

Bar responds to Innocence Project report

By Diane Curtis

The State Bar's chief trial counsel has ordered a review of claims by the Innocence Project that the bar isn't tough enough on prosecutors who violate ethics rules.

In response to the Oct. 4 release of the report by the Northern California Innocence Project at Santa Clara University School of Law, Chief Trial Counsel James Towery appointed Deputy Trial Counsel Cydney Batchelor to study the project's criticisms and recommendations, as well as determine if more action should be taken against about 130 attorneys named in the report whose cases resulted in reversal.

"We're happy to see the report because it shines a light on something that deserves attention," said Towery. At the same time, he added, the bar is striving for a "balanced response."

"On the one hand, there has been an historical underreporting and, as a result of that, underprosecuting of prosecutorial misconduct," he said. "On the other hand, we know there are some flaws in the report." Those flaws include the fact that early State Bar research indicates that a number of cases cited in the report involve minor violations of the rules and do not rise to a level of discipline. Also, many instances of prosecutorial misconduct are never reported to the bar. "We're looking at those which made a difference in trial and will weigh whether further investigation is warranted," said Towery.

Innocence Project researchers said they reviewed more than 4,000 state and federal appellate rulings issued from 1997 to 2009, as well as media reports and trial court decisions. In 3,000 of the cases, the report states, the courts rejected prosecutorial misconduct allegations, in 707 they found misconduct and in 282 they did not decide whether the prosecutors' actions were improper. Of 4,741 public disciplinary actions in the California Bar Journal from 1997 to September 2009, 10 involved prosecutors, the report said.

The [113-page report](#) by Professor Kathleen Ridolfi and Maurice Possley criticized the courts, prosecutors and the State Bar. "Courts fail to report prosecutorial misconduct (despite having a statutory obligation to do so), prosecutors deny that it occurred, and the California State Bar almost never disciplines it."

The report praised the bar for showing signs of progress by reaffirming its protection of the courts, the legal profession and the public in 2009 and agreeing to separate out seven categories of attorneys, including prosecutors, in its reports of misconduct and annual report of complaints.

The report recommended adopting the ABA's Model Rule 3.8, which makes it a disciplinary offense to prosecute a charge without probable cause, to seek to have an unrepresented defendant waive rights, and to make public comments that might harm a defendant. It also recommended that the bar expand discipline for prosecutorial misconduct, increase disciplinary transparency and require prosecutors who have committed misconduct more than once to take an ethics class especially targeted at criminal prosecutors.

Batchelor noted that the board of governors recently adopted for submission to the Supreme Court for its review a new Rule 3.8 similar to the ABA Model Rule, and, in that respect, discipline will be expanded for prosecutors. The bar also is working proactively with both the courts and prosecutors so they are aware of their responsibilities. As for the issue of transparency, Batchelor said, "We are bound by our confidentiality rules and statutes." Any changes in confidentiality rules would have to come via a change in statute. "We understand the request but the legislature and the Supreme Court may be the ones who are able to implement it," she said.

Batchelor laid out a plan for months of research into the cases cited in the report, which means locating the case, checking on its final outcome and matching it with the attorney who was the prosecutor. "We can't respond until we look at each of these cases . . . At this point and until the end of the year, we're going to be in an information-gathering mode."

When State Bar prosecutors do look at the cases, they'll consider such issues as the bar's mission to protect the public, the legal profession and the courts, whether misconduct is an isolated incident, whether there's a record, whether the burden of proof is the same as that of the trial and appellate courts, whether the

State Bar Court already addressed the issues, whether the courts reported the misconduct and how long ago it happened. “One of the things the court looks at in deciding to impose discipline is how old a case is,” she said, noting that two of the cases cited in the report were more than 20 years old.

Batchelor pointed out that the State Bar is repeatedly criticized by district attorneys for being too hard on prosecutors and by defense attorneys for being too easy on them. “This is a continuing tension. That said, we are taking the report seriously and we’re going to take a look at it. But we’re going to be very careful and very measured.”