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NOTE

PROSECUTOR'S DUTY TO DISCLOSE EXCULPATORY EVIDENCE

*Lisa M. Kurcias**

INTRODUCTION

In August of 1997, the American Bar Association Commission on the Evaluation of the Rules of Professional Conduct, widely known as the Ethics 2000 Commission, began its work evaluating the ethical practices of lawyers and recommending changes to the Model Rules of Professional Conduct.¹ One of the rules the Ethics 2000 Commission examined was Model Rule 3.8, which addresses the "Special Responsibilities of a Prosecutor."²

Model Rule 3.8(d) is controversial, not least for its severe lack of enforcement.³ Rule 3.8(d) requires a prosecutor in a criminal trial to disclose evidence that is favorable to the defendant,⁴ a requirement similar to the constitutional disclosure requirements established by the Supreme Court in *Brady v. Maryland*.⁵ The Court in *Brady* held that a prosecutor commits a Due Process violation, requiring reversal of a conviction, when it is shown that the prosecutor withheld favorable, *material* evidence.⁶

Although addressing the same issue, there are significant differences between the ethical requirements of the Model Rule and the legal requirements of the *Brady* Rule.⁷ For example, the ethics

* I am grateful to Professor Bruce A. Green for his invaluable guidance. I would like to thank my family for their continuing love and support.

1. See *Ethics 2000 – Comm'n on the Evaluation of the Rules of Prof'l Conduct*, Ctr. for Prof'l Responsibility, available at <http://www.abanet.org/cpr/ethics2k.html> (last visited Sept. 24, 2000) ("The ethical standards promulgated by the ABA have been adopted by virtually every jurisdiction, implicitly acknowledging that the Association is a recognized leader and the appropriate forum for discussing, drafting and adopting rules governing lawyer conduct.").

2. Model Rules of Prof'l Conduct R. 3.8 (1983) [hereinafter Model Rules]. See *infra* note 38 for the text of Rule 3.8.

3. See *infra* Part I.C.

4. See *infra* Part I.B.1.

5. 373 U.S. 83 (1963); see *infra* Part I.B.2.

6. See *infra* Part I.B.2.

7. See *infra* Part I.B.3.

rule does not limit the prosecutor's disclosure obligation only to evidence that is material to the case. In addition, the *Brady* Rule, unlike the ethics rule, dictates that the prosecution must disclose evidence that could be used to impeach a prosecution witness.

The Ethics 2000 Commission considered but rejected any change to the text of Rule 3.8(d).⁸ It did, however, recommend amending the comment to Rule 3.8 to state in part that "[e]vidence tending to negate the guilt of the accused includes evidence that materially tends to impeach a government witness."⁹ Thus, the Commission suggests clarifying that impeachment evidence is included under the prosecutor's ethical duty to disclose, but only where the evidence is material to the case. This raises an important question: Should the disclosure obligation of Rule 3.8(d) go further than *Brady* and require the disclosure of all evidence, regardless of materiality? If not, should Rule 3.8(d) be eliminated entirely, or alternatively, should it be limited to include the materiality requirement of the *Brady* Rule?

Part I of this Note will discuss how lawyers, and prosecutors in particular, are governed by legal and ethical obligations. Part I focuses specifically on the legal and ethical duties of a prosecutor to disclose exculpatory evidence, and it first explains a prosecutor's disclosure obligations under the ethics rules and then provides an overview of the development of the constitutional standard of disclosure set forth by the Supreme Court. Part I then looks at the differences between Rule 3.8(d) and the *Brady* Rule and concludes with an analysis of the prosecutor's ethical duty of disclosure with regard to enforceability issues. Part II also presents the arguments in support of and against eliminating the ethical rule altogether or amending it to include a materiality requirement. Finally, this Note argues that Model Rule 3.8(d) should remain unchanged because the ethics rule sets a higher standard toward which a prosecutor should strive.

I. THE PROSECUTOR'S LEGAL AND ETHICAL OBLIGATIONS

At its foundation, the lawyer's role is as "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."¹⁰ Various legal restrictions and ethics rules guide attorneys toward this aspirational definition. Legal restrictions exist in the form of judicial decisions handed down by the courts that govern a lawyer's behavior and in statutes enacted

8. See *Proposed Rule 3.8 – Public Discussion Draft*, Ctr. for Prof'l Responsibility, available at <http://www.abanet.org/cpr/rule38.html> (Apr. 13, 2000).

9. *Id.* at cmt.

10. Model Rules, *supra* note 2, at Preamble. The Model Rules of Professional Conduct are promulgated by the American Bar Association and they govern lawyers' conduct and provide professional discipline. Monroe H. Freedman, *Understanding Lawyers' Ethics* 2 (1990).

by state and federal legislatures.¹¹ Lawyers are also governed by ethical standards, and every state has adopted its own set of ethics rules that not only prescribe desirable behavior for lawyers but also provide a basis for discipline in response to attorney misconduct.¹² Furthermore, judicial decisions will often comment on ethical misconduct.¹³

This part discusses how ethical standards regulate all lawyers. It then illustrates the additional legal and ethical duties applied to prosecutors who are held to a different, and arguably higher, standard of conduct than private lawyers and defense attorneys, notably the duty to disclose exculpatory evidence to the defense. This part summarizes the prosecutor's ethical duty to disclose exculpatory evidence as provided for in the rules that guide lawyers on their ethical responsibilities, particularly under Rule 3.8(d) of the Model Rules of Professional Conduct. This part then addresses the law established by *Brady v. Maryland*, which regulates disclosure in criminal trials,¹⁴ discusses the different requirements of Rule 3.8(d) and the *Brady* Rule. Finally, this part explains the treatment of Rule 3.8(d) in practice with regard to lax enforcement of this rule.

A. Role of the Lawyer

The Supreme Court has defined the role of the lawyer as an "officer of the court" whose function is to further the interests of his clients above the interest of the state.¹⁵ The ethical standards are the primary means of regulating and defining the role of the lawyer. The ethics rules govern a wide range of attorney conduct, from the lawyer's duty of confidentiality¹⁶ and restrictions on advertising,¹⁷ to rules regarding admission to the Bar.¹⁸

11. See, e.g., *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) (stating that "the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion."). In addition, the Federal Rules of Criminal Procedure provide mandatory rules that an attorney in a criminal case must follow. See, e.g., Fed. R. Crim. P. 16.

12. See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. Rev. 669, 678.

13. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1463 (9th Cir. 1993) (sanctioning prosecutorial misconduct by mentioning prosecutor by name and chastising him in a published opinion).

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

15. *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973) ("[T]he duty of the lawyer, subject to his role as an 'officer of the court,' is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State."); Freedman, *supra* note 10, at 9.

16. Model Rules, *supra* note 2, at R. 1.6 (entitled "Confidentiality of Information").

17. *Id.* R. 7.2 (entitled "Advertising").

18. *Id.* R. 8.1 (entitled "Bar Admission and Disciplinary Matters").

