Formal Opinion 467
Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3

Model Rules 5.1 and 5.3 require lawyers with managerial authority and supervisory lawyers, including prosecutors, to make “reasonable efforts to ensure” that all lawyers and nonlawyers in their offices conform to the Model Rules. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to ensure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations. The particular measures that managerial and supervisory prosecutors must implement to comply with these rules will depend on a variety of factors, including the size and structure of their offices.

A. Introduction

Prosecutors have special duties under the Model Rules of Professional Conduct. They have “the responsibility of a minister of justice and not simply that of an advocate.”1 They must “refrain from prosecuting a charge that [they know] is not supported by probable cause.”2 They must “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.”3 They must “make timely disclosure to the defense” of exculpatory and mitigating evidence.4 In short, and in words long ago written by the Supreme Court in Berger v. U.S.,5 a prosecutor’s duties are “not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”6

We believe that most prosecutors know and follow the rules of professional conduct. Indeed, the laudable efforts of such prosecutors have provided good examples, cited throughout this opinion. But there are prosecutors who do violate the rules, and for all prosecutors there are special challenges and obligations. This opinion provides

1. ABA Model Rules of Prof’l Conduct R. 3.8 cmt. [1].
2. ABA Model Rules of Prof’l Conduct R. 3.8(a).
3. ABA Model Rules of Prof’l Conduct R. 3.8(b).
4. ABA Model Rules of Prof’l Conduct R. 3.8(d). For additional special duties of prosecutors, see also ABA Model Rules of Prof’l Conduct R. 3.8(c)-(h) and cmts. [3]-[9].
6. Id. at 88. See also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454 at fn. 9 (“References in U.S. judicial decisions to the prosecutor’s obligation to seek justice date back more than 150 years.”) (citations omitted). A “prosecutor” for purposes of this opinion is a lawyer employed by a government agency whose primary responsibility involves the investigation and prosecution of criminal cases and related matters. Where a prosecutor’s duties also embrace civil authority, this opinion also applies to that sphere of their work. Federal prosecutors are covered by state ethics rules under the McDade Amendment, 28 U.S.C. §530B.
guidance on the special challenges and obligations of prosecutors with managerial and supervisory responsibility.  

B. ABA Model Rules of Professional Conduct 5.1 and 5.3 Apply to Prosecutors

Rules 5.1 and 5.3 address obligations of lawyers with managerial authority (hereinafter sometimes referred to as “managers”) and supervisory lawyers within a “firm” or a “law firm.” Rule 1.0(c) defines “firm” or “law firm” to include “lawyers employed in a legal services organization or the legal department of a corporation or other organization.” Comment [3] makes clear that government organizations are included. The comments to Rule 5.1 also specifically reference government agencies. Prosecutors’ offices are government organizations.

Rule 3.8, which specifies the “Special Responsibilities of Prosecutors,” also makes clear that prosecutors have supervisory obligations under Rules 5.1 and 5.3. Comment [6] to Rule 3.8 reads, “Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office.” Finally, ABA Formal Opinion 09-454 emphasizes that these obligations apply to prosecutors: “Any supervisory lawyer in the prosecutor’s office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.”

Formal Opinion 09-454 adds, “[S]upervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.”

C. Who Has Responsibility Under ABA Model Rules 5.1 and 5.3 in a Prosecutor’s Office?

Rules 5.1 and 5.3 set forth three types of responsibility for the conduct of lawyers and nonlawyers “employed or retained by or associated with a lawyer.” Paragraph (a)
addresses lawyers “with managerial authority.” 14 Paragraph (b) pertains to lawyers “having direct supervisory authority over another lawyer” or “having direct supervisory authority over the nonlawyer”. 15 Paragraph (c) applies to lawyers who either (i) order or ratify the conduct of another, or (ii) have managerial authority or direct supervisory authority, know of the conduct at a time when its consequences can be mitigated, and fail to take reasonable remedial action. 16 We address each below.

1. Managerial Responsibility

Under paragraph (a), “managerial” lawyers “shall make reasonable efforts to ensure that [their organization] has in effect measures giving reasonable assurance that all lawyers in the [organization] conform to the Rules of Professional Conduct.” Managerial lawyers include “members of a partnership, the shareholders in a law firm organized as a professional corporation and [other lawyers] having comparable managerial authority.” 17 This group also includes “lawyers who have intermediate managerial responsibilities.” 18 Rule 5.3(a) imposes a corresponding obligation with respect to nonlawyers “employed or retained or associated” with the office.

In a prosecutor’s office, managerial lawyers are the top prosecutors and all other prosecutors with managerial or executive functions in the office. This group would include, for example, the District or County or U.S. Attorney him or herself, as well as executive staff, bureau or unit heads, and similarly positioned others who, among other duties, make policies and set procedures for the office as a whole or for individual units. As part of their functions, these individuals may also be direct supervisors under 5.1(b) and 5.3(b) discussed below--depending on the facts and circumstances--but they have overarching special duties under Rules 5.1(a) and 5.3(a). 19

Managers must make “reasonable efforts” to ensure compliance with the Model Rules of Professional Conduct by all lawyers in the office, including other lawyers with comparable managerial authority. As discussed further in this opinion, “these efforts can take many forms, so long as they are reasonably calculated to eliminate or inhibit violations [of the Rules].” 20

2. Supervisory Responsibility

Under Rule 5.1(b) “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” Under Rule 5.3(b) “[a] lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” This

14. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1(a) & 5.3(a).
15. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1(b) & 5.3(b).
16. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1(c) & 5.3(c).
17. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [1].
18. Id.
20. HAZARD & HODES, supra note 19, §42.4.
category “applies to lawyers who have supervisory authority over the work of other lawyers [and nonlawyers] in the [office]” regardless of their status in the organization.

