

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association urges courts to distinguish between
2 attorney misconduct and attorney error, and that prior to the issuance of any order,
3 opinion or finding that an attorney engaged in misconduct, courts give the attorney a fair
4 opportunity to address any charge of misconduct, and find that the attorney's act or
5 omission was purposeful, knowing or intentional or otherwise violated an applicable
6 disciplinary rule or law; and
7
8 FURTHER RESOLVED, That disciplinary agencies should not deem a finding of
9 misconduct in an order, opinion or ruling by a court determinative of a disciplinary
10 violation.

REPORT

Courts, with an important role to play in regulating the conduct of lawyers, have a range of options to deter and punish improper behavior short of a public finding of misconduct. Courts may communicate directly with the lawyer, refer the lawyer's conduct to the lawyer's office or report the suspected violation to a disciplinary body. The court may fine the lawyer, or disqualify him or her from the case.¹ It may reprimand the lawyer orally on or off the record, including in a published opinion.² Where appropriate as a response to an attorney's or judge's behavior, a public finding of misconduct may be an effective and efficient deterrent. However, its use should be limited to appropriate circumstances where there is a sufficient process and a determination that the conduct action or omission was purposeful, knowing or intentional or otherwise violated the applicable disciplinary rule or law. This resolution urges courts to carefully consider options to regulate the conduct of attorneys and be circumspect in the use of the term "misconduct."

A public finding that an attorney engaged in "misconduct" operates as a sanction with adverse impact on that person's reputation, whether or not so intended. This is both a substantive and procedural concern applicable to all lawyers and judges.³

Substantively, not every lawyer who has engaged in impermissible behavior deserves to be sanctioned for "misconduct" by being identified in a published opinion or otherwise. Sometimes, the conduct does not violate an established standard of conduct or law. Other times, the conduct may violate the applicable rule or law but the lawyer did not engage in the conduct with the requisite level of culpability—such as intent or knowledge—to warrant a sanction. It would be unwise for a court to issue an opinion finding that the particular lawyer engaged in "misconduct," thereby sanctioning the lawyer in effect for conduct that was not sanctionable.

Procedurally, the concern is that judicial findings of attorney misconduct are not invariably preceded by a fair proceeding with notice and a fair opportunity to be heard. This is of particular significance because many of these informal findings of misconduct are not subject to appeal. Further, even where appellate remedies exist and result in reversal of an attorney sanction, the lower court opinion sanctioning a lawyer for "misconduct" remains available for public scrutiny.

Moreover, a judicial finding of misconduct has consequences not only for an attorney's reputation, but for potential further proceedings against the lawyer. Notably, the

¹ See, e.g., *Laser v. Ford Motor Co.*, 239 F. Supp. 2d 1022 (D. Mont. 2003), *aff'd in part, rev'd in part*, 399 F.3d 1101 (9th Cir. 2005) (fine and disqualification); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) (compulsory legal education").

² See, e.g., *Fla. Breckenridge, Inc. v. Solvay Pharms., Inc.*, 174 F.3d 1227, 1232 (11th Cir. 1999); *United States v. Modica*, 663 F.2d 1173 (2d Cir. 1981).

³ In this report, "attorney" or "lawyer" refers to all lawyers including judges.

Department of Justice's Office of Professional Responsibility requires an internal investigation of the lawyer's conduct when a court finds that a lawyer engaged in misconduct.⁴

Prosecutorial Misconduct

The term "prosecutorial misconduct" is not synonymous with intentional, purposeful or knowing misconduct by the individual attorney. Rather, "prosecutorial misconduct" which has been called a "term of art,"⁵ is defined by federal and state case law, and is generally alleged by a defendant who seeks a judicial remedy for prosecutorial or other governmental misconduct. It may give rise to a reversal of a conviction.⁶ For some claims of prosecutorial misconduct, courts necessarily make findings of a prosecutor's knowledge, intent or motive.⁷ In many cases, however, the state of mind of the individual prosecutor is not relevant to the claim. For example, the prosecutor has an obligation pursuant to *Brady v Maryland* and its progeny to disclose exculpatory evidence to the defense. This includes the obligation to make reasonable efforts to review the police files to learn of any favorable evidence. Where the police withheld evidence from the individual prosecutor, a court may reverse a conviction for "prosecutorial misconduct" regardless of the prosecutor's knowledge, purpose or intent. That judicial finding should not be taken as a sanction against the individual prosecutor unless the prosecutor's act or omission rises to the appropriate level of personal culpability. In other words, courts should be careful not to collapse the distinction between the governmental misconduct to challenge a conviction and the professional conduct of the individual lawyer.⁸

⁴ The Department of Justice requires that whenever there is a judicial finding of misconduct, the matter be reported to the Office of Professional Responsibility by Department employees. <http://www.usdoj.gov/opr/proc-hdl.html> (2004 OPR Annual Report).

