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**AMERICAN BAR ASSOCIATION**

**CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

- 1 RESOLVED, That the American Bar Association urges trial and appellate courts when
- 2 reviewing the conduct of prosecutors to differentiate between “error” and “prosecutorial
- 3 misconduct.”

## REPORT

The term “prosecutorial misconduct” has become a term of art in criminal law that is sometimes used to describe conduct by the government that violates a defendant’s rights whether or not that conduct was or should have been known by the prosecutor to be improper and whether or not the prosecutor intended to violate the Constitution or any other legal or ethical requirement. When a prosecutor knowingly or intentionally violates a constitutional or legal requirement, the term “prosecutorial misconduct” may aptly describe the prosecutor’s actions. When a prosecutor makes an inadvertent or innocent mistake, the effect on a defendant may be the same as if misconduct occurred and must be accompanied by a fully appropriate remedy, but the term “error” may more accurately describe the prosecutor’s actions. Recommendation 100B, with the full support of the National District Attorneys’ Association, recognizes that there can be a difference between misconduct and error, and it urges courts, when reviewing claims that prosecutors have violated a constitutional or legal standard, to choose the term that more accurately describes prosecutorial conduct while fully protecting a defendant’s rights.

Even conscientious lawyers sometimes make mistakes. These mistakes can be small – e.g., misspelling the name of a case or citing in a brief the wrong page of an opinion – or large – e.g., turning over privileged documents in response to a discovery request. When a lawyer commits an error, the lawyer or the lawyer’s client may suffer an adverse consequence depending on the nature of the error and its effect on an adversary or court. The American Bar Association and the National District Attorney’s Association have consistently made efforts to improve lawyer performance by promoting continuing legal education, publishing books and articles to assist lawyers in performing at the highest levels, and offering opinions on issues of professional responsibility that educate lawyers as to their responsibilities and provide guidance to avoid professional mistakes. The reality that lawyers are not perfect does not mean that lawyers should not be held accountable for their mistakes. Holding lawyers accountable is of vital importance to public confidence in the bar. It is important, however, that lawyers be held appropriately accountable.

While lawyers cannot fairly complain when their errors are discovered, identified, and remedied, most lawyers perceive an important distinction between this and having their actions described as “misconduct.”

The resolution recognizes that the term “prosecutorial misconduct” may fairly describe some prosecutorial actions conduct and that the term “error” may more be a more accurate description of other conduct. The resolution seeks to assure that a defendant’s rights are fully protected regardless of what term is used to describe a prosecutor’s actions, but it asks courts to consider using the term “error” when it more accurately describes conduct than the term “misconduct.”

# 100B

Professional prosecutor offices today take pride in the professional reputation of their lawyers. The leadership in these offices seek to eliminate mistakes and errors that infringe a defendant's rights and require unnecessary additional proceedings that burden all participants in the system. Yet, even the most diligent office and the most careful lawyer sometimes make mistakes. Those who have considerable experience in criminal justice understand that the term "prosecutorial misconduct" can be used by a court to describe governmental conduct of which a prosecutor might have been unaware as well as misconduct by a prosecutor. But many people with less criminal justice experience might wrongly conclude that a judicial finding of "prosecutorial misconduct" implies that a prosecutor broke a rule or breached a trust with a level of culpability that warrants special condemnation.

The resolution asks judges to protect a defendant's rights fully and to provide whatever remedies the law requires when a defendant's rights have been violated, but to consider whether "error" more accurately describes a prosecutor's conduct than "misconduct." There is good reason for prosecutors, their offices and the public to know whether or not a court has merely found error and provided a remedy or whether a court has found culpable conduct associated with that error.

For example, suppose a prosecutor makes a closing argument and tells the jury that Witness X testified to a particular fact, opposing counsel objects that the witness did not so testify, the trial judge overrules the objection; and on appeal, with the benefit of a complete transcript, a reviewing court finds that the objection was correct and that Witness X did not actually testify as the prosecutor claimed during the closing. This could happen in any case, and the probability of it occurring might well increase along with the length of a case and the absence of daily transcript. In such a case, the reviewing court surely would find error and determine whether the error was prejudicial or harmless. The reviewing court could call the conduct "error" or "misconduct" without affecting the remedy to be provided, but the choice between the terms should reflect which more accurately describes the conduct

Contrast this example with one in which a criminal accused moves *in limine* just prior to opening statements to exclude certain evidence as unduly prejudicial, the trial judge grants the motion and instructs opposing counsel not to mention the evidence during the trial, and the prosecutor acknowledges hearing and understanding the judge's admonition and nonetheless mentions the excluded evidence in an opening statement, the moving party objects and requests a mistrial, and the judge grants the motion. The judge might describe what occurred as "prosecutorial misconduct" and might well add that it appears to have been intentional.