In a prosecutor’s office, a “supervisor” is a lawyer who—regardless of his or her position or title in the office hierarchy—directly supervises the work of another prosecutor in a particular matter, proceeding, inquiry or other event or series of events involving a case. “Even if a lawyer is not a partner or other general manager, he or she may have direct supervisory authority over another lawyer.”21

Further, a manager within the meaning of paragraph (a) can also be a supervisor within the meaning of paragraph (b). For example, a unit or bureau chief whose job description consists mainly or principally of executive or managerial functions may also directly supervise individual prosecutors in any proceeding, application, inquiry, investigation, trial, appeal, or other matter. When managers function as direct supervisors, they have obligations under paragraph (b) as well.

The key to responsibility under paragraph (b) is the relationship between the two lawyers in the matter. The supervisory authority “need not be over the entirety of the second lawyer’s practice. . . [5.1(b)] would apply to direct supervision in a particular case, to a senior or mid-level [lawyer] with supervisory authority over a junior [lawyer’s] work in that or a series of cases, or to one partner [or manager] who has been given supervisory authority over another partner [or manager’s] work in a case or practice area.”22

Finally paragraphs (a) and (b) impose some overlapping duties. For example, a direct supervisor “has the same responsibility as a partner or manager to assure compliance with the ethical rules by those lawyers under her direct supervisory authority.”23 In fact, as noted in G. Hazard, W. Hodes & P. Jarvis, The Law of Lawyering (3rd Ed., 2010 Supplement), Rule 5.1(b) “is essentially identical to Rule 5.1(a), except that it applies to all lawyers who have ‘direct supervisory authority over another lawyer,’ whether or not they are partners or managers or other partner-equivalents” and whatever their practice setting.24 And, “Rule 5.1(b), like Rule 5.1(a), can require proactive, as distinct from merely reactive or passive, measures.”25

3. Responsibility for Another’s Conduct Under ABA Model Rules 5.1(c) and 5.3(c)

Rules 5.1(c) and 5.3(c) make a lawyer responsible for another lawyer’s or a nonlawyer’s conduct if the lawyer “orders or, with knowledge of the specific conduct, ratifies the conduct involved” or if “the lawyer is a partner or has comparable managerial

21. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 5.1-2(b), at 1009 (2014) [hereinafter ROTUNDA & DZIENKOWSKI] (citing Rule 5.1(b)).
22. HAZARD & HODES, supra note 19, §42.5. See also ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [5] (“Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter.”).
23. ROTUNDA & DZIENKOWSKI, supra note 21, §5.1-2(b), at 1009.
24. HAZARD & HODES, supra note 19, §42.5 (emphasis added).
25. Id.
authority in the [office] where the other lawyer practices [or the nonlawyer is employed], or has direct supervisory authority of the other lawyer [or nonlawyer], and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

These obligations supplement the obligations of managers and supervisors under paragraphs (a) and (b), even though they are not directed at supervisors and managers alone. Indeed, the obligations set forth in Rules 5.1(c)(1) and 5.3(c)(1) apply regardless of whether the ordering or ratifying lawyer is a manager or a direct supervisor. But it is important to make clear--as we do here--that a lawyer who is a manager or supervisor may be responsible under Rules 5.1(c) and 5.3(c) even though he or she has no formal or structural relationship to the misbehaving lawyer or nonlawyer.27

Rules 5.1(c)(2) and 5.3(c)(2) also impose a duty to avoid or mitigate the consequences of improper conduct if there is an opportunity to do so.28 A lawyer who is “a partner or has comparable managerial authority . . . or has direct supervisory authority over the other lawyer [or non-lawyer] and knows of [misconduct] at a time when its consequences can be avoided or mitigated” must take “reasonable remedial action.”29

What constitutes “reasonable remedial action” will depend on the circumstances, but in any event requires “prevention of avoidable consequences” of the misconduct if the manager or supervisor learns of the misconduct when that can be achieved.30 Steps to avoid future similar acts may be important for other reasons, but Rules 5.1(c)(2) and 5.3(c)(2) require steps that look back -- that will “remedy or mitigate the consequences of [a] violation” that has already occurred. In the case of prosecutors, the immediate turnover of material to the defense might be required.31 In other instances, reporting the conduct to disciplinary authorities might be required.32 But the obligation to take reasonable remedial steps “extends to all known violations”--not only those covered by

26. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1(c) & R. 5.3(c).
27. RESTATEMENT OF THE LAW GOVERNING LAWYERS, supra note 19, §111, at 110 (the obligation of a partner or managerial lawyer to take remedial action as described in 5.1(c) “attaches even if [the partner or managerial lawyer] has no direct supervisory authority over the other lawyer”). See also HAZARD & HODES supra note 19 §42.6 (“[P]artners and those with comparable managerial authority cannot rely upon the fact that they have, or had, no direct responsibility for or supervisory authority over the lawyer engaged in wrongdoing. Partner status, equivalent managerial status, and direct supervisory authority all equally trigger a responsibility to take remedial action under Rule 5.1(c)(2)”). Further, “most violations of [(c)(1)] will also constitute violations of Rule 8.4(a)”). HAZARD & HODES, supra note 19, §42.6. Model Rule 8.4(a) provides that it is “professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”
28. See ABA MODEL RULES OF PROF’L CONDUCT R. 5.1(c)(1)-(2) & 5.3(c)(1)-(2). See also HAZARD & HODES, supra note 19, §42.6.
29. Id.
30. See, e.g., ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [5] (“[a]ppropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer’s involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension”). See also, HAZARD & HODES, supra note 19, §42.6.
31. In re Myers, 584 S.E.2d 357, 362 (S.C. 2003) (Solicitor (a supervising or managerial prosecutor) violated Rule 5.1(c)’s obligation to remediate when he failed to notify the defense lawyer about improper eavesdropping by his subordinates immediately upon learning of the misconduct).
32. RESTATEMENT OF THE LAW GOVERNING LAWYERS, supra note 19, §11 cmt. e.
an applicable reporting obligation\textsuperscript{33}—and should, in some recognizable measure, remedy or mitigate the consequences of misconduct that has occurred.