⁵ Steve Weinberg, Center for Public Integrity, A Question of Integrity: Prosecutors dispute the significance of 'prosecutorial misconduct,' June 26, 2003, <http://projects.publicintegrity.org/pm/default.aspx?act=sidebars&aid=34> (last visited Nov. 16, 2008) (quoting former Chief Justice of the Delaware Supreme Court Norman Veasey).

⁶ The standard for reversal is dependent upon the nature of the misconduct. For a *Brady* claim, this constitutional violation will result in reversal if there is a "reasonable probability that the outcome would have been different." *United States v. Bagley*, 473 U.S. 667 (1985). For most non-constitutional claims, there is a harmless error analysis, expressed in various ways including whether the "misconduct considered as a whole impaired the defendant's right to a fair trial." In some cases, such as bad faith prosecution or egregious error a court will apply a constitutional standard, that is, whether the error is harmless beyond a reasonable doubt. *See, e.g., State v. Caron*, 218 N.W. 2d 197, 200 (Minn. 1974).

⁷ *See, e.g., U.S. v. Johnson* 171 F.3d 139 (2d Cir. 1999) (prosecution may show good faith reason for conduct); *Lee v. U.S.*, 432 U.S. 23 (1977) (barring retrial when prosecutor misconduct is motivated by bad faith) *See generally* Bennett Gershman, PROSECUTORIAL MISCONDUCT 2d ed., 2008.

⁸ Courts may consider the use of the term "government misconduct" rather than "prosecutorial misconduct" for circumstances where the court does not intend to sanction the individual attorney.

Further, conduct determined to be “prosecutorial misconduct” may be the result of an innocent mistake by the individual attorney and does not rise to the level of culpability required by an applicable rule or law. For example, a prosecutor may have unintentionally misquoted words uttered by a witness. The mistake may give rise to reversal of a conviction for prosecutorial misconduct but this finding should not give rise to a sanction for the individual prosecutor unless the conduct violates a disciplinary standard or law. As the Prosecutors’ Deskbook points out, allegations of prosecutorial misconduct should not be confused with ‘prosecutorial error’.⁹

Not only is there a substantive concern about the appropriate use of the term “misconduct,” but there is a fundamental procedural one as well. Public findings of attorney misconduct are not invariably preceded by a fair proceeding. In part, this is because the judicial inquiry is often focused solely on the alleged conduct irrespective of the individual prosecutor’s state of mind. For example, in addressing a motion for a new trial based on an alleged *Brady* violation, it is unnecessary for the court to determine whether the evidence in question was withheld intentionally or inadvertently, and the prosecutor who was allegedly responsible for failing to produce the evidence may therefore have no motivation or opportunity to establish that he or she simply made an innocent mistake.

In a similar vein, it is not unusual for claims of prosecutorial misconduct to be raised for the first time on appeal. Oftentimes, prosecutors do not have the opportunity to contest the finding, particularly when the issue is first raised and decided on appeal.

Consequently, this resolution emphasizes the need for a fair process to determine whether the conduct is appropriately termed “misconduct” that violates the applicable rule or law. Without such a process, a finding of misconduct operates as a sanction of the individual. This consequence is compounded by the fact that in most jurisdictions, a finding of lawyer “misconduct,” unaccompanied by a formal sanction, is not appealable.¹⁰

Criminal Defense and Civil Lawyer Misconduct

Criminal defense lawyers and civil litigators have similar concerns about the content, process and consequences of a finding of “misconduct.” Criminal defense lawyers are infrequently the subject of judicial findings of misconduct.¹¹ Sometimes, criminal defense lawyers are publicly chastised for their conduct but it is not labeled

⁹ THE PROSECUTOR’S DESKBOOK: ETHICAL ISSUES AND EMERGING ROLES FOR 21ST CENTURY PROSECUTORS.” See, e.g., *State v. Leutschaft*, 759 N.W. 2d 414 (Minn. 2009) (acknowledging distinction between “prosecutorial misconduct” and “prosecutorial error”).

