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When prosecutors don't play fair with evidence

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By Pamela A. MacLean

This spring, in his tony office at Williams & Connolly three blocks from the White House, renowned attorney Brendan V. Sullivan Jr. stared at documents supplied by federal prosecutors and felt sick to his stomach.

He held the rock-solid evidence he could have used to thwart the corruption conviction of former Alaska Sen. Ted Stevens. But it arrived five months after jurors found Stevens guilty and voters tossed the 85-year-old, seven-term senator from office.

Before Stevens's trial, federal prosecutors on five separate occasions had hidden exculpatory evidence. They intentionally blacked out statements from an FBI form that would have been helpful to Stevens. They spirited a witness back to Alaska, out of reach of the defense, and downplayed an FBI whistleblower's complaint about their conduct.

Three times in the run-up to trial, the prosecutors called documents potentially helpful to Stevens "immaterial"; twice they pleaded that their conduct was a "mistake." On still other occasions they said they acted in "good faith" or that the transgressions were "unintentional" and "inadvertent."

By the time Sullivan spoke to newly assigned senior prosecutor Paul O'Brien, who supplied the damning revelations, Sullivan's revulsion had turned to silent rage. He wanted the entire conviction thrown out. He got to his office by 4 a.m. on April 1 to prepare for the day's meeting with O'Brien. He wanted to make sure Attorney General Eric H. Holder Jr. would agree to dismiss the conviction.

The early start wasn't necessary. O'Brien called ahead to say Holder would dismiss the case without even needing to hear Sullivan's argument. Everyone recognized how bad the government's conduct had been.

The misconduct by prosecutors in the very office assigned to root out public corruption raised a public outcry and pressure to fix the problem. The trial judge appointed an independent investigator to examine whether the prosecution team had obstructed justice. Holder replaced the head of the Office of Public Responsibility over its lackluster monitoring, and he ordered more training for all federal prosecutors on their ethical obligations, including the disclosure of exculpatory evidence.

If only California had been so lucky.

More than four years ago, in response to mounting exonerations of death-row inmates nationwide through DNA testing, the California state Senate created a commission to investigate the causes of wrongful convictions. Headed by former state Attorney General John K. Van de Kamp, the 22-member California Commission on the Fair Administration of Justice looked at police procedures, the competence of defense counsel, and the conduct of district attorneys. Last summer it delivered a 185-page report to the Legislature and the governor. Included in the report was an examination of prosecutorial misconduct.

Looking at 2,130 cases of alleged ethics violations by prosecutors over the past decade, the commission found misconduct in 443, or 21 percent of the total. In the vast majority of those instances (390), the judges concluded that the misconduct was harmless error. But in 53 cases the misconduct was sufficiently egregious to reverse a conviction. Some 30 cases involved repeat prosecutorial offenders, and two-thirds of those had engaged in the same bad behavior in multiple trials.

The most common type of prosecutorial misconduct? Failure to disclose exculpatory evidence.

Like their federal counterparts, state prosecutors have the same constitutional and ethical obligations to alert defense lawyers to evidence that is potentially exculpatory or can be used to impeach prosecution witnesses. The duty, commonly referred to as a Brady obligation, stems from the U.S. Supreme Court's decision in Brady v. Maryland (373 U.S. 83 (1963)). In addition, California Penal Code section 1054.1 imposes a series of discovery-disclosure obligations on prosecutors.

Yet according to a report to the Van de Kamp commission, district attorneys in many of the state's 58 counties don't keep track of ethics complaints, nor do they have a uniform method for investigating alleged misconduct. Professor Laurie Levenson of Loyola University Law School in Los Angeles found that at least 80 percent of the DAs surveyed said they have no process to check for potential repeat prosecutorial offenders by monitoring complaints from the public or police, or even to

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THE BATTLE FOR REFORM

California lags behind some of the most conservative regions in the country when it comes to holding prosecutors to account for misconduct.

