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Unleashing Rule 5.1 to Combat Prosecutorial Misconduct

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INTRODUCTION

When it comes to enforcement of the Rules of Professional Conduct, disciplining individual prosecutors will never be enough to overcome the multifarious incentives[1] some prosecutors have to cut corners to secure convictions. While bar discipline against prosecutors is increasing in frequency, professional regulators have a temptation to focus on individual actors rather than pay attention to systemic failures. No single instance of prosecutorial misconduct—revealed perhaps by the reversal of a criminal case or the exoneration of an innocent defendant—can ever be fully explained by the deeds of a lone actor without looking at who establishes enforcement priorities, who sets office policies, who provides incentives to subordinates, and who does the training.[2] Leaders in the office are usually involved, either by omission (failing to catch an error) or commission (creating an office culture where ethical lapses are tolerated or even encouraged).

The topic of this Article is the little understood and seldom invoked Rule of Professional Conduct 5.1, and how that disciplinary rule can be more aggressively enforced to detect and deter prosecutorial misconduct. The notion that supervisory attorneys must be more actively involved in their colleagues' ethical decisions and conduct has been recognized by the bar since the adoption of Rule 5.1 in 1983, but the rule remains undertheorized by scholars and underutilized by disciplinary authorities.

The Article proceeds in four parts. Section I reviews the obstacles to detecting and deterring prosecutorial misconduct in the criminal justice system. Section II discusses the history, structure, and purpose of ABA Model Rule 5.1 and analyzes the facts of two recent cases where Rule 5.1 has been used successfully by state bar regulators to discipline managers in a prosecutor's office for failing adequately to supervise lower-level attorneys. Section III borrows from literature on corporate criminality to explain why enforcement of professional discipline against leaders in a prosecutor's office is needed to incentivize the

1 *See* discussion *infra* at notes 9, 13 and accompanying text.

2 James M. Doyle, *Our Focus on Prosecutors' Impunity Blinds Us*, MASS. LAWS. WKLY., Jan. 6, 2023, at 32 (urging sentinel event review following exoneration of those wrongfully convicted).

adoption of office policies as well as more rigorous supervision and training. Section IV then discusses three recurring and highly intractable types of prosecutorial misconduct that could be prevented or reduced if more head prosecutors were willing to adopt written, transparent, and publicly available office policies and procedures: grand jury practice, disclosure of exculpatory evidence, and use of cooperating witnesses.

I
BARRIERS TO MEANINGFUL REFORM

Prosecutorial misconduct occurs with disturbing frequency in our criminal justice system.[3] While it may not be an epidemic,[4] it is certainly endemic. Next to misidentification by eyewitnesses, prosecutorial misconduct may be the second-leading cause of wrongful convictions.[5] A 2020 study by the National Registry of Exonerations found that of the first 2,400 exonerations in the registry (those posted by February 27, 2019), official misconduct contributed to the false convictions of fifty-four percent of defendants who were later exonerated.[6] Concealing exculpatory evidence—the most common form of official misconduct and one directly attributable to

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3 *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 59 (2005); Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 53 (2017) (explaining how exonerations, rise of information technology, and academic attention have all heightened public awareness of the problem).

4 *Compare* United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land."), *with* Joshua Marquis, *Prosecutorial Misconduct: A Rampant and Epidemic Lie*, CRIM. JUST. & THE NATURE OF THE RELATIONSHIP BETWEEN POPULAR CULTURE, MEDIA, AND THE L. (Apr. 14, 2014), https://coastda.blogspot.com/2014/04/a-rampant-and-epidemic-lie.html [https://perma.cc/S3K8-WGJE] (arguing that many if not most *Brady* violations involve information in police officers' files that was not turned over to the prosecutor).

5 Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 401 (2006) (collecting studies).

6 NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT iii (Samuel R. Gross et al. eds., 2020); Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 J. MARSHALL L. REV. 409, 423 (2001) (discussing 2001 study of Illinois Death Penalty cases finding that prosecutorial misconduct resulted in twenty-one percent of reversals).

the prosecutor[7]—occurred in forty-four percent of the exonerations studied.[8]

There are four primary reasons why prosecutorial misconduct is difficult to detect and deter. First, several forms of prosecutorial misconduct occur in secret, making it difficult to police. Prosecutors who engage in off-the-record contact with members of the grand jury, intentionally or recklessly suppress exculpatory evidence, or present testimony through cooperating witnesses that they know to be false (three problems discussed later in this Article) might be willing to risk doing so under the assumption that their conduct may never be detected.[9] Overworked and underfunded defense counsel and the ubiquity of plea bargaining exacerbate this risk-taking because the prosecutor's advocacy tactics might remain unchecked by an adversary or judicial neutral.[10]

Second, some judges are reluctant to report prosecutorial misconduct to bar disciplinary authorities notwithstanding an ethical obligation on their part to do so.[11] Judges may decline to report for myriad reasons: because they do not wish to deter expected adversarial zeal in their courtrooms, because they do not want to see another government actor performing a vital public function sanctioned, or because they do not feel like they have enough information about the case to second-guess discretionary decisions of the prosecutor.[12]

Third, notwithstanding the possibility of judicial or professional sanction, some prosecutors are willing to run the risk of committing prosecutorial misconduct due to a "win at all costs" mentality.[13]

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7 Kyles v. Whitley, 514 U.S. 419, 437 (1995) (explaining that an individual prosecutor has responsibility to learn about exculpatory evidence held by all government agents involved in the case, including the police).

8 NAT'L REGISTRY OF EXONERATIONS, *supra* note 6, at iv.

9 *See* Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 63 (2012) ("[M]uch of any prosecutor's discretionary power is exercised behind closed doors . . . .").

10 Arthur L. Rizer III, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845, 858 (2003) ("It is estimated that 28% of wrongful convictions are in part or directly a result of shoddy defense work . . . . [I]t is practically impossible to assemble a compelling defense without access to some of the multitude of assets that are accessible to the state.").

11 *See* MODEL CODE OF JUD. CONDUCT r. 2.15 (AM. BAR ASS'N 2020) ("A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct . . . shall inform the appropriate authority.").

12 *See* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2096 (2010).

13 *Id.* at 2091–92.

Pressure to secure a conviction may come from personal ambition or office culture. It may also occur when prosecutors become co-opted by the police[14] or lapse into tunnel vision, causing them to reject alternative hypotheses of what may have transpired in the case.[15]

Finally, tort liability does not serve as an adequate deterrent to prosecutorial misconduct because the hurdles for victims who wish to bring civil suits against prosecutors are practically insurmountable.[16] Prosecutors have absolute immunity in 42 U.S.C. § 1983 actions for conduct "intimately associated with the judicial phase of the criminal process."[17] Moreover, prosecutors enjoy absolute immunity under § 1983 even when the plaintiff's claim is that the prosecutor failed to create a proper administrative system for identifying and preventing adversarial misconduct.[18] Each of the areas discussed later in this Article—presentations before the grand jury, disclosure of *Brady* material, and use of cooperating witnesses—occur during the advocacy phase of the criminal proceeding, and thus are subject to absolute immunity.[19] The breadth of absolute immunity "remove[s] prosecutors from the incentive-based forces that permeate the tort system, which are designed to promote safety, minimize near misses, and compensate wronged individuals."[20]

One of the justifications the Supreme Court relied upon in 1976 for granting absolute immunity for prosecutors under § 1983 was the availability of bar regulation to detect and deter misconduct.[21] Since

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14 Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 900 (2020).

15 Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 329 (2006).

16 Barkow, *supra* note 12, at 2094.

17 Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

18 Van de Kamp v. Goldstein, 555 U.S. 335, 344–46 (2009). Although *Goldstein* challenged administrative procedures pertaining to use of jailhouse informants and collection of impeaching information, they were considered procedures directly connected with a trial's conduct. "The fact that the office's general supervision and training methods are at issue is not a critical difference for present purposes. The relevant management tasks concern how and when to make impeachment information available at trial. . . ." *Id.* at 335 (emphasis omitted).

19 *See* Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993); *see also* Johns, *supra* note 3, at 94.

20 Brian M. Murray et al., *Qualifying Prosecutorial Immunity Through* Brady *Claims*, 107 IOWA L. REV. 1107, 1111 (2022).

21 *Imbler*, 424 U.S. at 429 ("[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.").

the early 2000s, scholars like Fred Zacharias, Bruce Green, Monroe Freedman and myself began urging more professional discipline of prosecutors.[22] These scholars and others identified several reasons for the apparent reluctance of professional regulators to "take on" the conduct of government lawyers in criminal cases: the perceived institutional incompetence of regulators to wade into discretionary decisions of prosecutors in complex cases; the separation of powers between executive and judicial branches; and the mistaken belief that constitutional protections for the accused might adequately deter misconduct.[23]

Over twenty years later, there may now be reason for cautious optimism that the call for more rigorous professional regulation of prosecutors is finally taking root. In 2013, the Center for Prosecutor Integrity conducted a study of disciplinary sanctions against prosecutors. It found that there were sixty-three public sanctions imposed against prosecutors between 1963–2013. For that fifty-year period, this amounted to an average of 1.26 sanctions against prosecutors per year, nationwide. In the most recent ten-year period between 2013 and 2023, there have been twenty-five instances where prosecutors were publicly sanctioned in the United States for misconduct in criminal cases, for an average of 2.5 cases per year.[24]

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22 Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 765 (2001); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1596 (2003); Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 30 HOFSTRA L. REV. 121, 122 (2001); R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 383 (2000).

23 *See* Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 145 (2019); MacLean & Wilks, *supra* note 9, at 67; Barkow, *supra* note 12; R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 SAN DIEGO L. REV. 93, 98 (2011) ("[Courts] assume that contract principles, coupled with a trial court's obligation to conduct a plea colloquy that ensures both that there is a factual basis for the plea and that the defendant's relinquishment of rights is voluntary and informed, will be sufficient to curtail prosecutorial misconduct . . . .").

24 *See In re* Foster, 215 N.E.3d 394 (Mass. 2023) (imposing disbarment, suspension and public reprimand for three prosecutors involved in failure to disclose exculpatory evidence); Larsen v. Utah State Bar, 379 P.3d 1209 (Utah 2016) (suspending prosecutor from the practice of law for seven months—thirty days for recklessly making a false statement of fact to a tribunal in violation of Utah Rules of Pro. Conduct 3.3(a)(1) and six months for knowingly failing to make a timely disclosure of evidence favorable to the defense in violation of Utah Rules of Pro. Conduct 3.8(d)); Law. Disciplinary Bd. v. Amos, 760 S.E.2d 424 (W.Va. 2014) (suspending prosecutor from the practice of law for seventy-five days for engaging in inappropriate out-of-court conduct with the respondent in a case for which he was an assistant prosecutor, thereby creating a conflict of interest in violation of W. Va.