¹⁰ See, e.g., *Nisus Corp. v. Perma-Chink Sys., Inc.*, 497 F.3d 1316 (Fed. Cir. 2007); Carla R. Pasquale, *Can An Attorney Appeal a District Court’s Order Finding Professional Misconduct*, 77 Ford. L Rev. 219 (2008).

¹¹ See, e.g., *State v. Burnett*, 13 Kan. App 2d 60 (1988); *State v. Smith* 871 S.W. 667 (Tenn. 1994); *People v. Owens* 183 P.3d 568 (Colo.App.2007).

“misconduct.” More commonly, defense counsel’s conduct is challenged through appellate claims of ineffective assistance of counsel.

Criminal defense lawyers who are the subject of judicial findings of “misconduct” should be afforded a fair opportunity to contest the allegation and the substantive nature of the charged conduct. Judicial commentary that there is a “distinct possibility” of defense attorney misconduct” or a mention of “defense attorney misconduct” as the grounds to deny a defendant’s motion for a new trial, provide insufficient process to determine whether that attorney should be sanctioned.¹²

Civil litigators have longstanding concerns about judicial findings and informal sanctions of lawyers without procedural protections of notice and a right to be heard. This concern includes, but is broader than, the use of the term “misconduct.”

In civil litigation, a wide range of sanctions exist in state and federal courts for discovery failures and other litigation conduct. Sanctions may be imposed pursuant to a judge’s inherent power to regulate attorney conduct as well as in accordance with powers granted by specific rules of procedure, and local court rules. For example, in the federal system, Federal Rules of Civil Procedure 11 and 37 authorize sanctions proceedings. “Sanctions” may include formal sanctions such as monetary fines and nonmonetary directives based upon specific findings.¹³ Typically an attorney can appeal these sanctions but the scope of appealable orders is unclear because there is no universal definition of sanctions.¹⁴ Thus, “highly damaging findings of misconduct” may remain unchallenged.¹⁵ Even when the appellate court reverses the sanction judgment, the original district court opinion containing sharply worded findings of misconduct remain for public scrutiny.

Also, a court may make factual determinations based upon its observation of the attorney’s behavior. Judges may express disapproval of the lawyer’s candor, professionalism or conduct and conclude that an attorney is guilty of “blatant misconduct.” Such “findings of misconduct” by a court are not typically appealable because these are not deemed “orders.” These “findings” are often contained within other rulings.¹⁶

¹² *State v. Smith* 871 S.W. 667 (Tenn. 1994) (“distinct possibility” of defense attorney misconduct); *People v. Owens*, 183 P.3d 568 (Colo. App. 2007) (finding willful violation of court order).

¹³ Fed R. Civ. P 11, for example, requires that a judge imposing sanctions “must describe the sanctioned conduct and explain the basis for the sanction” in an order.

¹⁴ Comment, Robert B. Tannenbaum, *Misbehaving Attorneys, Angry Judges, And the Need for a Balanced Approach to the Reviewability of Findings of Misconduct*, 75 U. Chi. L. Rev. 1857 (2008).

¹⁵ *In re Williams*, 156 F 3d 86 (1st Cir. 1998) (attorneys may only appeal orders, including findings “expressly identified as a reprimand” of the attorney’s conduct, thereby leaving “highly damaging findings of misconduct”) (Roseann, J., dissenting).

¹⁶ *See, e.g., Advo System Inc. Walters* 110 F.R.D. 426 (E.D. Mich. 1986) (lack of notice for lawyer accountability for “pursuit of baseless litigation” contained within Rule 11 order); Jeffrey A. Parness, *The*

Not all impermissible conduct rises to the level of “misconduct” deserving of a sanction in a published opinion. For example, Rule 3.3(a) (1) forbids a lawyer from “knowingly” making a false statement of fact. An inadvertent false statement is not permitted, and must be corrected if discovered, but it is also not “misconduct” sanctionable under the disciplinary rule. Likewise, lawyers are required to comply with discovery obligations, so that a civil litigator, (or any other lawyer) who fails to comply with an applicable civil or criminal discovery provision has acted impermissibly, regardless of whether the lawyer acted intentionally, recklessly, negligently or inadvertently. But unless the lawyer acted with the level of culpability justifying a sanction, it would be unfair for a court to issue an opinion finding that the particular lawyer engaged in “misconduct,” thereby sanctioning the lawyer in effect for conduct that was not sanctionable.

