California Commission on the Fair Administration of Justice
Update: February 10, 2014

On August 4, 2008, the California Commission on the Fair Administration of Justice issued a press release about the publication of its Final Report and Recommendations (available at http://www.ccfaj.org). The Final Report and Recommendations included previously published reports on eyewitness identification procedures, false confessions, informant testimony, forensic science evidence, DNA testing backlogs, funding of indigent defense services, reporting of attorney misconduct, the prosecutorial duty to disclose exculpatory evidence, and remedies for the wrongfully convicted. The Final Report and Recommendation also included a report on the administration of the death penalty in California.

Since the Commission ceased operation in 2008, the following progress has been made towards implementing the Commission's recommendations:

Eyewitness Identification Recommended Procedures
Released April 13, 2006

1. Double-blind identification procedures should be utilized whenever practicable, so the person displaying photos in a photo spread or operating a lineup is not aware of the identity of the actual suspect. When double-blind administration is not practicable, other double-blind alternatives should be considered.

2. When double-blind procedures are utilized, the use of sequential presentation of photos and line-up participants is preferred, so the witness is only presented with one person at a time. Photos or subjects should be presented in random order, and witnesses should be instructed to say yes, no or unsure as to each photo or participant. Sequential procedures should not be used where double-blind administration is not available.

3. A single subject show-up should not be used if there is probable cause to arrest the suspect. The suggestiveness of show-ups should be minimized by documenting a description of the perpetrator prior to the show-up, transporting the witness to the location of the suspect, and where there are multiple witnesses they should be separated, and lineups or photo spreads should be used for remaining witnesses after an identification is obtained from one witness.

4. All witnesses should be instructed that a suspect may or may not be in a photo spread, lineup or show-up, and they should be assured that an identification or failure to make an identification will not end the investigation.

5. Live lineup procedures and photo displays should be preserved on video tape, or audio tape when video is not practicable. When video taping is not practicable, a still photo should be taken of a live lineup. Police acquisition of necessary video equipment should be supported by legislative appropriations.

6. At the conclusion of a lineup, photo presentation, or show-up, a witness who has made an identification should describe his or her level of certainty, and that statement should be recorded or otherwise documented, and preserved. Witnesses should not be given feedback confirming the accuracy of their identification until a statement describing level of certainty has been documented.

7. A minimum of six photos should be presented in a photo spread, and a minimum of six persons should be presented in a lineup. The fillers or foils in photo spreads and lineups should resemble the description of the suspect given at the time of the initial interview of the witness unless this method would result in an unreliable or suggestive presentation.

8. Photo spreads and lineups should be presented to only one witness at a time, or where separate presentation is not practicable, witnesses should be separated so they are not aware of the responses of other witnesses

9. Training programs should be provided and required to train police in the use of recommended procedures for photo spread, show-ups and lineups. The legislature should provide adequate funding for any training necessitated by the recommendations of this Commission.

10. Training programs should be provided and required for judges, prosecutors and defense lawyers, to acquaint them with the particular risks of cross-racial identifications, as well as unreliable identification procedures, and the use of expert testimony to explain these risks to juries. The legislature should provide adequate funding for any training necessitated by the recommendations of this Commission.

11. The standardized jury instructions utilized in eye witness identification cases to acquaint juries with factors that may contribute to unreliable identifications should be evaluated in light of current scientific research regarding cross-racial identifications and the relevance of the degree of certainty expressed by witnesses in court.

12. The Commission recognizes that criminal justice procedures, including eyewitness identification protocols, greatly benefit from ongoing research and evaluation. Thus, the Commission recommends the continued study of the causes of mistaken eyewitness identification and the consideration of new or modified protocols.