Rules of Pro. Conduct 1.7(b), communicating with a person represented by counsel without authorization in violation of W. Va. Rules of Pro. Conduct 4.2, and engaging in conduct prejudicial to the administration of justice in violation of W. Va. Rules of Pro. Conduct 8.4(d)); *In re* Kurtzrock, 192 A.D.3d 197 (N.Y. App. Div. 2020) (suspending prosecutor from the practice of law for two years for failing to make timely disclosure of exculpatory evidence known to him in violation of N.Y. Rules of Pro. Conduct. 3.8(b), engaging in conduct prejudicial to the administration of justice in violation of N.Y. Rules of Pro. Conduct. 8.4(d), and engaging in conduct adversely reflecting on his fitness as a lawyer in violation of N.Y. Rules of Pro. Conduct 8.4(h)); State *ex rel.* Okla. Bar Ass'n v. Miller, 309 P.3d 108 (Okla. 2013) (suspending prosecutor from the practice of law for 180 days and a partial payment of costs for issuing documents under false pretenses and manipulating witness testimony, thereby engaging in conduct prejudicial to the administration of justice in violation of Okla. Rules of Pro. Conduct 8.4(d), failing to timely disclose exculpatory evidence in violation of Okla. Rules of Pro. Conduct 3.8(d), unlawfully obstructing another party's access to evidence in violation of Okla. Rules of Pro. Conduct 3.4(a), eliciting false testimony in violation of Okla. Rules of Pro. Conduct 3.4(b), and alluding to matters in trial that are unsupported by evidence in violation of Okla. Rules of Pro. Conduct 3.4(e)); *In re* Disciplinary Action Against Feland, 820 N.W.2d 672 (N.D. 2012) (admonishing prosecutor and requiring that she pay partial costs of the hearing for failing to provide opposing counsel with evidence that would have assisted in the defense of the case in violation of N.D.R. Pro. Conduct 3.8(d)); Att'y Grievance Comm'n of Md. v. Cassilly, 262 A.3d 272 (Md. 2021) (disbarring prosecutor for knowingly making false statements of fact before the court in violation of Md. Rules 19-303.3(a) and 19-308.4(c), destroying exculpatory evidence in violation of Md. Rules 19-303.4(a) and 19-303.8(d), refusing to answer the Bar Counsel's lawful requests for information in violation of Md. Rule 19-308.1(b), and engaging in conduct that would negatively impact the perception of the legal profession and thereby prejudice the administration of justice in violation of Md. Rule 19-308.4(d)); *In re* Arabia, 495 P.3d 1103 (Nev. 2021) (publicly reprimanding prosecutor for representing a client despite having a concurrent conflict of interest and without obtaining the client's informed consent in violation of Nev. Rules of Pro. Conduct 1.7(a) & (b)(4), and for preventing an administrative proceeding from occurring to further his own interests, thereby engaging in conduct prejudicial to the administration of justice in violation of Nev. Rules of Pro. Conduct 8.4(d)); Bd. of Pro. Resp. v. Argeris, 341 P.3d 1030 (Wyo. 2014) (suspending prosecutor from the practice of law for thirty days for failing to inform county commissioners that administrative fees and costs she submitted to the county were associated with her own prior misconduct in violation of Wyo. Rules of Pro. Conduct 8.4(c), for declining county commissioners' requests to consult outside counsel on the matter of her own misconduct despite a clear conflict of interest in violation of Wyo. Rules of Pro. Conduct 1.7(a)(2) and 1.8, and for failing to inform the county that a complaint regarding the misconduct had been filed against her in an individual capacity and not as the County and Prosecuting Attorney, thereby breaching her duty of reasonable disclosure to the county as her client in violation of Wyo. Rules of Pro. Conduct 1.4); *In re* Spradling, 509 P.3d 483 (Kan. 2022) (disbarring prosecutor for making frivolous assertions unsupported by evidence and without a good-faith basis for modifying the law in violation of KRPC 3.1, for intentionally making false statements of material fact before the court in violation of KRPC 3.3(a)(1), for alluding to matters in trial unsupported by admissible evidence in violation of KRPC 3.4(e), for making false statements of material fact in a disciplinary investigation in violation of KRPC 8.1(a), for engaging in dishonest conduct in violation of KRPC 8.4(c), and for engaging in conduct that prejudiced defendants' rights to a fair trial in violation of KRPC 8.4(d)); Disciplinary Couns. v. Brockler, 48 N.E.3d 557 (Ohio 2016) (suspending prosecutor from the practice of law for one year for creating a fake Facebook account to manipulate alibi witnesses in a murder trial for which he was the assistant prosecutor,

thereby engaging in both deceptive conduct and conduct prejudicial to the administration of justice in violation of Ohio Rules of Pro. Conduct 8.4(c) & (d)); Cleveland Metro. Bar Ass'n v. Hurley, 34 N.E.3d 116 (Ohio 2018) (suspending prosecutor from the practice of law for two years, and a period of probation after the prosecutor pleaded guilty to a fifth-degree felony and two first-degree misdemeanors, all of which reflected adversely on his trustworthiness as a lawyer in violation of Ohio Rules of Pro. Conduct 8.4(b) and constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Ohio Rules of Pro. Conduct 8.4(c)); Bd. of Pro. Resp., Wyo. State Bar v. Hinckley, 503 P.3d 584 (Wyo. 2022) (suspending prosecutor from the practice of law for three years for failing to comply with court deadlines and making representations to the court regarding digital records without adequate investigation, thereby failing to act with reasonable diligence and promptness in representing a client in violation of Wyo. Rules of Pro. Conduct 1.3, failing to timely obtain digital records that delayed the litigation process for his client in violation of Wyo. Rules of Pro. Conduct 3.2, failing to comply with a court order to promptly request digital records and making prejudicial closing statements in violation of Wyo. Rules of Pro. Conduct 3.4(c), and because the aforementioned conduct was prejudicial to the administration of justice in violation of Wyo. Rules of Pro. Conduct 8.4); Law. Disciplinary Bd. v. Busch, 754 S.E.2d 729 (W. Va. 2014) (suspending prosecutor from the practice of law for three years for knowingly making false statements of material fact before the court in violation of W. Va. Rules of Pro. Conduct 3.3, ignoring requests for evidence by opposing counsel and disobeying court orders to produce copies of evidence in violation of W. Va. Rules of Pro. Conduct 3.4(a) & (c), failing to timely disclose potentially exculpatory evidence in violation of W. Va. Rules of Pro. Conduct 3.8, and because the aforementioned conduct was dishonest and prejudicial to the administration of justice in violation of W. Va. Rules of Pro. Conduct 8.4(c) & (d)); State *ex rel.* Okla. Bar Ass'n v. Wintory, 350 P.3d 131 (Okla. 2015) (suspending attorney for two years and one day because he was suspended in another state for conduct prejudicial to the administration of justice and was therefore subject to reciprocal disciplinary action under Okla. Rules of Disciplinary Proc. 7.7); People v. Ruybalid, Nos. 13PDJ065, 14PDJ064, 2015 Colo. Discipl. LEXIS 12 (Colo. O.P.D.J. Jan. 28, 2015) (suspending prosecutor for six months and a probationary period for failing to timely determine and disclose relevant information and evidence to investigative personnel and defense counsel, thereby failing to act with reasonable diligence and promptness when representing clients in violation of Colo. Rules of Pro. Conduct 1.3 and failing to make reasonable efforts to ensure that his subordinates adhered to the rules of professional conduct in violation of Colo. Rules of Pro. Conduct 5.1(b)); *In re* Favata, 119 A.3d 1283 (Del. 2015) (suspending prosecutor for six months and one day for knowingly making false statements of material fact before the court in violation of Del. Rules of Pro. Conduct 3.3(a)(1), stating his personal opinion about the credibility of a State's witness in violation of Del. Rules of Pro. Conduct 3.4(e), making demeaning remarks about the defendant that constituted conduct discourteous to the court in violation of Del. Rules of Pro. Conduct 3.5(d), and because the aforementioned conduct was dishonest and prejudicial to the administration of justice in violation of Del. Rules of Pro. Conduct 8.4(c) & (d)); Livingston v. Va. State Bar, 744 S.E.2d 220 (Va. 2013) (remanding to determine appropriate sanction for issuing three erroneous indictments against a defendant and thereby failing to provide competent representation to the Commonwealth in violation of Va. Rules of Pro. Conduct 1.1); State *ex rel.* Okla. Bar Ass'n v. Bounds, 415 P.3d 519 (Okla. 2018) (suspending prosecutor for two years and one day after being convicted of felony unlawful possession of a controlled substances and misdemeanor unlawful possession of drug paraphernalia, subjecting him to discipline under Okla. Rules of Disciplinary Proc. 7.1); *In re* Kratz, 851 N.W.2d 219 (Wis. 2014) (suspending prosecutor for four months for making sexual advances toward the victim of a domestic abuse crime while prosecuting the perpetrator of the crime, thereby creating a concurrent conflict of interest in violation of Wis. SCR 20:1.7, engaging in "offensive

Although this analysis is imperfect because it does not include private reprimands, it suggests that the rate of disciplinary sanction of prosecutors has doubled in the past decade. That is a promising trend that shows an increasing willingness on the part of bar disciplinary authorities to investigate and punish government attorneys in criminal cases.

Some scholars are less sanguine than I about the possibility of external regulation to change prosecutorial behavior. Stephanos Bibas posits that conventional external regulation cannot work well because outsiders lack the information, capacity, and day-to-day oversight to review patterns of decisions.[25] John Pfaff argues that external regulation has largely failed, and that internal regulation holds the greatest promise for addressing prosecutorial misconduct. Pfaff writes that "[g]uidelines will promote accuracy and consistency. They will make prosecutor offices more transparent. They will target

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personality," thereby violating his oath as an attorney in violation of Wis. SCR 20:8.4(g) and Wis. SCR 40.15, and harassing several women on the basis of their sex in violation of Wis. SCR 20:8.4(i)); Iowa Sup. Ct. Att'y Discipline Bd. v. Watkins, 944 N.W.2d 881 (Iowa 2020) (noting indefinite suspension for engaging in sexual harassment on a number of occasions including while serving as an elected county attorney, all in violation of Iowa Rules of Pro. Conduct 32:8:4(g)); State *ex rel.* Off. of Disciplinary Couns. v. Price, No. 14-0899, 2015 W. Va. LEXIS 127 (W. Va. Feb. 10, 2015) (suspending prosecutor for failing to memorialize a defendant's waiver of the statute of limitations due to inexperience and negligence in violation of W. Va. Rules of Pro. Conduct 1.1 and intentionally failing to timely submit orders in several proceedings in pending cases in violation W. Va. Rules of Pro. Conduct 1.3); Bd. of Pro. Resp., Wyo. State Bar v. Manlove, 527 P.3d 186 (Wyo. 2023) (noting disbarment for failing to timely collect, review, and disclose relevant evidence, thereby failing in her duties of competent and diligent representation as a District Attorney in violation of Wyo. Rules of Pro. Conduct 1.1 and 1.3, knowingly failing to timely disclose evidence to opposing counsel in violation of Wyo. Rules of Pro. Conduct 3.4(c), knowingly misrepresenting her reasons for failing to timely disclose evidence and thereby disrespecting the court in violation of Wyo. Rules of Pro. Conduct 3.3(a), knowingly making false statements of material fact to Special Bar Counsel during her disciplinary proceeding in violation of Wyo. Rules of Pro. Conduct 8.1(a), and because her overall failure to meet her professional responsibilities resulted in the dismissal of hundreds cases, thereby prejudicing the administration of justice in violation of Wyo. Rules of Pro. Conduct 8.4(d)); State *ex rel.* Okla. Bar Ass'n v. Jack, 481 P.3d 261 (Okla. 2021) (censuring prosecutor publicly for knowingly allowing and enabling five of her nonlawyer employees to represent the State of Oklahoma in criminal proceedings without law licenses in violation of Okla. Rules of Pro. Conduct 5.3(b), 5.3(c), 5.5(a), & 8.4(a), and because the aforementioned conduct was dishonest and prejudicial to the administration of justice in violation of Okla. Rules of Pro. Conduct 8.4(d)); *In re* Disciplinary Procs. Against Schiltz, 922 N.W.2d 509 (Wis. 2018) (demonstrating nine-month suspension for municipal prosecutor who continued to practice law while his law license was administratively suspended and did not notify the municipality, among other violations).

25 Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1016 (2009).

idiosyncratic shocks like hunger and persistent ones like implicit racial bias. And they can help regulate structural problems like the moral hazard created by state-funded prisons."[26] These scholars and others[27] view institutional design as more promising than external regulation.[28]

What if we could combine both approaches—external professional regulation that *spurs* more robust self-regulation? Judge Bibas and Professor Barkow are correct that setting up systems within the office, such as written guidelines, standard approval mechanisms, training, and closer supervision, are necessary to align a head prosecutor's interests with those of her subordinates.[29] But these actions should also be necessary for the managers within the office to *keep their law licenses*. That is, incentives for internal training and supervision should come from a variety of sources—the district attorney's moral interest in promoting justice, political interest in being reelected, and professional interest in avoiding attorney discipline of their own. More rigorous enforcement of Rule 5.1 can further incentivize those who are responsible for creating and maintaining an office's culture around legal ethics.

II
ABA MODEL RULE 5.1 AND THE REQUIREMENT OF REASONABLE SUPERVISION

Model Rule 5.1 is a largely overlooked rule in the arsenal to fight prosecutorial misconduct. Almost all states have adopted Rule 5.1 in a form substantially similar to the ABA Model Rule.[30] The rule had no

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26 John F. Pfaff, *Prosecutorial Guidelines*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESS 101, 115 (Erik Luna ed., 2017).

27 *See* Barkow, *supra* note 12, at 2110; Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 55–57 (2002) (explaining that prosecutorial self-regulation can and does work well—head prosecutors can align their subordinates' actions with principals' interest by writing down and enforcing prosecutorial and substantive office policies).

28 *See* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 515 (2017) (applying analytical theory of experimentalism to problem of prosecutorial conflict of interest and concluding that we need to enlist prosecutors themselves to establish and implement guidelines and procedures for monitoring these guidelines).

29 Bibas, *supra* note 25, at 996–1015 (noting that head prosecutors must create the moral agenda and then fashion an office culture that advances this moral agenda); Barkow, *supra* note 12, at 2116 ("Setting up a system within the office that emphasizes compliance is therefore critical to infusing line assistants with the right values as they make discretionary decisions in their cases.").