- In Texas, a wave of convictions overturned on the basis of DNA tests prompted a series of reforms. Craig Watkins won election as Dallas County DA in 2006, and he quickly created the Conviction Integrity Unit. The unit, along with the Innocence Project of Texas, cleared up more than 400 cases of inmate-requested DNA testing that had languished in the county.

monitor adverse appellate rulings. And 60 percent of the DAs reported that their offices don't even track complaints from judges or other prosecutors in the same office.

Among the recommendations in its final report, the commission called for "open file" discovery, or providing defense lawyers all the material in the prosecution files up front. It also sought to bolster a judge's obligation to report to the State Bar any court sanction for prosecutorial misconduct, and it urged that law schools expand legal ethics training.

But Van de Kamp, like a latter-day Cassandra, has seen his warnings ignored. Since release of the commission's final report, the Legislature has approved just two reforms—neither related to prosecutorial misconduct—and the governor vetoed them both.

"Though I hate to say it, the opposition to change came primarily from DAs' offices," says Van de Kamp, of counsel at the Los Angeles office of Dewey & LeBoeuf. "They all feel like they can handle it internally. One of the reasons for *Brady* violations probably rested with the trial deputy getting a conviction because he 'knew' that the defendant was 'bad,' and wanted to make sure that justice was done."

Enter Benjamin T. Field, a popular deputy district attorney in Santa Clara County, who was once touted as a potential judge. But Field turned out to have a long record of repeat misconduct offenses.

The very public imbroglio over his disciplinary proceeding ended earlier this year when the State Bar Court voted February 10 to suspend Field for four years. He was accused of withholding clearly exculpatory information from defense lawyers, in violation of *Brady* obligations, and of violating judicial orders dating back many years. Among other charges, Field hid from defense lawyers a witness who refuted rape allegations by a 15-year-old whose testimony in 1998 sent two men—Kamani Hendricks and Damon Auguste—to prison for 37 years and more than 18 years, respectively.

During his State Bar prosecution, Field alleged that defense counsel weren't forthcoming with information either. "I felt that we were in a discovery battle," Field told the court. "I figured if they were going to hold back, I was entitled to do the same. I think that's wrong now."

"What is jaw-dropping about it was that it was not accidental," says Edward W. Swanson, a partner in San Francisco's Swanson, McNamara & Haller who, along with Cliff Gardner, represented Auguste on the habeas case. "At the time Field concealed the whereabouts of the witness, he thought the witness was essential to our case. Every time I think of it, I'm as outraged as when I first learned of it."

Field also failed to tell defense lawyers in a murder case that his star witness might have had a role in the killing and a motive to lie. And in a third case, despite a judge's order not to do so, Field ordered a dental exam of a 13-year-old accused of sexual assault, in an effort to show that the youngster was old enough to be tried as an adult.

Field's attorney, Allen Ruby of San Jose, has appealed the suspension to the State Bar Court's Review Department, where the case is pending. Ultimately, the California Supreme Court must affirm the suspension before it can be imposed. Ruby declined to discuss the appeal.

The Field case was just one of a series of recent scandals in the Santa Clara County DA's office. In February, Deputy District Attorney Peter S. Waite received a public reproof from the State Bar Court for withholding evidence about the sanity of a defendant in a murder trial. By signing an agreement with the court, Waite essentially admitted that he had kept from the defense the fact that an expert witness who previously testified for the prosecution had changed his opinion and considered the defendant insane at the time of the murder.

The office also is immersed in a dispute over review of as many as 3,300 cases of sex crimes against children following revelations this year that medical examinations of victims had been videotaped since 1991. Defense attorneys had routinely received photos from the exams but were never provided copies of the videotapes, which could be crucial in a fraction of cases in which the assault is disputed.

During hearings to determine when prosecutors first learned of the taping, prosecutors Troy Benson and Paul Colin testified they knew about the practice as early as 2005. But supervising attorney Victoria Brown of the DA's office said she didn't learn that exams were videotaped until April 2006, when the procedure surfaced in a habeas claim by defendant Augustin Uribe. Brown testified that she then immediately alerted her staff.