In addition, the Commission recommends the enactment of legislation to require the Attorney General of California to convene a task force in conjunction with POST, local law enforcement agencies, prosecutors and defense attorneys, to develop Guidelines for policies, procedures and training with respect to the collection and handling of eyewitness evidence in criminal investigations by all law enforcement agencies operating in the State of California. The Guidelines should be consistent with the recommendations of this Commission, and should be promulgated to all law enforcement agencies operating in the State of California. The Task Force should report back to the legislature within one year of the effective date of the legislation, describing the policies or procedures adopted and the training implemented.

The Results

The Northern California Innocence Project (NCIP) surveyed California law enforcement agencies in 2010-2011 using the California Public Records Act. The data from the survey has not been published. However, the Innocence Project shared some of the results.

As late as 2011, only 6% of law enforcement agencies in California had a written policy recommending double-blind administration of photo spreads. The numbers are similar for live photo lineups. However live lineups are rarely used anymore.

The following counties have adopted double-blind administration of lineups since the Commission's recommendations were published: San Francisco, Alameda, Placer, and San Diego. Santa Clara had already adopted this practice by the time the Commission made its recommendation. In addition, Contra Costa is studying county-wide adoption and considering whether to become the first county to dispense with in-field showups. Individual Orange County law enforcement departments are studying adoption as well.

San Francisco is the only known county to record all lineups either through audio or video devices.

Martin Mayer, the attorney who represents many of the police departments and law enforcement agencies in California, is supportive of double blind, sequential administration of lineups. He asked the NCIP to speak at the annual California Sheriffs' Association meeting on June 5, 2013. Mayer is reluctant to issue a memo to all law enforcement agencies to adopt this procedure unless a case or legislation requires it.

Former Supervising Deputy District Attorney, and now Placer County Superior Court Judge, Garen Horst helped implement double-blind, sequential lineups in Placer County. Horst cited the Commission's recommendations while travelling the state to conduct hour-long trainings for law enforcement.

The California District Attorneys' Association includes a session on eyewitness identification and the Commission's recommendations as part of its Introduction to Felony Prosecution annual seminar for young prosecutors.

The NCIP study did reveal that a small number of departments are utilizing sequential procedures without double-blind administration. Gary Wells, one of the leading researchers in the area of eyewitness misidentification, states that the use of sequential presentation without double-blind administration can increase the chances of misidentification during a lineup.

All efforts to improve eyewitness identification at the State Capitol have been unsuccessful. In 2007, Sen. Ridley-Thomas (D-26) introduced SB 756 to require the Attorney General, in consultation with POST (the Peace Officer Standards and Training), to develop eyewitness identification policies and procedures consistent with the

Commission's recommendations. The bill passed the Legislature and was vetoed by the Governor following opposition from law enforcement lobbyists.

In 2011, Asm. Ammiano (D-San Francisco) introduced AB308 to require the Attorney General, in consultation with POST (the Peace Officer Standards and Training), to develop eyewitness identification policies and procedures consistent with the Commission's recommendations. The bill as introduced would require all law enforcement agencies to adopt the new protocol by January 1, 2013. The bill was amended in committee to remove the requirement that law enforcement adopt the new regulations. On August 15, 2011, the bill was placed on the suspense file by the Senate Appropriations Committee.

On February 20, 2013, Asm. Ammiano introduced AB 604. This bill would make expert testimony on eyewitness identification admissible in criminal trials if the proponent of the evidence establishes relevancy and proper qualifications of the witness. The bill encourages law enforcement agencies to adopt protocols similar to those the Commission recommended. Finally, the bill would add an instruction in criminal trials that jurors are to view eyewitness identification "with caution and close scrutiny" when law enforcement agencies have not followed the bill's recommended procedures. On May 30, 2013, the bill passed the Assembly on a 41-34 vote with four members abstaining. On July 2, 2013, the Senate Public Safety Committee passed the bill to the Senate floor on a 5-2 vote. The bill was amended on 8/13/13. On 9/6/13, the bill was amended again. This time, the eyewitness identification language was replaced in favor of a bill on medical marijuana. The medical marijuana bill was ultimately re-referred to the Senate Public Safety Committee.