30 *See* Am. Bar Ass'n CPR Pol'y Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct: Rule 5.1: Responsibilities of Partners, Managers, and*

express precursor in the Model Code of Professional Responsibility.[31] It was adopted in 1983 to establish general supervisory responsibility for partners and senior lawyers in law firms.[32] As a result of the work of the Ethics 2000 Commission, the rule was amended in 2002 to clarify that the words "partner" and "law firm" in paragraph (a) do not limit supervisory duties to lawyers working in private practice.[33] Comment [1] now states that paragraph (a) applies to all lawyers who have managerial authority within an organization, including "lawyers . . . in a legal services organization or a law department of an enterprise *or government agency*."[34] In ABA Formal Opinion 467, the Standing Committee on Ethics and Professional Responsibility confirmed that Rule 5.1 applies to prosecutors' offices.[35]

Rule 5.1 creates three sources of professional responsibility pertaining to the provision of supervision of subordinate lawyers.[36] Paragraph (a) addresses the responsibility of partners and managers. Partners and persons with "comparable managerial authority" have a

Supervisory Lawyers, AM. BAR ASS'N (Mar. 8, 2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-5-1.pdf. Ohio, Oregon, and Texas follow only subsection (c) of Model Rule 5.1, authorizing liability for managers and supervisors if they order or ratify the conduct or become aware of it in time to take remedial action but fail to do so, but not subsections (a) or (b). *Id.*; OHIO RULES OF PRO. CONDUCT r. 5.1 (2020); OR. RULES OF PRO. CONDUCT r. 5.1 (2024); TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 5.1 (2022).

31 Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 276 (1994).

32 *Id.* at 282–83; *see* AM. BAR ASS'N CTR. FOR PRO. RESP., THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 153–54 (1987).

33 *See* Margaret Colgate Love, *The Revised ABA* Model Rules of Professional Conduct*: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 470–71 (2002).

34 MODEL RULES OF PRO. CONDUCT r. 5.1 cmt. 1 (AM. BAR ASS'N 2018) (emphasis added).

35 ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 467 (2014) (discussing managerial and supervisory obligations of prosecutors under Rules 5.1 and 5.3).

36 Recognizing that lawyers often act through paralegals and other administrative personnel, Model Rule 5.3 imposes similar duties to supervise nonlawyer assistants. This rule "substantially parallels" Rule 5.1. Miller *supra* note 31, at 275 n.73. That is, both managers and supervisors may be subject to discipline for failing to undertake "reasonable efforts" to ensure that a nonlawyer's conduct is compatible with the professional obligations of the lawyer. MODEL RULES OF PRO. CONDUCT r. 5.3(a)–(b) (AM. BAR ASS'N 2023). Moreover, a lawyer may be subject to discipline under Rule 5.3 if she orders or ratifies a nonlawyer's conduct or knows about it in time to take remedial action and fails to do so. *Id.* at r. 5.3(c). Although the precise topic of this Article is Rule 5.1, the conclusions I draw are equally applicable to the supervision and training of nonlawyer personnel, such as paralegals, victim witness advocates, and administrative assistants—who often play vital roles within a prosecutor's office in producing discovery, issuing grand jury subpoenas, and preparing witnesses for trial.

duty to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."[37] Paragraph (b) applies the very same concept to lawyers supervising other lawyers on a case or matter, regardless of the lawyer's title or position in the organization, stating that such lawyers "shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."[38] These two provisions together create an affirmative and independent duty to engage in "reasonable" supervision on the subject of legal ethics; their application is not contingent upon the finding of an actual rules violation by a subordinate attorney.[39] These two provisions were "intended to establish the principle of supervisory responsibility without introducing vicarious liability."[40] Paragraph (c) by contrast, is the closest Rule 5.1 comes to imposing a form of vicarious responsibility for the conduct of others, but only in a very limited fashion. It states that *either* a manager or a supervisor in a legal organization can be found to have engaged in professional misconduct if she "knows of the conduct [of a subordinate] at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[41] Thus, responsibility under Rule 5.1(c), unlike subdivisions (a) or (b), is contingent upon a finding of ethical misconduct by the subordinate.[42]

Rule 5.1 is rarely enforced or mentioned in state disciplinary proceedings.[43] When it is invoked, it is usually in the context of a law firm's failure to set up appropriate case management systems,[44] screen conflicts of interest[45] or segregate client funds.[46] Very few opinions

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37 MODEL RULES OF PRO. CONDUCT r. 5.1(a).

38 MODEL RULES OF PRO. CONDUCT r. 5.1(b).

39 Miller, *supra* note 31, at 276–77.

40 *Id.* at 276.

41 MODEL RULES OF PRO. CONDUCT r. 5.1(c).

42 *See* MODEL RULES OF PRO. CONDUCT r. 5.1, cmt. 5–6 (referring to "misconduct" and "violation" of subordinate).

43 Rachel Reiland, Note, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2, and 5.3*, 14 GEO. J. LEGAL ETHICS 1151, 1153 (2001).

44 *See, e.g.*, Att'y Grievance Comm'n. v. Kimmel, 955 A.2d 269 (Md. 2008).

45 *See* J. Charles Mokriski & Paul R. Tremblay, *Respondeat Superior: 'Never Send to Know for Whom the Bell Tolls; It Tolls for Thee*,*'* 49 BOS. BAR J., Nov./Dec. 2005, at 16, 17; *see, e.g.*, *In re* Wyant, 533 N.W.2d 397, 400 (Minn. 1995); *In re* Swier, 939 N.W.2d 855, 873 (S.D. 2020).

46 *See* Reiland, *supra* note 43, at 1157; *see, e.g.*, *In re* Robinson, 74 A.3d 688, 690 (D.C. 2013).

under Rule 5.1 involve government lawyers. But that, too, is beginning to change. Two states recently have sanctioned managers in a prosecutor's office for failing adequately to supervise junior attorneys under their direction. One decision from Colorado disciplined an elected top prosecutor in the jurisdiction. Another decision from Massachusetts disciplined the Chief of the Criminal Bureau in the state Attorney General's Office. These decisions, discussed below, show promise for using Rule 5.1 to encourage adequate training and supervision to curtail prosecutorial misconduct.

In 2015, the Colorado Supreme Court suspended the elected district attorney of the Third Judicial District for six months, whose sanction was stayed pending compliance with conditions.[47] The respondent supervised a very small office of three prosecutors, including himself, a chief deputy, and one Assistant District Attorney. The respondent committed misconduct in cases that he handled personally, including failing to represent his client with competence and diligence under Rules 1.1 and 1.3, and engaging in conduct prejudicial to the administration of justice under Rule 8.4(d) for failing to set up systems of communication with investigatory personnel to discover the facts of each case and to comply with discovery and pretrial orders.[48] In addition, the respondent was sanctioned for violating Rule 5.1(b) because his staff was hired with very little criminal trial experience, and given little to no training or supervision after starting work with the office.

> The deputies had scant experience when Ruybalid hired them, yet they began handling trials without reasonable supervision. Ruybalid's subordinates in a number of cases did not ensure that a sufficient flow of information was maintained between investigative personnel and the prosecutor's office, neglected to produce impeachment information, did not comply with the Victim's Rights Act, disobeyed court orders, and did not make appropriate and timely discovery disclosures.[49]

In 2023, the Massachusetts Supreme Judicial Court disciplined three prosecutors involved in an investigation and prosecution of a drug lab scandal.[50] Sonia Farak, a chemist at the Amherst, Massachusetts, Drug

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47 People v. Ruybalid, Nos. 13PDJ065, 14PDJ064, 2015 Colo. Discipl. LEXIS 12 (Colo. O.P.D.J. Jan. 28, 2015).

48 *Id.* at 1.

49 *Id.* at 1–2.

50 *In re* Foster, 215 N.E.3d 394 (Mass. 2023). The author did not participate in the Kaczmarek, Foster, and Verner case as a member of the Massachusetts Board of Bar Overseers.

Laboratory, was arrested and charged with tampering with evidence and possession of narcotics taken from the lab. As a result of Farak's extensive misconduct and personal drug use, about 8,000 narcotics cases were eventually dismissed or vacated by the Supreme Judicial Court.[51] Before those dismissals, however, the assistant attorneys general prosecuting Farak were responsible for revealing to the local district attorneys exculpatory evidence gathered in their investigation that may have been useful to criminal defendants in challenging their pending indictments or convictions.[52] The Attorney General's Office and the State Police were in possession of evidence that Farak's drug use predated the year preceding her arrest (dating as far back as 2005) and involved substances other than cocaine, including oxycodone.[53] Yet the three prosecutors did not reveal this evidence to the District Attorney's offices or to criminal defense counsel representing defendants inculpated by Farak's reports. The Supreme Judicial Court characterized the prosecutors' conduct in the Farak case as "system wide failure[s]" that took "an ugly toll" on the public's perception of the legal profession.[54] Most notably for the purposes of this Article, it was the first time Rule 5.1 was applied in Massachusetts to the supervisory responsibilities of a lawyer in a government law office.[55] The lead counsel in Farak's prosecution, Anne Kaczmarek, was disbarred for violating Rule 1.1 (competence), Rule 1.3 (diligence), Rule 3.8(d) (failure to disclose exculpatory evidence), Rule 3.4(a) (obstructing another party's access to evidence), Rule 3.4(c) (knowingly disobeying obligations of a tribunal), and Rule 8.4(d) (conduct prejudicial to the administration of justice).[56] Kris Foster, a prosecutor in the Appeals Division of the State Attorney General's Office, was suspended for one year and one day for violating Rule 1.1, Rule 1.3, Rule 8.4(d), and Rule 1.2(a) (seeking lawful objectives of client) through her actions in falsely responding to subpoena requests in court pertaining to the contents of the Attorney General's file, and misleading the court that all items had been turned over to the district attorneys.[57] Their supervisor in the office, Criminal Bureau Chief John

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51 Comm. for Pub. Couns. Servs. v. Att'y Gen., 108 N.E.3d 966, 989 (Mass. 2018).

52 *In re Foster*, 215 N.E.3d at 399.

53 *Id.* at 401.

54 *Id.* at 417.

55 *See id.* at 418.

56 *Id.* at 430.

57 *Id.* at 426.

Verner, was disciplined[58] for violating Rules 1.3 and 5.1(b).[59] The Court found that although Verner had discussed outstanding discovery issues with his subordinate Kaczmarek and knew that certain critical material had yet to be disclosed in a very high profile case, "he neglected to follow up with Kaczmarek" and, as her supervising attorney, he had an obligation to do so.[60]

III
LESSONS FROM CORPORATE CRIMINAL LIABILITY

In federal court and under the law of most states, corporations may be liable for crimes committed by their agents when that agent acts (1) with the requisite level of mens rea provided for in the statute; (2) within the scope of their employment; and (3) for the purpose of benefiting the corporation.[61] Over thirty years ago, Professor Ted Schneyer identified factors that often led prosecutors to target corporations rather than solely individuals for misconduct committed in an organizational setting.[62] Based on these findings, Schneyer was among the first legal ethics scholars to call for law firm discipline.

First, he recognized that prosecutors might indict a corporation rather than (or in addition to) targeting individuals to avoid scapegoating those who are on the lower end of the prestige and power continuum.[63] Second, prosecutors often seek to punish corporations because of difficulties identifying precisely which individuals were responsible for the misconduct, especially when people work in a team

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58 The court publicly reprimanded Verner, rejecting the Board of Bar Overseers' recommendation that Verner be suspended for three months. *Id.* at 420. Although the court recognized the aggravating circumstances of the Criminal Bureau Chief's extensive experience and his causation of substantial harm, *id.* at 416, it found mitigating the fact that Kaczmarek had at one point falsely represented to Verner that certain disputed items had been disclosed. *Id.* at 404, 413. In the context of a 5.1(b) violation, the court ruled that a supervisor's misconduct may be mitigated where there is "reasonable and good faith reliance" on the false representations of a subordinate, especially where, as here, the subordinate was herself a highly experienced prosecutor. *Id.* at 415.

59 *Id.* at 413.

60 *Id.* at 419.

61 United States v. Agosto-Vega, 617 F.3d 541, 552–53 (1st Cir. 2010); United States v. Ionia Mgmt. S.A., 555 F.3d 303, 309–10 (2d Cir. 2009) (per curiam); *see* MODEL PENAL CODE § 2.07 (AM. L. INST. 1962); N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 491–94 (1909). *See generally Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247–51 (1979).

62 Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991).

63 *Id.* at 25.

environment.[64] Third, corporations are responsible for creating the ethical infrastructure that may incite individual misconduct for the benefit of the entire organization.[65] Finally, corporations may be in the best position, if indicted and punished through probationary terms, to remedy deficiencies going forward.[66] Analogizing law firms to corporations, each of these factors led Schneyer to conclude that bar regulators, like prosecutors, should be able to target law firms for institutional failures. Schneyer believed that typical corporate criminal sanctions like monitoring agreements, fines, and restitution should be applied to law firms whose members violate attorney discipline rules.[67]

In issuing the clarion call for law firm discipline, Schneyer addressed the liability of managers and partners under Model Rule 5.1, which had been introduced eight years earlier with the advent of the Model Rules in 1983. Schneyer believed that

> [i]n imposing ethical duties of reasonable supervision solely on individual lawyers in firms, as MR 5.1 does, policymakers have probably been unrealistic. Just as legislatures, prosecutors, and juries are reluctant to sanction individual corporate agents for such offenses, disciplinary authorities may resist proceeding against law firm partners. This, of course, strengthens the case for requiring law *firms* to supervise the ethical conduct of their lawyers.[68]

In other words, Schneyer thought that the reluctance of bar regulators to use Rule 5.1 was an argument *in favor* of law firm discipline.

