Panelists Examine How Prosecutors Can Be Held Accountable for Misconduct

By Helen W. Gunnarsson

CHICAGO—How much prosecutorial misconduct really exists? How effective are the systems being relied on to hold prosecutors accountable for misconduct, and what should be done to improve those systems?

A panel of experts hashed over these questions at a symposium on prosecutorial oversight presented here Aug. 4 by the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers in conjunction with the ABA Annual Meeting.

High-Profile Cases

"It seems that virtually every week there's another case" of prosecutorial misconduct that gains national attention in the media, said professor Ellen Yaroshefsky of Benjamin N. Cardozo School of Law, New York.

As examples of highly publicized prosecutorial misconduct, Yaroshefsky cited the exonerations of Michael Morton in Texas and John Thompson in Louisiana, both of whom spent years in prison—Thompson on death row—as the result of prosecutors withholding exculpatory evidence (see Connick v. Thompson, 79 U.S.L.W. 4195, 27 Law. Man. Prof. Conduct 217 <http://lawyersmanual.bna.com/mopw2/display/link_res.adp?fedfid=27603172&fname=a0c7f3k4e2&vname=mopcnotallissues> (U.S. 2011)) and the suspensions of two prosecutors who concealed exculpatory evidence in criminal proceedings against Sen. Ted Stevens (R-Alaska) (see 28 Law. Man. Prof. Conduct 342 <http://lawyersmanual.bna.com/mopw2/display/link_res.adp?fedfid=27603172&fname=a0d2p1z8h5&vname=mopcnotallissues>).

Yaroshefsky explained that by "prosecutorial misconduct" she did not mean conflicts of interest, negligence, or mere error. "People make errors all the time," she observed. Rather, she said, she and the other panel members were concerned with case-related, "intentional, significant acts of professional misconduct" that are "serious and egregious."

Such misconduct, she said, consists primarily of prosecutors' intentional or reckless failure to disclose information, presentation of false testimony, and summations that "have gone over the line." Misconduct may occur, she said, because "legal, not ethical, judgments [increasingly] guide the conduct of prosecutors…. Once a prosecutor is convinced of a defendant's guilt, a [different] mentality takes over."

Yaroshefsky acknowledged up front that the collection of data on the issue has been less than satisfactory. Whether misconduct is "episodic," "endemic," or "systemic," she said, "we don't know." But regardless of existing studies' limitations, she said, "we do know that we have a serious problem."

But "I would hope that there are just a few prosecutors engaging in misconduct," she said. "We couldn't operate if there were massive prosecutorial misconduct."

Call for More Discipline

Existing institutions do not adequately address the problem, she said, maintaining that internal controls in prosecutors' offices don't work as they should. "People are rarely fired," she said; instead, "what seems to happen is that when some prosecutors are brought before disciplinary committees, the prosecutor's office comes

in and defends the prosecutor."

Nor are courts an adequate line of defense, Yaroshefsky said. "Judges rarely report misconduct, even though they are mandatory reporters." It's likewise rare, she said, for courts to impose sanctions on errant prosecutors. "Contempt is a complicated area of law for many judges."

Because current institutional mechanisms are not sufficient, Yaroshefsky urged, lawyer disciplinary agencies must step up to the plate. "We control the profession," she said. "Other measures for accountability don't exist."

Whatever the shortcomings of the current research, she said, it demonstrates beyond a reasonable doubt that "scholars have documented that there has not been discipline for prosecutors who have overstepped their bounds," Yaroshefsky said.

Pointing to the relatively few disciplinary charges brought against prosecutors, Yaroshefsky suggested that the power of many prosecutors' offices is "a big reason why most of these cases have not been prosecuted" by lawyer disciplinary agencies.

Furthermore, "most people in bar counsel offices have a similar mentality to prosecutors. There may be the tendency to look at the allegation and say, 'I understand why that occurred.' Conduct that from the outside is perceived as intentional is not perceived as intentional when looked at from the inside. We all have biases," she said.

To effectively address prosecutorial misconduct, bar disciplinary bodies must revamp their own mentality, procedures, staff, and structures, Yaroshefsky said. Offering some recommendations for change, she suggested "you need skilled criminal defense lawyers and prosecutors on your staff. Historically, in most offices, that has not been the case." She also urged that "independent counsel appointed by statute" should deal with charges of ethics rule violations by prosecutors.