The California courts have declined to address the issue further in light of the Commission's recommendations. The First District Court of Appeal addressed the issue of eyewitness misidentification in an unpublished opinion. In *People v. Romero* 2010 WL 1857520, the defendant was convicted of robbery with an enhancement for the use of a handgun. On appeal, the defendant challenged the in-field show-up as unduly suggestive. The First District Court of Appeal reaffirmed decades-old California Supreme Court cases holding that in-field showups are not unduly suggestive. However, the Court did note that these procedures had come under considerable "scholarly and judicial criticism," but that it was bound to follow the precedent of higher court authority.

While the Courts and the Capitol have not implemented the Commission's recommendations, some district attorneys and law enforcement agencies have adopted the best practices outlined by the Commission. Reforms have taken root primarily through peer-to-peer education within the law enforcement community.

False Confessions
Released July 25, 2006

1. The Commission recommends that the state legislature enact the following statute to require the recording of the entirety of custodial interrogations of individuals suspected of all serious felonies:

The People of the State of California do enact as follows:

Section 1: Definitions.
(a) "Electronic Recording" or "Electronically Recorded" means an audio, video or digital audio or video recording that is an authentic, accurate, complete, unaltered record of a custodial interrogation, including a law enforcement officer's advice of the person's constitutional rights and ending when the interview has completely finished.
(b) "Serious Felony" means any of the offenses listed in Section 1192.7(c) of the California Penal Code.
(c) "Statement" means an oral, written, sign language or nonverbal communication.

Section 2: Electronic Recording Required.
All Statements made during custodial interrogation relating to a Serious Felony shall be Electronically Recorded.

Section 3: Cautionary Instruction Required.
If any Statement is admitted in evidence in any criminal proceeding which occurred during custodial interrogation which was not Electronically Recorded in its entirety in compliance with Section 2, the court shall, at the request of the defendant, provide the jury with an instruction in a form to be recommended by the California Judicial Council, which advises the jury to view such statements with caution.

Section 4: Handling and Preservation of Electronic Recordings of Custodial Interrogations relating to a Serious Felony.

(a) Every Electronic Recording of a Custodial Interrogation shall be clearly identified and catalogued by law enforcement personnel.
(b) If a juvenile or criminal proceeding is brought against a person who was the subject of an Electronically Recorded Custodial Interrogation, the Electronic Recording shall be preserved by law enforcement personnel until all appeals, post-conviction and habeas corpus proceedings are final and concluded, or the time within which they must be brought has expired, or the sentence has been completed.
(c) If no juvenile or criminal proceeding is brought against a person who has been the subject of an Electronically Recorded Custodial Interrogation, the related Electronic Recording shall be preserved by law enforcement personnel until all applicable state and federal statutes of limitations bar prosecution of the person.

2. The Commission urges all California law enforcement agencies to videotape the entirety of all custodial interrogations of felony suspects or, where videotaping is impractical, to audiotape the entirety of such custodial interrogations.

3. The Commission recommends that the State Legislature appropriate funds, to be administered by the Attorney General, to provide grants to California Police Agencies that wish to implement programs to videotape custodial interrogations.

4. The Commission recommends that training programs should be provided and required to train police, prosecutors, defense lawyers and judges about the causes, indicia and consequences of false confessions. Police interrogators should receive special training in how to identify and interrogate persons with developmental disabilities and juveniles.

The Results

In 2006 Sen. Elaine Alquist (D-13) introduced SB 171 to require all law enforcement agencies to adopt the Commission's recommendation to record all custodial interrogations by audio or video. The bill was amended numerous times and ultimately required the recording of custodial interrogations only for violent felonies. The bill included numerous exceptions to the recording requirement. The bill was vetoed by the Governor.

In 2007 Sen. Alquist introduced SB 511, a replica of the bill that had passed the Legislature in 2006. The bill passed the Legislature again and was vetoed by the Governor.