It turns out that the opposite may be true. Only New York and New Jersey have adopted law firm discipline.[69] If we believe that institutional actors are motivated by the ethical infrastructure created by higher-ups in an organization, and that regulators are reluctant to scapegoat individual actors, then the reluctance of states to institute law firm discipline should motivate more aggressive enforcement of

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64 *Id.* at 8.

65 *Id.* at 10–11.

66 *Id.* at 31–32.

67 *Id.*; *see* U.S. Dep't of Just., Just. Manual § 9-28.200 (2023) (reciting benefits to be achieved by indicting corporations, including "corporations are likely to take immediate remedial steps when another corporation is charged with criminal misconduct that is pervasive throughout a particular industry, and thus an [sic] criminal charges can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate prosecution may result in specific deterrence by changing the culture of the charged corporation and the behavior of its employees.").

68 Schneyer, *supra* note 62, at 26–27 (emphasis in original).

69 Reiland, *supra* note 43, at 1161; Hal R. Lieberman, *'Law Firm' Discipline and Other Noteworthy Cases; Attorney Discipline*, N.Y. L.J. (Feb. 4, 2015), https://nylegalethics.attorney/law-firm-discipline-and-other-noteworthy/ [https://perma.cc/72K8-JWPH].

sanctions under Rule 5.1. In fact, the key argument that led the ABA to reject law firm discipline in 2001 was the ability of sanctions against intermediate managers and supervisors to act as an institutional deterrent. The Committee felt that the "possible benefit [of law firm discipline] . . . [is] small when compared to the potential cost of de-emphasizing the personal accountability of partners and supervisors."[70] As the United States Justice Department Manual emphasizes, prosecuting individuals within a corporate framework is a higher level of priority than prosecuting the corporation itself where both options are available.[71]

As Rachel Barkow has recognized, the reasons for invoking concepts of *respondeat superior* in the corporate crime context map well onto a prosecutor's office with respect to attorney ethical obligations.[72] Especially in complex and high-level felony prosecutions, government attorneys often work in teams; identifying and proving responsibility for a discretionary decision—especially omissions like failing to turn over exculpatory evidence—can be very difficult. Bar disciplinary authorities might be reluctant to scapegoat lower-level prosecutors for misconduct if they believe that conduct was tolerated or even incentivized by superiors. Additionally, because at least one objective of attorney discipline is the deterrence of future misconduct, leaders are in a better position than subordinates to implement institutional change.

Beginning in the 1990s, prosecutors recognized that corporations could be made partners in preventing, rooting out, and reporting employee misconduct through an enterprise-based approach to criminal liability.[73] Congress and the United States Sentencing Commission were instrumental in this paradigm shift because fines increased after the Sarbanes-Oxley Act of 2002,[74] and the United States

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70 Colgate Love, *supra* note 33, at 471.

71 U.S. Dep't of Just., *supra* note 67, § 9-28.210 ("Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or outside the corporation. Because a corporation can act only through individuals, holding individual wrongdoers criminally liable may provide the strongest deterrent against future corporate wrongdoing. Provable individual criminal charges should be pursued, particularly if they implicate high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution.").

72 Barkow, *supra* note 12, at 2106.

73 *Id.* at 2100.

74 Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2002).

Sentencing Commission's Organizational Guidelines[75] provided that sanctions could be reduced or avoided altogether if companies adopted compliance programs and self-reported violations to the government.[76] Barkow highlights these developments to make the point that federal prosecutors could leverage the threat of enterprise liability to encourage prosecutors' offices to enact written guidelines with respect to *Brady* obligations. Because the Department of Justice could indict a prosecutor's office for a criminal civil rights violation for failure to turn over exculpatory evidence,[77] and because prosecutors' offices are legal entities under the United States Sentencing Guidelines,[78] Barkow argues that the DOJ could leverage the threat of enterprise liability to coax prophylactic compliance measures.[79] This is similar to the way that the DOJ has been instrumental in pursuing systemic change in police departments through civil consent decrees.[80]

I agree with Professor Barkow that there are many helpful analogies between corporate criminal liability and attorney discipline. I also agree that organizational self-regulation and better training ultimately may be the key to reducing prosecutorial misconduct. Where we seem to disagree, however, is what levers currently exist to incentivize organizational self-regulation.[81] Prosecuting individual DAs for criminal civil rights violations under *Brady* is extremely rare;[82] prosecuting *the office itself* is unprecedented. My recommendation expands and builds upon Professor Barkow's important work, because it recognizes that bar disciplinary authorities can themselves play a significant role in incentivizing organization self-regulation through a more robust application of Rule 5.1.

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75 U.S. SENT'G GUIDELINES MANUAL § 8C2.5(f)(1)–(2) (U.S. SENT'G COMM'N 2021).

76 Barkow, *supra* note 12, at 2102.

77 18 U.S.C. § 242 (making it a crime for any person acting under color of law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States).

78 U.S. SENT'G GUIDELINES MANUAL § 8A1.1 cmt. 1 (defining organization to include "governments and political subdivisions").

79 Barkow, *supra* note 12, at 2112–17.

80 *Id.* at 2117.

81 *Id.* (arguing that prompts for organizational self-regulation of *Brady* disclosures are most likely to come either from the threat of criminal prosecution, judicial attention to the matter through holding or threatening contempt proceedings, legislation, or personal self-interest on the part of head prosecutors wishing to avoid scandal).

82 *See* Kate Cohn, *When the Home Team Calls Their Own Balls and Strikes: The Problem of* Brady *Violations, Accountability, and Making the Case for a Washington State Commission on Prosecutorial Conduct*, 19 SEATTLE J. FOR SOC. JUST. 161, 180 (2020).

Perhaps the responsible corporate officer doctrine is a more apt analogy to Model Rule 5.1 than enterprise liability. Under the responsible corporate officer doctrine (RCO), a corporate executive can be liable for the criminal acts of her subordinates where three elements are met: (1) the violation occurred within the company; (2) the executive's position in the company at the time of the violation gave her authority to control the underlying activity, and it was objectively possible for her to do so; and (3) the officer failed to act to prevent this violation.[83] The origin of the doctrine in American law is typically traced back to two Supreme Court cases, *United States v. Dotterweich*[84] and *United States v. Park*,[85] both of which upheld convictions of corporate executives for a misdemeanor offense based on their failure to prevent violations of the Food, Drug, and Cosmetic Act (FDCA) by their employees, without requiring proof that the executives knew of the violations. In *Dotterweich* and *Park*, the Supreme Court concluded that an obligation to prevent violations was necessary to effectuate the FDCA's purpose of protecting human health and safety. "*Dotterweich* and *Park* established the proposition that, for some criminal offenses, liability attaches not only to those who directly participated in the violation but also to their supervisors or managers who stand in 'responsible relation' to the violation by virtue of their authority and responsibility."[86]

Although the RCO doctrine originated with misdemeanor public welfare offenses that imposed strict liability,[87] it has since been applied to felonies that require a higher level of mens rea on the part of the subordinate actor, such as knowledge. This is where the doctrine has become highly contentious. If the subordinate actor must have knowledge of the nature of their conduct, must the executive also have knowledge of what the subordinate actor is doing? That issue has been raised in the government's efforts to apply the RCO doctrine to environmental felonies, with varying results.[88] The Supreme Court had

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83 Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 387–88 (2014); United States v. Park, 421 U.S. 658, 673 (1975).

84 United States v. Dotterweich, 320 U.S. 277 (1943).

85 United States v. Park, 421 U.S. 658 (1975).

86 Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. L. & CRIMINOLOGY 1245, 1251 (2006) (quoting *Dotterweich*, 320 U.S. at 281).

87 *See* United States v. Freed, 189 F. App'x 888 (11th Cir. 2006) and cases cited.

88 *See generally* Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681 (2003). *Compare* United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998) (inferring legislative intent to apply

the opportunity to address this mens rea issue in *United States v. DeCoster*, a case involving a prison sentence, but denied certiorari.[89]

The RCO doctrine poses a challenge to traditional notions of criminal responsibility, under which individual actors must participate in a crime or assist in its commission before they may be held personally accountable.[90] Yet the doctrine is not the equivalent of imputed, or vicarious, liability.[91] It does not require a corporate executive to be the "guarantor" of the conduct of her employees. Viewed properly, it is either a criminal negligence doctrine carrying its own mens rea,[92] or it punishes failure to act to prevent misconduct, importing whatever mens rea is required under the applicable criminal statute.[93] That is, responsible corporate officers are not being punished for the acts of their subordinates; they are being punished either for their own misfeasance, or for their nonfeasance in the face of a duty to act. Rules 5.1(a) and (b) are most easily identifiable with the negligence view of RCO liability, because the "reasonable efforts" and "reasonable assurance" standards in the disciplinary rule suggest that a manager or supervisor cannot be subject to professional discipline unless they were negligent in overseeing the conduct of others. In all other respects, Rules 5.1(a) and (b) track the contours of the RCO doctrine quite readily: the actor must be a partner, have comparable managerial authority, or be a supervisor in the office,[94] and their role

RCO to Clean Water Act violations, but holding that executive must have knowledge), *and* United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991) (executive must have knowledge under the Resource Conservation and Recovery Act (RCRA)), *with* United States v. Self, 2 F.3d 1071, 1087–88 (10th Cir. 1993) (allowing jury to infer executive's knowledge of RCRA violation based on their managerial position and evidence of knowledge of prior violations).

89 United States v. DeCoster, 828 F.3d 626 (8th Cir. 2016), *cert. denied*, 581 U.S. 993 (2017).

90 *See* Sepinwall, *supra* note 83, at 385; United States v. Dotterweich, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting); *see also* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359 (2009).

91 Aagaard, *supra* note 86, at 1284.

92 Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 848–49 (1999) (interpreting *Dotterweich* to require a "mens rea of 'imperfect care'"); Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on* Dotterweich *and* Park, 28 UCLA L. REV. 463, 469–70 (1981); *see* United States v. Park, 421 U.S. 658, 672 (1975) (doctrine requires "foresight and vigilance").

93 Aagaard, *supra* note 86**,** at 1251; *see DeCoster*, 828 F.3d at 633.

94 Several courts have recognized that application of the RCO doctrine does not depend upon an executive's formal title in a corporation; that is, she does not have to be a "corporate officer" under the articles of incorporation, such as a president, treasurer, or secretary, but merely have been in a position to exercise authority and control. *See, e.g.*, United States v.

must have put them in a responsible relation to the underlying activity.[95]

Even though the RCO doctrine is highly contested and there are strong arguments that it should not be expanded in the criminal context without express legislative authorization,[96] focusing on a lawyer's lack of exercise of supervisory responsibility should be far less controversial in the professional regulatory context than it is in the criminal context. First, the goal of professional discipline is the protection of consumers and the courts, not punishment.[97] Where the sanction does not involve the loss of liberty, the moral opprobrium of the larger community, or collateral consequences of a criminal conviction, imposition of liability on a supervisor—who stands in a responsible relation to the underlying misconduct and acts negligently—seems perfectly appropriate. Second, the disciplinary rule contains a sufficient guardrail of "reasonableness." This rule ensures that professional regulators are unable to overreach and try to make managers and supervisors the guarantors of the conduct of all attorneys in their department.

Ming Hong, 242 F.3d 528, 531 (4th Cir. 2001); *see also* Aagaard, *supra* note 86, at 1286 n.198.

95 Perhaps the only element of RCO liability not readily discernible in Rule 5.1 is that the conduct must have occurred "within the company" and for the benefit of the corporation. One can imagine instances where a subordinate is subjected to professional discipline for conduct occurring outside the practice of the law, such as criminal conduct reflecting adversely on their fitness to practice law, *see* MODEL RULES OF PRO. CONDUCT r. 8.4(b) (AM. BAR ASS'N 1983), or conduct in their personal lives involving dishonesty, fraud, deceit, or misrepresentation, *see* MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR. ASS'N 1983). While Rule 5.1 (a) and (b) do not expressly mandate that managers and supervisors take reasonable efforts to assure that lawyers practicing in the organization conform to the Rules of Professional Conduct only "with respect to the practice of law," it is hard to imagine a state disciplinary board attempting to impose supervisory responsibility for the *personal* misconduct of a subordinate. *See* MODEL RULES OF PRO. CONDUCT r. 5.1 cmt. 1 (AM. BAR. ASS'N 1983) (referring to the "professional work of a firm").

