

## CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

### **Minutes of Public Hearing, July 11, 2007.**

Submitted by Chris Boscia, Executive Assistant to the Commission.

Commission Chair John Van de Kamp convened the public hearing at 9:30 a.m. in Donovan Hall at Loyola Law School, 919 Albany Street, Los Angeles.

Those present included Executive Director Gerald F. Uelmen, Commission Vice-Chair Jon Streeter, Commissioners Diane Bellas, Harold "Bosco" Boscovich, Gerry Chaleff (for Chief William Bratton), Janet Gaard (for Attorney General Jerry Brown), Chief Pete Dunbar, Jim Fox, Rabbi Allen Freehling, Michael Hersek, Sheriff Curtis Hill, Bill Hing, Michael Judge, George Kennedy, Michael Laurence, Alejandro Mayorkas, Judge John Moulds, Cookie Ridolfi, and Greg Totten.

Commissioners not present were Glen Craig and Doug Ring.

Invited witnesses included:

- Prof. Laurie Levenson, Loyola Law School
- Kate Flaherty, Deputy District Attorney, San Diego County
- Dolores Carr, District Attorney, Santa Clara County
- Michael Schwartz, Special Assistant District Attorney, Ventura County
- Lael Rubin, Deputy District Attorney, Los Angeles County
- Juliana Humphrey, Deputy Public Defender, San Diego County
- Charles Patterson, Attorney at Law, Morrison & Foerster
- Prof. Laurence Benner (& Lorenda Stern), Cal Western Law School, San Diego
- Lon Sarnoff, former Assistant Public Defender, Los Angeles County
- Len Tauman, Assistant Public Defender, Sacramento County, Former Public Defender, Placer County
- John Wesley Hall, First Vice-President, National Association of Criminal Defense Lawyers
- Judge Steven R. Van Sicklen, Los Angeles County Superior Court, Supervising Judge, Criminal Division
- Harry Sondheim, Chair, Commission for the Revision of Rules of Professional Conduct, California State Bar
- Scott Drexel, Chief Trial Counsel, California State Bar.

Mr. Van De Kamp (JVD) welcomed the Commissioners, invited witnesses, and members of the public and press.

Morning Testimony, 9:30am—12:00pm

- I. Prof. Cookie Ridolfi, Santa Clara University School of Law
  - A. Testimony on her study—**this is best viewed simultaneously with [Prof. Ridolfi's slide presentation](#)**.
    - i. Preliminary Data
      1. Reviewed all CA appellate cases from 1997-2006 (state and federal opinions) containing the term “prosecutorial misconduct.”
      2. Allegations of prosecutorial misconduct were raised in fewer than 5% (1,582 opinions) of CA state appellate court opinions.
        - a. There was no misconduct found in 1525 cases (71%).
        - b. The Court did not reach a finding or the finding is unknown in 162 cases (8%). Top reasons why courts did not make findings:
          - i. Waiver (46.3%)
          - ii. No explanation (20.4%)
          - iii. Case reversed on other grounds, “no prejudice,” or moot claim (15.4%)
          - iv. Unknown, because portions of opinions not available for review (16%)
        - c. There was misconduct found in 443 cases (21%).
          - i. Harmful error found in 53 cases (12%)
          - ii. Harmless error found in 390 cases (88%)
        - d. Plus...
          - i. There were 129 cases of Brady violations found, not all of those were considered harmful. This is preliminary data on the Brady cases; more to come.
          - ii. There were also 29 Battson-Wheeler violations found.
        - e. Total: the additional 149 cases of Brady and Batson brings total number of misconduct cases to 592.
      - ii. Under the Business and Professions Code (BPC) §6086.7, a court shall notify the State Bar whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.

1. What is the actual difference in the conduct that is considered “harmless” and “harmful” in these cases?
  2. Not much. See p. 7 of slides for examples.
- iii. Where can prosecutorial misconduct occur? We used the *Types and Stages of Misconduct* developed by Prof. Zacharias, including Investigation, Charging, Pretrial, and Trial. See p. 8 of slide presentation.
1. In the appellate decisions reviewed, the greatest number of misconduct cases occurred during the trial stage; the next most frequent was pretrial.
  2. Trials represent less than 3% of all dispositions. Guilty pleas make up 76% of all dispositions in CA. Dismissals are 19%. Convictions and acquittals represent 3%.
- iv. If we know prosecutorial misconduct is occurring in the trials, what is going on the rest of the time?
1. There’s not much data available on the 76% of guilty pleas and therefore these circumstances are held largely unaccountable.
  2. The [Ochoa](#) case is an example of how the pressure on a defendant to plead guilty instead of facing life imprisonment could lead to a wrongful conviction. Ochoa was later exonerated by DNA.
- v. Is there a record of discipline?
1. Very few cases identify names of prosecutors that commit misconduct. Research did identify the names of 347 attorneys. Of those 347, 11 were disciplined.
    - a. 7 for failure to pay bar dues
    - b. 1 for misuse of office (putting pressure on an accident victim involved with a family member)
    - c. 1 MCLE non-compliance
    - d. 2 Brady violations
  2. There were 30 recidivists found.
    - a. 28 prosecutors had been found to have committed error in 2 cases.
    - b. 2 prosecutors had been found to have committed error in 3 cases.
    - c. 2/3rds of the recidivists were found to have repeated the same misconduct.
    - d. None were disciplined for their prosecutorial misconduct.

vi. Recommendations

1. BPC should be changed and not limited to cases where there were modifications and reversals. If you include all the cases, will it burden the State Bar? According to State Bar, they say it won't overburden.
2. The Courts are not reporting. The problem does not lie with the State Bar. Recommend that judges are required to report prosecutorial misconduct to the State Bar *and* to managing prosecutors and public defenders. Leave it to State Bar to determine what happens next.
3. Follow the Ramparts suggestions in the Commission's report.
4. More specific guidelines in the Code for the responsibilities of prosecutors. State Bar would welcome more specific guidelines.
5. Supports Special Masters proposal
6. Supports joint training on Brady issues including getting prosecutors and defense lawyers in same room more frequently.

B. Questions

- i. Fox: did you attempt to break out cases where prosecutors had actual knowledge of Brady violation or the Kyles v. Whitley?
  1. Ridolfi: the research hasn't been finished yet. From an outside perspective, it's hard to get that information. It's hard to say precisely where the bad conduct is coming from.
  2. Based on cursory review of wrongful convictions, police misconduct is the largest problem in the wrongful conviction cases in CA. It's hard to research b/c the info is not available.
- ii. Judge: Are you suggesting that judges should also report misconduct to heads of various offices or should the heads of offices report to the Bar?
  1. Ridolfi: Court should report to Bar. Heads of prosecutors' units should report. Errant prosecutors should report as well.
  2. There is a requirement for self-reporting for defense attorneys, but hasn't seen one for prosecutors.

II. Prof. Laurie Levenson, Loyola Law School

A. Testimony. Click [here](#) for Prof. Levenson's Full Report on assessing the policies and practices of District Attorneys' offices and the impact of prosecutorial misconduct on wrongful convictions.

i. Describe task of research:

1. Conducted a survey of DA offices, including:

- a. Evaluation of training procedures
- b. Caseloads
- c. Supervision
- d. Mechanisms for responding to prosecutorial misconduct
- e. Discovery practices
- f. Complaints against office
- g. Impact of Civil Service status
- h. Training available

2. Prepared Study and sent it out to all the DAs offices...twice. The responses came with suggestions for modification to the survey to make it more palatable. Survey was changed as a result of feedback.