D. Background: The Need for Guidance

In recent years, reports, court opinions, and other authorities have drawn attention to prosecutorial misconduct—notwithstanding the many excellent prosecutors who scrupulously follow or exceed the mandates of the Rules of Professional Conduct. These reports, opinions and authorities suggest a need for more guidance.\textsuperscript{34} For example, in Connick v. Thompson,\textsuperscript{35} the Supreme Court reversed a $14 million judgment awarded against the New Orleans Parish District Attorney’s Office in favor of John Thompson, an innocent man who spent 18 years in prison—14 of them on death row—because prosecutors withheld exculpatory evidence. The majority opinion rejected Mr. Thompson’s theory of liability based on 42 U.S.C. §1983,\textsuperscript{36} and did not address the Rules. But the opinions in Connick—both majority and dissenting—document events that demonstrate the need for guidance on the managerial and supervisory obligations of prosecutors under the Rules of Professional Conduct. And, only one year later in Smith v. Cain,\textsuperscript{37} the Supreme Court reversed a conviction for Brady violations by the same office.\textsuperscript{38}

In 2013 the Supreme Court of Oklahoma disciplined a former Assistant District Attorney for the Oklahoma County District Attorney’s Office and criticized the District Attorney’s office for a lack of managerial and supervisory effectiveness.\textsuperscript{39} The Court said:

\begin{quote}
We must recognize that the [Assistant District Attorney] was acting under the direction, supervision, and policies of the then elected District Attorney. Responsibility for the respondent’s conduct and
\end{quote}

\begin{footnotes}
\footnotetext{33}{Id.}
\footnotetext{35}{Connick v. Thompson, 131 S.Ct. 1350 (2011).}
\footnotetext{36}{“Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused [the District Attorney’s Office to fail to disclose certain evidence to Thompson].” Id. at 1355. See 42 U.S.C. §1983 (1996) provides in relevant part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”.}
\footnotetext{37}{Smith v. Cain, 132 S.Ct. 627 (2012) (reversing a murder conviction for Brady violation by the New Orleans Parish District Attorney’s Office).}
\footnotetext{38}{Brady v. Maryland, 373 U.S. 83 (1963).}
\footnotetext{39}{State ex rel. Oklahoma Bar Ass’n v. Miller, 309 P.3d 108 (Okla. 2013) (assistant prosecutor suspended for 180 days for violations of, inter alia, Rules 8.4, 3.8 & 3.4). The Tenth Circuit has also expressed concern about prosecutorial misconduct in the Oklahoma County District Attorney’s office. See Le v. Mullin, 311 F.3d 1002, 1029 (2002) (“While it is true that any prosecutor will have his share of trial-outcome challenges, over the last fifteen years, the Oklahoma County District Attorney’s office has been cited for actions deemed improper, ‘egregiously improper,’ deceitful and impermissible in striking foul blows, deplorable, ‘perhaps inappropriate,’ worthy of condemnation, and, in this very case, ‘condemned’ and ‘certainly error.’”); “The prosecution’s actions in this case suggest defiance of Oklahoma courts and disregard for Oklahoma law.”) (footnotes omitted).}
\end{footnotes}
trial tactics falls partially to the District Attorney as the chief administrator of the office.\footnote{40}

The New Orleans and Oklahoma examples alone would justify examination of the obligations of managerial and supervising prosecutors under Rules 5.1 and 5.3. But the frequency of prosecutorial misconduct nationwide documented by, \textit{inter alia}, opinions in criminal cases and disciplinary proceedings reported in the last fifteen years, also underscores this need. These decisions reveal numerous violations of \textit{Brady} in criminal cases\footnote{41} (which are also violations of Rule 3.8), and show other examples of misconduct, e.g., prosecutors using false evidence or failing to correct false statements to the court;\footnote{42} prosecutors engaging in other improper courtroom conduct;\footnote{43} and prosecutors engaging in conduct that would violate, \textit{inter alia}, Rule 4.2,\footnote{44} Rule 3.6,\footnote{45} Rule 8.4(a), and Rule 8.3(a).\footnote{46}
E. Basic Requirements

1. Establishing Office-Wide Policies

To accomplish the goals set forth in Rules 5.1 and 5.3, managers must “establish internal policies and procedures.” Generally, these policies and procedures should address confidentiality obligations, how to detect and resolve conflicts of interest, “dates by which actions must be taken in pending matters,” and ways to “ensure that inexperienced lawyers are properly supervised.” In the prosecutorial context, these policies and procedures should specifically facilitate compliance with ABA Model Rule 3.8. As we wrote in ABA Formal Opinion 09-454, “Supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations. To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.” Further, in light of the “intensely difficult ethics issues” that arise for prosecutors, more elaborate procedures may be necessary to ensure compliance.

With respect to nonlawyers, managers must establish policies and procedures that provide for “appropriate instruction and supervision concerning the ethical aspects of their employment . . . [that ] . . . take account of the fact that [nonlawyers] do not have legal training and are not subject to professional discipline.” These policies and procedures for nonlawyers must, among other things, specifically facilitate compliance with Rule 3.8.

For lawyers and nonlawyers the policies and procedures set by managers should include substantive provisions that reasonably ensure compliance, as mandated by paragraph (a), and procedural provisions identifying specific measures that direct supervisors and other responsible individuals should implement to ensure that the policies
and procedures established by the managers will be effectively executed. What those specific measures are will vary, depending on the size and structure of the office; no one size fits all. But some measures must be adopted and implemented. Recommendations for such measures are set forth below.

2. Guidance on Specific Measures

The ABA Standards for Criminal Justice Prosecution Function and Defense Function Standards (the “ABA Standards”), the National District Attorneys Association, National Prosecution Standards published by the National District Attorneys Association (the “District Attorneys Standards”), substantial literature on prosecutorial conduct, and compliance programs implemented by law firms and corporate legal departments in response to the requirements of the Sarbanes-Oxley Act all provide examples of the types of measures that might be adopted. We set forth our recommendations below, based on these and other sources.

a. Training

The ABA Standards recommend that supervising prosecutors train incoming lawyers regardless of their previous experience. We recommend that the training cover the ethical and legal obligations imposed by the Rules of Professional Conduct, including what disclosures and other obligations Rule 3.8 imposes, what public statements may be made under Rules 3.6 and 3.8 (including statements on social media, websites, and blogs), what must be revealed to a tribunal under Rule 3.3, what contacts may be made with represented and unrepresented persons under Rules 4.2 and 4.3, what statements may be made in closing argument, and what conduct by other prosecutors must be reported under Rule 8.3(a). We also recommend that training cover what constitutes Brady material. Others have suggested that the initial training also address office policies and procedures, technical skills, other relevant substantive law, and court rules.