The first official national ethical guidelines regulating lawyer conduct were enacted in 1908 when the American Bar Association ("ABA") adopted the Canons of Professional Ethics ("Canons").¹⁹ The Canons failed, however, to provide lawyers with sufficient guidance regarding what was expected of them or how the guidelines should be followed.²⁰ These shortcomings led the ABA to replace the Canons with the Model Code of Professional Responsibility ("Model Code") in 1969.²¹ The Model Code,²² essentially a redraft of the Canons, is composed of Canons that are general ethical principles, Ethical Considerations that provide aspirational guidelines, and Disciplinary Rules that are mandatory.²³ Critics, however, contend that the Model Code is incoherent, inconsistent, and even unconstitutional.²⁴ In response to these criticisms, the ABA adopted the Model Rules of Professional Conduct ("Model Rules") in 1983, which provides an alternative to the Model Code.²⁵

Standing on their own, the Model Code and Model Rules are no more than *suggestions* of aspirational norms of professional conduct and they lack the force of law.²⁶ State supreme courts are vested with the power to license lawyers, and state courts have supervisory authority over the attorneys in their jurisdiction.²⁷ In order to govern the professional conduct of attorneys, the state supreme courts adopt ethics rules that are based largely on either the Model Code or the Model Rules.²⁸ To give these ethics rules force, the state courts also adopt disciplinary sanctions for violations.²⁹ When appropriate, the state courts hear disciplinary cases and choose the sanction to be imposed.³⁰

19. Canons of Prof'l Ethics (1908).

20. See Freedman, *supra* note 10, at 4.

21. See *id.*

22. Model Code of Prof'l Responsibility (1981) [hereinafter Model Code].

23. The preliminary statement of the Model Code defines the parts of the Model Code as follows:

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. . . . The Disciplinary Rules, unlike Ethical Considerations, are mandatory in character [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

Id. at Preliminary Statement.

24. Freedman, *supra* note 10, at 4.

25. Model Rules, *supra* note 2.

26. See Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 Fordham L. Rev. 33, 38 (1996) ("[T]he ABA writes ethics codes and state supreme courts give them legal effect.").

27. *Id.* at 37.

28. *Id.* at 40-41; Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 Fordham L. Rev. 3441, 3443 (1999).

29. Schneyer, *supra* note 26, at 38-39.

30. *Id.* at 39.

B. Disclosure Obligations for Prosecutors

While all lawyers are governed by legal and ethical rules, prosecutors are subject to more stringent obligations.³¹ Unlike the private lawyer or defense attorney whose obligation is to be a zealous advocate on behalf of his client, the prosecutor is entrusted with the duty to "seek justice" in addition to fulfilling her role as an advocate.³² The prosecutor has this duty to seek justice because she is a representative, not of a single individual, but of the government and society as a whole.³³

As the representative of a sovereign, the prosecutor enjoys powers that other lawyers do not. For example, prosecutors have broad discretion in deciding whom to prosecute and what charges to bring.³⁴ In addition, prosecutors have the benefit of a police force that investigates their cases and gathers evidence for them.³⁵ This broad access puts defendants at a great disadvantage in preparing their cases.³⁶ In the adversary system in which the prosecutor operates, the availability of these powers leads to great inequity between the prosecution and the defense in a criminal trial.³⁷

Thus, the heightened ethical obligations of the prosecutor are meant to ensure a fair process and minimize the disparity of resources between the prosecution and defense in the criminal justice system. The ethics rules written especially for prosecutors, therefore, impose

31. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L.J. 607, 615-16 (1999) [hereinafter Green, *Justice*].

32. See *Berger v. United States*, 295 U.S. 78, 88 (1935); Green, *Justice*, *supra* note 31, at 612; Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 46 (1991) [hereinafter Zacharias, *Justice*].

33. See Charles W. Wolfram, *Modern Legal Ethics* 759 (1986). As Professor Bruce A. Green explains, the prosecutor works under heightened requirements because of her role as the representative of the sovereign. See Green, *Justice*, *supra* note 31, at 634. The sovereign, according to Green, has the responsibility to see that justice is done, which is more than just convicting the guilty. Justice requires a fair process. See *id.* at 642-43. As the lawyer for the sovereign, this responsibility is passed on to the prosecutor. See *id.* at 634. Prosecutors are therefore distinguished from other government lawyers and from private lawyers by "the identity of the client, the amount of authority delegated to the lawyer to act on behalf of the client and the nature of the client's interests and ends in the criminal context." *Id.* at 633; Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 Fordham L. Rev. 525, 555 (1999).

34. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1524-25 (1981) (discussing the prosecutor's broad discretion in deciding whether to charge a witness, what charges to bring, and when to offer a plea bargain).

35. See Zacharias, *Justice*, *supra* note 32, at 59.

36. Indigent defendants who are represented by public defenders suffer the most in this respect. They have no funds to pay for investigations and the attorneys who represent them are overworked and in most cases do not have the opportunity to spend much time preparing a defense. See Green, *Justice*, *supra* note 31, at 626.

37. See Zacharias, *Justice*, *supra* note 32, at 54-55.

additional obligations and responsibilities on them.³⁸ The ABA mentions the prosecutor's unique duty to seek justice in the Canons,³⁹ in the Model Code,⁴⁰ and in the Model Rules.⁴¹ Although the term "justice" is very ambiguous⁴² and the ethics rules provide very little guidance to prosecutors on its meaning,⁴³ it is clear that prosecutors are expected to provide defendants with certain assistance in an attempt to alleviate the inherent imbalance between the two sides. The Model Rules contain specific provisions designed to combat this

38. Model Rule 3.8 provides that:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused . . . ;
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;
- (f) 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.
- (g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Model Rules, *supra* note 2, R. 3.8.

39. Canons of Prof'l Ethics Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.").

40. Model Code, *supra* note 22, EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

41. See Model Rules, *supra* note 2, R. 3.8 cmt. ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 695 (1987) ("The prosecutor's role as an advocate is tempered by an obligation of fairness, a duty to ensure that each trial results in an accurate determination of guilt and punishment.").

42. See Melilli, *supra* note 12, at 679.

43. See Zacharias, *Justice*, *supra* note 32, at 46 ("Although the special prosecutorial duty is worded so vaguely that it obviously requires further explanation, the codes provide remarkably little guidance on its meaning. In effect, code drafters have delegated to prosecutors the task of resolving the special ethical issues prosecutors face at every stage of trial.").

uneven treatment,⁴⁴ and they explicitly state that a prosecutor has a role distinct from that of an ordinary attorney participating in the criminal justice system.⁴⁵ Model Rule 3.8, which is entitled Special Responsibilities of a Prosecutor, provides in the comment that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."⁴⁶

As with the ethical obligations, the common thread that runs through the legal obligations applied to prosecutors is the notion of protecting the integrity of the process. The legal restrictions stem from both criminal procedure law and judicial case law. For example, criminal procedure law requires the government, upon request, to produce documents to the defendant that are material to the defense or will be used as evidence by the prosecution.⁴⁷ Similarly, judicial opinions formulate restrictions and obligations for prosecutors in their holdings.⁴⁸ The Court's decision in *Berger v. United States*,⁴⁹ for example, stated that a prosecutor has an obligation to see that justice is done.⁵⁰ In addition to defining the prosecutor's role in *Berger*, the Supreme Court also set guidelines for prosecutors to follow in order to achieve this duty to seek justice.⁵¹ Furthermore, as set forth in *Bank of Nova Scotia v. United States*,⁵² judges can publicly "chastise

44. See Model Rules, *supra* note 2, R. 3.8; see also *infra* Part I.B.1 (providing further discussion of these provisions).

45. Model Rules, *supra* note 2, R. 3.8 cmt. para. 1.

46. *Id.*

47. See Fed. R. Crim. P. Rule 16(a).

48. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (establishing a prosecutor's duty to disclose to the defense exculpatory evidence that is material to the guilt or punishment of the defendant); *Berger v. United States*, 295 U.S. 78, 88 (1935) (mentioning the duty of the prosecutor to refrain from improper methods designed to obtain a wrongful conviction).

49. 295 U.S. 78 (1935).

50. The Court stated:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Id. at 88.

51. See *Brady*, 373 U.S. at 87; see also *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (holding that the prosecutor's reference to the defendant's post-arrest, post-Miranda silence was a violation of Due Process); *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that the prosecutor's comments regarding the failure of the defendant to testify was a violation of the defendant's Fifth Amendment right against self-incrimination).

52. 487 U.S. 250 (1988).