3. Prof. Levenson followed up with phone calls to DAs' offices.

ii. Findings:

1. Challenges faced:

- a. There was great suspicion about survey and Commission
  - i. Agreement among DAs offices not to cooperate
  - ii. CDAA did not back cooperation
  - iii. Chilling of those offices who did want to participate.
- b. Grateful to offices who shared information. Special thank-you to DA's offices in LA County, Orange, Sacramento, Santa Cruz, Mono, Lake, Toulomne, San Diego, and Ventura counties
- c. Eventually resorted to informal conversations on phone to fill out surveys.

2. Results: all offices that participated say they take prosecutorial misconduct very seriously and believe that the responsibilities of DAs are more than of an average attorney.

- a. Difficult to make statistical conclusions
- b. Looked at appellate cases both published and unpublished in a smaller period than Prof. Ridolfi to

get a general picture on number of cases and impact on specific counties.

### 3. Training

- a. Significant resources are available to DAs offices. They share well together and have good statewide organization.
- b. They desire no standardization for that training
- c. Typically a 1-2 week training initially; good deal of focus on Brady and other substantive components
- d. Experienced DAs have 3-4 hours of ethical training per year
- e. Two observations
  - i. DAs offices report they have good training. They are open to more training that could help them.
  - ii. They resist joint training b/c of suspicion on two issues of misconduct that Courts find most frequently:
    1. Discovery—defense conducts gamesmanship as well in this area, and
    2. Closing Argument—defense does this too.
  - iii. Conclusion by Levenson: since this is an area of little trust between both groups, this is exactly what should be the subject of joint training
- f. Publications of prosecutorial community to be used in training:
  - i. There are few regarding discovery, Brady, and prosecutorial misconduct.
  - ii. Written materials are available, but role-playing is the most effective method of training.

### 4. Supervision of DAs

- a. Each office is an office unto itself. There aren't even standardized email addresses!
- b. On average, 1 supervisor to 11 deputy district attorneys.
- c. Caseloads vary greatly from 30-50 cases in smaller offices; 90-125 cases to calendar deputies in large offices

- d. Workload does impact on ability to do job. Their job is also to press police for what the law enforcement should have. The greater the caseload, there is less opportunity to press law enforcement on what it should be doing.
  - e. Conclusion by Levenson: Increased supervision and reduced caseload.
5. Discovery practices
- a. Most offices encourage open discovery early in process, but they hold back on info that imperils a witness or informant.
  - b. For deputy DAs in position a long time, they are not used to doing public defender's job for them by giving info. That needs to be pushed.
  - c. Large offices have policies and compliance program for Brady
  - d. Smaller offices run the gamut from informal discussion to having internal office policies. In smaller offices, several are run by DAs who are defense attorneys. They are better able to guide and be open to discovery
  - e. Conclusion by Levenson:
    - i. Early discovery w/o request
    - ii. Automating the system
    - iii. Tying it to promotion?
6. Internal Audit—How well did we do?
- a. Generally, this is not done by offices. There may not be a great deal of time for this, but it's important.
  - b. There is no effort to collect a list of cases that were raised as issues of concern by the defense bar. The cases that are on record are Habeas.
7. Complaint procedures
- a. No formal tracking mechanism for collecting complaints
  - b. Supervisors and Deputy DAs generally collect. No central log.
  - c. Conclusion by Levenson: A centralized system would be helpful, but no one is eager to implement one.
8. Civil Service Commission
- a. Does not impose an impediment to discipline

- b. Reasons:
  - i. Type of stuff that goes before Commission doesn't involve prosecutorial misconduct.
  - ii. Enough latitude and flexibility to move problem DA's within office. This is a method that can be used.
- 9. Discipline—Very rare
- 10. Types of Misconduct
  - a. Discovery
  - b. Batson-Wheeler
  - c. Overzealous charging
  - d. Improper Argument
- 11. Measures to Prevent Wrongful Conviction according to DAs
  - a. More training
  - b. DAs did not blame defense community
  - c. Improper Argument—see p.10 of report for the dramatic increase between 2001-2002. The Courts think improper argument is an issue.
    - i. Why does it happen? Zeal to win
    - ii. Not a level playing field during argument phase of case; defense counsel violates rules as well, response in-kind
    - iii. Difficult area of training b/c of changing legal standards
- iii. Respond to Focus Questions by Commission:
  - 1. Amend CA Rules of Prof. Conduct? Very difficult to do with Brady violations. Since it's already rule, how do you amend?
  - 2. Post-conviction claims of innocence? Might be important to have standardized procedures to do it
  - 3. Competency of forensic work? Better forensic facilities would be helpful.
  - 4. Reporting by judges and lawyers? Similar requirements on federal side. They go to OPR; standard is allegation, not finding. Has a dramatic impact on morale.
    - a. Notification to State Bar? If the requirement regarded willful or repeated misconduct, that might be appropriate.



6. Current job has her teaching ethics almost full-time; co-chair of CDAA ethics Committee; staffs hotline for CDAA; teaches across country
7. These issues are taken very seriously. She taught 300 lawyers in office. Took past instances of prosecutorial misconduct cases and turned them into streaming video training program for prosecutors

ii. Response

1. Judges have a handle on this. They come down hard on lawyers who commit misconduct.
2. Be sure not to mix and match “error” and “misconduct.”
3. San Diego will respond to the questionnaire. Please contact Kate Flaherty.

B. Questions—none

V. Dolores Carr, District Attorney, Santa Clara County

A. Testimony

i. Bio

1. Superior Court judge for six years before election to DA
2. Only in elected office for 6 months
3. During 15 years as Deputy DA, she was a union representative as well.
4. Worked for State Bar as bar grader for 25 years. Responsible for professional responsibility exam for a number of years.

ii. Presenting view of CDAA

1. Some overlap with Prof. Levenson. Generally agree with observations of Prof. Levenson, consistent with CDAA’s paper.
2. Santa Clara County will respond to the survey.
3. There is some concern and suspicion about how views of CDAA will be used and considered. DAs are accountable to the public, to the State Bar, and to the Court
4. Specific Suggestions
  - a. CA Rules of Prof. Conduct? Difficulty is how to define “misconduct.” In Santa Clara, the County Bar is going through the voluntary civility rules. They have a code of conduct on civility, but it didn’t address criminal practice. Effort to encourage lawyers to be more civil to each other. Are we

creating rules that repeat the law? What's the purpose?