In a tense day of testimony in May, Brown denied knowing about the taping prior to its discovery by Uribe's defense attorney, Al Lopez. Uribe had been convicted and sentenced to 38 years in prison for molesting one of his granddaughters. Lopez now wants the entire DA's office recused for bias in Uribe's retrial. Lopez also found that a paralegal responsible for gathering discovery in response to defense requests had no training. "This went beyond Troy [Benson]. Others in the office knew about the tapes," Lopez contends.

But Gerald A. Engler, a senior assistant attorney general, appeared in court on behalf of the state of California to oppose Lopez's motion for recusal. "A defendant doesn't get to choose his prosecutor," Engler says.

Santa Clara County isn't the only district attorney's office in the state facing misconduct allegations. The Riverside County DA has been ordered to review 3,000 cases involving forensic evidence after a defense attorney who insisted on background checks of prosecution experts discovered that a laboratory technician working on the cases had admitted to fraud, forgery, and perjury in another

The wrongful convictions also led two Texas lawmakers to introduce measures in 2008 that would make it a crime to suppress evidence favorable to a defendant and eliminate the statute of limitations for violations. Both measures were opposed by state prosecutors and died in committee, but the bills' sponsors plan to try again in 2010.

Last year the Texas legislature also considered a bill to require open-file discovery, or letting the defense see everything except prosecutors' work product. "Some people's idea of open discovery is: 'I'll read the police report to you, and don't take notes while I do it,'" says Mike Ware, who heads Dallas County's Conviction Integrity Unit. "We allow them to make a copy of the whole file." The open-file measure was voted out of committee but too late in the session for full consideration. It, too, will be reintroduced next year.

- In Las Vegas, a federal judge dismissed a 64-count stock-fraud case last year after J. Greg Damm, an assistant U.S. Attorney, was accused of concealing exculpatory evidence. And in Miami, Florida, a federal judge censured three assistant U.S. Attorneys in April for alleged witness tampering and illegally using informants to tape defense lawyers. The judge ordered the government to pay \$600,000 in defense fees for the defendant, a doctor acquitted of illegally prescribing painkillers (*U.S. v. Shaygan*, No. 08-21112 (S.D. Fla. April 29, 2009) (order imposing sanctions)).

"There is an easy way to fix the federal system—open-file discovery," says David O. Marcus, a principal at Marcus Law and one of the lawyers secretly taped in the Shaygan case. "Prosecutors should be required to show the defense all the evidence, good and bad."

- In 2004 the North Carolina legislature took just such steps. It mandated an open-file discovery system after public outcry over the wrongful conviction and death sentence of Alan Gell. On appeal, Gell's conviction was overturned because of exculpatory evidence that had been withheld; in a 2004 retrial he was acquitted.

The state legislature's action helped expose misconduct in the infamous Duke University rape case in 2007. Durham County District Attorney Michael Nifong's mishandling of the prosecution of lacrosse team members who had been falsely accused led to his disbarment and subsequent personal bankruptcy. Nifong was accused of hiding exculpatory evidence.

state. And in 2007 Sonoma County prosecutor Brooke Halsey Jr. was suspended by the State Bar Court for withholding exculpatory evidence in a murder case.

So where was the State Bar Court during the ten-year period examined by the Van de Kamp commission? In a follow-up hearing on the commission's research, State Bar Chief Trial Counsel Scott J. Drexel testified that after reviewing half of the 53 misconduct cases that led to reversals of conviction, he had yet to find a single instance where a judge reported the misconduct to the bar—despite a mandate to do so (Cal. Bus. & Prof. Code § 6086.7(a)(2)). Drexel told the commission that the State Bar sends out a letter each year reminding judges of the statutory requirements.

In a review of 1,464 State Bar cases between 2001 and 2005, the *San Jose Mercury News* found just one disciplinary action against a prosecutor. Since 2005 the State Bar Court has disciplined seven prosecutors; three of those cases involved *Brady* issues. The commission concluded that a lack of reporting "means there simply is no 'track record' of an offending attorney's history anywhere." And it observed that the biggest obstacle to compiling a track record for claims of misconduct or incompetence "is the prevailing attitude of judges."