On December 20, 2011, Congresswoman Richardson (D-37) introduced H.R. 3750 in the 112th Congress. H.R. 3750 echoed the Commission's recommendation that the Attorney General provide grants to local law enforcement agencies to implement recording of interrogations. H.R. 3750 would have done this on a national scale. The bill was referred to the Judiciary Committee and died there.

In 2012 Sen. Alquist introduced SB 1300 to require the recording of custodial interrogations in all serious or violent felonies. The Senate Appropriations Committee voted to place the bill in the suspense file on May 14, 2012.

On February 22, 2013, Sen. Lieu (D-28) introduced SB 569 to amend the Welfare and Institutions Code to require recording of interrogations involving juveniles accused of serious or violent felonies, i.e., offenses listed in Welfare and Institutions Code §707(b). The Senate Appropriations Committee voted to place the bill in the Suspense file on April 29, 2013. On February 22, 2013, the bill was amended only to require recording of interrogations for juveniles suspected of committing murder. The bill was signed by the Governor and chaptered by the Secretary of State on October 13, 2013.

While some state and federal attempts at legislating the issue have been unsuccessful, the ubiquity and decreasing costs of recording devices have made recording of interrogations commonplace in many law enforcement agencies. This trend should continue.

The Use of Jailhouse Informant Testimony
Released November 20, 2006

1. Whenever feasible, an express agreement in writing should describe the range of recommended rewards or benefits that might be afforded in exchange for truthful testimony by an arrested or charged informant.

2. Wherever feasible, California District Attorney Offices should adopt a written internal policy to govern the use of in-custody informants. The policy should provide:

> *(1) The decision to use the testimony of an in-custody informant be reviewed and approved by supervisory personnel other than the deputy assigned to the trial of the case;*
> *(2) The maintenance of a central file preserving all records relating to contacts with in-custody informants, whether they are used as witnesses or not;*
> *(3) The recording of all interviews of in-custody informants conducted by District Attorney personnel;*
> *(4) The corroboration of any testimony of an in-custody informant by evidence which independently tends to connect the defendant with the crime, special circumstance or circumstance in aggravation to which the informant testifies.*

3. The Legislature should enactment a statutory requirement of corroboration of in-custody informants, similar to the current requirement of the corroboration of accomplices contained in Penal Code Section 1111. The statute should provide:

> A conviction can not be had upon the testimony of an in-custody informant unless it be corroborated by such other evidence as shall independently tend to connect the defendant with the commission of the offense or the special circumstance or the circumstance of aggravation to which the in-custody informant testifies. Corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance or the circumstance in

> aggravation. Corroboration of an in-custody informant cannot be provided by the testimony of another in custody informant.
>
> An in-custody informant is hereby defined as a person, other than a codefendant, percipient witness, accomplice or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.

A jury should be instructed in accordance with the language of this statute. A jury should not be instructed that corroborating evidence may be slight, as in CALCRIM No. 335.

4. Training programs for California prosecutors, defense lawyers, judges and police investigators should include a component addressing the use of arrested or charged informants as witnesses.

The Results

On August, 1, 2011, the Governor approved SB 687, introduced by Sen. Leno (D-11). SB 687 added §1111.5 to the Penal Code. §1111.5 tracks the language of the Commission's proposed statute very closely. The only difference is that §1111.5 creates an exception and establishes a burden for the proponent where one in-custody informant is used to corroborate another in-custody informant.

In addition, the jury instruction governing the use of in-custody informants, CALCRIM 336, was amended in 2012 to reflect this change in the law.

The California District Attorneys' Association has not issued a public statement encouraging District Attorney's Offices to adopt a written internal policy to govern the use of in-custody informants. Some district attorneys' offices have such a policy, but there is no data to establish that the practice has increased since the Commission's report.

To this date, neither the California District Attorneys' Association, POST, the Judicial Council of California, the California Public Defenders' Association, nor the State Bar have offered training programs on the use of in-custody informants.