- i. Difficulty lies in applying the rules
  - ii. Comparable to identifying every contour of search and seizure rules—too many variations; rely on Appellate review to determine whether activity was correct
  - iii. Practice in real world is fact-based and case law changes.
- b. Training is a fundamental need to prevent prosecutorial misconduct. Many opportunities to be trained if one is in DA's office. Challenge is that with reduced budgets there is less time to train b/c there are higher case loads.
- i. In Santa Clara County, she met a \$5 million reduction—a 10% budget cut
  - ii. In the last 6 years, we went from 215 lawyers down to 170 lawyers. Caseloads have not reduced.
  - iii. Time to train and discuss cases and thoroughly review is not always realistic.
- c. Instead of more rules, let's focus on how we apply those rules that exist—how DAs offices implement or change culture. How do we monitor lawyers and how are they held accountable?
5. Should Courts be required to report prosecutorial misconduct to State Bar? Requires finding by judge.
- a. Reports may be made by lawyers, judges, and others if they are unhappy with conduct by a lawyer. The issue remains: what type of conduct are we talking about? Right now, it's reported when a conviction is reversed.
  - b. Whether or not judges feel that requirement would be helpful in reducing misconduct in court rooms? Judges of Superior Court should be surveyed about whether this rule would help prevent prosecutorial misconduct.
  - c. Superior Court judges already have the authority to deal with what prosecutors and defense lawyers do in the courtroom

- i. Meetings at the bench
    - ii. In camera
    - iii. Suppress evidence
    - iv. Dismiss
    - v. Sanction lawyers
    - vi. Allow defense to comment on prosecutorial misconduct
    - vii. Limiting instructions about what is said, if it might affect a verdict
    - viii. Talk to supervisors about repeat offenders.
  - d. Judges need to have this power and do have it under current law.
- 6. Do existing disciplinary processes make it difficult to hold lawyers accountable?
  - a. In CA, each DA is independent. Some function at-will, e.g. San Francisco. Others are civil service, like Santa Clara.
  - b. Personnel matters are confidential. Discipline for inappropriate conduct is not available to public.
  - c. Regardless, ethical standards apply to all the same. It's the elected official's job to hold all accountable and to make sure that rules of professional conduct are followed. Rights of defendants to due process trump employees rights under our system.
  - d. State Bar may also get involved.
- iii. Observations about Santa Clara County
  - 1. Monthly meetings with public defenders' office.
  - 2. Reality in Santa Clara County—large budget cuts mean there needs to be more efficiency
  - 3. Meeting to discuss discovery—provide concrete examples of problems; self-reporting about issues to each other. Ventura does a similar program. DA's office will investigate when public defender raises issue.
  - 4. Joint training on discovery. Will happen this Fall about crime labs—not from an advocacy standpoint but from where both offices could use additional training.

## B. Questions

- i. Laurence: how do we ensure that police give DA's Brady material? Is there any downside to having law enforcement hand over written notes to DAs?

1. Carr: Sometimes Law enforcement doesn't know what they're looking for. One of the issues in SC County is that officers are typing reports on computers. Will a changed note from the field into the office become suspicious? Explanations need to be considered how editing happens in terms of police investigations. Redaction of police reports in sexual assault cases is a problem for the public defenders office. Law enforcement does this and didn't realize in SC County that this was very difficult for defense community. Defense community thought it was the DA's doing it.
  - ii. Uelmen: Administrative office of the Court has been very helpful in arranging input to the Commission. Judge Steven Van Sicklen will address the issue this afternoon. We will also receive written responses from Orange and San Diego County as well.
  - iii. JVD: Drexel will talk about impact on State Bar later today. Appreciates comments from DA Carr.
- VI. Michael Schwartz, Special Assistant District Attorney, Ventura County
- A. Testimony
- i. There is not a crisis of prosecutorial misconduct that we need to take care of.
    1. Levenson study: 1 in 3000 cases to 1 in 12,000 cases involve prosecutorial misconduct claims in filed felony cases. Of these, there are statistics from several counties. About 7.5% resulted in reversible error. This is a tiny percentage. This lumps in Brady and improper argument. Improper argument can be a misstatement of facts during argument as part of advocacy; can also be a misstating of law.
    2. Ridolfi study: of appeals, 5% raise issue of prosecutorial misconduct. Court finds error in 21%. That's 1% of appeals where a finding of pm. Of those, only 12% is prejudicial error. 1 in 800 appeals the court finds reversible prosecutorial misconduct.
    3. CPDA Study—11 cases of prejudicial error in 33 years; that's one case in every 3 years
  - ii. Training
    1. Hand over material to Court at beginning of trial and let them decide when it comes to Brady material.
    2. It's in self-interest of prosecutor to reveal everything up front.
  - iii. Proposals

1. DAs should not have to sign a statement under penalty of perjury that they have gathered all relevant evidence and disclosed it to defense.
  2. This is unnecessary b/c there is already a requirement to turn over Brady information. No requirement for others to sign a statement that says they did certain things, including judges and defense. Not appropriate to single out prosecution—insulting.
- iv. Mandatory Reports
1. BPC §6086.7—requires that Court reports to State Bar when prosecutorial misconduct or incompetence happens if it results in reversal or modification. The current barrier is appropriate to only do it in reversal or modification cases.
  2. Rule in office: if there is a deputy DA or deputy public defender issue, they discuss amongst themselves before taking it to the State Bar.
  3. Judges should report defense attorneys or prosecutors who commit repeated or egregious misconduct or incompetence.
  4. Court has authority to issue sanctions around discovery and hold people in contempt.
  5. Not necessary to have more enforcement mechanisms; more important that we're following rules we have.
- v. Ventura DA's Brady Policy
1. Worked out with a number of groups and working well since 2003.
  2. Two policies:
    - a. External—if police discipline an officer for misconduct which involves dishonesty or moral turpitude, they will tell DA that they have potential Brady info, but they won't specify. That officer's name goes on a list. Every time that officer is a witness, DA does Pitchess motion to find out misconduct. Usually agencies fire officer so this isn't necessary.
    - b. Internal—info that DA discovers on their own. Police report gives a certain account of interview that doesn't match with tape. How does that happen? It's a discrepancy that DA investigates. All info goes to Deputy DA who reviews for dishonesty or moral turpitude. Most aren't. About half of the cases do

include dishonesty and moral turpitude. Officer and agency can come in and talk about it. In practice, they do have some useful things to say. Sometimes it ends up on Brady list; other times it doesn't. If it's found, the name goes on a list available to Deputy DAs. If it comes up in a case, then it goes in discovery to the public defender.

- vi. One size does not fit all. Other counties have other procedures. It would be a mistake to mandate a particular procedure on counties.

## B. Questions

- i. JVD: Is the sourcebook for ethical activity of prosecutors used in training?

- 1. Schwartz: Yes, it's a thick binder that is given to Deputy DAs. The chapter on Brady was updated about two years ago. Surprised to hear that it's privileged. CDAA does use it.

- ii. Uelmen: should a subsequent misconduct by public defender be reported by State Bar? What kind of record is kept to know that public defender committed misconduct before?

- 1. Schwartz: In Ventura, a small county, people just know. Larger counties might need record-keeping.

- iii. Mayorkas: numerical analysis is not appropriate; this is a sensitivity issue. One case in 3000 could be significant. Should Profs. Ridolfi and Levenson move upstream from training to hiring? Can an individual's ethics be determined in hiring process?

- 1. Schwartz: Hiring for people with a deep sense of commitment is important.

- 2. Ridolfi: One of 10 CA DNA exonerations includes prosecutorial misconduct.

- 3. Levenson: problem is not just with new DAs. They can be very sensitized. Training issues are important for people who have been onboard for a long time.

- 4. JVD: it's a cultural issue within every office. Culture needs to be supportive of being open and fair.

- 5. Hill: law enforcement identified that hiring is an issue. With regards to the "lie, you die" philosophy, there has been binding arbitration for discipline since 1990. There is 60% loss rate on deputies who are taken into a determination of unfitness to operate in department. There is a Brady issue

when you fire a deputy sheriff and the arbitration puts that officer right back in the office. These things are reported to DA, but it's difficult to increase public trust.

