. Harmless Error (4)
    - i. 2002—2, 2005—2
8. **San Bernardino County (10)**
  - a. Reversals (0)
  - b. Harmless Error (10)
    - ii. 2001—3, 2002—3, 2003—3, 2004—1
9. **Sacramento County (8)**
  - a. Reversals (0)
  - b. Harmless Error (8)
    - i. 2002—1, 2003—3, 2004—2, 2005—2
10. **Kern County (5)**
  - a. Reversals (1)
    - i. 2002—1
  - b. Harmless Error (4)
    - ii. 2002—2, 2003—1, 2005—1

**B. Basis of Prosecutorial Misconduct Claim**

The two primary bases for claims of prosecutorial misconduct are *Brady* violations and improper argument. *Brady* violations are being studied by Professor Ridolfi for the Commission. Our report identifies the types of improper arguments made by prosecutors at trial.<sup>8</sup> Below is a summary:

**Prosecutorial Misconduct  
Improper Argument Cases**

2000	5
2001	7
2002	58
2003	51
2004	39
2005	43

**A. Examples of Improper Argument**

Defense counsel routinely alleges improper argument. In fact, there has been a dramatic increase in such allegation in the last ten years. Very few of these cases result in reversal.

The most serious allegations of improper argument involve: (1) attacking the integrity defense counsel, (2) asserting facts not in the record, (3) inflammatory appeals to the passions and prejudices of jurors, (4) commenting on the defendant's exercise of the Sixth Amendment right to counsel or Fifth Amendment right to remain silent, (5) and referring to evidence disallowed by the court.<sup>9</sup>

There are several possible reasons why there has been an increase in cited incidents involving improper argument: (1) A zeal to win by prosecutors, especially during the heat of trial (2) Prosecutors reacting to what they view as improper arguments by defense counsel, and (3) The difficulty of training prosecutors to avoid improper argument given that courts are not always consistent in what they designate as improper argument.<sup>10</sup>

---

<sup>8</sup> See Appendix F.

<sup>9</sup> See Appendix F.

<sup>10</sup> While this may true, our study indicated that there is still a problem with argument errors that have been well-defined by the courts, such as *Griffin* error. There were eight cases of *Griffin* error in a five-year period. There were also two reversals based upon *Doyle* error.

**B. *Recommendations***

To ensure that prosecutors do not engage in improper argument, several steps are crucial: (1) DA Offices must establish and maintain a culture that does not reward prosecutors just for winning cases, but instead recognizes prosecutors for arguing in a professional and ethical manner, (2) DA Offices should institute more effective training for giving closing arguments, including discussions of how to object and respond to improper arguments by defense counsel, (3) DA Offices should provide greater supervision of attorneys (even experienced DDAs) as they prepare and present their closing arguments, (4) Prosecutors should be updated on case law regarding the boundaries between proper and improper argument.

**IX. Information Being Collected for the Commission**

In addition to making follow-up contacts to offices that did not respond to our survey, we are still in the process of collecting additional information regarding the following issues:

1. Complaints of prosecutorial misconduct to workload ratios;
2. Impact of civil service system on effectiveness of discipline;
3. Policies regarding access to police personnel records.

I anticipate that the final study should be completed by August 15, 2007.