

The Ethics of Justice in the District Attorney's Office

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SUMMARY:

This position paper addresses some serious ethical issues in the Santa Clara County District Attorney's Office that were revealed in a series of articles printed in the San Jose Mercury News called "Tainted Trials, Stolen Justice." The First Installment of this position paper provides background on the ethical problems identified by the San Jose Mercury News and introduces the role of office management in creating them.

This installment explores the nature and consequences of flawed management practices employed by the Office.

As an accompaniment to this general piece on ethics, I have written a Briefing Paper intended primarily for professionals in the District Attorney's Office. This paper outlines certain principles and policies that I would put in place following my election to the Office. I invite prosecutors, investigators, and other professionals who work in the Office to review this paper by clicking on the link, [Management Policies.](#)

INSTALLMENT TWO:

Management Creates the Wrong Incentives

1. Winning at All Costs: What It Means

The San Jose Mercury News talked about a “win-at-any-cost” culture in the DA’s office. In my candidate statement, I said that “justice is not a win-at-all-costs proposition.” What does this phrase mean?

Some prosecutors have been puzzled by the phrase. Their view is that the Office and its finest prosecutors have long taught by example that winning ethically is the only way to win. This is a valid and important point.

I am NOT claiming that prosecutors are taught to win using unethical tactics. Rather, I am using “win at all costs” to define a number of flawed management practices which, when taken together, create undue pressure on prosecutors to win cases without respecting the rules of ethics and criminal procedure.

2. Flawed Management Practices

Flawed management practices have fostered unethical behavior in the District Attorney’s Office in three important ways:

- They have created incentives which encourage unethical behavior.
- They have created a culture which encourages lawyers to disregard the checks and balances which were put in place to guard against unethical behavior in the criminal justice system.
- They have failed to prepare prosecutors to confront “confirmatory bias.”

A. Flawed Practice #1: Winning as the Main Criterion for Promotion

Traditional Focus: Developing Skills. When I began my career in the Office in 1985, we were taught that trial attorneys who learned the skills of the profession would be promoted, and those who did not would be required to leave. The best prosecutors would be given the most prestigious assignments.

During a course of a successful career, skilled prosecutors would try every type of case our criminal justice system had to offer. Our Office was the finest in the state, without any more pressure on prosecutors than the inner drive to practice our trade at the highest level.

Some of our most revered prosecutors had rather modest won-loss records. A consequence of trying tough cases that the timid will not pursue is that sometimes you lose. Managers evaluated prosecutors carefully using various criteria related to their abilities, including the prosecutor’s skills and technique, passion for professionalism, and judgment in evaluating cases.

How the Focus Has Changed. Current management has moved away from that ethos by creating the perception that in order to be promoted, attorneys must focus above all on winning cases. The changes have been subtle but noticeable. Promotion is now less predictable, with prosecutors having to submit huge portfolios of paperwork—which may or may not be relevant to their ability to handle cases professionally. Skilled prosecutors have been denied timely promotion, or quietly instructed to delay submitting their promotion applications for reasons that are unclear.

However, for any prosecutor concerned about whether he or she will be promoted, there is one surefire remedy: win every case that is taken out to trial. In some cases, that single-minded focus can lead to behavior that oversteps ethical boundaries.

While the focus on winning is a relatively new development for the Office, it is easy to understand its attraction to management. The public and the media have traditionally measured District Attorneys by the conviction rates of their offices for felonies (and often, for a subset of felonies such as homicides). But the shift in focus has created some dangerous consequences. Foremost among them is a de-emphasis on justice as an ultimate goal of the system.

B. Flawed Practice #2: Micromanagement

“mi-cro-man-age (mi'kro-man'ij) To direct or control in a detailed, often meddlesome manner.” (American Heritage Dictionary, online edition)

The pressure to win inside the District Attorney's Office is magnified by another recent development: Micromanagement.

Traditional Focus: Managers Helped Foster Skills. In years past, trial attorneys enjoyed a great deal of control over their cases.

- Managers were available to discuss problems, offer advice and solutions, and occasionally step in and make tough decisions about what offers should be made to settle unusual cases.
- Managers would create policies and ensure that trial lawyers were implementing them by periodically reviewing case files.
- Managers would evaluate the performance of deputies through various means, including watching them in court, reviewing their written work, and talking to various judges and defense lawyers.
- A poor won-loss record would invite greater scrutiny, with managers identifying problems and helping struggling prosecutors when needed.
- Allegations of unethical behavior were taken very seriously.