6. Chaleff: LA has same issues as San Benito.
7. JVD: the numbers are tip of the iceberg. We don't know how big it is. Yes, the reported cases get us to where we are. But we need to minimize the problem.
8. Hersek: the number of cases we heard from Professors Ridolfi and Levenson are cases that are "filed." 95% of cases are pleas. That means the statistical significance of the number we see applies to 5% of all cases, not 100%. The rate of misconduct and error that the professors found is far more significant because we have no way of knowing about the misconduct that occurs in the other 95% of cases.
9. Cottingham: we need to have further discussion of the discipline of officers this afternoon.

VII. Lael Rubin, Deputy District Attorney, Los Angeles County

A. Testimony—there are three documents posted on the web, a [general response](#), the [LA DA's Brady Compliance Policy](#), and the [Brady and Law Enforcement Policy Manual](#).

i. Bio

1. 29<sup>th</sup> year in LA County DA's office
2. For last 2.5 years, she has headed appellate division comprised of 22 lawyers.
3. Three separate sections within appellate division. Habeas, Brady compliance unit, etc.
4. She helped develop Brady policy in 2002. DA announced the policy as a work-in-progress depending on case law and new issues.

ii. Task

1. What happens in other large DA's offices throughout US?
  - a. Universal response is that most offices don't have a clue. They're interested in developing material.
  - b. Brady has been around for awhile, but each department handles it differently.
2. Response to earlier testimony
  - a. §6068.7 of BPC—this section also states that all attorneys must "self-report" on cases based on prosecutorial misconduct.

- b. LA DA Habeas unit monitors reversals based on prosecutorial misconduct. They make sure to follow up with DA to self-report within 30 days.
  - c. There is an extensive training program on legal and ethical issues in office, including 6 full time lawyers to do training for new lawyers and veteran lawyers.
  - d. Quarterly publication called EthicsLine—discusses particular ethical issues by particular lawyers and also broader ethics topics learned about through public media or other publications.
  - e. Brady unit, aside from reviewing info we receive or allegations of Brady that they receive, they provide a resource for lawyers in the office who want guidance on what to do.
  - f. Levenson presentation: on occasion, there is no way of capturing this data. Maybe there should be a way to capture data to know whether the policies are working or not. Prof. Levenson asked a number of pointed questions about habeas writs. That data is not accessible. There is no system for gathering that info and focusing on it. LA DA is trying to figure out how that can be gathered and developed. Thanks to Prof. Levenson and Commission for asking the right question.
3. Learning from Brady Policy
- a. LA DA can determine which lawyers are accessing the system and which kind of cases they are accessing the system on. That tells whether lawyers are using it, universally, in what location, and what they are doing with it.
  - b. In the process of being able to determine which cases and officers are using information, what are the results or disposition of the case, etc. This will continue to benefit lawyers in LA DA and what they do. Policy is a work in progress.
4. Cooperation with LA Public Defender
- a. Specifically Public Integrity Assurance Division, counterpart to Lael's unit in LA DA.
  - b. Rather than beginning by filing motions in court, there is a good working relationship with lawyers in

section. While there isn't always agreement, there is continuing dialogue.

## B. Questions

i. JVD: with all the law enforcement agencies and counties you deal with, what kinds of problems are you having getting Brady material?

1. Rubin: Mostly small departments are cooperative. They understand issues. Chiefs of Police of 40+ law enforcement agencies have been very responsive. Up until recently, LAPD Board of Rights did give information. Following Copley decision and LA City Attorney decision that those Board of Rights hearings should not be open, LA DA does not get that info. LA DA interprets Copley differently than City Attorney. Information is no longer forthcoming. Sheriff's Dept. never made that material available to LA DA. Biggest loss is inability to get Board of Rights info from LAPD.

ii. Hersek: what is the opposition to modifying the existing BPC code to require a court, when a court makes a finding of misconduct by prosecutor or incompetence by defense, that it not just happen when cases are reversed, but in all instances, especially since the level of egregiousness only counts relative to the other evidence in the case?

1. Rubin: Courts know how to report misconduct and incompetence. They can report someone to State Bar if they feel someone is acting a certain way. In LA County, the judges are good about doing it.

2. JVD: Ridolfi report says Courts aren't doing it.

3. Ridolfi: recidivists aren't being tracked.

iii. Judge: would you support a rule that would require Court, in absence of reversal or modification of judgment, to report to Chief Public Defender or DA, instances in which a member of one office had violated Rules of Professional Responsibility?

1. Rubin: Judges do it now. Starting out with that type of reporting in that way is probably a good idea. In many instances, it's a training issue. Supervisors can't get to court all the time to watch lawyers. Having a judge pick up the telephone to call a supervisor opens a dialogue. There is nothing wrong with getting as much info as possible.

- iv. Ridolfi: BPC only refers to appellate cases. Would you be opposed to all cases being reported?
  - 1. Rubin: Yes, because it still depends on what the nature of the misconduct is.
  - 2. Ridolfi: Shouldn't that be the job of the State Bar?
  - 3. Rubin: It will be interesting to ask Drexel this afternoon. Because of media interest throughout the country, the State Bar more frequently looks at claims of prosecutorial misconduct than they used to.
  - 4. Carr: Very important to define up front what misconduct is. About Judge question, it sometimes happens in reverse where the other side contacts the opposing office, which then contacts the judge to determine what happened. The proposed rule is about when the court makes a finding. But judges will be able to get around making findings.
  - 5. Rubin: the more info the LA DA can have the better, wherever it comes from.
- v. Cottingham: Copley hampers info to Brady?
  - 1. Chaleff: City Attorney policy says you can't turn over anything.
  - 2. Rubin: still making request, but they don't get them anymore.

VIII. Juliana Humphrey, Deputy Public Defender, San Diego County

- A. Testimony—please see the [report of CPDA](#) for a fuller background on testimony
  - i. Bio
    - 1. Been a public defender for 20 years; 2 with Feds and 18 in San Diego
    - 2. Applauds Commission for addressing issues
  - ii. Relationship with DA
    - 1. Has gotten better than the past
    - 2. Both sides attempt to communicate; it happens informally. But when there are differences, sometimes problems can't be resolved informally.
    - 3. Criminal Justice System is only as good as the players in it.
  - iii. Problem
    - 1. When ethical lapses occur and when it's finally been figured out what's wrong, the client could be on death row or serving 25 to life.
    - 2. Harmless error is oftentimes not harmless.

3. The silent killer is that no one wants to snitch on each other.
  4. There needs to be more free discussion about the issues.
  5. Key Issue: What are the structures in each office that prevent this type of dialogue, conversation, and reporting?
- iv. Issues:
1. Question 1—Rules of Prof. Conduct
    - a. As defense attorney, IAC is the number one hit on appeal. Defense attorneys are used to being scrutinized.
    - b. What types of activity are considered misconduct can be defined. There should be ethical standards. This highlights the vital role that prosecutors have.
    - c. Surprised by Prof. Levenson’s experience—never heard DAs are shy about expressing themselves.
    - d. Judges are reluctant to report misconduct.
    - e. Deterrence is important. This type of rule will help deter misconduct.
    - f. Recommend that CCFAJ develop guidelines similar to Indigent Defense Delivery System for prosecutors for transparency and guidance. All should have guidelines.
  2. Question 2
  3. Question 9
    - a. Brady and Pitchess are over 30 years old, yet there is still confusion and disagreement. It’s critical to start speaking the same language about Brady and Pitchess.
    - b. After Ramparts, not much has happened.
    - c. Police Unions have thwarted ability of public to learn more information about law enforcement officers.
    - d. CPDA supports DA’s direct access to law enforcement personnel files.
    - e. The problem is not rampant; it’s intermittent.
  4. Question 10
  5. Unaddressed Issue: Finances
    - a. Is the prosecution adequately funded? CPDA is supportive of reduced case loads so that prosecutors can meet the demands upon them.
    - b. The real question in funding is to talk about the other stakeholders as well. Funding should be proportional for the fair administration of justice.