55. Responding to the regulations promulgated by the Securities and Exchange Commission (the “SEC”) under Section 307 of the Sarbanes-Oxley Act --- which sets forth minimum standards of professional conduct for attorneys --- law firms and corporate legal departments adopted internal policies which include but are not limited to distributing written policies describing the up-the-ladder reporting requirements, creating compliance committees and setting up training programs. See James L. Sonne, Sarbanes-Oxley Section 307: A Progress Report on How Law Firms and Corporate Legal Departments Are Implementing SEC Attorney Conduct Rules, 23 GEO. J. LEGAL ETHICS 859, 864-65, 868-69 (2010).

56. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARDS § 3-2.6 & Commentary (3d ed. 1993) (the “ABA Standards”) (“[t]raining programs should be established within the prosecutor’s office for new personnel and for continuing education of the staff”; “[e]ven lawyers with extensive experience in the trial of civil cases must undergo new training … before they can function effectively in the trial of a criminal case”). See also National District Attorneys Association, NATIONAL PROSECUTION STANDARDS §§ 1-5.3, 1-5.4 (2009) (the “District Attorneys Standards”) (“At the time they commence their duties and at regular intervals thereafter, prosecutors should participate in formal training and education programs. Prosecutors should seek out continuing legal education opportunities that focus specifically on the prosecution function . . . . Each prosecutor’s office should develop written and/or electronically retrievable statements of policies and procedures that guide the exercise of prosecutorial discretion and that assist in the performance of those who work in the prosecutor’s office.”). Both the ABA Standards and the District Attorneys Standards state that they are intended only as guides to professional conduct, but the ABA Standards constitute ABA policy. The District Attorneys Standards do not constitute ABA policy. For additional guidance see, e.g., Barry Scheck, Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them, 31 CARDOZO L. REV. 2215, 2244-46 (describing benefits of “Clear Office-Wide Definitions of What Is or Is Not Brady Material”).

57. See NATIONAL PROSECUTION STANDARDS § 5, Commentary (2009) (“A basic orientation package for assistants could include familiarization with office structure, procedures, and policies; the local court system; the operation of local police agencies; and training in ethics, professional conduct, courtroom decorum, and relations with the court and the defense bar.”); CTR ON THE ADMINISTRATION OF CRIMINAL LAW, ESTABLISHING CONVICTIN INTEGRITY PROGRAMS IN PROSECUTORS’ OFFICES: A REPORT OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW’S CONVICTIN INTEGRITY PROJECT, at 17 (2012), available at
addition, making office policies and procedures available to all lawyers in hard copy or electronically retrievable format may help ensure compliance. Updating those policies and procedures regularly is advisable.

Supervising lawyers should also provide initial training for nonlawyers who are “employed, retained or associated with” the office. This group would ordinarily include detectives and investigators, forensic experts in the office, paralegals and clerical staff. The training should include education on the ethical and legal obligations of prosecutors and related office procedures, e.g., proper handling, filing, and retention of forms and documents, and the preservation of evidence. The training should be adequate to insure that the conduct of nonlawyers is compatible with the professional obligations of prosecutors.

Training sessions should be offered as frequently as needed to update lawyers and nonlawyers on relevant subjects, for example, when an important decision is rendered that directly bears on a prosecutor’s professional obligations. Policies, procedures, and training manuals should also be updated regularly, as events require, and key court decisions on prosecutorial conduct should be circulated with explanatory memos. When a court criticizes the conduct of a lawyer or nonlawyer in the office, supervising prosecutors should consider holding special training or educational sessions as appropriate to avoid any repetition.

b. Supervision

Effective supervision would require that supervisors keep themselves informed of the status of and developments in pending cases by, for example, requiring periodic written or oral reports on pending cases. Other examples of appropriate measures include: (i) requiring that supervising prosecutors participate in major decisions, e.g., granting immunity, deciding charges, identifying Brady material, and, where feasible, documenting the basis for these decisions in writing; (ii) establishing a system of individual oversight of line prosecutors, including during the preparation for and the conduct of trials; (iii) pairing untrained or newly-trained prosecutors with more experienced prosecutors; (iv) holding prosecutors with Rule 5.1(b) and 5.3(b) obligations accountable for the conduct of their subordinates; and (v) designating a specific attorney to oversee the review of files for Brady material.

F. Other Recommendations

1. Creating a Culture of Compliance

http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf [hereinafter CONVICTION INTEGRITY PROJECT REPORT] (“Both new and experienced prosecutors must be trained and educated about their ethical and professional obligations. Ongoing training programs are not an admission that an office has a problem with attorney misconduct; they are a necessary component of reminding prosecutors about their unique job responsibilities.”).

58. See NATIONAL PROSECUTION STANDARDS § 5, Commentary.


60. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [3] notes managerial lawyers “may not assume that all lawyers associated with the firm will inevitably conform to the Rules.” Keeping abreast of the developments in the matters under supervision and requiring such periodic reports are reasonable measures to check any such assumptions. See In re Anonymous Member of S. Carolina Bar, 552 S.E.2d 10, 14-15 (S.C. 2001) (“[u]ndoubtedly, the supervision of attorneys by other attorneys in their firm is one of the most effective methods of preventing attorney misconduct”; “[w]hen an attorney has allegedly violated Rule 5.1, it is not a complete defense to prove that the attorney did not know about the underlying misconduct. . . . In fact, a complete lack of knowledge can lead to a finding of poor supervision if the subordinate's violation is such that reasonable supervision would have discovered it.”).