Yaroshefsky advocated staffing disciplinary bodies not only with personnel "with extensive experience in the criminal justice system," but also "people who understand cognitive bias and the human tendency to push margins when there are not [adequate] controls in place."

Higher Standards, Harsher Consequences

Panelist Maureen E. Mulvenna, Chicago, described her state's experience in handling disciplinary matters involving prosecutorial misconduct. Mulvenna is Director of Adjudication Services of the Illinois Attorney Registration and Disciplinary Commission.

Mulvenna said as she prepared for the joint program she wondered "Do adjudicators view prosecutors as the good guys on a white horse? Is there a sense that if they cross the line, the ends justify the means?" To answer those questions, Mulvenna said she interviewed individual members of Illinois's volunteer lawyer disciplinary hearing board panels and read as many opinions as she could find in cases nationwide involving prosecutorial misconduct.

Mulvenna cited In re Howes, 39 A.3d 1, 28 Law. Man. Prof. Conduct 157 <http://lawyersmanual.bna.com/mopw2/display/link_res.adp?fedfid=27603172&fname=a0d0y5f0y0&vname=mopcnotallissues> (D.C. 2012), in which a former assistant U.S. attorney was disbarred for supplying thousands of dollars in witness vouchers to ineligible persons in gang and drug prosecutions and concealing those payments from the defendants and the courts, as noteworthy for both its facts and its reasoning.

The hearing board opinion, she said, highlighted panel members' personal views of prosecutors. "One member

wanted to recommend disbarment but didn't think he could because bar counsel hadn't recommended it."

Some members, she said, favored a one-year suspension, reasoning that the misuse of vouchers prevailed in the U.S. Attorney's Office and advanced what those members felt was a legitimate goal of law enforcement: bringing trials to a successful conclusion, or, in other words, getting convictions. "They relied on the fact that since the U.S. Attorney's Office didn't do anything about this policy, it wasn't a serious offense." For those adjudicators, Mulvenna said, a prosecutor's highest duty was to "make sure none of your witnesses get killed."

But the opinion of the D.C. Court of Appeals "hammered home" that "the unethical performance of prosecutorial duties has much more serious consequences" than when private counsel violate ethical rules, Mulvenna said.

She said that opinion, like the majority of those she read, expressed the view that prosecutors should be held to higher standards, and the penalty for their intentional misconduct made more severe, because of their important role within the justice system and the potential for harm to the public. Furthermore, she said, the court explicitly disavowed the view that prosecutorial ethical violations should be winked at as long as a transgressing prosecutor's goal was to amass convictions.

Unconvinced of Problem

Panelist Melanie J. Lawrence, San Francisco, sounded a cautionary note. "After having read the data and research, I am still not convinced that there is a problem," Lawrence said. She is Assistant Chief Trial Counsel for the State Bar of California.

"The vast majority" of cases cited in existing reports on prosecutorial misconduct are "mistake, error, and instances in which prosecutorial misconduct was not found, although it may have been referenced." She urged the audience to "go and read the reports for yourself," commenting "we don't have a way of truly identifying whether or not this is a [serious and widespread] problem."

Bar prosecutors, Lawrence noted, generally rely on external sources to identify potential disciplinary matters. "Attorneys are required to report when there is a reversal based on prosecutorial misconduct. We rely on courts to report [to us] when such reversals are made. When we see instances in the paper we will look at them," she said. "We can point to a number of sensational cases that make the front pages of newspapers. But from bar counsel's point of view, … we are not going to prosecute unless we have evidence and proof."

OPR's Approach

Panelist Lyn Hardy, assistant counsel in the Justice Department's Office of Professional Responsibility in Washington, D.C., explained that supervising federal government lawyers are required to make reports of misconduct to OPR.

To catch unreported misconduct, she said, OPR personnel review newspapers and Westlaw on a regular basis, using "a huge list of search terms," including "professional misconduct," "error," and "prosecutorial misconduct" to ferret out judicial findings and criticisms of Justice Department lawyers. "We go through and pull district court cases and appellate court cases that may not be referred to us."

In addition to the disclosure requirements set forth in Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), the Jencks Act (18 U.S.C. §3500), and Fed. R. Crim. P. 16, Hardy noted that federal prosecutors must comply with DOJ internal rules and the policies set forth in the U.S. Attorneys' Manual (USAM).