DNA Testing Backlog
Released February 20, 2007

1. The California Department of Justice should immediately ascertain the staffing levels required for the State Laboratory to reduce the backlog in the uploading of DNA profiles to thirty days or less, both now and when the future demands of Proposition 69 take effect. The salary level necessary to fill and maintain those staffing levels should also be ascertained.

2. Emergency budget appropriations should be immediately introduced, to provide state funding to staff the State Laboratory at the levels ascertained pursuant to the Commission's first recommendation.

3. The California Attorney General should immediately commence consultation with state and local public laboratories, criminalists, law enforcement, prosecutor's offices, public defenders and private defense lawyers, victim representatives and judges to address the problems of DNA forensic technology resources in California. The following concerns should be urgently addressed:

A. Identify the nature and scope of current capacity problems, backlogs of unprocessed evidence and systems issues that impede the utilization of DNA forensic technology to its fullest potential.

B. Identify best practices that enhance collection and timely processing of DNA evidence, including crime scene and rape kit evidence, to meet the needs of the criminal justice system.

C. Make recommendations for eliminating current backlogs and preventing future backlogs of unprocessed evidence in state and local public laboratories.

D. Evaluate the efficiency and effectiveness of the current organization of resources in the State of California, to determine what systems and strategies will most effectively serve the needs of the State of California.

E. Recommend strategies for training and educational programs to address the shortages of trained personnel to meet the staffing needs of crime labs throughout the State of California.

F. Assess the impact of "cold hits" upon local investigative, prosecution and defense resources.

G. Report to the Legislature and Governor regarding the legislative or administrative steps that must be taken to insure timely processing of evidence in California's criminal justice system.

4. The Legislature and the Governor should provide adequate support to quickly respond to the needs identified by the Attorney General.

The Results

The Commission published its report in 2007. In 2009, the DNA backlog skyrocketed with the advent of Prop 69, requiring DNA samples from all arrested felons.

In 2010 and 2011, the Bureau of Forensic Science of the California Department of Justice was awarded over $4.2 million from the National Institute of Justice Forensic DNA Backlog Reduction program. The goal was to hire 15 limited-term criminalists to complete additional DNA cases and reduce the turnaround time by 10%.

As of January 1, 2012, the Department of Justice announced that it could analyze routine DNA evidence within 30 days, consistent with the Commission's recommendations. This was 4 times faster than the rate of analysis that occurred in prior years. The Department of Justice laboratory steadily improved its analysis capabilities by testing 4,100 samples in 2009, 4,800 in 2010, and 5,400 samples in 2012. The backlog has now disappeared.

Forensic Science Evidence
Released May 8, 2007

1. The California Commission on the Fair Administration of Justice recommends that California Crime Lab Directors encourage the certification of the forensic experts they employ, and use certification wherever possible as a basis for promotion and salary decisions.

2. The California Commission on the Fair Administration of Justice recommends that legislation be enacted to require that any allegation of professional negligence or misconduct that would affect the integrity of the results of a forensic analysis conducted by a California laboratory, facility or entity be reported in a timely manner to the District Attorney or other appropriate prosecutorial agency, and to require the District Attorney or other prosecutorial agency to which such allegations are reported to report the results of any independent investigations of such allegations to the State Attorney General.

3. The California Commission on the Fair Administration of Justice recommends that the legislature consider the creation or designation of a governmental agency or commission (which could be the office of the California Attorney General) with the power and duty to formulate and apply standards to define who is qualified to perform analysis of evidence in any particular scientific discipline on a statewide basis. The creation or designation of such an entity should be preceded by an opportunity for the Forensic Science community and all affected criminal justice agencies to be heard from, to elicit a wide spectrum of views as to how these needs can best be met. A.B. 1079, currently pending before the legislature, could provide an excellent vehicle to elicit this input. Rigorous written examinations, proficiency testing, continuing education, recertification procedures, an ethical code, and effective disciplinary procedures could be part of such a program. Such an agency could also promulgate standards for scientific testing, report writing, and the parameters of appropriate expert testimony; provide information to all participants in the criminal justice system regarding the evidentiary validity of forensic science evidence; identify and fund research needs and opportunities; and provide state-wide training programs for forensic experts.