- c. Look at ratios between support staff and investigative services. Must look at what the additional funding will accomplish.

B. Questions—none.

Break for Lunch.

Afternoon Testimony, 1:00pm—4:30pm

- IX. Prof. Laurence Benner (& Lorenda Stern), Cal Western School of Law, San Diego
- A. Testimony
- i. Lorenda Stern, 3L at Cal Western—Analysis of Indigent Defense and Prosecution Budgets for California Counties (this testimony is best viewed side-by-side with the [PowerPoint Presentation](#))
    1. Plumas County—spent more on county fair than it did on indigent defense
    2. Study obtained budget data from 88% of counties
    3. Total spent on indigent defense (includes public defender, alternate defender, private indigent defense): \$726,773,196; total spent on prosecution: \$1,218,481,004. This includes the entire indigent defense system.
    4. Research adjusted prosecution budgets downward to account for indigency rate, which is a median average of 88% of prosecution’s budget.
    5. This does not account for:
      - a. Extra grants to prosecution offices
      - b. Misdemeanors handled by City Attorney in larger cities
      - c. Multiple defendants
      - d. PD functions outside of criminal justice, i.e. conservatorships, involuntary commitments
    6. Researchers took populations of each county and came up with a per capita rate of funding spent on indigents.
    7. Researchers highlight that such severe disparity in funding between prosecutors and public defenders’ offices puts California in non-compliance with ABA Principle 8 of Defense Delivery System.
    8. See PowerPoint Presentation above for exact figures.
  - ii. Prof. Laurence Benner—Systemic Factors Affecting the Quality of Criminal Defense Representation (this testimony is best viewed side-by-side with the [PowerPoint Presentation](#))
    1. Bio
      - a. Used to testify across the country that public defenders offices are the remedy for the problem
      - b. Used to say that California was on the cutting edge of public defense. Now things have changed.

2. Address Focus Questions
  - a. Reviewed 600 cases of claims of ineffective assistance of counsel. Only 74 cases are in appendix b/c not many claims are found. The Strickland standard is hopeless in terms of having any effect on the problem.
  - b. Survey Respondents:
    - i. Public Defenders
    - ii. Contract Defenders
    - iii. Assigned Counsel Systems
    - iv. Certified Criminal Defense Specialists
    - v. Judges
    - vi. Response Rate—76% of counties responded
    - vii. Response Rate by Provider—85% of public defenders, 45% contract defender, and 100% assigned counsel
3. Systemic Factors
  - a. Types of Errors
    - i. One person with 33 years of experience tried a death penalty case in a totally inept manner
    - ii. One had discipline for mishandling client funds, etc.
    - iii. Bad apples are very few, but have been able to hang around.
    - iv. People commit egregious errors and are given token responses. Their names should be published.
  - b. What did they find?
    - i. Failure to conduct an adequate investigation, in over 54% of IAC cases, was the major cause of deficient performance.
    - ii. Courts are redacting information about these cases.
    - iii. When they found misconduct, they looked at year of admission and categorized types of claims to find patterns.
  - c. Almost half of errors were made by privately retained counsel
    - i. Only 3 of these attorneys had less than 5 years of experience.

- ii. Over a third of these attorneys had more than 20 years of experience
- iii. Common culprit: failure to investigate.
  - 1. Failure to discover or fully investigate a viable defense
  - 2. Failure to uncover impeachment evidence that discredited prosecution witness
  - 3. Failure to uncover evidence, primarily death penalty, involving mitigation
- d. Request of Judges
  - i. Have you seen a Strickland issue in your court?
  - ii. Failure to investigate was over half. These must be blatant b/c how do judges know what hasn't been investigated.
- e. Why does this happen?
  - i. Average indigency rate is 88%.
  - ii. Over 80% of public defenders report that excessive attorney case loads are a significant problem.
  - iii. 100% reported excessive investigative load issues.
  - iv. See attorney to investigator ratios slide on p.11
  - v. Lack of prompt discovery—almost one-third of defender offices report this as a serious problem.

#### 4. Recommendations

- a. Bring back the preliminary trial
  - i. 5 days after arraignment, prosecutors should give discovery.
  - ii. No “take it or leave it” plea offers until full discovery has been given.
- b. Develop State-funded task force for indigent defense services.
  - i. Phase I: go county by county to determine what minimum standards are necessary in each county.
  - ii. Phase II: get matching funds to meet the standards.
- c. Training needs:

- i. Immigration consequences of guilty pleas
- ii. Brain Disorders, Mental Illness, and Retardation
- iii. Death Penalty Mitigation
- iv. Challenging Eyewitness Identification
- v. Presenting/Challenging Expert Testimony
- vi. Understanding Forensic Evidence
- d. Support for Independent Forensic Labs
- e. Minimum Requirements for Indigent Defense Contracts
- f. Prohibition of Flat-Fee Contracts

## B. Questions

- i. Judge: In doing the data collection, did you inquire of various providers the extent to which they were in compliance with State Bar Guidelines for Indigent Defense Providers?
  - 1. Benner: The survey was front/back. The California Bar Standards don't have any teeth or specificity. They're helpful, but they don't give the specific suggestions similar to the ABA standards.
- ii. Uelmen: was there a relationship between low-bid contract and counties where little investigation is done?
  - 1. Benner: Haven't looked at it yet.
- iii. Totten: on the budget presentation, it appears that the total DA budget is compared with total indigent. Is that correct?
  - 1. Stern: Weighting was given, mostly to sample out the 88% of indigency rates. See Table 4 on p. 17
  - 2. Laurence: also didn't include the funding for law enforcement to do investigation.
  - 3. Fox: figures from prosecutors office do not include additional grants.
- iv. Moulds: what is the universe of cases looked at for this study?
  - 1. Benner: The last ten years.
- v. Hill: were counties asked about Prop 172 money?
  - 1. Benner: No.

## X. Charles Patterson, Attorney at Law, Morrison & Foerster

### A. Testimony

- i. Manuel Babitt convicted in 1981 of felony murder of an 81 year old woman in Sacramento. He was executed on May 4, 1999.
- ii. Patterson was defense counsel during later portions of Habeas phase and during clemency.