The commission acknowledged that confusion on the part of judges could be a factor in the lack of reporting. It asked rhetorically, "[W]ho has the actual duty to report when a judgment is reversed: The trial judge who rendered the judgment? The judge who authored the reversing opinion? The Presiding Judge of the Court of Appeal that rendered the reversing judgment? All of the judges who concurred in the reversing judgment? It may be that everyone's business becomes nobody's business." The authors called for clarity in reporting requirements, to be spelled out in a revised California Rule of Court and changes to the California Code of Judicial Ethics. Currently, the code directs a judicial officer to "take appropriate corrective action whenever information surfaces that a lawyer has violated ethical duties." (Cal. Canons of Jud. Ethics, Canon 3D(2).)

"The courts have not done anything yet" in terms of making the requested changes, Van de Kamp says. "Judges have some responsibility here. We found very few, if any, reporting to the State Bar."

The lax or nonexistent oversight of prosecutors has also attracted the attention of the American Bar Association. In June a task force created by the ABA's Criminal Justice Section completed a three-year effort to revise the ABA Prosecution and Defense Function Standards for the first time since the early 1990s. The draft revisions deal with the touchy issues of open discovery and judicial requirements for reporting misconduct.

"Virtually every standard is being revised," says U.S. District Judge John Tunheim of Minneapolis, who chairs the task force. The revisions, which are not yet public, will be reviewed initially by the Criminal Justice Section's Standards Committee. A final version will take several years to wend its way through the approval process.

In California, the Commission for the Revision of Rules of Professional Conduct is considering a proposal to adopt for the first time a version of ABA Model Rule 3.8, which covers the conduct of prosecutors. A draft of the proposed rule will be distributed for public comment late this summer.

Meanwhile, in the absence of a uniform policy on what constitutes willful withholding or suppressing of exculpatory evidence, California DAs have taken a variety of approaches to training and disciplining prosecutors. In 2007 the California District Attorneys Association (CDAA) reported that the DAs' offices in Los Angeles, Ventura, and Santa Clara counties have policies on *Brady* obligations, but that other offices "have opted not to have a specific policy, but to require their deputies to follow the statutory and case law on these subjects." Responding in its final report, the Van de Kamp commission wrote that "compliance with *Brady* obligations should not be left up to each individual deputy's own interpretation of statutory and case law."

"The state is not a monolith, there are enormous differences," says Loyola Law School's Levenson. "Some [DAs] roll their eyes, and some act with as much concern as the commission members."

San Mateo County District Attorney James Fox, who served on the commission, says he has long supported open discovery practices. "Just having open discovery goes a long way to eliminating accusations of *Brady* violations," Fox says. "It puts the burden on the defense. They can look at what we've got. From my experience it works well."

But the use of open discovery isn't universal. Fresno's Rick Horowitz often represents clients accused of gang-related crimes in Fresno, Tulare, and King's counties. Asked about open-file discovery in those jurisdictions, Horowitz says, "I never heard of anyone doing that here. Sometimes the problem isn't getting discovery, but getting it in time to be useful." State law mandates that discovery be completed 30 days before trial, but Horowitz says judges consider foot-dragging to be cured if prosecutors turn over material when the defense complains, or by the day of trial.

Some DAs won't even concede that noncompliance with *Brady* obligations is a problem. Gregory D. Totten, Ventura County district attorney and also a commission member, dissented from the final report's conclusions and recommendations. "If the proposed [Rule of Court] were adopted in our highly adversarial system, demands by counsel for judicial findings of misconduct would become commonplace and the courts would inevitably find themselves mired in ruling on disputes among lawyers," he wrote in his letter of dissent.

Totten contends the number of prosecutors involved in misconduct is small, and says such matters can be dealt with internally. "My concern was that the commission wanted to dramatically and inappropriately expand the scope of what is reported," Totten says. "I don't think the problem is so

inappropriately expand the scope of what is reported," Foster says. "I don't think the problem is so profound that it is sufficient to provoke a policy body to make changes."

To date, the commission has gotten little traction even on recommendations involving the most basic of issues, such as training prosecutors about *Brady* obligations. Van de Kamp says that shortly after the report was released, some smaller DA offices moved to implement formal *Brady* policies based on those in larger counties. But delays since then have created an appearance that prosecutors and the courts are protecting their own.