4. The California Commission on the Fair Administration of Justice recommends that training programs for California prosecutors, defense lawyers, judges and police investigators be expanded to include greater attention to the appropriate use and validity of forensic science evidence.

The Results
Since the Commission issued its report, there has been no change in the certification status of individual criminalists. Currently, the majority of California crime laboratories are accredited by the American Society of Crime Lab Directors/Laboratory Accreditation Board (ASCLD/LAB). That group does not individually certify criminalists, but does accredit laboratories.

The Legislature has not passed legislation requiring allegations of professional negligence or misconduct that could affect the integrity of results to be reported to the District Attorney of Attorney General.

The Legislature has not created a governmental agency or Commission to address the on-going needs of the forensic science community. However, Sen. Patrick Leahy (D-Vt) successfully passed legislation to create a National Commission on Forensic Science. That Commission will be co-chaired by the US Department of Justice and the National Institute of Standards and Technology. The Commission held its first meeting the week of February 3-7, 2014. Membership for the Commission can be found at the following link: http://www.aafs.org/sites/default/files/pdf/2014/AAFSNationalCommRel.pdf

Attorney Misconduct
Released October 14, 2007

1. The Commission recommends the adoption of the following California Rule of Court:

> *When notification of the State Bar is required of a court pursuant to California Business and Professions Code Section 6086.7(a), if the order of contempt, modification or reversal of judgment, imposition of judicial sanctions or imposition of a civil penalty is signed by a Superior Court judge or magistrate, that judge or magistrate shall notify the State Bar. Modification of a judgment includes the vacation of a judgment in granting an Extraordinary Writ. If the order of contempt, modification or reversal of judgment, imposition of judicial sanctions or imposition of a civil penalty is by the Court of Appeal or the Supreme Court, the author of the Court's order or opinion shall notify the State Bar. The report to the State Bar shall include the State Bar member's full name, and State Bar number, if known. When notifying the attorney involved pursuant to California Business and Professions Code Section 6086.7(b), the judge, magistrate or Justice identified in this Rule shall also notify the attorney's supervisor, if known.*

2. The Commission recommends the following changes in Canon 3D of the California Code of Judicial Ethics (Changes indicated in **bold**):

> *D. Disciplinary Responsibilities*
> *(1) Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge shall take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority.*
>
> *(2) Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, or* ***makes a finding that such violation has occurred****, the judge shall take appropriate corrective action.*
> ***Appropriate corrective action should include a prompt report to the State Bar and to the attorney's supervisor, if known, where an attorney in a criminal proceeding has engaged in egregious misconduct, including but not limited to:***
>
> ***a. A willful misrepresentation of law or fact to a Court;***
> ***b. Appearing in a judicial proceeding while intoxicated;***
> ***c. Engaging in willful unlawful discrimination in a judicial proceeding;***
> ***d. Willfully and in bad faith withholding or suppressing exculpatory evidence (including impeachment evidence) which he or she is constitutionally obligated to disclose.***

e. Willful presentation of perjured testimony.
f. Willful unlawful disclosure of victim or witness information.
g. Failure to properly identify oneself in interviewing victims or witnesses.

Any doubt whether misconduct is egregious should be resolved in favor of reporting the misconduct.

(3) A judge who is charged by prosecutorial complaint, information, or indictment or convicted of a crime in the United States, other than one that would be considered a misdemeanor not involving moral turpitude or an infraction under California law, but including all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol, shall promptly and in writing report that fact to the Commission on Judicial Performance.

(4) A prompt report means as soon as practicable, and in no event more than thirty days after knowledge is acquired or a finding is made.