Judicial Misconduct

Similar concerns exist for the judiciary. Sometimes, appellate courts make findings that a trial judge engaged in “misconduct” that do not necessarily correlate to the standards in the relevant code of conduct or law. The trial judge in such circumstances is unlikely to have an opportunity to contest and address the conduct. Just as for other lawyers, a public finding that a judge engaged in “misconduct” should be limited to circumstances where the judge’s conduct was sanctionable before the relevant judicial commission or a court of law and where a fair process is afforded the judge to contest the findings.

Disciplinary Committees

Finally, disciplinary committees that undertake examination of the lawyer’s conduct should not afford collateral estoppel effect¹⁷ or otherwise determine that a judicial statement or declaration that an attorney has engaged in “misconduct” establishes a disciplinary violation. The disciplinary process is distinct from that of a court and the attorney should be afforded appropriate protections within the relevant disciplinary authority.

Respectfully submitted,

Criminal Justice Section
Anthony Joseph, Chair
August 2009

New Method of Regulating Lawyers: Public and Private Interest Sanctions During Civil Litigation for Attorney Misconduct, 47 La. L. Rev. 1305 (1987).

¹⁷ See, e.g., *In re Capoccia*, 272 A.D.2d 838, 841, 709 N.Y.S.2d 640, 644 (3d Dep’t 2000) (collateral estoppels applicable to attorney disciplinary proceedings).

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Anthony Joseph, chair, Criminal Justice Section

1. Summary of Recommendation(s).

The American Bar Association urges courts to distinguish between attorney misconduct and attorney error, and urges courts to refrain from declaring in any order, opinion, or other public statement that an attorney engaged in misconduct unless the court finds, after giving the attorney a fair opportunity to address any charge of misconduct, that the attorney's act or omission was purposeful, knowing or intentional or otherwise violated an applicable disciplinary rule or law. The finding of misconduct by a court shall not be considered as a finding of a disciplinary violation

2. Approval by Submitting Entity.

The recommendation was approved by the Criminal Justice Section Council at its meeting on April 4, 2009.

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?

ABA statements in favor of reciprocal discipline may be implicated by the recommendation that a finding of misconduct by a court shall not be considered as a finding of a disciplinary violation

5. What urgency exists which requires action at this meeting of the House?

None

6. Status of Legislation. (If applicable.)

N.A.

7. Cost to the Association. (Both direct and indirect costs.)

The recommendation's adoption would not result in direct cost to the Association.

8. Disclosure of Interest. (If applicable.)
No known conflict of interest exists.
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 2009 House of Delegates agenda it is being circulated to the following:

Section, Divisions, Forums
All Section and Divisions

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

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EXECUTIVE SUMMARY

1. Summary of the Recommendation

The American Bar Association urges courts to distinguish between attorney misconduct and attorney error, and urges courts to refrain from declaring in any order, opinion, or other public statement that an attorney engaged in misconduct unless the court finds, after giving the attorney a fair opportunity to address any charge of misconduct, that the attorney's act or omission was purposeful, knowing or intentional or otherwise violated an applicable disciplinary rule or law; and disciplinary agencies should not consider a judicial finding of misconduct in an order, opinion or other public statement to establish a disciplinary violation.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the concern that a public finding by a court that a lawyer or judge engaged in "misconduct" operates as a sanction with adverse impact on the person's reputation. The finding of misconduct should be preceded by a fair process and should only be made when the conduct rises to the specified level.

3. Please Explain How the Proposed Policy Position will Address the Issue

The standards set forth in the resolution will encourage courts to distinguish between attorney misconduct and attorney error

4. Summary of Minority Views

The National Association of Criminal Defense Lawyers has expressed opposition and will make a formal submission prior to the meeting. Among its concerns is that this resolution interferes with a defendant's fifth and sixth amendment rights.