- iii. He served in USMC with Manny Babbitt in Vietnam.
- iv. Patterson has both prosecuted and defended murder cases.
- v. Background on Babbitt case
  - 1. The last thing that Manny Babbitt remembered was walking down the street and seeing two headlights coming towards him. The next thing he remembered was the next morning.
  - 2. Woman was found in her room. She was found struck, but that did not kill her. She died of a heart attack.
  - 3. His fingerprints were in her apartment. He had loose change in his pocket, which she had in her apartment
- vi. The Trial
  - 1. Prosecutor is experienced. Medical examiner testifies that there was no evidence of penetration, b/c Babbitt was accused of rape. Asked if there was possibly any evidence? Medical examiner answered "Yes." No objection by defense.
  - 2. Defense put on two psychiatrists that examined Post-traumatic stress disorder. Neither had any prior history on Babbitt from Vietnam or his family.
    - a. There was evidence that he had dissociative experiences in Vietnam, up to 20 hours.
    - b. He was institutionalized and was determined to be not releasable.
  - 3. None of his prior mitigating evidence, like military service, was brought out during trial or appeal.
    - a. Most of this stuff was not evidence of innocence.
  - 4. Prosecution psychiatric expert said that most psychiatric evidence was not believable.
    - a. This type of testimony would result in setting people free.
    - b. That would be tantamount to telling insane people they can commit a crime and get away with it.
    - c. CA Sup. Ct. said this was misconduct, but was not prejudicial. No reports were made. The arguments were not objected to by defense counsel.
- vii. Post-Trial
  - 1. Evidence that could have indicated innocence
    - a. Eyewitness ID said he was in the bar during the time.
    - b. Broken clock in apartment showed 12:40am. It broke and stopped at time it had been dropped on floor.

- c. Footprints in apartment never offered as evidence and not disclosed.
  - 2. Over-eager prosecutor attempting to get a capital prosecution.
  - 3. At time of clemency they found out that the defense counsel was impaired during the whole of case, drinking four double-martinis at lunch. He then spent his nights drinking beer till 8 or 9pm at night. If you look at the record, he didn't object.
  - 4. Defense counsel had never done a death penalty mitigation case.
- viii. What can we do about this?
- 1. We need to find out information about people who have substance abuse problems prosecuting and defending cases.
  - 2. In order to keep the profession honorable, people have to act honorably.

#### B. Questions

- i. JVD: do you have any specific recommendations based on what you have heard so far in testimony?
  - 1. Patterson: Funding is a major issue. The investigation costs about \$300,000.
  - 2. JVD: Did investigation start during clemency?
  - 3. Patterson: No, it began during Habeas and mushroomed when he got into clemency. Defense counsel excluded all blacks from the jury.
- ii. Weinstein: was this tried in Sacramento?
  - 1. Patterson: Yes
- iii. Streeter: What kind of process did you get during clemency?
  - 1. Patterson: Gray Davis gave an opportunity to submit a clemency petition with a video of Manny speaking from prison. A democratic lobbyist told them they had zero chance.
- iv. JVD: was there a hearing with the Governor?
  - 1. Patterson: No.
  - 2. JVD: Was there a written process for how clemency would be dealt with?
  - 3. Patterson: No written process was given as written rules. They were told to submit a petition and that they were allowed to submit a video. Prosecution responded. Defense

replied. Then they received a lengthy reply from Governor's office.

XI. Harry Sondheim, Chair, Commission for the Revision of the Rules of Professional Conduct (RRC), California State Bar

A. Testimony

i. Bio

1. Retired
2. Working on pro bono professional responsibility issues for State Bar

ii. Focus Question #1

1. State Bar uses ABA Model Rules as well as CA Rules of Professional Conduct.
2. With regard to competence, the RRC recommends that current CA competence rule be retained with slight modification under ABA Model Rule 1.1 That rule relates to both civil and criminal matters.
3. RRC recommends addition of comment: "It is a violation of this rule if a lawyer accepts employment...the lawyer does not have sufficient time, resources, ability, to perform with competence." It would also be a violation if a lawyer repeatedly accepted.
4. Rule would encompass circumstances when defense attorneys or prosecutors should decline representation.
5. RRC recommends rule derived from ABA 5.1 which sets forth responsibilities for lawyers in supervisory roles. Comment 6 notes that those in charge of a public sector legal agency can create and implement regulations and guidelines for caseload.
6. CCFAJ concern with CA
  - a. 3-500 and 3-510 require that lawyer keep client reasonably informed to permit client to make informed decisions regarding representation.
  - b. Comment 7: "a lawyer ordinarily should provide to a client the information appropriate for a comprehending adult."
7. Duty for judges
  - a. Variant of Model Rule 8.3.
  - b. Recommended rule of RRC: mandatory requirement not recommended.

8. RRC is still going to consider CA Rule 5-220 about Brady and other exculpatory issues.
  - a. Also will consider ABA Rule 6.2 and 3.8.
  - b. These rules will also impact Focus Question #1
- iii. Personal Remarks on Focus Question #2
  1. Mandatory referrals to State Bar. Should not refer only to criminal, but to all cases.
  2. If there should be greater mandatory reporting, then the same should be true in civil cases as well.
- iv. RRC can consider amendments from CCFAJ.
  1. They have received numerous suggestions about rules. They take these into consideration as they consider the rules.
  2. State Bar website says what they have done thus far.
  3. Any suggestion from CCFAJ can be considered by RRC.
  4. When all batches are considered, they will go back and examine all recommendations for further comment.

#### B. Questions

- i. JVD: what is timeframe for the RRC?
  1. Sondheim: Started as 5 year project and will take longer than 7 years. Trying to finish by 2009.
- ii. Uelmen: Is ABA Rule 3.8 included in one of the batches?
  1. Sondheim: Yes, it's included in the last batch which are ABA rules that have no counterpart in CA as well as other rules from other states.

#### XII. Lon Sarnoff, LA County

- A. Testimony relates to [a survey for Public Defenders](#). When specific question numbers are mentioned, view this document.
  - i. Question #5
  - ii. Guidelines for Indigent Defense Delivery Systems
    1. Institutional Public Defenders
    2. Non-Institutional Public Defenders
      - a. Contract
      - b. Appointed
      - c. Others
  - iii. Guidelines are not the same for each group. Some counties have as many as five separate contracts for public defense. There are 55 contract firms or individuals throughout the State.
  - iv. Highlight the response to Question 3.
  - v. Highlight the qualifications asked about in Question 10 and 11.
    1. Conflicts policies are important.

2. A substantial number of the public defenders do not have guidelines that follow the Guidelines for Indigent Defense Delivery System
- vi. Training with regards to medical and psycho-social issues. Half of respondents say they don't require this type of training, e.g. brain damage.
- vii. Many respondents do not have time to provide input to public policy arguments.
- viii. Question #37—declarations of unavailability: a number of departments take on more cases than are healthy for their lawyers.
- ix. Resources:
  1. Paralegals—used heavily in LA for mitigation in capital cases.
  2. Move afoot to use staff social workers.
- x. Question #46—management structure

#### B. Questions

- i. JVD: which counties have responded up to this point?
  1. Sarnoff: Fresno, Kern, San Bernardino, Alameda, Tulare, Humboldt, Santa Clara, Merced, Sonoma, Marin, LA, Shasta, Lassen
  2. JVD: we welcome an updating of this report as more responses come-in. Would be helpful if DAs association sent out similar questions.
- ii. As they receive more responses, they will provide to CCFAJ.

### XIII. Len Tauman, former Assistant Public Defender, Sacramento County, Former Public Defender, Placer County

#### A. Bio

- i. Lost contract in Placer County through bid process.
- ii. Started practicing law in 1972—been a public defender ever since.
- iii. Worked in San Joaquin PD office in 1990. Managed a conflicts office from 1980-1990. In 1990, he bid on contract public defender in Placer. Even though he had higher bid, he was awarded bid.
- iv. He was PD over 16 years—proud of work done.
- v. Sentencing structure and collateral issues started to befuddle PD's office. They computerized their sentencing scheme.
- vi. They litigated frequently in appellate courts. They had first decision that required probation departments to turn over Brady material during probation hearings.