3. The Commission recommends that the State Bar include, in its annual report on the State Bar of California Discipline System, the number of Reportable Actions received from Courts pursuant to each of the four categories in Business and Professions Code Section 6068.7(a), and each of the six categories in Canon 3D(2) of the California Code of Judicial Ethics. In addition, the Report should indicate the number of Reportable Actions related to the conduct of prosecutors and defense lawyers by County. Defense lawyer data should be reported to distinguish public defenders, contract defenders, appointed lawyers, and privately retained lawyers. Prosecutorial data should be reported to distinguish district attorneys and city attorneys.

4. The Commission recommends that law school courses in legal ethics and continuing education programs in legal ethics for prosecutors, defense lawyers and judges include familiarity with the obligations to report misconduct and incompetent representation by lawyers, and the obligation of lawyers to self-report, to the California State Bar, as well as familiarity with the consequences of such reports with respect to the State Bar's investigatory and disciplinary authority.

The Results

The Administrative Presiding Justices Advisory Committee and the Trial Court Presiding Judges Advisory Committee of the Judicial Council of California have proposed two separate rules of court to address the reporting responsibilities of appellate justices (Rule 10.1017) and superior court judges (rule 10.609). The rules specify who must report misconduct under certain circumstances. These rules have been published publicly with an invitation to comment period that expires June 19, 2013. The new rules went into effect on January 1, 2014. Both committees rejected the Commission's recommendations

that after reporting an attorney to the State Bar, the Court would also notify an attorney's supervisor.

Effective January 1, 2013, Canon 3D of the California Code of Judicial Ethics includes the following language and commentary:

> *(2) Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.*
>
> *ADVISORY COMMITTEE COMMENTARY*
> *Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body.*
> *Judges should note that in addition to the action required by Canon 3D(2), California law imposes mandatory additional reporting requirements on judges regarding lawyer misconduct. See Business and Professions Code section 6086.7.*
> *"Appropriate authority" denotes the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.*

Canon 3D(2), as recently amended, adopts the Commission's recommendation that a judge may have personal knowledge "or conclude[] in a judicial decision" that a lawyer has committed misconduct. Moreover, the amended Canon references Business & Professions Code §6086.7. However, the Canon does not include language specifying egregious misconduct by attorneys.

Since the publication of the Commission's report, the State Bar has seen a 30% increase in the number of mandatory reportable actions annually. This does not include the discretionary reporting of Canon 3D(2) prior to January 1, 2013.

In 2011, the State Bar began tracking complaints against prosecutors and defense attorneys by county. These complaints include reportable actions by Courts as well as complaints from any source. Defense lawyer data is separated by county alternate public defense, county appointed criminal defense, county public defender, private retained criminal defense, state public defender, and federal public defender. Prosecutorial data is separated by city attorney, county district attorney, county counsel, military legal counsel, state attorney general, and United States Attorney.

There have been two high profile prosecutions against district attorneys this year. The first was filed against Deputy District Attorney Troy Benson in Santa Clara County. The second was filed against the elected District Attorney of Del Norte County, Jon Alexander. Decisions in both matters have been published on the State Bar's website.

The Office of the Chief Trial Counsel of the State Bar has done training on self-reporting for the following offices between 2010-2013:

Marin County Public Defender
Marin County District Attorney
Los Angeles County District Attorney
Los Angeles County Public Defender
Los Angeles City and County Attorneys
San Diego District Attorney
Ventura County District Attorney
Kern County District Attorney
Sacramento County District Attorney
Sonoma County District Attorney
Placer, El Dorado, and Nevada County District Attorney (1 combined training)
Fresno County District Attorney
Monterey County District Attorney
Yolo County District Attorney
Merced County District Attorney
San Mateo County District Attorney
Santa Barbara County District Attorney

The Office of the Chief Trial Counsel of the State Bar also created a 3-part video series for the Alameda County District Attorney that has been shown at the San Francisco County District Attorney as well. In addition, the office provided live/videotaped training for the California District Atttorneys' Association as well as the National District Attorneys' Association.