“[T]he ethical atmosphere of [an organization] can influence the conduct of all its members . . . .” Managers and supervisors in prosecutors’ offices should create a “culture of compliance.” This can be done by, e.g., (i) emphasizing ethical values and imperatives during the hiring process; (ii) providing incentives for ethical behavior, such as positive reviews, promotions, and raises; (iii) protecting and rewarding lawyers who fulfill their up-the-ladder duties; (iv) promoting initiatives that make compliance with ethical obligations less demanding for line prosecutors, such as “open-file” discovery policies; (v) publicizing ethical compliance reforms and internal policies both within the office and to the public; and (vi) internally disciplining lawyers and reporting lawyers who violate the Rules of Professional Conduct.

2. Enforcing “Up-the-Ladder” Obligations

Prosecutors, like lawyers in other government offices, have obligations under Rule 1.13 to report conduct by an employee or other constituent that is a violation of law that might be imputed to the office. This raises especially complex issues for prosecutors and other lawyers who work in government offices about the identity of their clients and the nature of their obligations. We do not address these Rule 1.13 issues in this opinion. We focus here on how prosecutors might implement their supervisory and managerial obligations under Rules 5.1 and 5.3 by developing an internal system for “up-the-ladder” reporting of violations of the Rules of Professional Conduct whether or not such violations would also trigger the up-the-ladder reporting obligations of Rule 1.13.

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62. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [3].
63. See Barkow, supra note 53, at 2116 (“Whether or not an office is responding to a history of misconduct, creating a culture of compliance and ethical behavior is in the interests of prosecutors who head the office.”).
64. See CONVICTION INTEGRITY PROJECT REPORT, supra note 56, at 16 (recommending posing ethical hypotheticals and asking “potential hires to discuss key ethical rules or obligations”).
65. See discussion of a prosecutor’s up-the-ladder duties, infra at Part F2.
66. An “open-file” discovery policy includes, for example, the office disclosing all exculpatory evidence of which they are aware, without evaluating materiality, in an effort to avoid both intentional and unintentional withholding of Brady evidence. See Barkow, supra note 53, at 2111 (“Another way of improving transparency and monitoring without imposing substantial costs would be for prosecutors’ offices to adopt an ‘open-file’ discovery process. Many offices already follow open-file policies, and several scholars have touted these policies as a protection against Brady violations.”) (footnote omitted); See also CONVICTION INTEGRITY PROJECT REPORT, supra note 56.
67. This provides interested “stakeholders” the opportunity to comment on these policies. See Barkow, supra note 53, at 2111; CONVICTION INTEGRITY PROJECT REPORT, supra note 56, at 33-34 (discussing the benefits to prosecutors of publicizing their efforts to curb prosecutorial misconduct).
68. ABA MODEL RULES OF PROF’L CONDUCT R. 8.3(a) provides: “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”
69. See ABA MODEL RULES OF PROF’L CONDUCT R. 1.13(b). R. 1.13 cmt. [9] reads, “The duty defined in the Rule [1.13] applies to governmental organizations.” “Up the ladder” obligations are also imposed by the Sarbanes-Oxley rule for lawyers appearing and practicing before the SEC. See 17 C.F.R. §§ 205.3(b), 205.4 & 205.5 (2013) (establishing responsibilities for supervisory and subordinate lawyers to report material violations of the Sarbanes-Oxley Act). For a model up-the-ladder policy, see ASSOC. OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE TASK FORCE ON THE LAWYER’S ROLE IN CORPORATE GOVERNANCE, App. F (2006), which establishes specific procedures, provides for an appropriate level of confidentiality, prohibits retaliation, requires training on reporting requirements, and provides for annual written certification by all lawyers that they are aware of their obligations and will comply.
70. For example, actions by constituents in a prosecutor’s office could lead to liability under 42 U.S.C. §1983, as alleged in Connick v. Thompson, 131 S.Ct. 1350 (2011), and might require up-the-ladder reporting under Rule 1.13. So too might the apparent failure to supervise and train in the Oklahoma County District Attorney’s office noted by the Tenth Circuit in Le v. Mullin, 311 F.3d 1002 (2002), where the Court said that the prosecutor’s actions “suggest defiance of Oklahoma courts and disregard for Oklahoma law.” In such instances there could be violations of Rule 1.13 separate from any violations of Rules 5.1 and 5.3.
Though not addressing Rule 1.13, we recommend that managerial and supervising prosecutors establish a similar system for up-the-ladder reporting concerning possible violations of the Rules of Professional Conduct by lawyers in the office. Such internal reporting procedures would enable managers and supervisors to correct, remedy, and sometimes avoid such violations. A system for this up-the-ladder reporting could include (i) designating a specific attorney or committee to receive reports and address and address and resolve the issues; 72 (ii) permitting confidential review, as appropriate, to promote increased reporting of potential ethical issues; 73 and (iii) requiring the reporting of any reprimand or other criticism by a judge, as well as written complaints or allegations of ethical misconduct by any person, to a supervising prosecutor or to a prosecutor designated for this purpose. 74 In addition, supervising prosecutors should make clear that any lawyer who knows of a violation of the rules of professional conduct may be required to report that information to a supervising prosecutor, or pursuant to an established up-the-ladder regime instituted to comply with Rules 5.1 and 5.3.