96 Cynthia H. Finn, Comment, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine*, 46 AM. U. L. REV. 543, 570–71 (1996) (rejecting the viewpoint that the RCO doctrine should be used to create strict liability for environmental crimes and arguing that "a prevalence of 'emotionalism' and 'anger' over corporate America's ambivalent and 'callous attitude' toward the environment . . . [is] an inadequate basis for reordering settled principles of jurisprudence, such as the mens rea requirement, and would be directed more appropriately to the legislature, rather than to the courts") (quoting Kevin L. Colbert, *Considerations of the Scienter Requirement and the Responsible Corporate Officer Doctrine for Knowing Violations of Environmental Statutes*, 33 S. TEX. L. REV. 699, 700 (1992)).

97 STANDARDS FOR IMPOSING LAW. SANCTIONS § 1.1 (AM. BAR ASS'N 1992) ("The purpose of lawyer discipline proceedings is to protect the public and the administration of justice . . . .").

I am recommending that bar regulators use Rule 5.1 (and the responsible corporate officer principles that the rule evokes) in addition to discipline against individual prosecutors, not in place of such discipline. Creating maximum deterrence to prosecutorial misconduct may require that all members of a prosecutorial team be given a serious stake in ensuring compliance with ethical standards. If an individual prosecutor "goes rogue" and engages in misconduct that was not sanctioned or even reasonably foreseeable by a supervisor, then only the individual prosecutor should be sanctioned. But where the misconduct is ordered or ratified under Rule 5.1(c), or could have been detected and avoided by more adequate supervision under Rule 5.1(b), multiple actors bear responsibility.

Some might argue that overly aggressive application of the responsible corporate officer doctrine in the government context might unfairly stigmatize individuals doing important public work at low pay. Unlike corporate executives, who are well compensated, prosecutors do demanding work under difficult circumstances for relatively low renumeration. Holding them accountable for the ethical missteps of their subordinates may strike some as an unfair application of risk.

I have two primary responses to this critique. First, it smacks of the reason many judges and bar disciplinary authorities may have been reluctant in the latter part of the twentieth century to discipline prosecutors at all; that is, an unwillingness to jeopardize the reputations and law licenses of fellow public servants.[98] Hopefully the legal profession is past the point where prosecutors should be immune from discipline due to the importance or value of their work; if anything, it is the importance of their work, and their obligation to promote justice,[99] that make compliance with ethical standards more rather than less critical. Corporate officers act as fiduciaries for shareholders,[100] supervising prosecutors act as fiduciaries for the public interest. In both situations we are recognizing that the failure to act to prevent

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98 Green & Yaroshefsky, *supra* note 3, at 56 ("No doubt, the Court's general confidence in the professionalism of prosecutors partly reflected Chief Justice Warren's confidence, as a former Alameda County prosecutor, that other prosecutors' offices maintained the high professional standards he attributed to his own former office. That level of confidence is apparently shared by most current-day Justices, including another former local prosecutor, Justice Sonia Sotomayor.") (citations omitted).

99 MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983).

100 Sepinwall, *supra* note 83, at 402 ("If the wrong is a wrong of her corporation—and the next part underscores the necessity of an antecedent *corporate* wrong—then she must, as a matter of fulfilling the obligations of team-spiritedness that her role demands of her, accept blame for it, and whatever consequences blame entails.").

misconduct by subordinates, where unreasonable, breaches that fiduciary duty.

Second, if line prosecutors are being subjected to professional discipline, why not their more highly paid supervisors? If level of prestige and compensation must bear some relationship to the need for professional discipline (an argument that I contest), we should be looking higher up the chain of command to set an example of those who occupy positions of authority. Leaving staff out to dry with bar suspensions or reprimands while failing to address the root causes of their misconduct simply picks at low-hanging fruit without looking at who sets office standards, who creates office culture, and who does the training.

IV
THE NEED FOR TRANSPARENT WRITTEN GUIDELINES

One way that leaders in a prosecutor's office can satisfy their ethical obligations under Rule 5.1 is to issue written policy manuals and train line assistants on their contents.[101] Written policies are vital for promoting uniformity among prosecutors in the exercise of their discretion, consistency in the procedural and substantive justice received by defendants across cases and across time, and the confidence of the community that prosecutorial discretion is being exercised evenhandedly. They may also provide a "safe harbor" for conscientious and inexperienced prosecutors trying mightily to resolve complex ethical issues in difficult cases, because reliance by a subordinate lawyer on a supervisor's "reasonable resolution of an arguable question of professional duty" is a defense to professional discipline.[102]

Over fifteen years ago, Peter Joy pointed out that only "a relatively small number of the more than 2300 prosecutors' offices that try felony cases in state courts of general jurisdictions have manuals or written standards, or, if they do, those manuals or standards are not available to the public."[103] Since that time, several jurisdictions have adopted and published written policy manuals on a prosecutor's discovery obligations under *Brady*, as will be discussed below. But progress in

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[101] The ABA has issued a formal opinion stating that prosecutors who do not issue written policies on discovery obligations under *Brady v. Maryland* may be violating their obligations under Rule 5.1. ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 467 (2014).

[102] MODEL RULES OF PRO. CONDUCT r. 5.2(b) (AM. BAR ASS'N 1983).

[103] Joy, *supra* note 5, at 422.

this area has been very slow and rather limited. State disciplinary enforcement of Rule 5.1 can help spur further action in this area.

The policy manuals I recommend should be posted on the prosecutor's website and available to the bar.[104] Transparency is essential for promoting accountability and public confidence in the work of the office. One source of continuing reluctance for prosecutors to enact written policy manuals may be the fear that criminal cases will be tied up in court with motions attempting to litigate whether or not prosecutors have complied with their own guidelines. Such reluctance is misguided. Like the Denver District Attorney's discovery guidelines, discussed below, the policies I am recommending should state prominently that they are intended as a source of training and guidance for staff in complying with their legal and ethical responsibilities, but the policies themselves create no legal rights or privileges. The Justice Manual, which has successfully guided the discretion of federal prosecutors since 1997, contains a disclaimer that "[The Manual] provides internal DOJ guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."[105] Although these types of disclaimers will block *judicial* enforcement, the transparency of written guidance will enable defense attorneys to challenge prosecutorial behavior by arguing with *the prosecutor herself* that she needs to comply with her own office's policy manual, seeking review and intervention of a supervisor where the line prosecutor fails to do so.

In this section, I identify three particular areas where I think prosecutors are undertrained and undersupervised and suggest topics appropriate for written policy manuals for line prosecutors: grand jury practice, discovery, and agreements with cooperating witnesses. I emphasize these three subject areas because they are points in the criminal process where prosecutors typically have vast, unregulated discretion, and where abuse of that discretion can result in substantial miscarriages of justice. Prosecutors should issue precise written

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104 The American Bar Association's Criminal Justice Standards—developed by a commission of expert judges, scholars, and criminal practitioners to help explain and fill gaps left by the Model Rules of Professional Conduct—recommends that each prosecutor's office adopt a prosecutor's handbook and make that handbook available to public, unless it is necessary to label certain sections confidential. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-2.4(c) (AM. BAR ASS'N 2017).

105 U.S. Dep't of Just., *supra* note 67, § 1-1.200.

directives on each of these topics, or include the subjects in a comprehensive office handbook if they issue one.

My goal in this section is not to suggest the precise contents of office policy manuals—undoubtedly they will vary in each jurisdiction depending on local statutes, rules of criminal procedure, and appellate opinions that augment the requirements of the Rules of Professional Conduct. The contents of each office's policy manual may also vary given the size of the office, the types of criminal cases most frequently handled, and whether prosecutors engage in vertical or horizontal prosecution models.[106] My goal in this section is to highlight the ethical landmines that may be encountered in each of these practice areas, the Rules of Professional Conduct that are implicated, and the contours of general discretionary decisions that a thoughtful policy manual should address. In other words, this section is a roadmap, not an exhaustive set of recommendations. Each jurisdiction's manual must be shaped by leaders of that office working in consultation with experienced practitioners, retired judges, and scholars in their respective jurisdictions to construe relevant local rules and case law. There are helpful templates in place that can help guide the start of each office's conversation around these topics, including the *ABA Criminal Justice Standards: Prosecution Function*,[107] the *National District Attorneys Association Standards*,[108] and the *DOJ Justice Manual*.[109]

Critically, office directives in each of these areas must be continuously monitored and updated. As will be discussed below, I recommend that each office appoint an "Ethics and Professionalism Committee," with a designated chairperson. That Committee can serve several important functions: it may be a source of designated approvals, where required; it may serve an advisory function when prosecutors have difficult questions in gray areas, similar to the way that a law firm ethics committee operates;[110] and, it may engage in critical incident review when an appellate decision or exoneration exposes prosecutorial misconduct. When the Ethics and Professionalism

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106 *See* Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 12–13 (2013) (explaining the difference between horizontal and vertical prosecution models).

107 *See generally* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS'N 2017).

108 *See generally* NAT'L PROSECUTION STANDARDS (NAT'L DIST. ATT'YS ASS'N 2009).

109 *See generally* U.S. Dep't of Just., *supra* note 67.

110 Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 565–66 (2002).

Committee encounters ethical lapses, it should modify its office's policy manuals, if necessary, and conduct further training and education of line assistants.[111] As Professor Barkow has convincingly argued, prosecutor's offices now need to recognize what has become clear in the corporate context—the importance of auditing and risk assessment.[112] Policy manuals should require any assistant who has been criticized by a judge for failing to disclose exculpatory evidence, abusing the grand jury, or knowingly presenting false testimony to report that criticism to the Committee so that it can further its important monitoring function.

A. Grand Jury Practice

The prosecutor's conduct in the grand jury presents grave risks to the administration of justice because it is largely unchecked by the adversarial process. A putative target of the grand jury's investigation has no right to call witnesses, object to evidence, or ask questions. The prosecutor controls the entire show. Prosecutorial discretion in this area thus needs to be checked by written office directives. Rules of Professional Conduct that often are implicated by a prosecutor's

111 *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 467 (2014) (recognizing that—to fulfill their obligations under Rule 5.1—managers and supervisors must not only implement written discovery policies but also update them in response to court decisions and other legal developments).

112 Barkow, *supra* note 12, at 2100.

(mis)conduct in the grand jury include Rule 3.8(c),[113] Rule 3.8(d),[114] Rule 3.8(e),[115] Rule 3.4(a),[116] Rule 3.4(f),[117] and Rule 3.5(a).[118]

A prosecutor's conduct in the grand jury can impede the putative target's access to evidence in violation of Rule 3.4(a). First, it is improper for a prosecutor to instruct a grand jury witness that they may not talk to others involved in the investigation. Prosecutors sometimes include on their grand jury subpoenas a notification to the witness that they should not inform other individuals about their receipt of a subpoena, the documents requested, or the contents of their testimony. This is improper. Under the rules of criminal procedure in effect in most states, only official participants in the grand jury proceedings (the jurors, the prosecutor, the stenographer) are bound by rules of secrecy.[119] Suggesting to a witness that they may be prosecuted for obstruction of justice if they talk to other witnesses hamstrings a defense attorney from gathering evidence.[120] Second, prosecutors

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113 MODEL RULES OF PRO. CONDUCT r. 3.8(c) (AM. BAR ASS'N 2023) ("The prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing . . . .").

114 MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2023) ("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 . . . .").

115 MODEL RULES OF PRO. CONDUCT r. 3.8(e) (AM. BAR ASS'N 2023) ("The prosecutor in a criminal case shall . . . 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 . . . .").

116 MODEL RULES OF PRO. CONDUCT r. 3.4(a) (AM. BAR ASS'N 2023) ("A lawyer shall not: . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . . .").

117 MODEL RULES OF PRO. CONDUCT r. 3.4(f) (AM. BAR ASS'N 2023) ("A lawyer shall not: . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.").

118 MODEL RULES OF PRO. CONDUCT r. 3.5(a) (AM. BAR ASS'N 2023) ("A lawyer shall not: . . . seek to influence a judge, juror, prospective juror or other official by means prohibited by law . . . .").

119 R. Michael Cassidy, *Silencing Grand Jury Witnesses*, 91 IND. L.J. 823, 836 (2016).

120 James C. McKinley, Jr., *Judge Finds Fault with Gag Order in U.S. Attorney's Subpoena*, N.Y. TIMES (Oct. 8, 2015), https://www.nytimes.com/2015/10/09/nyregion

should record their legal instructions to the grand jury. Not only is this required by the rules of criminal procedure in many states,[121] it is sound professional practice. If the defendant cannot access a transcript of the legal instructions, she cannot possibly gather evidence to challenge in court whether the grand jury was improperly manipulated.