Prosecutorial Duty to Disclose Exculpatory Evidence
Released March 6, 2008

1. The California Commission on the Fair Administration of Justice recommends that all District Attorney Offices in California formulate and disseminate a written Office Policy to govern *Brady* compliance, and that this policy provide for gathering Brady material in a systematic fashion from all appropriate sources in a manner that is consistent with *Pitchess*, tracking the delivery of the material, and disclosing material determined to be relevant. The policy should provide that material relevant to factual innocence or an affirmative defense be disclosed as soon as that determination is made, and prior to entry of a guilty plea.

2. The California Commission on the Fair Administration of Justice recommends that a list organized and maintained by each District Attorney's office should be created pursuant to procedures and standards established by that office, in consultation with law enforcement agencies, peace officer associations representing law enforcement officers, and Public Defender Offices. The list should contain the names of police officers and other recurring witnesses as to whom there is information that may be subject to disclosure requirements under Brady. This would include all facially credible information that might reasonably be deemed to undermine confidence in a conviction in which the law enforcement employee is a material witness, and is not based upon mere rumor, unverifiable hearsay, or an irresolvable conflict in testimony about an event.

3. The California Commission on the Fair Administration of Justice recommends that training programs be conducted to assure that all deputy district attorneys understand and apply office policies and procedures with regard to *Brady* disclosure and *Pitchess* Motions. If feasible, joint training programs should be organized to include prosecutors, public defenders and other criminal defense lawyers.

4. The California Commission on the Fair Administration of Justice recommends that all police and other investigative agencies formulate policies and procedures to systematically collect any potential *Brady* material and, consistent with the statutory protections for personnel records, promptly deliver it to prosecutors.

5. The California Commission on the Fair Administration of Justice recommends that training programs for peace officers include full treatment of the obligation to disclose *Brady* material to the prosecutor.

The Results
Some District Attorneys' offices have created office policies on *Brady* compliance, including lists of recurring witnesses that may be subject to *Brady* disclosure. However, many of these policies are not made available to the public. Therefore, it is difficult to ascertain whether progress has been made regarding the Commission's recommendation. The California District Attorneys' Association does not have a publicly recommended policy for compliance.

Many District Attorney's offices make available a 200-page training manual called "Basic *Brady* and Statutory Discovery Obligations." The most recent edition was edited by Jeff Rubin at the Alameda County District Attorney's Offices, but the genesis of these materials dates back to retired Senior Deputy District Attorney Doug Pipes of Contra Costa County. Pipes is now a defense attorney and continues to advise on *Brady* issues.

Some police and investigative agencies have formulated policies and procedures to systematically collect potential *Brady* material to deliver to prosecutors. However, many of those policies and procedures have not been made available to the public. Therefore, it is difficult to ascertain whether progress has been made regarding the Commission's recommendation.

Funding of Defense Services in California
Released April 14, 2008

1. The Commission recommends that legislation be enacted to provide that when Counties contract for indigent defense services in criminal cases, the contract shall provide separate funding for accessing technology and criminal justice databases to the extent those are provided by law, legal research tools, travel expenses, forensic laboratory fees and costs, data processing, modern exhibit capabilities, paralegals, investigators and expert witnesses with appropriate qualifications and experience. Full time defense counsel should be compensated at rates equivalent to comparable prosecutors.

2. The Commission recommends that the California State Bar reconvene its Commission on the Delivery of Legal Services to the Indigent Accused to make recommendations regarding the adequacy of funding for defense services which meet acceptable standards of competent representation.

The Results
The Legislature has not introduced a bill since 2008 to provide for the separation of salary from investigation for contract defense services in criminal cases.

The State Bar has not reconvened the Commission on the Delivery of Legal Services to the Indigent Accused.

Presentation at the USC Gould School of Law by John Van de Kamp, Counsel at Mayer Brown LLP, Los Angeles, California.

This report was prepared with the assistance of Deputy District Attorney Chris Boscia of Santa Clara County. This report was updated on February 10, 2014.