#### B. Testimony

- i. Ratio of investigators was 8 investigators to 20+ attorneys.
- ii. Operated very efficiently. In year 2000, they tried to survey other offices throughout the state about raw budgets, grants, etc. They were operating at 41% of the DA's budget in Placer County.
- iii. They bid out a contract in 2002 which extended to 2006 with a four year extension. In 2005, they talked with CEO about contract extension. At that time, there was a change in Board of Supervisors. The new center of balance displaced the CEO and removed all the institutional memory from the CEO's office.
- iv. When they discussed budget with new CEO, they pointed out that they were operating at 27% of DA's budget.
- v. Compared to other counties (those over 300,000):
  - 1. Lowest was Santa Clara at .36
  - 2. Placer was operating at .27
- vi. Prepared budget and line-item cost to move up to 38% of DA's budget
  - 1. Other bidders will come in and undercut.
  - 2. The level of what is competent representation is hard to identify when you talk about institutional providers.
- vii. Disparity between money provided by Placer County to PD and DA's office is high.
- viii. Numbers and politics will change the issues in contract-bidding counties. In Santa Cruz county, they have had the same provider for over 20 years. When politics change, it can have a huge impact on the quality of representation.
- ix. Echo Benner's recommendations on preliminary examination.

#### C. Questions

- i. JVD: difficulty in comparing budgets for DAs to budgets for Public Defenders. Does that include all indigent defense?
  - 1. Tauman: No.
  - 2. JVD: How should we approach this problem?
  - 3. Tauman: The investigators to attorneys ratio is important to public defenders. Having a criminal investigator who has experience doing police work is crucial.
- ii. JVD: what kind of training did you provide?
  - 1. Tauman: The lawyers did not do anything other than public defense. They encouraged defenders to attend CPDA events. They also encouraged attorneys to go to death penalty conference in Monterey.
- iii. JVD: Were there any internal training programs?

1. Tauman: Gang experts, attorneys from Sacramento, the experienced attorneys oversaw work by younger attorneys.
- iv. JVD: did you have any reversals based on incompetence of defense lawyers in Placer?
  1. Tauman: One case where an offer was made at arraignment in a three strikes case to remove one strike; the offer was removed after arraignment. That was considered IAC by the appellate court.
- v. JVD: any courts or prosecutors calling you about misconduct?
  1. Tauman: Courts called and he occasionally had conversations with DAs. He would talk to attorney involved to see what issue was. There is a generic suspicion between offices. When a young attorney makes a mistake, there is a suspicion that one side is out-gaming the other. A little clarification solves the problem.
- vi. JVD: what about joint training?
  1. Tauman: The British system has you switching sides.
- vii. Uelmen: what is ratio of investigators to attorneys now?
  1. Tauman: I do not know.
  2. Uelmen: Did contract go to local attorney or a network?
  3. Tauman: It went to a firm that got its start in Madera County. This same group is in a number of counties, including Placer.
- viii. Fox: how many lawyers did you contemplate having when you submitted bid? What was the differential between their bid and the winning bid? How many attorneys are there now?
  1. Tauman: Unsure. Their proposal included 30 attorneys and he doesn't know what opposing bidder anticipated and what they have now. The price differential was \$9 million per year.
  2. Hing: please submit the information on the differential between attorneys and investigators now and then between bids.
- ix. Hersek:
  1. Tauman: In 1990, public defender was dedicated when Len arrived. In 1994, the firm that had the contract bid against his office at a cost of millions of dollars less than his bid. One of the judges appeared before the board and said that the top quality representation was worth the money. The Judge prevailed on the Board even though the vote was 3-2

with one Board Member citing that saving money and worse defense representation might be desirable. Bidding process is competitive.

- x. Cottingham: did you hire a number of rookie attorneys? Did you try to hire seasoned police investigators?
  - 1. Tauman: Yes, it's a huge advantage to have someone with CHP background to investigate the crimes around I-80.
  - 2. Cottingham: What is the ratio of seasoned investigators to rookie investigators?
  - 3. Tauman: In LA, the public defender is populated with ex-law enforcement as investigators.

#### XIV. John Wesley Hall, First Vice-President, National Association of Criminal Defense Lawyers

##### A. Testimony

- i. CA Ethics Rules are an enigma for a person from Arkansas.
- ii. Arkansas went to a statewide public defender system five years ago. The systems were county-based.
- iii. In Int'l Law System, they use the common law system—called quality of arms. Both sides are entitled to the same number of investigators, compensation, resources, etc. to defend a case.
- iv. Caseload standards are not met in any state. In Chicago, every agency was required to cut a certain amount of money.
- v. Competence includes ability to handle cases. ABA 06-0441: if a public defender believes that a caseload has become unbearable, it is the public defender's job to raise the issue with the supervisor first. Peart and Citizen cases: Louisiana Supreme Court says the Legislature hasn't done enough. No trials until the public defenders are better resourced.
- vi. Arkansas keeps a list of who is certified to handle capital cases.

##### B. Questions

- i. JVD: if there is a statewide system, does the state get charged?
  - 1. Tauman: Yes, it used to be a county charge, now it gets charged to the State. In a capital case, if the local public defender is not certified, then they reach out to other lawyers to bring them in.
- ii. JVD: In that type of system, the employment is made at county level?
  - 1. Tauman: No, it's done at the State level.

- 2. JVD: certain large counties have some parity in terms of benefits, but in the contract counties the benefits are not equivalent.
  - iii. Totten: the lesser cases often involved pleas because of economics. Is it necessary to expend large resources for some of the lesser crimes?
    - 1. Tauman: No.
  - iv. Hersek: how is the system set up?
    - 1. Tauman: There is a public defender Commission with judges, attorneys, etc.
    - 2. Hersek: The funding comes from the State and through the Board it is distributed?
    - 3. Tauman: Yes. Counties have no role. The Board signs all the checks.
  - v. NACDL is happy to help the Commission provide any resources.
- XV. Judge Steven R. Van Sicklen, Los Angeles County Superior Court, Supervising Judge, Criminal Division
  - A. Testimony (Judge Van Sicklen's testimony was read directly from his written comments: [Judge Van Sicklen's written submission](#))
  - B. Questions
    - i. Hersek: why wouldn't we want Batson-Wheeler violations reported to the State Bar?
      - 1. Van Sicklen: Because the judge doesn't think he's qualified to decide what racist is. When he grants a Wheeler motion, he's not saying that the lawyer is a racist. He's just saying that the lawyer made a mistake.
    - ii. JVD: Code of Judicial Ethics requires judge with personal knowledge to take appropriate corrective measures. Have you send that done often?
      - 1. Van Sicklen: Not many cases, but he has seen cases of age or infirmity from alcohol.
    - iii. JVD: have you ever called DA or supervising attorney about a misbehaving lawyer in court?
      - 1. Van Sicklen: He has never personally done that.
    - iv. Ridolfi: what about a proposal that modifies Focus Question 1? What about a routine referral once appellate court makes decision as a notice that goes to State Bar? Would there be some value to have every lawyer, defense or prosecution, receive a letter from the State Bar?