Each jurisdiction's grand jury policy should contain a provision sharply curtailing the practice of subpoenaing attorneys to provide information about their clients, past or present. Model Rule 3.8(e) discourages issuance of attorney subpoenas because they can drive a wedge between an attorney and her client and risk improper disclosure of privileged material. There are three preconditions that must be met under Rule 3.8(e) before a prosecutor may subpoena an attorney to provide information about a client.[122] What many prosecutors fail to appreciate is that these preconditions apply even if the attorney represented a client in a civil, rather than criminal, matter (such as a real estate transaction or drafting an estate plan). While Model Rule 3.8(e) no longer contains an advance judicial approval requirement, many state analogues do.[123] Grand jury manuals should require line prosecutors to seek approval of managers in the office—preferably the Chair of the Ethics and Professionalism Committee, if one exists—prior to issuing attorney subpoenas to assure a second set of eyes on whether the strict preconditions of Model Rule 3.8(e) have been met.

Prosecutors must be cautioned in office policy manuals to respect the Fifth Amendment rights of grand jury witnesses. When a prosecutor knows in advance that a witness will assert their right not to incriminate themselves and refuse to testify in the grand jury, the prosecutor should not call the witness solely for the purpose of having them assert their Fifth Amendment rights. Such coercive conduct may violate both Rule 3.8(c) and Rule 8.4(d)[124] because the sole purpose of the conduct is to prejudice the witness in the eyes of the jurors. Prosecutors should also

/judge-finds-fault-with-gag-order-in-us-attorneys-subpoena.html [https://perma.cc/7TCT-QG7A].

121 *See* MASS. R. CRIM. P. 5(i).

122 The information sought in the subpoena must be both unprivileged and essential to the successful completion of the investigation, and there must be no other feasible alternative to obtain the information. *See* MODEL RULES OF PRO. CONDUCT r. 3.8(e)(1)–(3) (AM. BAR ASS'N 2023).

123 *See, e.g.*, MASS. RULES OF PRO. CONDUCT r. 3.8(e) (2016); R.I. RULES OF PRO. CONDUCT r. 3.8(f) (2017).

124 MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 2023) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice . . . .").

be required to give "target" warnings to witnesses if the prosecutor has a reasonable basis to believe that the witness's conduct is within the scope of the grand jury's investigation and violates the law.[125] Such target warnings are necessary to signal to witnesses who may need to obtain counsel to assist them with deciding whether to testify or assert privilege. Failure to give a target warning risks coercing waiver of important pretrial rights in violation of Rule 3.8(c).

Prosecutors should be instructed to bring to the grand jury's attention substantial exculpatory evidence that directly negates the guilt of the potential target(s) to the investigation. This might include, by way of example, evidence of self-defense in an assault prosecution or evidence of consent in a rape case. As a "minister of justice,"[126] the prosecutor must, in fairness, present evidence that might exonerate the target if believed by the grand jury, because otherwise the grand jury is not capable of performing its function to act as a shield against unsupported accusations. Although not constitutionally required in the federal system,[127] this duty to disclose exculpatory evidence to the grand jury has been recognized by several state supreme courts.[128] It also flows ineluctably from the prosecutor's duties under Rule 3.8(a) not to prosecute a case she "knows is not supported by probable cause"[129] and under Rule 3.3(d) to inform the tribunal in an ex parte proceeding of all material facts "that will enable the tribunal to make an informed decision, whether or not the facts are adverse."[130]

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125 *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.6(g) (AM. BAR ASS'N 2017); U.S. Dep't of Just., *supra* note 67, § 9-11-151.

126 *See* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2023).

127 United States v. Williams, 504 U.S. 36, 54 (1992).

128 *See* Commonwealth v. Mayfield, 500 N.E.2d 774, 778 (Mass. 1986) (stating that "[i]n certain circumstances" failure to disclose exculpatory evidence may impair the integrity of the grand jury proceedings); State v. Hogan, 676 A.2d 533, 543 (N.J. 1996); Sheriff, Clark Cnty. v. Frank, 734 P.2d 1241, 1244 (Nev. 1987); People v. Lancaster, 503 N.E.2d 990, 993 (N.Y. 1986).

129 MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2023).

130 MODEL RULES OF PRO. CONDUCT r. 3.3(d) (AM. BAR ASS'N 2023). The definition of "tribunal" in Model Rule 1.0(m) includes a court "or other body acting in an adjudicative capacity." MODEL RULES OF PRO. CONDUCT r. 1.0(m). While the ABA does not expressly include grand juries in its definition of tribunals to whom the obligation of disclosure under Model Rule 3.3(d) applies, the disciplinary rules in Connecticut, Florida, Maryland, Michigan, Mississippi, Texas, and Utah all include grand juries in Rule 3.3(d) by way of reference to commentary under Model Rule 3.8, which states that grand juries are included in ex parte proceedings under 3.3(d). *See* CONN. RULES OF PRO. CONDUCT r. 3.8 cmt. (2015); FLA. RULES OF PRO. CONDUCT r. 4-3.8 cmt. (2023); MD. RULES OF PRO. CONDUCT r. 3.8 cmt.(2022); MICH. RULES OF PRO. CONDUCT r. 3.8 cmt.(2023); MISS. RULES OF PRO. CONDUCT r. 3.8 cmt. (1987); TEX. RULES OF PRO. CONDUCT r. 3.09 cmt. (2022); UTAH RULES OF PRO. CONDUCT r. 3.8 cmt. (2024). By contrast, the disciplinary rules in Alabama,

ABA Criminal Justice Standards, Prosecution Function 3-4.6(e) provides as follows:

> A prosecutor with personal knowledge of evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. The prosecutor should relay to the grand jury any request by the subject or target of an investigation to testify before the grand jury, or present other non-frivolous evidence claimed to be exculpatory.[131]

The DOJ Justice Manual similarly cautions prosecutors that, in the interests of justice, they should disclose evidence to the grand jury when they are "personally aware of substantial evidence that directly negates the guilt of [the] subject"[132] and that they ordinarily should give "favorable consideration" to a target's request to testify.[133]

In short, office directives on grand jury practice *at a minimum* should include express provisions requiring prosecutors to present substantially exculpatory evidence to the grand jury; require prosecutors to give favorable consideration to a target's request to testify; prohibit off-the-record communications with the grand jury other than on administrative matters; require "target" warnings to witnesses; and prohibit putting a witness in the grand jury who the prosecutor knows will assert their Fifth Amendment rights against self-incrimination, unless the prosecutor is doing so for the purpose of bringing a judicial challenge to that assertion or is laying the foundation for a judicial grant of immunity.

B. Discovery

Perhaps the most important obligation of a prosecutor as a "minister of justice" is to disclose exculpatory evidence to the other side so that

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Georgia, Hawaii, Massachusetts, South Dakota, Vermont, and Virginia explicitly *exclude* grand juries from the operation of Rule 3.3(d). *See* ALA. RULES OF PRO. CONDUCT r. 3.3(d) (2023); GA. RULES OF PRO. CONDUCT r. 3.3(d) (2024); HAW. RULES OF PRO. CONDUCT r. 3.3(d) (2014); MASS. RULES OF PRO. CONDUCT r. 3.3 cmt. 14 (2022); S.D. RULES OF PRO. CONDUCT r. 3.3(d) (2022); VT. RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (2009); VA. RULES OF PRO. CONDUCT r. 3.3 cmt. 14 (2016). The remaining thirty-six states and the District of Columbia are simply silent about whether grand juries are "tribunals" under Rule 3.3 (d) to which attorneys have a duty to disclose evidence during an ex parte proceeding. Nevertheless, the combined operation of Rules 3.8(a) and 3.3(d) arguably creates a duty to present substantial exculpatory evidence to the grand jury, because if that body finds that evidence credible, probable cause may not exist to charge the defendant.

131 CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.6(e) (AM. BAR ASS'N 2017).

132 U.S. Dep't of Just., *supra* note 67, § 9-11.233.

133 *Id.* § 9-11.152.

it may effectively prepare its defense. In *Brady v. Maryland*,[134] the Supreme Court ruled that "suppression by the prosecution of evidence favorable to [the] accused," where material either to guilt or punishment, violates due process. Evidence that the defense could use to impeach a government witness is considered exculpatory under *Brady* and its progeny.[135]

Parallel to this constitutional obligation, Model Rule 3.8(d) provides that a prosecutor must "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."[136] In the post-conviction context, Model Rule 3.8(g) now requires a prosecutor who learns of "new, credible and material evidence" supporting "a reasonable likelihood that a convicted defendant did not commit [the] offense" to disclose that information to the defendant.[137] Such post-conviction developments might include recantation by a material witness, new forensic evidence casting doubt on the identity of the perpetrator, or a confession to the crime by another person.

Concealing exculpatory evidence is the most common form of prosecutorial misconduct leading to wrongful convictions.[138] Problems with the *Brady* doctrine have led prosecutors to be confused about their responsibilities, and/or willing to take risks that a conviction will not be reversed because the evidence will not be considered "material."[139] Compounding this problem, in federal courts, prosecutors are under no constitutional obligation to disclose impeaching material or evidence supporting affirmative defenses prior to guilty pleas,[140] which account for over ninety percent of criminal convictions in this country.

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134 Brady v. Maryland, 373 U.S. 83, 87 (1963).

135 Giglio v. United States, 405 U.S. 150, 154–55 (1972).

136 MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2023).

137 MODEL RULES OF PRO. CONDUCT r. 3.8(g) (AM. BAR ASS'N 2023).

138 *See* discussion *supra* note 6 and accompanying text.

139 *See* Eugene Cerruti, *Through the Looking-Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211 (2005) (identifying failures of the *Brady* doctrine); Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1 (2015) (discussing prosecutorial incentives).

140 United States v. Ruiz, 536 U.S. 622, 631 (2002). Whether prosecutors have a due process obligation to disclose evidence that supports *factual innocence* prior to a guilty plea is a question that has led to a circuit court split. *See* Buffey v. Ballard, 782 S.E.2d 204 (W. Va. 2015) (discussing cases and ruling that prosecutors must disclose evidence of factual innocence prior to guilty plea). The Supreme Court missed an opportunity to resolve this issue by denying certiorari in *Alvarez v. City of Brownsville*. 904 F.3d 382, 395 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2690 (2019).

In 2009, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 09-454, concluding that Model Rule 3.8(d) was intended to extend discovery obligations on prosecutors in three critical respects that exceed the requirements of *Brady*: it requires prosecutors to disclose "information," without respect to its potential admissibility as evidence in court; it requires prosecutors to disclose that evidence or information without regard to its likely impact on the proceeding (the so-called "materiality" standard of *Brady*); and it requires prosecutors to disclose exculpatory evidence or information in a "timely" manner, which means as soon as reasonably practical, and certainly before a guilty plea. Notwithstanding this expansive construction of Rule 3.8(d) by the ABA, some state supreme courts have declined to interpret their state professional conduct rules to impose any obligations beyond *Brady*.[141]

Difficulties in interpreting and applying the *Brady* doctrine have led scholars[142] and bar associations[143] to call on prosecutors' offices to craft written, transparent, office-wide discovery policies for their attorneys. Some jurisdictions have begun to heed this call, leading the way in establishing transparent policies that will promote consistency, ensure fair trials, and reduce the number of reversals. Notable among those jurisdictions publishing written discovery policies are Philadelphia, Pennsylvania;[144] Los Angeles, California;[145] Denver, Colorado;[146] and Douglas County, Kansas.[147]

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141 *See In re* Seastrunk, 236 So. 3d 509, 513 (La. 2017); *In re* Riek, 834 N.W.2d 384, 389 (Wis. 2013); Disciplinary Couns. v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010); *In re* Att'y C, 47 P.3d 1167 (Colo. 2002) (en banc).

142 *See* Green & Roiphe, *supra* note 28, at 533; Pfaff, *supra* note 26, at 103.

143 ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 467 (2014); Susan Humiston, *Prosecutorial Ethics: Part Two*, BENCH & BAR MINN., Nov. 2020, at 8.

144 *See Philadelphia DAO Policies on: (1) Disclosure of Exculpatory, Impeachment, or Mitigating Information, (2) Open-File Discover*, PHILA. DIST. ATT'YS OFF. (Oct. 1, 2020) [hereinafter *Philadelphia District Attorney Office Policy*], https://phillyda.org/wp-content/uploads/2021/11/DAO-Brady-Policy.pdf [https://perma.cc/UU3B-CDKN].

145 *See Discovery Compliance System Manual*, L.A. CNTY. DIST. ATT'YS OFF. (Dec. 2021), https://da.lacounty.gov/sites/default/files/pdf/Discovery-Compliance-System-Manual-December-2021.pdf [https://perma.cc/NN57-C99E].

146 *See The Denver District Attorney's* Brady *Committee and Credibility Disclosure Notifications Procedures*, DENVER DIST. ATT'Y (Jan. 1, 2023) [hereinafter *Denver District Attorney* Brady *Guidelines*], https://www.denverda.org/wp-content/uploads/2023/02/020123Final-2023-Brady-Policy.pdf [https://perma.cc/9PW3-6ZEH].