[prosecutors] in a published opinion" for professional misconduct, allowing "the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant."⁵³

Because the more stringent legal and ethical requirements imposed on prosecutors share the same goal, they sometimes overlap. One of the most notable obligations imparted on prosecuting attorneys both legally and ethically is the duty to disclose exculpatory evidence to the defense.⁵⁴ A prosecutor must assist the defense in the preparation of its case by providing evidence that is favorable to the accused.⁵⁵

1. Ethical Obligation: Rule 3.8(d)

A prosecutor's ethical disclosure obligations, established by the ABA in 1908, pre-date the Court's decision in *Brady*.⁵⁶ Since the inception of the ethics rules, the ABA has sought to create a higher standard of behavior for prosecutors.⁵⁷ For example, the Canons provided special instructions for criminal prosecutors. Canon 5 states that "[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."⁵⁸ This coupling in the ethics rules of the general requirement to seek justice with the specific prohibition against withholding facts or witnesses favorable to the defense, highlights the importance of disclosure.

In subsequent redrafts of the ethics rules, this standard continued to be of the utmost importance. The Model Code and the Model Rules both advise that, in conjunction with their duty to do justice, prosecutors are required to disclose evidence favorable to the defense.⁵⁹ For example, the Model Code contains an Ethical Consideration stating the special duty of a public prosecutor to disclose exculpatory evidence to the defense.⁶⁰ The rationale

53. *Id.* at 263.

54. See Model Rules, *supra* note 2, R. 3.8(d); *Brady*, 373 U.S. at 87. Exculpatory evidence is defined as evidence "which tends to justify, excuse or clear the defendant from alleged fault or guilt." Black's Law Dictionary 566 (6th ed. 1990).

55. See Freedman, *supra* note 10, at 214, stating that:

[T]he defense attorney is entitled, and may be professionally bound, to withhold material evidence; defense counsel may advise a guilty defendant to remain silent and put the government to its proof. The Constitution guarantees the defendant nothing less. The prosecutor, however, is not similarly entitled to withhold material evidence. Indeed, she is forbidden to do so.

Id. (footnote omitted).

56. See *supra* notes 19-30 and accompanying text.

57. See Canons of Prof'l Ethics Canon 5 (1908).

58. *Id.*

59. Model Code, *supra* note 22, DR 7-103(B); Model Rules, *supra* note 2, R. 3.8(d).

60. Model Code, *supra* note 22, EC 7-13.

underlying the Ethical Consideration is the idea that the prosecutor represents a sovereign.⁶¹ Additionally, the corresponding Disciplinary Rule requires the timely disclosure of evidence "that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."⁶² Similarly, Model Rule 3.8 sets forth the special responsibilities of a prosecutor. Rule 3.8(d) provides in pertinent part:

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.⁶³

A review of the ABA model ethics rules, therefore, clearly indicates that the prosecutor's duty to disclose evidence favorable to the defense is an inherent and important part of a prosecutor's ethical responsibilities.

2. Legal Obligation: The *Brady* Rule

In *Brady v. Maryland*, the Court attempted to ensure a fair process for the defendant by requiring prosecutors to disclose evidence to the defense that could assist the defendant.⁶⁴ *Brady* and its progeny⁶⁵ established what is commonly referred to as the "*Brady* Rule": that a criminal defendant has a constitutional right to disclosure of exculpatory evidence that is material to guilt or punishment.⁶⁶ While the decisions prior to *Brady* focused on the intentional misconduct of the prosecutors, the *Brady* Court was primarily concerned with harm to the defendant resulting from nondisclosure.⁶⁷ The *Brady* Court ruled that "suppression by the prosecution of evidence favorable to an accused upon request violates Due Process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."⁶⁸ The Supreme Court held that the

61. *Id.*

62. *Id.* DR 7-103.

63. Model Rules, *supra* note 2, R. 3.8(d).

64. See *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963).

65. For subsequent cases that have expanded the Court's holding in *Brady* see *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995).

66. See *Kyles*, 514 U.S. at 437-38.

67. See *Brady*, 373 U.S. at 87 ("The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.").

68. *Id.*

suppression of favorable evidence violated Brady's rights under the Due Process Clause of the Fourteenth Amendment.⁶⁹

Since its decision in *Brady*, the Court has continued to expand the prosecutor's constitutional duty to disclose exculpatory evidence.⁷⁰ In *United States v. Agurs*,⁷¹ the Court held that "there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all."⁷² Thus, the *Agurs* Court accepted the argument that the *Brady* Rule applies even when no specific request for evidence has been made. The Court also stated, however, that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."⁷³

Subsequently, in *United States v. Bagley*,⁷⁴ the Court concluded that there is no difference between impeachment evidence and exculpatory evidence with respect to prosecutorial disclosure obligations.⁷⁵ Accordingly, the Court held that evidence that would be useful to impeach a prosecution witness also falls within the scope of the *Brady* Rule.⁷⁶ Additionally, the Court restricted the materiality standard, stating that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."⁷⁷ By imposing such a narrow definition, the Court created a "very demanding standard of materiality"⁷⁸ that makes it difficult for a defendant to establish a violation of his Due Process rights under the Fifth or Fourteenth Amendments as required to be granted a new trial.⁷⁹

Ten years after *Bagley*, in *Kyles v. Whitley*,⁸⁰ the Court once again addressed the issue of the prosecutor's duty to disclose exculpatory

69. *Id.* at 86. The Due Process Clause states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

70. *See supra* note 65.

71. 427 U.S. 97 (1976).

72. *Id.* at 107.

73. *Id.* at 108.

74. 473 U.S. 667 (1985).

75. *Id.* at 676. Impeachment of a witness is "[t]o call in question the veracity of a witness, by means of evidence adduced for such purpose, or the adducing of proof that a witness is unworthy of belief." Black's Law Dictionary 753 (6th ed. 1990).

76. *Bagley*, 473 U.S. at 676.

77. *Id.* at 682.

78. Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 902 (1997).

79. See Tracey L. Meares, *Rewards For Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 907-10 (1995).

80. 514 U.S. 419 (1995).

evidence.⁸¹ In *Kyles*, the Court reaffirmed its previous decisions in *Brady*, *Agurs*, and *Bagley* and summarized the *Brady* Rule,⁸² stating that "[w]hile the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden."⁸³ Moreover, the Court held that the scope of the *Brady* Rule extends to evidence that is known only to police investigators and not to the prosecutor.⁸⁴ Therefore, a "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."⁸⁵

Brady and its progeny established a prosecutor's constitutional duty to disclose exculpatory and impeachment evidence when it is in her possession or in the possession of the police. This obligation, unique to prosecutors, is widely deemed necessary for a defendant to receive a fair trial. Yet, as important as this duty is, it is severely limited by the materiality requirement.⁸⁶ In cases where a prosecutor has intentionally withheld exculpatory evidence, a conviction will not be overturned if that evidence is not deemed material because the defendant was not actually prejudiced.

While the Supreme Court requires prosecutors to disclose certain evidence to the defense, consequences for withholding such evidence do not exist in the criminal justice system.⁸⁷ In fact, the Supreme Court has granted prosecutors absolute immunity from civil liability for failure to disclose exculpatory evidence.⁸⁸ Thus, prosecutors do not fear being sued for withholding evidence and the *Brady* Rule is consequently weakened. As one commentator stated, "[i]nsofar as federal law is concerned, we have no reason at all to believe, under these circumstances, that prosecutors will not continue to ignore their constitutional obligation under *Brady*."⁸⁹ Consequently, encouragement for prosecutors to adhere to this requirement must be found elsewhere. Ideally, the ethics rules would supply this incentive.

81. *Id.* at 421.

82. *Id.* at 432-38.

83. *Id.* at 437.

84. *Id.* at 438.

85. *Id.* at 437.

86. See *supra* text accompanying notes 77-78.

87. See *Weeks*, *supra* note 78, at 878 ("[T]he prospect of a civil suit under federal law for a *Brady* violation simply does not exist. We will have to look elsewhere to discover the incentive for prosecutors to comply with their constitutional obligation to disclose exculpatory evidence.").