In Santa Clara County, for instance, the colleagues of suspended deputy DA Field rallied against the threat of more oversight. Last year the Government Attorneys Association—the bargaining unit for the county's deputy DAs, public defenders, and child-support lawyers—drafted legislation that would shift the investigation and prosecution of misconduct charges against State Bar prosecutors from the Office of Trial Counsel to the state attorney general's office. The measure, titled the State Bar Fairness Act, also would establish a statute of limitations: Any investigation must begin within three years of the discovery of the alleged misconduct; formal charges would have to be filed no more than a year later. And under the proposal, prosecutors acquitted of charges could recover defense costs.

"Everyone believes this is to protect a friend or to protect prosecutors," says Kevin D. Smith, the deputy district attorney who spearheaded the proposal. "Did it come about because of Field? Absolutely. But this is for every lawyer. None of us had experience with State Bar discipline. We didn't understand the due process rights lawyers give up."

The CDAA, however, withdrew its initial support for the proposal in February, citing poor timing in the legislative session. Smith says his association will resubmit the bill next January.

According to Van de Kamp, it took the mishandling of the Stevens case to renew some interest in the accountability of prosecutors. Attorney General Holder, who began his career as a prosecutor in the DOJ's Public Integrity Section, has imposed added training about *Brady* obligations for federal prosecutors. And Mary Patrice Brown, whom Holder appointed to head the Office of Professional Responsibility, has pledged a more transparent internal investigation system.

In California, Van de Kamp isn't looking to the Legislature for help, though he has recently made public statements about the death penalty and the commission's recommendations on the recording of interrogations and eyewitness identification procedures.

"The chance for change really rests with rule-making by the courts," he says. "The courts are much closer to the issue. Discipline by the State Bar Court ties in because its decisions have to be affirmed by the California Supreme Court."

Last year the commission referred its proposals to the Administrative Office of the Courts, where Chief Justice Ronald M. George passed them on to committees for review. The process is likely to go on for months. "I'm not a pessimist," Van de Kamp says. "Things take time."

But in June, prospects for reform faded when the State Bar Board of Governors decided not to reappoint Drexel to another four-year term as chief trial counsel. The board gave no reason for its action, taken during a closed-door personnel session. But the misconduct case Drexel brought earlier in the year against DA Field may have been a factor.

According to one source at the meeting, the animated opposition to Drexel's reappointment came from two prosecutors on the board, whose arguments swayed the votes of neutral members. Asked to comment on Drexel's ouster, San Diego County DA and board member Bonnie M. Dumanis replied by email, "Regarding questions about the State Bar chief trial counsel, that is a management/personnel matter and therefore is confidential."

In a letter to state legislators one week after Drexel's dismissal, board member Richard Frankel addressed "speculation" about the reasons for the board's action. "The decision was purely a personnel and management decision," he wrote. "The Board expects the [chief trial counsel] to hold all attorneys in this state fully accountable for their actions regardless of their employment status."

During Santa Clara County's investigation of the undisclosed videotaping of sex-crime exams, supervising attorney Brown was asked about how prosecutors in the office were trained with regard to their *Brady* obligations. Brown said she had no recollection of specific training in the sex-crimes unit. "My office was full of training manuals," she said. "But I don't know if anyone ever read them."

Pamela A. MacLean, a freelance writer based in the Bay Area, has reported on state and federal courts for 25 years.

Reader Comments

Comment by Sean - April 10, 2011

Very odd that former San Mateo DA Jim Fox served on this commission, as citizens have complained repeatedly about his prosecutors. Al Giannini, who tries murders, has been sanctioned for withholding exculpatory evidence.

Comment by miff66t - February 12, 2012

DAs who break the law should be punished much harsher than the average citizen. They are in a position that when abused causes immeasurable damage to people. These evil DAs That are responsible for deliberately prosecuting people who are innocent should be put to death. They are the cancer that is killing the American way of life. They are drunk with the power they have and they will get a conviction no matter what the cost!

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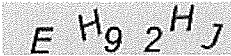
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