3. Discipline

The training and supervision described in this opinion can be enhanced with appropriate remediation and discipline. For example: (i) imposing sanctions within the office; (ii) requiring remedial education targeted at particular types of misconduct; 75 (iii) intensifying, in appropriate cases, the scrutiny of prosecutors who have engaged in improper conduct or whose conduct has been criticized by a court; (iv) demotion or dismissal; and (v) where appropriate, referring the matter to an outside authority under Rule 8.3(a). 76 It may be effective to have responsibility for in-house review placed with a specific supervisory lawyer or a group of lawyers within the office. 77

G. Organizational and Structural Variables

Organizational and structural differences, such as the size of an office, the personnel turnover rate, the manner in which cases are prosecuted, the size of caseloads, 78 and the hierarchical structure may have an impact on which of the measures we recommend should be used to ensure compliance. Large offices with several layers of hierarchy may need to establish a formal committee to coordinate and direct the internal reporting of misconduct and the

72. See ABA Model Rules of Prof’l Conduct R. 5.1 cmt. [3] (“Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee.”).
73. Id.
74. See Barkow, supra note 53, at 2110.
75. For example, if the office is criticized for a Brady violation, appropriate remedial education is imperative.
76. See, e.g., In re Brizzi, 962 N.E.2d 1240 (Ind. 2102) (public reprimand for improper public statements); In re McKinney, 948 N.E.2d 1154 (Ind. 2011) (120 day suspension for conflict of interest); In re Miller, 677 N.E.2d 505 (Ind. 1997) (reprimand for advancing the cause of a civil litigant while serving as a prosecutor). But see, Joel B. Rudin, The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong, 80 Fordham L. Rev. 537, 541-42 (2011); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454, at 2 (“[D]isciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d)’’); United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, Pregerson, Reinhardt, Thomas & Watford dissenting) (denying petition for rehearing en banc) (“[p]rofessional discipline [for Brady violations] is rare”).
77. See Conviction Integrity Project Report, supra note 56, at 16 (discussing creation of “Best Practices Committees”). For an analogous discussion of the benefits of having a general counsel in private firms, see Rotunda & Dzienkowski, supra note 21, § 5.1-1.
78. High caseloads are a particular risk factor. Whether a caseload is manageable may depend on, inter alia, the type and complexity of cases being handled by each lawyer, the experience and ability of each lawyer, and the resources available to support the lawyers. See also Va. Standing Comm. on Legal Ethics, Advisory Op. 1798 (2004) (addressing whether a chief prosecutor violates Rule 5.1 when he assigns too high a caseload; “[w]here a supervising attorney assigns a caseload so large as to preclude any hope of the supervised attorney’s ethically representing the client (or clients), that supervisor would be in violation of Rule 5.1”).
monitoring for ethics violations. Such formalized assignments, on the other hand, are unlikely to be required for small prosecutor’s offices that employ 10 to 15 prosecutors, or even fewer. Supervising prosecutors in these smaller offices may make “reasonable efforts” by simply, for example, adopting an open-door policy for reporting misconduct or assigning a specific person in the office to hear such reports.

Direct supervision and monitoring also may vary with organizational and structural differences. For example, some offices assign multiple prosecutors to handle a case and each prosecutor is responsible for only one stage of the process.79 In these offices, a monitoring scheme is unlikely to be reasonable if no special attention is paid to ensure that important information, such as Brady material, is not lost in the transition from prosecutor to prosecutor. The handling of this transition is especially delicate in offices with high turnover rates--much can be lost with frequent transitions. By contrast, where only one prosecutor handles a case from start to finish and through all stages in the process, a different monitoring regime will be appropriate.80

H. Conclusion

Prosecutors with managerial authority and supervisory lawyers must make “reasonable efforts to ensure” that all lawyers and nonlawyers in their offices conform to the Rules of Professional Conduct. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to insure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations. The particular measures that managerial and supervisory prosecutors must implement to comply with these rules will depend on a variety of factors, including the size and structure of their offices, as set forth in this opinion.

79. Don Stemen & Bruce Frederick, Rules, Resources, and Relationships, Contextual Constrains on Prosecutorial Decision Making, 31 QUINNIPIAC L. REV. 1, 13 (2013) (“horizontal prosecution” refers to matters handled by “multiple prosecutors, each handling the case at one stage of the process”).

80. Id. at 12 (“vertical prosecution” refers to matters handled by one prosecutor at all stages). See also Formal Op. 09-454, supra note 6, at 8 (“[W]hen responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. . . . Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant’s guilt in another case, that prosecutor provides it to the colleague responsible for the other case.”).
Formal Opinion 09-454     July 8, 2009
Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.” This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution. Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Prosecutors have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct, which provides: “The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” This obligation may overlap with a prosecutor's other legal obligations.

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*, which held that criminal defendants have a due process right to receive favorable information from the prosecution. This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule. Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule. Finally, although courts

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1 This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2 *Brady*, 373 U.S. at 87 (“the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”); *see also* Kyles v. Whitley, 514 U.S. 419, 432 (1995) (“The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century stricures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*."


4 *See* e.g., Mastrochico v. Vose, 2000 WL 303307 *13 (D.R.I. 2000), aff'd, 274 F.3d 590 (1st Cir.2001) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close
sometimes sanction prosecutors for violating disclosure obligations.\textsuperscript{6} disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

The Committee undertakes its exploration by examining the following hypothetical.

A grand jury has charged a defendant in a multi-count indictment based on allegations that the defendant assaulted a woman and stole her purse. The victim and one bystander, both of whom were previously unacquainted with the defendant, identified him in a photo array and then picked him out of a line-up. Before deciding to bring charges, the prosecutor learned from the police that two other eyewitnesses viewed the same line-up but stated that they did not see the perpetrator, and that a confidential informant attributed the assault to someone else. The prosecutor interviewed the other two eyewitnesses and concluded that they did not get a good enough look at the perpetrator to testify reliably. In addition, he interviewed the confidential informant and concluded that he is not credible.

Does Rule 3.8(d) require the prosecutor to disclose to defense counsel that two bystanders failed to identify the defendant and that an informant implicated someone other than the defendant? If so, when must the prosecutor disclose this information? Would the defendant’s consent to the prosecutor’s noncompliance with the ethical duty eliminate the prosecutor’s disclosure obligation?

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor’s constitutional obligation extends only to favorable information that is “material,” \textit{i.e.}, evidence and information likely to lead to an acquittal.\textsuperscript{7} In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law.\textsuperscript{8} The following review of the rule’s background and history indicates that Rule 3.8(d) 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.

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives “not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern to violating [Rule 3.8]”\textsuperscript{9}.

\textsuperscript{6} See, e.g., \textit{In re Jordan}, 913 So. 2d 775, 782 (La. 2005) (prosecutor’s failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); N.C. State Bar v. Michael B. Nifong, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm’n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); \textit{In re Grant}, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state’s key witness in murder prosecution).