88. See *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); see also Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 St. Thomas L. Rev. 69, 79 n.54 (1995) [hereinafter Green, *Enforcement*] (stating that "prosecutors have absolute immunity for misconduct related to their prosecutorial function").

89. *Weeks*, *supra* note 78, at 902.

3. Differing Obligations Under the *Brady* Rule and Rule 3.8(d)

While Rule 3.8(d) and the *Brady* Rule both require prosecutors to disclose exculpatory evidence, significant differences remain between the two. Rule 3.8(d) is narrower than the *Brady* Rule in that the ethics rule does not require a prosecutor to provide the defendant with impeachment evidence, as *Bagley* requires.⁹⁰ Furthermore, the ethics rule does not hold the prosecutor responsible for evidence that is only in the possession of the police. The prosecutor is not ethically required to search for evidence favorable to the defense as required under *Kyles*.⁹¹

Conversely, however, Rule 3.8(d) is broader than the *Brady* Rule in some significant respects.⁹² Model Rule 3.8(d) states that a prosecutor must disclose to the defense "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."⁹³ Thus, unlike the *Brady* Rule which states that no Due Process violation occurs for failure to produce exculpatory evidence if the evidence is not material to the defendant's guilt or punishment, Rule 3.8 does not have a materiality requirement.⁹⁴ As a result, cases exist in which a prosecutor's willful failure to turn over evidence favorable to the accused will not warrant a reversal of the conviction because the evidence is found to be immaterial to the defendant's case,⁹⁵ and thus does not amount to a *Brady* violation, while the same conduct is a violation of Model Rule 3.8(d).⁹⁶

In addition, Rule 3.8(d) states that a prosecutor must, in connection with sentencing, "disclose to the defense and to the tribunal all unprivileged mitigating information known"⁹⁷ This ethical requirement to disclose information to the defense for the purpose of sentencing the defendant cannot be found in the *Brady* line of cases.⁹⁸ The ethical standard therefore again requires disclosure beyond the legal requirements of the *Brady* Rule.

90. See *supra* text accompanying notes 74-79 for a discussion of *Bagley*.

91. See *supra* text accompanying notes 80-85 for a discussion of *Kyles*.

92. See Rosen, *supra* note 41, at 714; see also Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 3.8:501 (2d ed. 1998 Supp.) (stating that rule 3.8(d) is broader than the *Brady* Rule on which it is based).

93. Model Rules, *supra* note 2, R. 3.8(d) (emphasis added).

94. See Rosen, *supra* note 41, at 714.

95. See Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 438 (1992) ("[U]nder the Supreme Court's current disclosure rules, the prosecutor's decision to suppress favorable evidence would be a perfectly rational, albeit unethical, act." (footnote omitted)).

96. See Rosen, *supra* note 41, at 714 ("An ethical violation can, and often will, be present even when due process is not violated.").

97. Model Rules, *supra* note 2, R. 3.8(d).

98. See *supra* note 65.

Scholars note that "[a] significant gap exists between the performance the Constitution requires of a prosecutor and the higher standard compelled by the rules of professional responsibility."⁹⁹ The existence of this gap begs the question of whether a prosecutor should understand her disclosure obligation to go only as far as the standard the Supreme Court set forth in *Brady* or as far as the more liberal ethical obligations. Obviously, the answer to this question is of the utmost importance to prosecutors, as it creates the standard to which a prosecutor must adhere. The next part discusses how Rule 3.8(d) functions in practice. It explains that this rule is under-enforced, raising the issue of whether the purpose of the rule is being served.

C. Enforcement

The ethics rules serve a variety of functions, including providing an interpretation of the rules for the practice of law and detecting and providing a remedy for violations of those rules.¹⁰⁰ Theoretically, the rules not only provide a basis for personal discipline of attorneys but also serve to educate lawyers about their ethical obligations, which exist in addition to their legal obligations.

One of the key functions of the ethics rules is to set the norms of conduct and provide a standard for professional discipline.¹⁰¹ Absent a vehicle for personal discipline, punishment for prosecutorial misconduct would only be available through the reversal of a conviction.¹⁰² The Supreme Court has found, however, that the reversal of a conviction for prosecutorial misconduct is not appropriate where the misconduct is deemed harmless error.¹⁰³ Where there is no denial of Due Process, the courts owe an obligation to society to uphold convictions and not reverse just to punish an unethical prosecutor.¹⁰⁴ Because cases arise where it is appropriate to

99. Meares, *supra* note 79, at 909.

100. See Schneyer, *supra* note 26, at 38 ("Lawyer regulation is not a unitary task. . . . The basic sub-tasks are: (1) making rules for law practice; (2) interpreting rules; (3) detecting rule violations; (4) determining 'guilt' when lawyers are charged with violations; (5) designing remedies or sanctions; and (6) imposing them in specific cases.").

101. See *id.*, Freedman, *supra* note 10, at 1 ("Disciplinary sanctions against lawyers include private reprimands, public censure, suspensions of the right to practice, and disbarment.").

102. See Weeks, *supra* note 78, at 870.

103. See *United States v. Hasting*, 461 U.S. 499, 506 (1983). The Court stated that "deterrence is an inappropriate basis for reversal . . . where means more narrowly tailored to deter objectionable prosecutorial conduct are available." *Id.* In a footnote the Court indicates that the trial court could have dealt with the misconduct through professional discipline. *Id.* at n.5. See generally Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line*, 88 Colum. L. Rev. 1298, 1298 (1988) (arguing that "harmless error" test should be applied to misconduct after analysis of conduct under notions of fair play and standards of professional conduct).

104. See *Hasting*, 461 U.S. at 506.

discipline a prosecutor, but inappropriate to overturn the conviction, the ethics rules provide a way to punish for misconduct.

Professional discipline of prosecutors serves multiple functions. First, it provides incentive for prosecutors to follow the ethical rules adopted by the court because failure to do so could result in a personal sanction even where there is no Due Process violation.¹⁰⁵ Because of the stringent materiality standard imposed by *Brady*, even where it is clear that a prosecutor has knowingly withheld exculpatory evidence, such conduct may not rise to the level of a Due Process violation.¹⁰⁶ In such a case, without an ethics rule, the court has no means to sanction such clearly unethical conduct.¹⁰⁷

In addition, the ethics rules allow courts to identify lawless lawyers and sanction them accordingly.¹⁰⁸ Critics, however, argue that Rule 3.8(d) is not very effective in serving this purpose.¹⁰⁹ Although *Brady*-type¹¹⁰ violations are believed to be quite common,¹¹¹ the ethics rules are rarely enforced and prosecutors are rarely disciplined for such violations.¹¹² In his notable 1987 article, Professor Richard A. Rosen addressed the overwhelming lack of discipline for *Brady*-type violations.¹¹³ Professor Rosen thoroughly researched how effectively the disciplinary rules were applied for *Brady*-type misconduct.¹¹⁴ An exhaustive search turned up surprisingly few cases in which prosecutorial misconduct was found.¹¹⁵ Furthermore, the punishment for the few instances of misconduct appeared to be quite weak.¹¹⁶ Thus, when a prosecutor must determine whether to disclose potentially exculpatory evidence, she has no personal incentive to

105. See Weeks, *supra* note 78, at 898 ("[E]ven if the prospect of meaningful sanction is remote, the mere fact of having to respond to charges might of itself be an effective deterrent to such abuse.").

106. See *supra* notes 77-78 and accompanying text.

107. See *supra* notes 87-88 and accompanying text.

108. See Schneyer, *supra* note 26, at 38.

109. See Rosen, *supra* note 41, at 697.

110. This term is used by Professor Richard A. Rosen to describe violations by prosecutors where a reversal of a conviction is not warranted. See *id.* at 696.

111. Meares, *supra* note 79, at 909.

112. Rosen, *supra* note 41, at 697.

113. See *id.*

114. *Id.* at 696-97.

