

June 28, 2007

**CALIFORNIA COMMISSION ON THE
FAIR ADMINISTRATION OF JUSTICE**

Focus Questions for Hearing on Professional Responsibility Issues.

The Commission would like to focus on the following questions at a public hearing on the Professional Responsibility and Accountability of Prosecutors and Defense Lawyers, the topic to be addressed in its next report. The hearing will take place on Wednesday, July 11, 2007 from 9:30 a.m. to 12:00 p.m. and 1:00 p.m. to 4:30 p.m. at Loyola Law School, 919 Albany Street, Los Angeles 90015. Please contact the Commission at 408-554-5002 to arrange for oral presentations, which will be limited to 15 minutes. Written submissions are also welcome, and may be submitted to the Commission at 900 Lafayette Street, Suite 608, Santa Clara, California 95050, or via Fax (408-554-5026) or email (cboscia@scu.edu). The Commission will consider written submissions for posting on its website.

1. Should amendments to the California Rules of Professional Conduct be recommended, to provide greater specificity in defining the ethical standards to guide prosecutors and defense lawyers engaged in handling criminal cases? In what areas is greater specificity desirable? The areas of particular concern brought to the attention of the Committee thus far include the prosecutor's discovery obligations pursuant to *Brady v. Maryland*; prosecutorial duties in the investigation of post conviction claims of innocence; prosecutorial and defense lawyer competence in addressing issues of forensic science; the defense lawyer's duty to decline representation if commitments to other clients or lack of adequate expertise or resources preclude competent representation; the defense lawyer's duty to investigate before recommending acceptance of a plea bargain; the defense lawyer's duty to fully advise clients of the collateral consequences of conviction; and the reporting of violations of the Rules of Professional Conduct by other lawyers, or the Code of Judicial Ethics by judges.

2. Should California Business and Professions Code Section 6086.7, which currently requires a court to 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, be modified to require a court to notify the State Bar whenever a finding is made that an attorney in a criminal proceeding engaged in misconduct, incompetent representation or willful misrepresentation, regardless of whether the

misconduct, incompetence or misrepresentation results in modification or reversal of a judgment?

3. Do procedures for discipline of employees of District Attorney and Public Defender offices unreasonably limit or compromise the ability to insure adherence to the professional standards that apply to prosecutors and defense lawyers? Should independent Special Masters, who are acquainted with professional standards for prosecutors and defense lawyers, be utilized by Civil Service Commissions or similar bodies in recommending or upholding action in cases involving prosecutors or defense lawyers?

4. Are existing office policies and procedures implemented by District Attorney Offices and Public Defender offices adequate to ensure full compliance by all deputies with discovery obligations? Are any legislative or administrative changes needed to assure full compliance with the requirements for disclosure of evidence?

5. To what extent have the California State Bar Guidelines on Indigent Defense Services Delivery Systems been implemented? Are adequate resources available for full implementation?

6. To what extent are low bid contracts being used to meet the obligation of California counties to provide competent representation to indigent accused? Do such contractual arrangements provide the requisite assurance of competent representation?

7. Do California prosecutorial offices and agencies receive resources adequate to assure the fair administration of justice?

8. Are the current levels of training and continuing education of California prosecutors, public defenders and private defense lawyers adequate to assure their competency and ethical responsibility? Should joint or combined training of prosecutors and defense lawyers regarding their ethical obligations be encouraged?

9. Should the following Recommendations for Improving the California Criminal Justice System in the Wake of the Ramparts Scandal, compiled in 2003 by the Los Angeles County Bar Association Task Force on the State Justice System, be implemented on a statewide basis?

2.1 To implement prosecutors' responsibility for obtaining and producing *Brady* material, prosecuting agencies should establish

procedures to gather *Brady* material in a systematic fashion from all appropriate sources. To assist prosecutors in the fulfillment of their obligations, governmental agencies should establish procedures to gather all *Brady* material and to provide that material to prosecuting agencies in a timely manner. Other options for obtaining *Brady* material should be utilized by prosecutors before resorting to *Pitchess* motions.

2.2 *Brady* . . . material should be collected in a central database under the control of the prosecuting agency.

2.3 Production of *Brady* material to the defense must be timely. In particular, *Brady* material tending to establish factual innocence or an affirmative defense should be revealed before a guilty plea is entered.

2.4 In felony cases, prosecutors should be required to execute a declaration affirming that inquiries have been made of all appropriate sources and that all *Brady* material obtained has been reviewed and disclosed.

In addition, the Commission invites written submissions regarding the following question:

10. Should the following Recommendations for Improving the California Criminal Justice System in the Wake of the Ramparts Scandal, compiled in 2003 by the Los Angeles County Bar Association Task Force on the State Justice System, be implemented on a statewide basis?

2.2 . . . *Pitchess* material should be collected in a central database under the control of the prosecuting agency.

2.5 Courts should order the production of the text of witness statements in response to the first *Pitchess* motion.

2.6 In appropriate cases, *in camera* inspections of *Pitchess* documents should be scheduled for a date after the *Pitchess* hearing.

2.7 Prosecutors should be present for the *in camera* review. When *Pitchess* motions are granted, material should be produced to both the prosecution and the defense.

2.8 The Legislature should amend Evidence Code Section 1045(e) so that it does not require issuance of a protective order restricting the use of *Pitchess* information to a single case.

6.1 The standard for referring information concerning witness credibility issues to the District Attorney should be reasonable suspicion or some other standard less than probable cause. A written policy should be established setting forth the standard in detail.

6.2 A database organized and maintained by the prosecutor's office should be created pursuant to procedures and standards established by that office and containing the names of police officers and other recurring witnesses whose honesty and truthfulness may be in question, as set forth below.

a) Data should include information obtained from prosecution, defense, judicial and public sources. Information obtained from the defendant should be relayed through defense counsel (or the defendant, if proceeding *in pro per*).

b) The standard for entry into the database should include fact-based allegations relating to public integrity, honesty and truthfulness. It is recommended that the criteria be a broader standard than that required in *Giglio v. United States*, 405 U.S. 150 (1972), *Brady v. Maryland*, 373 U.S. 83 (1963), and their progeny. Data collected in the prosecution database may not necessarily end up in a *Brady* database.

c) Access to the database should be limited to the prosecution with the understanding that it is the duty of the prosecution, by designated senior deputies, to review the database and determine whether material contained therein should be discoverable. Toward that end, the prosecution shall seek this material and will be held accountable for its dissemination or lack thereof. A purging process should be in place for information that turns out to be clearly false or that is too remote in time.

6.3 In order to ensure the completeness of the database, the Task Force recommends that when a court has reason to believe perjury may have been committed, the court should report it to the prosecutorial agency for appropriate action and inclusion in the database.

7.1 Law enforcement agencies are encouraged to implement automated data systems in which personnel and other records are maintained in a centralized computer database.

7.2 Automated databases maintained by law enforcement should retain information relating to sustained citizen complaints for at least ten years.

7.3 The courts, district attorneys, and public defenders should develop technical compatibility with law enforcement agencies to facilitate transmission and accessibility of *Brady* and *Pitchess* information by prosecutors, defense attorneys, and judges in criminal cases.