These examples present fairly clear scenarios in which it often will be easy to distinguish between inadvertent error and culpable conduct. In many other cases, the distinction may not so easily be drawn. For example, did a prosecutor make a good faith mistake in failing to produce a document in discovery, or did the prosecutor intentionally suppress a document that clearly should have been produced? In many

instances, a reviewing court might have no reliable information concerning the prosecutor's state of mind. As long as the court fully protects the rights of a defendant, a decision to use the term "error" rather than "misconduct" might avoid an inaccurate and unnecessarily pejorative characterization of ambiguous action.

Respectfully Submitted,  
Charles Joseph Hynes, Chair  
Criminal Justice Section  
August 2010

# 100B

## GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Joseph Charles Hynes, Chair

1. Summary of Recommendation(s).  
This Recommendation recognizes that the term “prosecutorial misconduct” has become a term of art in criminal law that is sometimes used to describe conduct by the government that violates a defendant’s rights whether or not that conduct was or should have been known by the prosecutor to be improper and whether or not the prosecutor intended to violate the Constitution or any other legal or ethical requirement.
2. Approval by Submitting Entity.  
The recommendation was approved by the Criminal Justice Section Council on April 10, 2010.
3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?  
NO.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?  
None that we are aware of at this time.
5. What urgency exists which requires action at this meeting of the House?  
Even conscientious lawyers sometimes make mistakes. These mistakes can be small – e.g., misspelling the name of a case or citing in a brief the wrong page of an opinion – or large – e.g., turning over privileged documents in response to a discovery request. When a lawyer commits an error, the lawyer or the lawyer’s client may suffer an adverse consequence depending on the nature of the error and its effect on an adversary or court. The reality that lawyers are not perfect does not mean that lawyers should not be held accountable for their mistakes. Holding lawyers accountable is of vital importance to public confidence in the bar. It is important, however, that lawyers be held appropriately accountable.
6. Status of Legislation. (If applicable.)  
Not applicable
7. Cost to the Association. (Both direct and indirect costs.)  
None
8. Disclosure of Interest. (If applicable.)  
No known conflict of interest.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)  
Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the August 2010 House of Delegates agenda it is being circulated to the following:  
Standing Committee on Legal Aid and Indigent Defendants  
Judicial Division  
Litigation Section  
Individual Rights and Responsibilities Section  
Coalition for Justice  
Council on Ethnic and Racial Justice  
Young Lawyers Division  
Government and Public Sector Lawyers Division  
Standing Committee on Ethics and Responsibility  
Standing Committee on Lawyers' Professional Responsibility  
Standing Committee on Professional Discipline  
State and Local Government Law  
Administrative Law

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House)

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# 100B

## EXECUTIVE SUMMARY

### **A. Summary of Recommendation.**

This Recommendation recognizes that the term “prosecutorial misconduct” has become a term of art in criminal law that is sometimes used to describe conduct by the government that violates a defendant’s rights whether or not that conduct was or should have been known by the prosecutor to be improper and whether or not the prosecutor intended to violate the Constitution or any other legal or ethical requirement.

### **B. Issue Recommendation Addresses.**

It addresses and urges trial and appellate courts reviewing the conduct of prosecutors, while assuring that a defendant’s rights are fully protected, to use the term “error” where it more accurately characterizes that conduct than the term “prosecutorial misconduct.”

### **C. How Proposed Policy Will Address the Issue.**

The recommendation calls upon judges to protect a defendant’s rights fully and to provide whatever remedies the law requires when a defendant’s rights have been violated, but to consider whether “error” more accurately describes a prosecutor’s conduct than “misconduct.” There is good reason for prosecutors, their offices and the public to know whether or not a court has merely found error and provided a remedy or whether a court has found culpable conduct associated with that error.

### **D. Minority Views or Opposition.**

None.