115. *Id.* at 697.

116. See *id.* at 720-29. In 1997, Professor Joseph R. Weeks updated Professor Rosen's article and found no increase in the frequency of the discipline of prosecutors for *Brady*-type violations. See Weeks, *supra* note 78, at 844-71. Professor Weeks reviewed cases decided subsequent to Professor Rosen's article and found only seven additional cases where prosecutors were disciplined for failure to disclose exculpatory material, and the sanctions for these violations were very weak. In the ten years since Professor Rosen addressed this issue there still appeared to be a startling lack of enforcement of this rule for *Brady*-type misconduct. *Id.*; see also Meares, *supra* note 79, at 909 (Professor Tracey L. Meares attributes the lax enforcement to the gap between the disclosure obligations under the *Brady* Rule and the ethics rules).

encourage her to disclose this evidence to the defense.¹¹⁷ Moreover, when the prosecution's case is weak, there may be a significant risk that disclosing the evidence will severely harm the case.¹¹⁸ A prosecutor may see obvious advantages to withholding such evidence when there is no serious risk of repercussion. Hence, it is easy to see why a prosecutor who believes in the guilt of the defendant would choose not to disclose exculpatory evidence. Even if the prosecutor's failure to disclose exculpatory evidence is discovered, the worst-case scenario for the prosecutor is that the conviction will be overturned on appeal and the defendant will be granted a new trial, which is an unlikely result.¹¹⁹ On the other hand, the prosecutor may fear that she will not win a conviction if she does disclose the evidence.¹²⁰

Furthermore, "[i]t is also likely that in most cases the prosecutor believes the defendant is guilty, and therefore might be motivated by the concern that, in one sense, justice will not be served by revealing evidence which will increase the probability that the defendant will go free."¹²¹ Moreover, a prosecutor may not even realize that she has an ethical obligation to turn over evidence beyond what is required under the *Brady* Rule, because new prosecutors are given little or no education regarding prosecutorial ethics.¹²² The broader disclosure requirements of Rule 3.8(d) and the lack of enforcement of this rule begs the question of whether prosecutors should really be required to disclose evidence beyond what they are already required to disclose under the *Brady* Rule and if not, whether it is appropriate to change the ethical requirement to match the legal standard.

II. IMPORTANCE OF THE MATERIALITY REQUIREMENT

There is a controversy regarding the necessity of a materiality requirement that would limit a prosecutor's ethical duty to disclose exculpatory evidence. This part addresses the arguments in support of and against adding a materiality requirement to Rule 3.8(d) or eliminating the rule altogether. This part first presents the arguments in favor of adding a materiality requirement and therefore proposes that the rule is unnecessary. This part further argues that the *Brady* limit is the correct ethical standard because the proper balance has already been established, there may be constitutional problems with requiring broader disclosure, enforcement is lax, and prosecutors look

117. See Meares, *supra* note 79, at 907-11 (proposing the creation of a financial incentive system to encourage prosecutors to act ethically).

118. Gershman, *supra* note 95, at 438.

119. See *id.*

120. *Id.* ("If the case is weak, disclosure might destroy any chance for a conviction.").

121. Rosen, *supra* note 41, at 732.

122. See Melilli, *supra* note 12, at 686 (explaining that young lawyers entering into service as prosecutors are inexperienced and given little or no education in prosecutorial ethics).

to the legal requirements for their disclosure obligations. This part then addresses the arguments in favor of keeping the rule unchanged, stating that because the ethics rule establishes a different standard, has historical significance, serves to guide prosecutors, and directs the actions of the prosecutor going forward, a different standard of disclosure should apply. This Note concludes that Rule 3.8(d) should remain in effect to guide prosecutors and to set a higher ethical standard.

A. Arguments in Favor of Eliminating Rule 3.8(d) or Amending it to Include a Materiality Requirement

Arguably, the ethical disclosure obligation should be limited by the materiality requirement of the *Brady* rule. Because the rule is superfluous, the proper balance for a fair trial has already been set by the Supreme Court and legislators, courts exercising their ethics authority may lack the constitutional authority to require a prosecutor to disclose evidence beyond what is required by the legal requirements, the rule is under-enforced and the additional disclosure requirement may be part of the cause, and prosecutors look to the legal rules to determine their disclosure obligations are significant reasons in favor limiting the breadth of the rule.

First, Model Rule 3.8(d) may be unnecessary. An ethical requirement that a prosecutor disclose exculpatory evidence may be found in the Model Rules outside of Rule 3.8(d). Model Rule 3.4, entitled Fairness to Opposing Party and Counsel, establishes the ethical duty of a lawyer in the adversary system.¹²³ Rule 3.4(c) requires that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal . . ."¹²⁴ Similarly, Model Rule 8.4 provides a catch-all that makes it unethical to "engage in conduct that is prejudicial to the administration of justice."¹²⁵ *Brady* and its progeny established that exculpatory, material evidence in a prosecutor's possession must be disclosed to the defense.¹²⁶ Accordingly, the failure of a prosecutor to disclose such evidence would be a violation of Rule 3.4(c) and Rule 8.4(d). Therefore, even without Rule 3.8(d), a prosecutor is ethically required to comply with her *Brady* obligations and 3.8(d) may not be necessary.

Secondly, both Congress and the Supreme Court have considered the question of prosecutorial disclosure and have already created the rules that they consider appropriate.¹²⁷ As such, Congress and the Supreme Court have already established the proper balance to ensure

123. See Model Rules, *supra* note 2, at R. 3.4.

124. *Id.* R. 3.4(c).

125. *Id.* R. 8.4(d).

126. See *supra* notes 64-89 and accompanying text.

127. See 18 U.S.C. § 3500 (1994); Fed. R. Crim. P. 16; *Brady v. Maryland*, 373 U.S. 83 (1963).

a fair trial.¹²⁸ Arguably, the ethics rule should not require more from a prosecutor than is required under Due Process. As the Supreme Court clearly stated in *Agurs*: "there is . . . no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor."¹²⁹ More stringent ethical requirements allow a court to exercise its supervisory authority to demand more disclosure from prosecutors than the legal requirements do, which some argue is an inappropriate use of the courts' ethics authority.

A third argument in favor of limiting the disclosure obligation is that there may be constitutional issues that interfere with a court exercising its ethics authority in this manner. State courts have supervisory authority over prosecutors within the state, yet courts may not have the constitutional authority to regulate the discovery obligations of a prosecutor beyond what is required by Due Process and state criminal procedure rules. The requirements of Rule 3.8(d) closely resemble rules of criminal procedure and procedural rules are promulgated by the state legislature. It is therefore unclear whether the courts supervisory authority to govern attorney conduct includes the authority to impose discovery obligations on a prosecutor or whether this authority is limited by the separation of powers doctrine.¹³⁰ A court may be hesitant to test its power because it is unclear whether it has the constitutional authority to require further disclosure. In addition, the Supremacy Clause may prevent a federal court from enforcing a disclosure requirement that extends beyond the *Brady* Rule. Where state rules conflict with the Federal Constitution or federal legislation,¹³¹ the Supremacy Clause supports application of federal law.¹³² At present, it is unclear whether a state court has the constitutional authority to require disclosure beyond that required under the Constitution or the Federal Rules.¹³³

Furthermore, the Citizens Protection Act of 1998 ("CPA") subjects federal prosecutors and other government attorneys to the state laws

128. See John M. Burkoff, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows,"* 53 U. Pitt. L. Rev. 271, 275 (1992) ("As a practical matter, the [ethical] rules are an undisguised effort by the defense bar to undo what both Congress and the Supreme Court have declared to be the law." (quoting Joint Press Release from the U.S. Dep't of Justice, the Nat'l Ass'n of Att'ys General, and the Nat'l District Att'ys Ass'n 1 (Aug. 6, 1991))).