\textsuperscript{7} Cf. Rule 3.8, cmt. [9] (“A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.”)

\textsuperscript{8} “[Petitioner] must convince us that ‘there is a reasonable probability’ that the result of the trial would have been different if the suppressed documents had been disclosed to the defense... [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” \textit{Strickler}, 527 U.S. at 290 (citations omitted); see also United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) (“The result of the progression from \textit{Brady} to \textit{Agurs} and \textit{Bagley} is that the nature of the prosecutor’s constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.”)
impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Similarly, Comment [1] to Model Rule 3.8 states that: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”

In 1908, more than a half-century prior to the Supreme Court’s decision in \textit{Brady v. Maryland}, the ABA Canons of Professional Ethics recognized that the prosecutor’s duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused. This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: “A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.” The ABA adopted the rule against the background of the Supreme Court’s 1963 decision in \textit{Brady v. Maryland}, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation.

Over the course of more than 45 years following \textit{Brady}, the Supreme Court and lower courts issued many decisions regarding the scope of prosecutors’ disclosure obligations under the Due Process Clause. The decisions establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor’s obligation “to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence,” and most importantly, “that special precautions are taken to prevent . . . the conviction of innocent persons.” A prosecutor’s timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited

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\textsuperscript{9} Berger v. United States, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor’s obligation to seek justice date back more than 150 years. See, e.g., Rush v. Cavanaugh, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor “is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.”)

\textsuperscript{10} Prior to \textit{Brady}, prosecutors’ disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. See, e.g., Jencks v. United States, 353 U.S. 657, 668, n. 13 (1957), citing Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done;" United States v. Andolschek, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) (“While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.”)

\textsuperscript{11} ABA Canons of Professional Ethics, Canon 5 (1908) (“The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.”)

\textsuperscript{12} See, e.g., OLAVI MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) (“a disparity exists between the prosecutor’s disclosure duty as a matter of law and the prosecutor’s duty as a matter of ethics”). For example, \textit{Brady} required disclosure only upon request from the defense – a limitation that was not incorporated into the language of DR 7-103(B), see MARU, id. at 330 – and that was eventually eliminated by the Supreme Court itself. Moreover, in United States v. Agurs, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. MARU, id.

\textsuperscript{13} Rule 3.8, cmt. [1].

\textsuperscript{14} Id.
access to evidence, the prosecutor’s disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d) \( ^{15} \) establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation. \(^{16} \) The ABA Standards for Criminal Justice likewise acknowledge that prosecutors’ ethical duty of disclosure extends beyond the constitutional obligation. \(^{17} \)

In particular, Rule 3.8(d) is more demanding than the constitutional case law, \(^{18} \) in that it requires the disclosure of evidence or information favorable to the defense\(^ {19} \) without regard to the anticipated impact of the evidence or information on a trial’s outcome. \(^{20} \) The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution. \(^{21} \)

\(^{15} \) For example, Rule 3.4(a) makes it unethical for a lawyer to “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value” (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to “offer an inducement to a witness that is prohibited by law” (emphasis added), and Rule 3.4(c) forbids knowingly disobeying “an obligation under the rules of a tribunal . . . .” These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

\(^{16} \) This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative “materiality” test. See Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by Brady, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.”), citing inter alia, Rule 3.8(d); Kyles, 514 U.S. at 436 (observing that Brady “requires less of the prosecution than” Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) (“The professional ethical duty is considerably broader than the constitutional duty announced in Brady v. Maryland . . . and its progeny”); PETER A. JOY & KEVIN C. McMUNGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

\(^{17} \) The current version provides: “A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.” ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), available at http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. The accompanying Commentary observes: “This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the correlative duty imposed upon prosecutors by constitutional law.” Id. at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: “It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity.”

\(^{18} \) See, e.g., United States v. Jones, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); United States v. Acosta, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the Brady line of cases. See In re Attorney C, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof’l Conduct 3.8, cmt. 1 (“[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.”)

\(^{19} \) Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that “mitigates the offense.” Evidence or information mitigates the offense if it tends to show that the defendant’s level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

\(^{20} \) Consequently, a court’s determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). See, e.g., U.S. v. Barraza Cazares, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer’s statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

\(^{21} \) Cf. Cone v. Bell, 129 S. Ct. at 1783 n. 15 (“As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”); Kyles, 514 U.S. at 439 (prosecutors should avoid “tacking too close to the wind”). In some jurisdictions, court rules and court orders serve a similar purpose. See, e.g., Local Rules of the U.S. Dist. Court for the Dist. of Mass., Rule 116.2(A)(2) (defining “exculpatory information,” for purposes of the prosecutor’s pretrial disclosure obligations under the Local Rules, to include “among other things” “all information that is material and favorable to the accused because it tends to . . . [cast] . . . doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which, if allowed, be appealable . . . [or] . . . cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.”)
Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution’s proof. Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

Further, this ethical duty of disclosure is not limited to admissible “evidence,” such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable “information.” Though possibly inadmissible itself, favorable information may lead a defendant’s lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor’s disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant’s guilt, or that the favorable evidence is highly unreliable.

In the hypothetical, supra, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant’s guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eyewitnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses’ testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant’s favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information “known to the prosecutor.” Knowledge means “actual knowledge,” which “may be inferred from [the] circumstances.” Although “a lawyer cannot ignore the obvious,” Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors’ legal obligations under other law. Although the rule requires

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22 Notably, the disclosure standard endorsed by the National District Attorneys’ Association, like that of Rule 3.8(d), omits the constitutional standard’s materiality limitation. NATIONAL DISTRICT ATTORNEYS’ ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) (“The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged.”). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

23 For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

24 Rule 1.13, cmt. [3]. cf. ABA Formal Opinion 95-396 (“[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious.”); see also ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) (“A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution’s case or aid the accused.”).