1. Van Sicklen: At the trial level, he doesn't agree that findings of error should have mandatory reporting.
  2. Ridolfi: Should the Appellate Bench be required to report every finding of misconduct?
  3. Van Sicklen: No.
- v. Judge: If the ambit of the cases in which a judge was required to report is expanded, would that make it less likely that a judge would grant a Wheeler motion b/c of the mandate for the offending lawyer to be reported?
    1. Van Sicklen: Yes, this would subliminally erode independence of judiciary of making rulings that might affect how the defense or prosecution bar worries about the judge reporting.
  - vi. Uelmen: Canon 3D-2, it leaves up to the Judge to determine what the appropriate corrective action is?
    1. Van Sicklen: Didn't research in great detail the case law. Read annotations in Judge Rothman's book. Judge must do something.
  - vii. Dunbar: why is it that lawyer mistakes/incompetence don't automatically get reported when law enforcement mistakes do get reported?
    1. Van Sicklen: Pitchess motions are the bane of existence.
  - viii. Totten: given position of not wanting to formalize reporting requirements, is there a danger of formalizing this policy that the problem of misconduct and incompetence could get work b/c of less civility in the system?
    1. Van Sicklen: Anything is possible. If the lawyers think that the Judge is a policeman, they may act differently.
  - ix. Levenson: are you aware of any standard that the Court of Appeal uses to decide whether to strike a lawyer's name from a misconduct case?
    1. Van Sicklen: No.
- XVI. Scott Drexel, Chief Trial Counsel, California State Bar
- A. Testimony
    - i. His office is responsible for investigating and prosecuting accusations of attorney misconduct.
    - ii. Focus Questions 1 and 2
      1. After considerable reflection, he does not believe the State needs additional rules or statutes. There are already a considerable number of rules that cover this and are

- adequate for our purposes, including Rule 3-110A (Competence Rule), Rule 5-110 (Duties of a Gov't Attorney), Rule 5-220 (Prohibition on Suppression of Evidence), BP&C 6068(d)[duty of attorney not to mislead judicial officer], BP&C 6016 (moral turpitude).
2. No other rules or statutes necessary to deal with incompetence and misconduct.
  3. On the reporting issue, complaints come to the State Bar in three ways:
    - a. Complaint from client or opposing attorney or subsequent counsel
    - b. Referral from Court or Press Coverage
    - c. Complaint from criminal defendant
  4. Two significant constraints on investigating complaints
    - a. Time constraints of investigation within 6 months of receipt of complaint
    - b. The State Bar has a high standard of proof in discipline cases: clear and convincing evidence.
- iii. State Bar is looking at Ridolfi data to see which cases were reported to State Bar
1. They haven't found any in the first half of the data.
  2. Every year they send out a letter to Appeals Court and Trial Court judges reminding them of statutory provisions. A spate of reporting follows, but then it drops off.
- iv. Concern amongst judges about reporting that it would bring taint to attorneys
1. Only most egregious cases are moved on. Where there is significant doubt, the State Bar does not proceed.
  2. As prosecutors, the State Bar feels they should only bring cases where they have clear and convincing evidence.
  3. As far as protections to attorneys, the investigations are confidential. They can't even confirm that an investigation is on-going.
- v. Why BP&C code 6068.7 is inadequate?
1. Brooke Halsey case in Sonoma—suppressed evidence in murder prosecution. Trial judge dismissed charges against defendant, but didn't have to report. Judge did not report.
  2. State Bar heard from defendant's attorney. They investigated, prosecuted, and then Halsey was suspended for three years.

- vi. Things for commission to think about
  - 1. Reporting every single error is too broad. But if Court believed that misconduct violated 3-110 or 5-110 or if there was suppression of evidence in 5-200, those are things that should be reported to the State Bar

B. Questions

- i. JVD: how do we get appellate judges to report, even with present law?
  - 1. Drexel: Through the assistance of the Chief Judge.
- ii. JVD: Report from Ridolfi recommended that even when there was no reversible error, there may be other error that should be reported for appropriate action that would be taken by State Bar. Does that present a workload problem for the State Bar?
  - 1. Drexel: That would not constitute an inordinate addition.
- iii. JVD: State Bar would take the reporting requirement of Appellate Court down to trial court for misconduct that is dispositive?
  - 1. Drexel: Yes.
  - 2. JVD: What about Judge Van Sicklen's comments about the difficulty of ruling on these things in close situations, such as 170.6 motions, would that apply to appellate courts?
  - 3. Drexel: No.
  - 4. JVD: Is there a difference?
  - 5. Drexel: Yes. Knowing that there is a possibility that a report must be filed, it's a good deterrent for prosecutors and defense lawyers.
- iv. Bellas: under what circumstances would you not defer to appellate or habeas process if you received a letter from a criminal defendant?
  - 1. Drexel: If we get a complaint at trial level on matter still pending, they await any significant investigation until pending proceeding has been completed. Getting the State Bar involved could be prejudicial on the outcome of the case.
- v. Levenson: what kind of background does current State Bar staff have to evaluate these cases?
  - 1. Drexel: There are a significant number of trial and investigative attorneys with prosecution and defense backgrounds.
- vi. Benner: there is a category called private reproof. I have one. Can I share that with Commission?

1. Drexel: There are two types of reproof: one is before charges and the other is after charges.
  2. Benner: How do researchers know this stuff if you have to pay for the information for private reproofs?
  3. Drexel: The term private reproof is a misnomer.
- vii. Uelmen: If State Bar gets a complaint and they don't launch investigation, is a record kept of receiving the complaint?
1. Drexel: Yes. They are allowed by statute to destroy record after five years. As a practical matter, they keep a computer record. They do look for patterns.
  2. Uelmen: Do you believe that 5-220 is co-extensive with Brady obligation of prosecutors?
  3. Drexel: Would not say that categorically. This would be decided on a case-by-case basis. But there are Brady violations that wouldn't be covered by 5-220.
  4. Uelmen: What do you use to prosecute that?
  5. Drexel: We look for prosecutor knowledge and intent to meet the 5-220 standard.

## Public Comment

### XVII. Testimony from Members of Public

#### A. Natasha Minsker—please view [ACLU Written Submission](#)

- i. Most disturbed by Judge's testimony. When a lawyer intentionally dismisses a juror because of race or gender, that is a violation of juror's constitutional rights. I do understand his point about the law being confused about what is prosecutorial misconduct. We're not over-sanctioning our lawyers.
- ii. Following up on NACDL: CA is one of five states that does not provide quality indigent defense services in a statewide manner. Is it possible to do so? Yes.
- iii. The question is not whether misconduct or IAC is rampant or rare. The question is whether there are systemic problems that need systemic solutions.
- iv. Letter
  1. ACLU looked only at death penalty cases of actual execution.
  2. Two cases of actual execution in CA that involve substantial prosecutorial misconduct that are very disturbing
    - a. Manny Babbitt

- b. Tommy Thompson—a later case reversed with similar facts. Thompson was executed.
  3. They look at 8 particular cases in which they were able to identify 6 of the prosecutors' names.
  4. People v. Hill—one of the few cases where CA Supreme Court reverses b/c of misconduct and critiques prosecutor's misconduct.
  5. What amounts to proper and ethical prosecution is important in capital cases.
  6. We need to remind people what the rules are.
- XVIII. Closing Remarks by Chair, JVD