129. *United States v. Agurs*, 427 U.S. 97, 106 (1976).

130. Wolfgram, *supra* note 33, at 57 (noting that the adoption of the ethics rules has "raised a number of difficult legal issues, not all of which have been satisfactorily resolved.").

131. *E.g.* Fed. R. Crim. P. 16.

132. See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 Georgetown L.J. 207, 248 (2000); Williams, *supra* note 28, at 3446.

133. See Green, *Enforcement*, *supra* note 88, at 90-91 ("It is generally, although not universally, accepted that state disciplinary agencies may sanction state prosecutors for professional misconduct. It is far less certain, however, that they may sanction federal prosecutors.").

and rules and local federal court rules that govern all attorneys in the state.¹³⁴ Traditionally, federal prosecutors did not consider themselves subject to the ethics rules of the states in which they practiced.¹³⁵ The recent adoption of the CPA will subject federal prosecutors to Rule 3.8(d), which raises jurisdictional questions regarding what happens when state courts, federal courts, Congress and the Justice Department create conflicting rules.¹³⁶ The question of who has the authority to regulate federal prosecutors remains unanswered, and the issue will remain so as long as different ethical guidelines apply to prosecutors.¹³⁷ Therefore, limiting the breadth of the ethical disclosure obligation to include the materiality requirement will eliminate the confusion that surrounds the conflicting rules and provide an ethics rule that is consistent with the legal requirements.

A forth argument in favor of limiting the disclosure requirement of the ethics rule stresses that the rule as currently written lacks real teeth and is severely under-enforced. Professor Meares suggests that "[t]he frequency of *Brady*-type misconduct . . . likely is due in part to the lack of effective sanctions for such conduct."¹³⁸ Courts may be hesitant to punish for violations of a rule that reaches beyond the legal obligation of *Brady* because they are unsure whether the broad disclosure required under Rule 3.8(d) is appropriate. In order to provide a rule that will be enforced the ethics rule should be limited to include a materiality requirement, which would eliminate any questions surrounding the breadth of a prosecutor's disclosure obligation. A uniform rule of disclosure may provide an ethics rule that is more likely to be enforced.

Finally, Rule 3.8(d) does not serve its educational purpose.¹³⁹ Prosecutors' behavior indicates that when they look to their disclosure obligations they focus on following the *Brady* Rule and the rules of disclosure under criminal procedure law, because these rules are

134. 28 U.S.C.A. § 530B (West 2000 Supp.).

135. See Zacharias & Green, *supra* note 132, at 228. Part of the justification for this unique treatment of federal prosecutors is that they are subject to the internal guidelines of the Department of Justice, which include ethical rules. Dep't. of Justice Manual, Tit. 9. The Department of Justice Manual, however, does not have a specific policy regarding the disclosure of exculpatory evidence in general. The Department does have a policy requiring the disclosure of exculpatory evidence to a Grand Jury. Dep't of Justice Manual § 9-11.233 (Supp. 1992). In addition, the Department has a policy requiring disclosure of potential impeachment information by law enforcement agencies to prosecutors. Dep't of Justice Manual § 9-5.100 (1999); see Zacharias & Green, *supra* note 132, at 238-39.

136. See Zacharias & Green, *supra* note 132, at 245-46.

137. See *id.* at 259. The jurisdictional issues discussed are beyond the scope of this Note. In their article, Professors Zacharias and Green address the many facets of this complex issue without attempting to provide a resolution. *Id.* at 247.

138. Meares, *supra* note 79, at 909; see also Weeks, *supra* note 78, at 869-70 (noting that the *Brady* Rule is so often ignored due in most part to "the lack of any real incentive" to comply with the rule).

139. See *supra* note 122 and accompanying text.

enforced more often and prosecutors are concerned about significant repercussions from a violation of their legal disclosure obligations. Alternatively, no real threat of a sanction for a violation of the ethical duty to disclose arises, and therefore, the ethical rule is essentially ignored. Absent consequences, a prosecutor has no reason to follow the ethics rules and may not even be aware that the requirements of the ethics rules are any different from the obligations under *Brady*. Thus, the Rule's educational function is not being served.

The ABA can opt to eliminate Rule 3.8(d) altogether or it can choose to amend Rule 3.8(d) and narrow the scope of the ethics rule so that it complies with *Brady*. Since Rule 3.8(d) requires more than is required by both Congress and the Supreme Court, is under-enforced, and serves no real educational purpose, there are strong arguments that it should either be eliminated or limited so that a prosecutor is not ethically required to disclose any more evidence than she is legally required to disclose under *Brady*. There are, however, several strong arguments that advocate the importance of an ethics rule for disclosure without a materiality limitation and therefore support keeping Rule 3.8(d) unchanged.

B. Arguments in Favor of Keeping Rule 3.8(d)

Although Rule 3.8(d) receives criticism from some scholars, others argue that the rule serves several important purposes and should therefore remain unmodified. Although providing enforceable rules is a desirable objective, it is not the only goal of the ethics rules, which exist in part to guide lawyers and encourage ethical behavior. As one commentator states, "[t]o the extent the professional codes appropriately rest on the assumption that lawyers will respond to guidance, clear rules and punishment for violation of those rules are not always necessary to produce desirable conduct."¹⁴⁰ Scholars argue that the ethics rules serve a different purpose than Due Process and thus a different standard is appropriate. In addition, history indicates that the ABA intentionally drafted Rule 3.8(d) with this broader disclosure obligation and the rule serves as an aspirational guide, which is an important purpose beyond providing an enforceable rule. Moreover, the ethics rule proscribes a prosecutor's disclosure requirements at the beginning of a case going forward, while the materiality requirement of the *Brady* Rule sets the standard for the reversal of a conviction after trial on appeal and therefore different treatment of the obligations is appropriate.

First, some argue that the ethics rules generally, and Rule 3.8 especially, exist to set a different and higher ethical standard than the

140. Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev. 223, 236. (1993) [hereinafter Zacharias, *Ethics*].

minimal standards set by the Supreme Court.¹⁴¹ The ethics rules exist to set a higher level of conduct to which a prosecutor should aspire, not the minimal acceptable standard of behavior to avoid a Due Process violation.¹⁴² According to the Court of Appeals for the Second Circuit:

The Constitution defines only the "minimal historic safeguards" which defendants must receive rather than the outer bounds of those we may afford them. In other words, the Constitution prescribes a floor below which prosecutions may not fall, rather than a ceiling beyond which they may not rise. The Model Code of Professional Responsibility, on the other hand, . . . is designed to safeguard the integrity of the profession and preserve public confidence in our system of justice. . . . Hence, the Code secures protections not contemplated by the Constitution.¹⁴³

Similarly, Professor Meares argues in favor of separate treatment by the courts of the ethical requirements imposed on a prosecutor and the constitutional minimums.¹⁴⁴ According to this view, the ethics rules should not just match the constitutional requirements set by the Supreme Court, but they should require more to encourage attorneys to act ethically.¹⁴⁵ Thus, in terms of the ethical duty to seek justice, the ethical obligation of the prosecutor to provide favorable evidence to the defense should not be limited by the materiality requirement of the *Brady* Rule.

In addition, individual rules, such as Rule 3.8(d), help guide a prosecutor toward her more general ethical obligation to serve as a "minister of justice."¹⁴⁶ For example, Professor Zacharias examined the purpose of ethics rules and stated that, according to the traditional view, the ethics rules "represent ideals and a model for practice."¹⁴⁷ Professor Schneyer explained that professional "discipline is meant to deter, incapacitate, or even rehabilitate, but does little to remedy a victim's loss."¹⁴⁸ Accordingly, the purpose of the ethics rules is quite different than the purpose of the Due Process Clause. The defendant's right under the Due Process Clause entitles him to a new trial when he has been denied a fair trial,¹⁴⁹ but the ethics rules instead seek to punish or deter misconduct on the part of the prosecutor. While the Due Process Clause focuses on the defendant's remedy, the ethics rules focus on the attorney's conduct.