25 Rule 1.0(f).
prosecutors to disclose known evidence and information that is favorable to the accused, it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution’s proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively. Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty. Because the defendant’s decision may be strongly influenced by defense counsel’s evaluation of the strength of the prosecution’s case, timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant’s arraignment. Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant’s identity would be revealed, the prosecutor may seek a protective order.

26 If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant’s guilt. However, a prosecutor’s erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor’s judgment was made in good faith. Cf. Rule 3.8, cmt. [9].

27 Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

28 Compare D.C. Rule Prof’l Conduct 3.8(d) (explicitly requiring that disclosure be made “at a time when use by the defense is reasonably feasible”); North Dakota Rule Prof’l Conduct 3.8(d) (requiring disclosure “at the earliest practical time”); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, supra note 17 (calling for disclosure “at the earliest feasible opportunity”).

29 See ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

30 In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide “open file” discovery to defense counsel—that is, they provide access to all the documents in their case file including incriminating information—to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. See N.C. GEN. STAT. § 15A-903 (2007); see generally Robert P. Mosteller, Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery, 15 GEO. MASON L. REV. 257 (2008).

31 See JOY & McMUNIGAL, supra note 16 at 145 (“the language of the rule, in particular its requirement of ‘timely disclosure,’ certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner”).

32 Rule 3.8, Comment [3].
Defendant’s Acceptance of Prosecutor’s Nondisclosure

The question may arise whether a defendant’s consent to the prosecutor’s noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor’s duty to comply. For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is “no.” A defendant’s consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant’s consent.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client or another. Rule 3.8(d) is designed not only for the defendant’s protection, but also to promote the public’s interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant’s consent might undermine a defense lawyer’s ability to advise the defendant on whether to plead guilty, with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution’s purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.

The Disclosure Obligation in Connection with Sentencing

The obligation to disclose to the defense and to the tribunal, in connection with sentencing, all unprivileged mitigating information known to the prosecutor differs in several respects from the obligation of disclosure that apply before a guilty plea or trial.

First, the nature of the information to be disclosed is different. The duty to disclose mitigating information refers to information that might lead to a more lenient sentence. Such information may be of various kinds, e.g., information that suggests that the defendant’s level of involvement in a conspiracy was less than the charges indicate, or that the defendant committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness).

Second, the rule requires disclosure to the tribunal as well as to the defense. Mitigating information may already have been put before the court at a trial, but not necessarily when the defendant has pled guilty. When an agency prepares a pre-sentence report prior to sentencing, the prosecutor may provide mitigating information to the relevant agency rather than to the tribunal directly, because that ensures disclosure to the tribunal.

Third, disclosure of information that would only mitigate a sentence need not be provided before or during the trial but only, as the rule states, “in connection with sentencing,” i.e., after a guilty plea or

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33 It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may require a defendant entirely to waive the right under Brady to receive favorable evidence. In United States v. Ruiz, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in Giglio v. United States, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that “[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant.” 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor’s constitutional duties of disclosure, as already discussed.

34 See, e.g., Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule’s protection. See, e.g., Rule 1.7(b)(1).

35 See, e.g., Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial protective order); Rule 4.2 (permitting communications with represented person with consent of that person’s lawyer or pursuant to court order).

36 See Rules 1.2(a) and 1.4(b).

37 The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.
verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing.38

The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Any supervisory lawyer in the prosecutor’s office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.39 Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure,40 and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.41 To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant’s guilt in another case, that prosecutor provides it to the colleague responsible for the other case.42

38 The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant’s interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant’s interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.
39 Rules 5.1(a) and (b).
40 Rule 5.1(b).
41 Rule 5.1(c). See, e.g., In re Myers, 584 S.E.2d 357, 360 (S.C. 2003).
42 In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). See, e.g., Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).
[Prosecution] Standard 3-3.11 Disclosure of Evidence by the Prosecutor

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

Commentary

Withholding Evidence of Innocence

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, including consideration of exculpatory evidence known to the prosecution. This obligation, which is virtually identical to that imposed by ABA model ethical codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law. The National District Attorneys Association similarly requires prosecutors to “disclose the existence or nature of exculpatory evidence pertinent to the defense.”

Compliance with Discovery Request

The development of discovery procedures in criminal cases entails obligations on the part of prosecutors to seek diligently and in good faith to make the procedures function effectively. Prosecutors should not compel defense counsel to resort to a court order for discovery in order to harass the defense, make discovery more costly, or obstruct the flow of information when the prosecutor knows the information sought is discoverable. Where there is no obligation to produce that which is sought in a discovery request, however, a response which makes this point is in compliance with this Standard. Nonetheless, independent of any rules or statutes making prosecution evidence available to discovery processes, many experienced prosecutors have habitually disclosed most, if not all, of their evidence to defense counsel. This practice, it is believed, often leads to guilty pleas in cases that would otherwise be tried. A defense preview of a strong prosecution case, for example, frequently strengthens the posture of a defense lawyer who is trying to persuade the defendant that a guilty plea is in the defendant's best interest. Voluntary disclosure also serves to open areas in which the parties can stipulate to undisputed or other facts for which a courtroom contest is a waste of time.

Intentional Ignorance of Facts
Just as it is unprofessional for defense counsel to adopt the tactic of remaining intentionally ignorant of relevant facts known to the accused in order to provide a "free hand" in the client's defense, it is similarly unprofessional for the prosecutor to engage in a comparable tactic. A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether disclosure to the defense may be required. The duty of the prosecutor is to acquire all the relevant evidence without regard to its impact on the success of the prosecution.
ABA Model Code of Professional Responsibility

CANON 5 A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

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DR 7-103 - Performing the Duty of Public Prosecutor or Other Government Lawyer.

(A) - A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) - A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.
ABA Model Rule of Professional Conduct 3.8

Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor’s jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.
District of Columbia Rules of Professional Conduct: Rule 3.8--Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall not:

(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt;

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor’s action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or

(g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.
North Dakota Rules of Professional Conduct: Rule 3.8--Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall not:

(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt;

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor’s action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or

(g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.