147 *See "*Brady/Giglio *Policy" of the District Attorney*, DOUGLAS CNTY. DIST. ATT'YS OFF. **(**Aug. 10, 2022**),** https://www.douglascountyks.org/sites/default/files/docs/county-news/pdf/bradygigliopolicyaugust2022.pdf [https://perma.cc/G6A2-GJRU].

Each jurisdiction's discovery manual will necessarily be different, because the *Brady* doctrine and Rule 3.8(d) intersect prominently with state rules of criminal procedure, state statutes dealing with the privacy rights of police officers, and appellate decisions interpreting state constitutional requirements. But having a *framework* that prosecutors can follow in executing their discovery obligations will be necessary to reduce human error, poor judgment, and bias that prosecutors may exhibit in making important decisions.[148] Enacting discovery guidelines will also be essential for leaders in a prosecutor's office to satisfy state bar regulators that office leadership has fulfilled their responsibility under Rule 5.1 to reasonably supervise attorneys working under them.

I outline briefly below what I believe to be nine essential ingredients of a fair, effective, and constitutionally sound discovery manual:

- Manuals should include a checklist of types of discoverable information typically included in a prosecutor's file, allowing prosecutors—particularly less experienced prosecutors—to conduct discovery in each case by reference to a routine checklist;[149]
- Manuals should dispense with a materiality standard for defining exculpatory evidence, focusing not on the likely impact of information on the jury's ultimate determination in the case, but on the ability of the information to provide some level of assistance to the defense, however minimal;[150]
- Manuals should require prosecutors to inform all police officers and government agents on the investigative team of the scope and nature of the *Brady*/*Giglio* requirement, so that prosecutors will receive from investigatory agents potentially discoverable material that is in the agent's, but not the prosecutor's, file;[151]

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148 *See* Trace C. Vardsveen & Tom R. Tyler, *Elevating Trust in Prosecutors: Enhancing Legitimacy by Increasing Transparency Using a Process-Tracing Approach*, 50 FORDHAM URB. L.J. 1153 (2023) (arguing that a process-tracing method will increase transparency in prosecutorial decision-making by identifying factors that shape prosecutors' decisions).

149 *See* Memorandum from N.J. Att'y Gen. Gurbir S. Grewal to the Dir., Div. of Crim. Just., Dir., Off. of Pub. Integrity & Accountability, Ins. Fraud Prosecutor, Superintendent, New Jersey State Police, and All Dep't of L. & Pub. Safety Pers. 3–4 (June 18, 2019), https://www.nj.gov/oag/dcj/pdfs/policies/LPS_Brady-Giglio-Policy_June-2019.pdf [https://perma.cc/73AM-XNQY] (delineating various types of evidence that constitute *Brady* and *Giglio* material).

150 *See* MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2023); ABA Standing Comm. on Ethics & Pro. Resp., Formal Ethics Op. 09-454, at 4–5 (2009); *see also Denver District Attorney* Brady *Guidelines*, *supra* note 146, at 1.

151 *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (imposing affirmative obligation on prosecutor to gather and turn over exculpatory evidence possessed by investigatory team).

- Manuals should require prosecutors to request all investigative agents and expert witnesses to preserve their notes, whether or not those notes are reduced to a formal report;
- Manuals should provide a place to go for guidance if prosecutors have questions about their discovery obligations in particular cases, such as an office "Ethics Coordinator" or the Chairperson of its "Ethics and Professionalism Committee;"[152]
- Manuals should require all factually exculpatory evidence and all evidence supporting affirmative defenses to be turned over to the defendant before a change of plea. In those cases where the prosecutor has not completed discovery at the time of allocution, and where the practice is not prohibited by local rules of criminal procedure, the defendant should be allowed to waive his right to receive impeachment material in open court during a change of plea colloquy, but only in misdemeanor cases and felony cases where the prosecutor is not requesting jail time;
- Manuals should identify certain types of information that ordinarily will be turned over to a judge for *in camera* review and a determination by the court as to whether it is discoverable, such as mental health records of victims or impeachment material of confidential informants referenced in a search warrant;[153]
- Manuals should create a system for requesting and receiving support of supervisors in accessing information held by other sovereigns (other states or the federal government) who may have been involved in the investigation but have so far been uncooperative in providing information to the office; and
- In the post-conviction context, manuals should require any prosecutor who receives information that a defendant previously convicted of a crime may not be guilty of that crime (such as by recantation by a material witness, forensic evidence, or information about another suspect supplied by an arrested individual) to report that information to the Ethics and Professionalism Committee for a determination as to what further steps are required to comply with Rules 3.8(g) and (h).

Perhaps the most difficult issue that a comprehensive discovery manual must address is impeachment material on police witnesses. Police officers participating in the arrest or investigation of a defendant

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[152] *See* Green & Roiphe, *supra* note 28, at 534; *Philadelphia District Attorney Office Policy*, *supra* note 144, at 2–3.

[153] *See* Franks v. Delaware, 438 U.S. 154, 155 (1978) (holding that fruits of search must be suppressed if defendant establishes by a preponderance of the evidence that false statements were included in the affidavit by the affiant knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause).

may have been subject to investigation and sanctioned by internal affairs for infractions varying from minor administrative matters (such as failure to report for duty or insubordination) to major infractions such as falsifying overtime reports, using racial epithets during an arrest, or excessive force. They may also have been convicted of a crime, or found by a judge to have lied under oath in a ruling on a motion to dismiss or suppress.[154] Some, but not all, of these incidents constitute *Brady*/*Giglio* material because they could be used to impeach the police officer as a witness and create a reasonable doubt that otherwise might not exist.[155]

Offices across the United States are struggling with this issue and have taken a variety of approaches. "Prosecutorial practices around maintaining and using *Brady* lists vary widely and are almost completely unregulated."[156] Some offices have created do not call lists that seek to obviate the discovery issue by retaining a list of police officers who simply will not be called as witnesses in any circumstances, even if it means dismissal of a case in which they were the arresting officer. Other offices seek to cooperate with local police chiefs to collect internal affairs material on police officers and provide this impeaching material to defendants if they think it meets the *Giglio* standard.[157] Still others create a "*Brady* list" of police officers who have significant impeaching material in their files; whenever a prosecutor intends to call one of these police officers as a witness, the defense attorney is told about the existence of impeaching information and encouraged to seek a subpoena from the court if they wish to obtain it from the police department.[158] Which approach, or combination of approaches,[159] is appropriate for any particular jurisdiction will vary

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154 *See* Graham v. Dist. Att'y for the Hampden Dist., 493 Mass. 348, 350 (2024) (requiring prosecutors in Massachusetts to collect and turn over to the defense any adverse credibility determinations made by judges against police officers in other cases, irrespective of prosecutor's assessment of that evidence's admissibility).

155 *See* United States v. Bagley, 473 U.S. 667, 682 (1985); Thomas P. Hogan, *An Unfinished Symphony:* Giglio v. United States *and Disclosing Impeachment Material About Law Enforcement Officers*, 30 CORNELL J.L. & PUB. POL'Y 715, 719 (2021) (discussing range of police misconduct that could conceivably fall under *Giglio* and describing Supreme Court precedent in this area as "incoherent").

156 Rachel Moran, Brady *Lists*, 107 MINN. L. REV. 657, 659 (2022).

157 *See Berkshire District Attorney's Office* Brady *Policy*, MASS.GOV 4–5 (Aug. 16, 2021), https://www.mass.gov/doc/berkshire-district-attorneys-office-brady-policy/download [https://perma.cc/2BM3-GRNS].

158 *See Denver District Attorney* Brady *Guidelines*, *supra* note 146, at 4–6.

159 The Justice Manual requires federal prosecutors to interview agent witnesses for each forthcoming trial and "have a candid conversation with each potential investigative agency

depending on exemptions contained in state public records laws, statutes pertaining to the privacy rights of police officers, and collective bargaining agreements in effect with the police union. My point is that prosecutors desperately need written guidance on this contentious issue. For the sake of both uniformity and fairness, cases involving "problem" officers should be handled consistently within an office, and defense attorneys should have access to the policy directives that guide the decisions of line assistants.

C. Cooperating Witnesses

An accomplice or other person involved in a criminal enterprise may be willing to testify on behalf of the government if she perceives that she will receive some benefit from the arrangement. In return for that cooperation, the accomplice witness may expect charging or sentencing concessions. While this form of bargaining is a prominent fixture in our criminal justice system, it is also rife with the potential for abuse.[160]

A prosecutor seeking to "turn" a witness faces several sensitive ethical dilemmas under the Rules of Professional Conduct. First, any benefits—or promises of future benefits—bestowed upon that witness is information that could be used by the defense to show bias on cross examination, and therefore is exculpatory material required to be disclosed to the defense under both the Due Process Clause[161] and Rule 3.8(d).[162] As the Supreme Court has recognized, a "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."[163]

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witness and/or affiant with whom they work regarding any on-duty or off-duty potential impeachment information, . . . so that prosecuting attorneys can take appropriate action." U.S. Dep't of Just., *supra* note 67, § 9-5.100.

160 *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 932 (1999). The frequency of fabrication by witnesses who have made "deals" with the government is potentially staggering. Members of the Innocence Project at Cardozo Law School analyzed sixty-seven cases in which defendants were wrongfully convicted, incarcerated, and later exonerated by DNA evidence. In a remarkable twenty-one percent of these cases, false testimony by a government informant contributed to the wrongful conviction. JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED 156 (2000).

161 Giglio v. United States, 405 U.S. 150, 154–55 (1972).

162 *See supra* text accompanying note 136.

163 Napue v. Illinois, 360 U.S. 264, 269 (1959).

Cooperating witnesses professing to have insider information about a criminal enterprise can have a powerful impact on the jury. Any prior inconsistent statements that these witnesses made during the course of the investigation must be disclosed to the defense as impeachment material under both the Due Process Clause[164] and Rule 3.8(d).[165] As the failed corruption trial of Alaska Senator Ted Stevens revealed in 2009, prosecutors who possess notes of prior statements of a cooperating witness that deviate from that witness's trial testimony on any relevant issue are ethically obliged to reveal those statements to the defense.[166]

Third, under Rule 3.3(a), a prosecutor may not knowingly present false testimony through a witness; if she presents material evidence and subsequently learns of its falsity, the prosecutor has a duty to take reasonable remedial measures.[167] This disciplinary rule, like 3.8(d), has a constitutional dimension. The Supreme Court ruled in *Napue v. Illinois* that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."[168] "The same result obtains when the State, *although not soliciting false evidence*, allows it to go uncorrected when it appears."[169] Where an accomplice witness shades their testimony in

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164 *See* United States v. Bagley, 473 U.S. 667, 676 (1985) (rejecting distinction between impeaching and exculpatory evidence for the purpose of due process analysis).

165 *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (failure to disclose impeachment material may violate both due process and ABA Model Rule 3.8(d)).

166 *See* Order of U.S. District Court for the District of Columbia, In re Special Proceedings, Misc. No 09-0198 (Nov. 21, 2011), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2011/11/21/Local/Graphics/sullivanordernov21.pdf?itid=lk_inline_manual_9 [https://perma.cc/4DDS-QD5H]; Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES (Apr. 7, 2009), https://www.nytimes.com/2009/04/08/us/politics/08stevens.html [https://perma.cc/GWU4-4U39].

167 MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 2023).

168 *Napue*, 360 U.S. at 269.

169 *Id.* (emphasis added). There is one important legal issue that has been left open after *Napue*—what level of materiality must be shown before a conviction may be reversed due to the prosecutor's knowing use of perjured testimony or failure to correct perjured testimony. There is language in *Napue* suggesting that prosecutors must correct their witnesses' false testimony if it is "in any way relevant," *Id.* at 269–70, and that a new trial is required so long as the false testimony *could* have affected the jury's judgment. *Id.* at 271. This is a more lenient materiality standard than traditional *Brady* error, which requires the reviewing court to determine "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding *would* have been different." *Bagley*, 473 U.S. at 682 (emphasis supplied). Several circuit courts have applied a "could have affected the judgment" standard to *Napue* error. *See* Haskell v. Greene, 866 F.3d 139, 146–47 (3d Cir. 2017); Dow v. Virga, 729 F.3d 1041, 1048 (9th Cir. 2013). The D.C. Circuit, in agreement, has described this standard as "quite easily satisfied." United States v. Butler, 955 F.3d 1052, 1058 (D.C. Cir. 2020) (quotations omitted). But other circuit courts have

a way that favors the government on direct or cross examination, the prosecutor has an obligation to correct that false testimony under Rule 3.3(a). The ABA Criminal Justice Standards for the Prosecution Function explain more fully what is implicit in this "reasonable remedial measures" requirement:

> During the trial, if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps. If the witness is still on the stand, the prosecutor should attempt to correct the error through further examination. If the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for determination of an appropriate remedy.[170]

Finally, a prosecutor may not attempt to insulate a cooperating witness by instructing that witness not to talk to the defendant or his counsel.[171] A cooperating witness who is concerned for their own safety or privacy may choose *not* to be interviewed by the defense team, but that is their choice to make without influence from the government. Where local rules of criminal procedure require the prosecutor to provide the address of government witnesses prior to trial, and where the government lists the address of a cooperating witness as the prosecutor's office in an attempt to provide for the safety of that witness and/or their family, the court may require the prosecutor to make that witness available for a pretrial interview.[172]

With these parameters in mind, a "cooperating witness policy" should address the following topics:

- Not all witnesses who may have been factually involved in a criminal incident need be considered "cooperators" for the

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overlaid a harmless error analysis onto their constitutional review of *Napue* error, similar to the materiality standard of *Brady*, but with the burden on the prosecution to show that the error was harmless beyond a reasonable doubt. *See, e.g.*, Gilday v. Callahan, 59 F.3d 257, 268 (1st Cir. 1995) (noting that second step of the *Napue* analysis tests "whether the perjured testimony in fact had a substantial and injurious effect or influence on the jury's verdict"); Carter v. Mitchell, 443 F.3d 517, 537 (6th Cir. 2006) (stating that even if there had been a *Napue* violation, "any constitutional error would have been harmless"). Whether *Napue* error is subject to a separate and more lenient form of materiality review is a question that may be addressed if the Supreme Court grants certiorari in *Glossip v. Oklahoma*. 143 S. Ct. 2453 (2023) (mem.).