141. See Meares, *supra* note 79, at 909.

142. See *id.* at 910-11.

143. *United States v. Hammad*, 846 F.2d 854, 859 (2d Cir. 1988).

144. See Meares, *supra* note 79, at 910-11.

145. See *id.*

146. Model Rules, *supra* note 2, R. 3.8 cmt.; see Green, *Justice*, *supra* note 31, at 617.

147. Zacharias, *Ethics*, *supra* note 140, at 226.

148. Schneyer, *supra* note 26, at 49.

149. See *supra* note 69.

Second, the ABA has historically chosen to highlight the prosecutors duty to disclose as an especially important obligation,¹⁵⁰ which suggests that Rule 3.8(d) should remain in force as it stands. The language of Rule 3.8(d) indicates that the ABA intended to create an ethics rule with different disclosure obligations from constitutional requirements of the *Brady* Rule. At the time the Model Rules were drafted, the Court had already established the constitutional requirements for the disclosure of exculpatory evidence in *Brady* and *Agurs*.¹⁵¹ Although the Court included the materiality requirement in these cases, significantly the ABA omitted it from Rule 3.8(d). Clearly, when Rule 3.8(d) was first written, therefore, the drafters intended that the ethics rule require a prosecutor to disclose favorable evidence without considering materiality.

The legislative history and the intent of the ABA House of Delegates at the time of drafting of the rules also show an intention not to limit the ethical obligation to disclose evidence. The legislative history states that in the drafting of Model Rule 3.8(d) "[t]he language was changed slightly from 'supports innocence' to 'tends to negate the guilt of the accused' to impose a greater obligation of disclosure on the prosecution. Also, the scope of the duty to disclose was expanded to include 'information' as well as 'evidence.'"¹⁵² Twenty years after *Brady* was decided, the House of Delegates voted to expand the scope of the disclosure obligation in the Model Rules,¹⁵³ showing the ABA's desire to provide a broader requirement for disclosure under the Model Rules than that already required under *Brady*. Therefore, declining to change the rule is consistent with the intentions of the Rule's initial drafters, who presumably wanted the ethical obligations to be broader than the legal obligations.

Third, although violations of the ethics rule are dramatically under-enforced,¹⁵⁴ eliminating this rule or changing it to match the *Brady* requirements is not necessarily the proper solution for such lax enforcement. Arguably, changing the rule will have very little or no effect on prosecutorial misconduct. Scholars have noted that many ethics rules are rarely enforced, particularly those rules that are specific to prosecutors.¹⁵⁵ Therefore, lax enforcement may not be a

150. See Canons of Prof'l Ethics Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."); *supra* text accompanying notes 57-58.

151. See *supra* notes 64-73 and accompanying text.

152. Center for Prof'l Responsibility, ABA, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates Proposed Rule 3.8* (Discussion Draft 1983) 141 (1987).

153. See *id.*

154. See *supra* notes 109-16 and accompanying text.

155. See Green, *Enforcement*, *supra* note 88, at 89-90; Gershman, *supra* note 95, at 444-45; Zacharias, *Justice*, *supra* note 32, at 104-07.

problem specific to this particular rule but a failure of the ethics rules in general. In addition, this rule is rarely enforced even where there are clear violations of both the ethics and *Brady* obligations,¹⁵⁶ therefore, it is unclear what changing the rule will achieve. Accordingly, eliminating this rule or changing it to include a materiality requirement may not remedy the problem.

Finally, when a prosecutor must decide whether to disclose evidence to the defense, she should not consider the question in terms of the outcome of the trial and the possibility of an appeal. Under Rule 3.8(d) a prosecutor must disclose "all evidence . . . that tends to negate the guilt of the accused or mitigates the offense,"¹⁵⁷ whereas a defendant's constitutional right is only violated where the evidence withheld is shown to be material to the defendant's case.¹⁵⁸ As such, the constitutional requirement establishes a standard of conduct below which a prosecutor cannot fall without violating the rights of the defendant.¹⁵⁹ The ethics rule, however, aims for a higher standard. The materiality requirement in the *Brady* Rule creates a harmless error rule where the case is reviewed after the fact, and no violation exists unless the defendant has been injured by the failure to disclose.¹⁶⁰ By comparison, the ethics rules guide prosecutors on what they are required to disclose at the beginning of the case.¹⁶¹

The ethical rules thus direct the forward action of a prosecutor by setting guidelines for disclosure prior to trial. Conversely, Due Process claims for reversal of a conviction are reviewed after the fact. As Professor Zacharias explains:

In assessing her obligation, the prosecutor must keep in mind the difference between disclosing initially and reversing a conviction for failure to disclose. Most of the standards set by case law arise from the latter context. . . . An ethical prosecutor, in deciding whether to disclose, must focus on whether adversarial equality mandates disclosure, rather than whether nondisclosure would result in reversal.¹⁶²

This difference suggests that a different standard should apply to the ethics rule, a standard which does not limit the ethics rule to what will be held to be material after trial. A prosecutor should understand her ethical obligation to be disclosure of any evidence that may assist the defendant's case, not only the evidence the prosecutor believes will be material to the defendant's case.

156. See *supra* notes 109-16 and accompanying text.

157. Model Rules, *supra* note 2, R. 3.8(d).

158. See *supra* notes 92-96 and accompanying text.

159. See *supra* text accompanying note 143.

160. See *supra* notes 76-79 and accompanying text for a discussion of *Bagley*.

161. See Zacharias, *Justice*, *supra* note 32, at 84 n.172.

162. *Id.*

It is counterintuitive to require the same standard of behavior for prosecutors in a rule where the behavior is reviewed after the fact and when the rule prescribes the proper behavior going forward.¹⁶³ Two separate standards are necessary. It is logical to have a rule that examines the situation after the fact to provide for reversal of a conviction only upon a showing that the evidence withheld was material to the defendant's case. It is similarly logical for a rule that prescribes proper conduct before the fact to have a different standard of conduct, one that does not evaluate the evidence in terms of whether or not it was material to proving the defendant's guilt or innocence, but only whether or not the evidence may be helpful to the defense.

Convictions are not overturned just to prove a point when a prosecutor has clearly misbehaved.¹⁶⁴ There should be an additional basis of punishment in the form of a personal sanction to encourage prosecutors to disclose all exculpatory evidence prior to trial. These sanctions would prevent prosecutors from suppressing evidence in the hope that it will not be discovered or will be deemed immaterial. In deciding what to disclose, a prosecutor should be forced to err on the side of disclosure.

Additionally, without Rule 3.8(d) there would be no way to discipline prosecutors for the failure to disclose evidence absent a *Brady* violation. Because the *Brady* Rule is commonly violated without consequences,¹⁶⁵ it is fair to conclude that many situations arise in which a prosecutor has withheld exculpatory evidence but the failure to disclose did not rise to the level of a *Brady* violation. In such a situation, when the defendant has not been prejudiced and it is clearly inappropriate to grant the defendant a new trial, the prosecutor has still engaged in misconduct; even where there has been no Due Process violation, it is desirable to deter prosecutors from suppressing evidence. Without an ethics rule that is broader in scope than the legal obligation, there would be no means to discipline prosecutors for prosecutorial misconduct absent a Due Process violation.

When deciding what evidence to disclose, a prosecutor should also be forced to err on the side of disclosure in order to preserve the fairness of the process. Disclosure of any evidence that could be favorable to the defense is not overly burdensome for the prosecution. In fact, it is just the opposite. It is easier for a prosecutor to turn all evidence over to the defense than to make a judgment call regarding the materiality or the exculpatory nature of the evidence. A prosecutor is not an unbiased party to the case and is therefore not in

163. See *id.*

164. See *supra* notes 103-04 and accompanying text.

165. See *supra* notes 109-16 and accompanying text.

a good position to make the determination of whether the evidence would be material.¹⁶⁶ The prosecutor may not be aware of the theory behind the defense's case and therefore may not know whether a certain piece of evidence would be helpful.