This “walking around” style of management served to weed out the ineffective lawyers, and the occasional bad apple.

Prosecutors Learned to Make Good Decisions. More significantly, this management system enabled attorneys, particularly junior attorneys, to use their discretion to make good decisions.

Good judgment is the prosecutor's most important asset. Every day, prosecutors make judgment calls that can change the course of a case. Prosecutors must decide when to attempt to admit evidence, when to object, which evidence must be turned over to the defense, how to frame an opening statement and closing argument, and the settlement value of a case. They must do so under pressure from defense attorneys and judges, and often with little time.

Prosecutors learn good judgment by making decisions. Inevitably, junior prosecutors will make mistakes while exercising their judgment. However, the more decisions they are allowed to make early in their careers, when the stakes are relatively low, the more likely they will develop into seasoned prosecutors capable of making tough decisions when the stakes are higher. This includes realizing when the investigatory apparatus may have targeted the wrong person, and having the courage to “stop the train” and investigate further.

The Current Focus on Micromanaging is Counterproductive.

That traditional management system no longer exists. With its loss, the system also has become inflexible and counterproductive.

- In the Office today, virtually every prosecutor must obtain approval from a manager before making or accepting a settlement offer. Even straightforward tasks, such as appearing in court when a defendant pleads guilty, require prosecutors to fill out endless forms (voir dire form, case disposition sheet, etc.). In short, monitoring has replaced mentoring.
- The only reasonable conclusion to draw from this transformation is that senior management has lost confidence in the judgment of its trial attorneys. The irony is that by removing the ability of junior attorneys to make their own decisions, management is ensuring that those lawyers will require monitoring throughout their careers.

Micromanagement through excessive supervision is counterproductive for other reasons as well.

- It leaves less time for trial attorneys to prepare their cases
- It leaves less time for managers to actually go to court and evaluate their attorneys' performance.

This means higher caseloads, more harried and mistake-prone attorneys, and lower productivity and morale.

Certainly, prosecutors should be supervised. However, I do not agree with HOW current management supervises prosecutors. When supervision crosses over the line into excessive supervision, it becomes micromanagement. Micromanagement is rarely justifiable. In addition, micromanaged decisions are often made for political, not professional, reasons.

A Recent Example. Consider the recent "rule"—announced with great fanfare—that prosecutors must consult with supervisors before withholding evidence from the defense. This is not a new principle. The managers for whom I worked reviewed prosecutors' decisions to ensure that they were effective and ethical. Prosecutors were expected to disclose evidence to the defense, and exceptions were to be discussed with managers.

So how is the new "rule" indicative of a micromanagement problem in the Office?

- It appears that current management failed to offer prosecutors detailed training on the rules governing disclosure of evidence.
- Worse, they sent an unmistakable message that those rules were unimportant by ignoring a fusillade of complaints from judges and defense lawyers that certain prosecutors were withholding evidence.
- Instead of being proactive and attacking the cause of the problem, the micromanagers simply issued another rule, in this case in response to the hot glare of publicity.

Rules, principles, and procedures are critical parts of effective management that provide important philosophical and operational guidelines. However, the micromanager usually considers the rule as a solution rather than a guide. Important principles are easily lost as each new incident results in yet another expedient rule being promulgated. Unfortunately, "management by promulgation" does not foster good judgment. Current management in the District Attorney's Office has substituted micromanagement for good judgment.

Micromanagement Suppresses Initiative. Another consequence of micromanagement is to suppress initiative. Increasing the pressure to avoid making mistakes in even the smallest of matters (e.g., failing to completely fill out every relevant box on a voir dire form), means that attorneys are less inclined to make any decision which could draw scrutiny or criticism. A prosecutor who

lacks initiative will therefore be less likely to raise doubts about the strength of evidence in a particular case.

Summary. The combination of a relentless focus on winning cases and micromanagement of trial attorneys is dangerous. It increases the likelihood that a few prosecutors will cross ethical boundaries and that others will fail to make bold decisions necessary to avoid convicting the innocent.



The next installment of this paper will explore two additional management failures in the District Attorney's Office which contribute to the ethical problems documented by the *San Jose Mercury News*.