170 CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-6.6(c) (AM. BAR ASS'N 2017).

171 *See* MODEL RULES OF PRO. CONDUCT r. 3.4(a) ("[A] lawyer shall not . . . obstruct another party's access to evidence.").

172 *See* United States v. Speciale, No. 1:10CR61, 2011 WL 795014, at *3–4 (N.D.W. Va. Feb. 14, 2011).

purpose of these written directives. For example, a victim in an assault and battery case would generally not be considered a cooperator, even where it is anticipated that the defendant will raise a self-defense claim. The manual should expressly define a "cooperating witness" to whom the guidelines apply. One possible definition is "a person who the government has probable cause to believe committed a criminal offense, charged or uncharged, and who has agreed to cooperate with the government's investigation notwithstanding a reasonable, good faith basis to assert their Fifth Amendment privilege against self-incrimination."

- The office policy manual should require a designated level of approval, such as from a trial division chief, before any sentencing or charging considerations can be offered or extended to a witness in exchange for their cooperation.
- To make compliance with Giglio easier and more transparent, the office policy manual should require that all cooperation agreements be reduced to writing[173]
- The prosecutor should inform all members of the investigative team that they may not bestow any promises, rewards, inducements, or benefits on a cooperating witness other than as reflected in the government's written cooperation agreement. All oral promises are prohibited.
- The prosecutor should inform all members of the investigative team that they may not provide illegal narcotics or opportunities for sexual contact to a cooperating witness, nor may they promise them immunity for any future crimes.[174]
- The prosecutor should inform all members of the investigative team that they may not have a conversation about the cooperating witness's immigration status with the Department of Homeland Security—specifically, the U.S. Citizenship and Immigration Services (USCIS)—without prior authorization of the prosecuting attorney.
- The manual should provide that if a cooperating witness is in custody, no member of the investigative team should have a conversation with the sheriff or department of corrections staff about the housing status of that witness without prior authorization of the prosecuting attorney.
- Where the cooperating witness is represented by counsel, that counsel must be informed before the government conducts any

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[173] *See* United States v. Speciale, No. 1:10CR61, 2011 WL 795014, at *3–4 (N.D.W. Va. Feb. 14, 2011).

[174] Certain forms of payment or benefit to cooperating witnesses have been found to be so outlandish as to constitute "outrageous government conduct" in violation of the due process clause, whether or not the rewards are disclosed to the defense. *See* United States v. Russell, 411 U.S. 423, 435 (1973); State v. Lively, 921 P.2d 1035, 1048 (Wash. 1996).

interview with the cooperating witness, and shall either be present or shall provide authorization for the government to conduct the interview without counsel being present.[175]

- To collect and preserve possible impeachment material, at least two members of the investigative team should be present whenever a cooperating witness is interviewed, and that oral interview should be audio recorded or reduced to writing.
- Neither the prosecutor nor any member of the investigative team shall discourage a cooperating witness from supplying information to the defense.
- The manual should provide recommended procedures for complying with local discovery requirements about a witness's biographical information and home address whenever the safety of the witness is reasonably believed to be in jeopardy.
- Because the testimony of a cooperating witness is often central to the government's proof, and the impeachment of that witness will therefore be central to the defense, the prosecutor should provide the defense with all impeachment information about a cooperating witness before a change of plea, and should not demand as a condition of a plea bargain that the defendant waive her right to impeachment information on a cooperating witness.[176]
- If necessary to safeguard the physical safety of the witness or his family, the integrity of ongoing investigations, or sensitive national security information, the prosecutor may seek a protective order limiting the prosecutor's obligation to disclose impeachment material on a cooperating witness at the time of a guilty plea.
- If a cooperating witness testifies at trial in a manner the prosecutor believes to be false, the prosecutor must take remedial measures wherever that false testimony relates to a relevant issue.[177]

A comprehensive policy on cooperating witnesses must also include strict limitations on the use of so-called "jailhouse informants"—those individuals who propose to testify to statements that the defendant made in prison, such as confession to participation in the crime. Problems with the use of jailhouse informants have been well-

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[175] *See* MODEL RULES OF PRO. CONDUCT r. 4.2 (stating that a lawyer shall not have communication with a person represented by counsel "about the subject of the representation" without permission of that counsel, unless authorized by law or a court order).

[176] *See* discussion of United States v. Ruiz, 536 U.S. 622 (2002), *supra* note 140 and accompanying text.

[177] *See supra* note 169 and accompanying text.

documented by the literature[178] and highlighted by recent scandals across this country.[179] A full discussion of the misuse of jailhouse informants is beyond the scope of this Article. But a jailhouse informant may have the incentive to testify falsely to obtain jail privileges or early release, and they may have the *capacity* to falsify a confession because they have access to details about the charges against the defendant through court papers in the defendant's possession.[180] They may have been moved into proximity to the defendant for the express purpose of eliciting a confession, and that deliberate elicitation may violate the right of the defendant under both the Fifth and Sixth Amendments.[181] They may have received benefits from prison officials (e.g., canteen privileges, lower classification, extra recreation time, etc.) that are required to be disclosed to defense counsel for use on cross-examination.[182] It is important for a

178 *See* Paul C. Giannelli, Brady *and Jailhouse Snitches*, 57 CASE W. RSRV. L. REV. 593 (2007); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000); *see also* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 89 (2d. ed. 2022) (describing the pernicious effects of using jailhouse informants).

179 Nathalie Baptiste, *Prosecutors Are Using Jailhouse Snitches to Send Innocent People to Death Row*, MOTHER JONES (July 9, 2018), https://www.motherjones.com/criminal-justice/2018/07/prosecutors-are-using-jailhouse-snitches-to-send-innocent-people-to-death-row/ [https://perma.cc/R4TE-9J7N] (describing capital case of Curtis Flowers in Mississippi and the recantation of jailhouse informant); Lorelei Laird, *Secret Snitches*, 102 A.B.A. J. 46 (May 2016) (describing scandal in Los Angeles, California Sherriff's and Prosecutor's offices revealed during the prosecution of Scott Dekraai for the Seal Beach murders).

180 NATAPOFF, *supra* note 178, at 8–9, 83.

181 Pursuant to *Massiah v. United States*, once an adversarial criminal proceeding has been initiated against the accused, and the constitutional right to the assistance of counsel has attached, any incriminating statement the government deliberately elicits from the accused in the absence of counsel is inadmissible at trial against that defendant. 377 U.S. 201 (1964). To prevail on a *Massiah* claim involving use of a jailhouse informant, the defendant must demonstrate that the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. Specifically, the defendant must establish that the informant (1) was acting as a government agent at the time of the conversation, i.e., under the direction of the government pursuant to some preexisting arrangement, and (2) deliberately elicited incriminating statements. *See* Fairbank v. Ayers, 650 F.3d 1243, 1255 (9th Cir. 2011).

182 *See also* MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2023). Some actions by corrections officials might be relevant both to impeach the witness for bias under *Giglio* and to make the two-step showing required by *Massiah*. *See* discussion *supra* note 181. For example, where jail officials change the informant's inmate classification and move him to a cell next to the defendant, this could be used both to show bias and to show that the prisoner was working as an agent of the government at the time of the alleged conversation.

cooperating witness policy to address all these unique problems.[183] Perhaps the best guidance that has ever been given to prosecutors about jailhouse informants is "don't use [them] and, if you do, 'corroborate everything you can.'"[184] At a minimum, a chief prosecutor's cooperating witness policy should require extra levels of approval within the office before a jailhouse informant may be used (including by the Ethics and Professionalism Committee), demonstrable corroboration of that witness's information,[185] and close work with the Department of Corrections to gather and turn over all information about the jailhouse informant's custody status, movements within the prison, work on past cases, and rewards.

CONCLUSION

As the corporate crime literature demonstrates, the predominance of collective action and shared responsibility in business organizations frequently makes it difficult to pinpoint criminal liability. The challenge, addressed through the "responsible corporate officer" doctrine, is to hold executive-level individuals accountable for

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183 Some states have created special reliability hearings that the court must hold for jailhouse informants prior to letting the jury hear their testimony. *See* 725 ILL. COMP. STAT. 5/115-21 (2019) (requiring such hearings in murder, sexual assault, and aggravated arson cases). Some states require prosecutors to create a database of jailhouse informants and the benefits they receive. *See* CONN. GEN. STAT. § 51-286k (2022); NEB. REV. STAT. § 29-4703 (2019). Some states now explicitly specify what material must be disclosed to the defense in terms of past and expected future benefits to be bestowed on the witness. *See* NEB. REV. STAT. § 29-4704 (2019); Dodd v. State, 993 P.2d 778, 784 (Okla. 2000) ("At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make in the future to the informant (emphasis added); (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.").

184 Giannelli, *supra* note 178, at 610 (citing Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1427 (1996)).

185 *See* CAL. PENAL CODE § 1111.5 (West 2012) (requiring corroboration connecting defendant to offense for conviction); TEX. CODE CRIM. PROC. ANN. art. 38.075 (West 2017) (same). *See generally Achieving Justice: Freeing the Innocent, Convicting the Guilty—Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process*, 37 SW. U. L. REV. 763, 783 (2008) (recommending corroboration requirement for jailhouse informants).

wrongdoing to which they contributed, whether through commission or omission.[186]

Prosecutor's offices are organizations with structures and incentives not dissimilar to that of a corporation. Because existing frameworks for addressing prosecutorial misconduct in the criminal justice system are not effective,[187] bar regulators should borrow from the responsible corporate officer doctrine and more aggressively enforce Model Rule 5.1.

When opening a disciplinary case against a prosecutor—whether on referral from a judge or a defense lawyer, a ruling on a motion for new trial, or post exoneration publicity—bar disciplinary authorities should examine witnesses and respondents to inquire into the adequacy of training within the prosecutor's office. They should be willing to charge managerial attorneys in a district attorney's office, and even the elected district attorney herself, under Rule 5.1. The "buck" should not always stop with an individual line attorney assigned to the case. Lone prosecutors might be doing what they think is expected of them. They might believe they are following informal work rules or modeling the work of others. More often than not, their failure might lie in conforming to institutional culture rather than 'going rogue.' The bar needs to uncover and confront abiding systemic weaknesses in the exercise of prosecutorial power.

Over fifty years ago, the Supreme Court attempted to justify absolute immunity for prosecutors on the ground that loss of licensure may serve as an adequate deterrent to misconduct.[188] During the past decade, bar disciplinary authorities have begun to heed the call of the judiciary, scholars, and the defense bar to investigate and sanction line prosecutors.[189] But the next step in making that promise of *Imbler* a reality is to sanction managers for failing reasonably to exercise their supervisory responsibilities. The notion that supervisory attorneys must be more actively involved in their colleagues' ethical decisions has been recognized by the bar,[190] but its potential remains unfulfilled. Because elected district attorneys and their top assistants will not want to see themselves brought before disciplinary boards for the misconduct of subordinates, unleashing Rule 5.1 will serve as a catalyst for better training and more transparent written policies within a

186 Aagaard, *supra* note 86, at 1246.

187 Barkow, *supra* note 12, at 2090.

188 *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

189 *See* discussion *supra* notes 22–24 and accompanying text.

190 Miller, *supra* note 31, at 262.

prosecutorial organization. While not a complete solution to the problem of prosecutorial misconduct, more aggressive enforcement of Rule 5.1 represents a promising way to influence head prosecutors to create and implement a culture of professionalism within their offices.