In addition, a prosecutor has a personal desire to win her case. Many prosecutors are driven by the strongly held belief that the defendant is guilty and therefore, giving the defense evidence that will help its case is extremely difficult. It may be easy for a prosecutor who wants to win a conviction to convince herself that the evidence is immaterial.¹⁶⁷ As such, a bright line rule like Rule 3.8(d) is desirable because it does not allow the prosecutor to weigh materiality at all, and it better ensures the fairness of the justice system.

The court's constant reminder of the prosecutor's duty to seek justice, in addition to her role as advocate, reinforces the concept that prosecutors must operate at a higher standard than other criminal lawyers.¹⁶⁸ The criminal justice system presupposes equality between the prosecution and the defense and if this equality is not present, the system will deteriorate.¹⁶⁹ In order to better balance the sides, the prosecutor has an additional burden. The prosecutor's unique access to information and resources includes the benefit of a police force to perform their investigation. As a result, the prosecutor will often know of the existence of evidence that is unknown to the defense.¹⁷⁰ If this evidence is not shared with the defense, it may never be revealed. For these reasons, the obligation to disclose exculpatory evidence should not be limited by what is required under the *Brady* Rule but should include all exculpatory evidence. If it is fairness we are seeking, then there is no reason for such a limit on the prosecutor's ethical obligations. It is desirable for the guilty to be convicted, but not at the expense of a fair process.

It will not be helpful to eliminate or modify Rule 3.8(d) and lower the ethical standards set by the ABA. Changing the rule would remove the benefits of having a broader rule that goes beyond the constitutional requirements and encourages prosecutors to perform their duty to seek justice, which is an integral part of their role as prosecutors. The ABA should not lower the ceiling simply to meet the floor. Instead, it should strive to find ways to raise the minimum to meet the ideal. Rather than giving up a smartly crafted rule, the

166. Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391, 405-06 (1984) (advocating a requirement that a prosecutor submit the entire case file to a court for in camera review).

167. *Id.* at 405.

168. See *supra* notes 31-37 and accompanying text.

169. See Freedman, *supra* note 10, at 213-15.

170. See *supra* text accompanying note 35.

focus should be on better enforcement through greater vigilance and stiffer sanctions.

Better education and informing prosecutors of their ethical obligations will likely achieve more desirable results than including a materiality limit on a prosecutor's duty to disclose. Prosecutors entering the profession are currently given little or no training regarding the ethical duty to disclose exculpatory evidence.¹⁷¹ Nor are prosecutors educated about how this duty differs from the legal requirement of the *Brady* Rule.¹⁷² Educating prosecutors about this additional ethical obligation and the policy reasons behind it is not burdensome and would likely lead to fewer *Brady* violations in addition to fewer occasions of ethical misconduct. It is also necessary to train prosecutors as soon as they enter the office because once a prosecutor is involved in a case it would be difficult, if not impossible, for her to view the situation objectively and observe the need for disclosure. There is every reason to believe that the majority of prosecutors would follow the ethical guidelines if they understood what was actually required.

CONCLUSION

Rule 3.8(d) should not be eliminated or amended to include a materiality requirement. Instead it should remain in effect without a materiality limitation because it sets a higher standard toward which a prosecutor should strive. Although it frequently occurs in conjunction with a *Brady* violation, prosecutorial misconduct is separate from a Due Process violation and should therefore receive different treatment through a different rule. The problem of lax enforcement of Rule 3.8(d) will not be resolved by allowing prosecutors to withhold non-material exculpatory evidence. Properly educating prosecutors about this ethical obligation when they initially enter the profession is likely to produce a more desirable result. Rule 3.8(d) should therefore remain in the Model Rules as it is currently drafted.

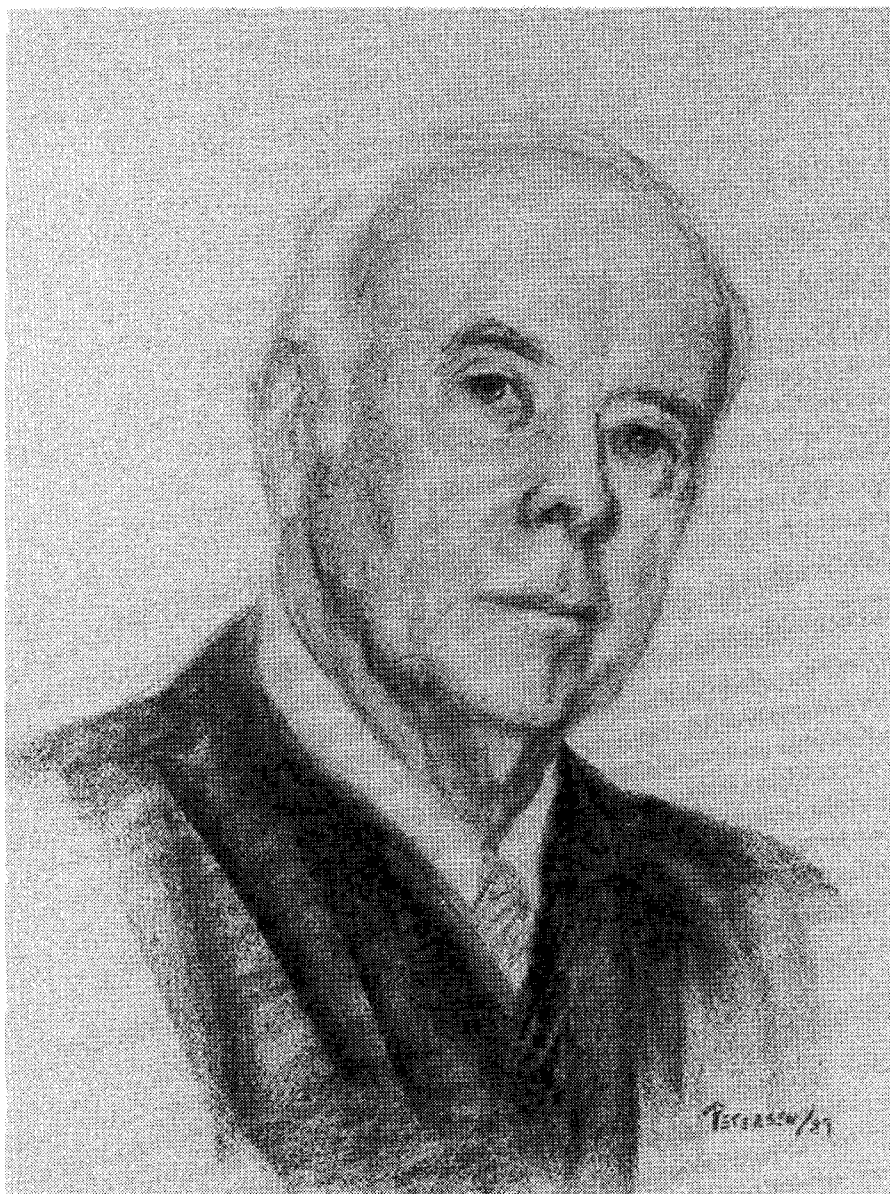
171. See *supra* note 122 and accompanying text

172. See *supra* note 122 and accompanying text.

Notes & Observations

*The Editors of the Fordham Law Review
dedicate this issue in memory of
Joseph A. Doran '33.*

*Professor Doran will be remembered as a fine professor
and a loyal friend to Fordham Law School.*



Chalks on paper by Frank Petersen

Joseph A. Doran
1908-2000

This Portrait is installed in the Dean's Corridor of the Fordham University School of Law.