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Melanie J. Lawrence
California State Bar

In 2006, she said, the department revised Section 9-5.001 of the USAM to formalize DOJ policy that federal prosecutors must exceed their constitutional obligations in criminal cases and disclose information beyond that which is “material” to guilt, and further guidance was issued in 2010.

If OPR finds that a Justice Department lawyer has engaged in misconduct, Hardy said, it will impose discipline, including reprimand or suspension that will remain on the lawyer's record. If an ethics rule was implicated, she said, OPR will refer the matter to and cooperate with the lawyer's state bar disciplinary organization.

Oversight Systems Aren't Working

Panelist Stephen Saloom, policy director for the Innocence Project in New York, reaffirmed Yaroshefsky's position, saying existing systems “are not working” and do not effectively address misconduct, he said.

Saloom said his organization has sponsored forums in several states titled “Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson,” aiming to learn how prosecutorial oversight systems work in individual jurisdictions.

“At these forums, we're finding that there is not consistent training of prosecutors regarding their ethical and legal obligations, there are rarely written expectations of prosecutorial behavior within offices, nor written or consistent responses to findings of misconduct,” Saloom said.

Noting that prosecutors are entrusted with “immense power,” Saloom said that “even when misconduct is found, it often doesn't make it to the bar disciplinary system.” Individuals, whether fellow prosecutors, defense counsel, parties, or judges, “don't feel that they can report it, or they don't know how.” And “lawyer oversight entities rarely address misconduct,” he said.

For Saloom, the research does show that there's a serious problem. But, like other speakers, he said that data collection is inadequate to show the extent of the crisis. “Court findings of misconduct are probably just the tip of how many instances of misconduct there really are. A lot is probably never identified as problematic,” even though “transgressions of ethical and legal boundaries” have occurred.

“Used improperly, power threatens justice,” Saloom said. He called for “effective and respected leadership” on addressing prosecutorial misconduct. “The point is not to punish prosecutors. It's to ensure the propriety and quality of prosecutorial action and to ensure that it happens at all levels.” He said “If [lawyer disciplinary] rules are not enforced, they provide [only] the illusion of oversight.”

Disclosure and Materiality

In response to an audience member's question about “materiality,” Hardy stated that the Justice Department wants to ensure that the application of Model Rule 3.8(d) <http://lawyersmanual.bna.com/mopw2/display/link_res.adp?fedfid=27603172&fname=aba_rules_3_8_d_&vname=mopcnotallissues> , which covers the disclosure obligations of prosecutors, is no broader than the

constitutional and statutory requirements governing prosecutors.

But Yaroshefsky said prosecutors and ethics lawyers disagree on that point. Rule 3.8(d), she noted, requires prosecutors to disclose evidence tending to negate guilt or mitigate the offense. "It says nothing about 'materiality.' In cases post-Brady, courts have determined that cases will only be reversed if the evidence that was not disclosed was 'material,' so that it would have resulted in the reversal of a conviction. Prosecutors are now looking at evidence [in cases that are in progress] and saying, 'this is not 'material,' so I don't have to disclose,'" she said.

Yaroshefsky noted that ABA Formal Ethics Op. 09-454 <http://lawyersmanual.bna.com/mopw2/display/link_res.adp?fedfid=27603172&fname=aba_ethics_opinion_09_454&vname=mopcnotallissues> , 25 Law. Man. Prof. Conduct 471 <http://lawyersmanual.bna.com/mopw2/display/link_res.adp?fedfid=27603172&fname=a0b9t6h3q9&vname=mopcnotallissues> (2009), advised that Model Rule 3.8(d) <http://lawyersmanual.bna.com/mopw2/display/link_res.adp?fedfid=27603172&fname=aba_rules_3_8_d_&vname=mopcnotallissues> does not implicitly include the materiality limitation recognized in the constitutional case law.

"The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility." Yaroshefsky said. "There is no consensus, whether state-by-state or otherwise. This is why bar counsel need experienced criminal practitioners who understand state [criminal] law."

Obstruction Charges?

Yaroshefsky observed that prosecutors are seldom prosecuted for their misconduct. "Why aren't some of these cases criminal?" Some instances of prosecutorial misconduct, she asserted, may constitute obstruction of justice—a federal crime.

"People who steal money are dealt with. What about people who steal lives? When you're hiding evidence, you're stealing someone's life." She said "A few heads have to roll. That's the only thing that's going to make a difference."