THE (LACK OF) ENFORCEMENT OF PROSECUTOR DISCLOSURE RULES

*Kevin C. McMunigal**

I. INTRODUCTION

Criminal defense lawyers and academics have long complained of failures by prosecutors to honor their constitutional and ethical obligations to disclose exculpatory information. In recent years, such prosecutorial failures have gained the attention of a broad audience. The advent of DNA evidence has revealed and continues to reveal wrongful convictions around the country. These exonerations and the investigations that accompanied them have shown that failures by prosecutors and police to disclose exculpatory information have repeatedly contributed to wrongful convictions.[1] In 2007, a national spotlight shone on North Carolina prosecutor Michael Nifong's failure to reveal that DNA testing exonerated players charged in the Duke Lacrosse team case.[2] In 2009, the national press gave front page treatment to another prosecutorial failure to disclose exculpatory information when Judge Emmet G. Sullivan dismissed the public corruption case against Alaska Senator Ted Stevens due to Department of Justice prosecutors' failure to make required disclosures.[3] In addition to dismissing the charges, Judge Sullivan appointed a special prosecutor to investigate the prosecutors' disclosure violations.[4] In a front page story in *The New York Times*, Neil Lewis described Judge Sullivan as delivering "a broad warning about what he said was a 'troubling

* Judge Ben C. Green Professor of Law, Case Western Reserve University School of Law.

1. *See* JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 90-92, 101 (2000).

2. *See, e.g.*, Adam Liptak, *Prosecutor Becomes Prosecuted*, N.Y. TIMES, June 24, 2007, § 4, at 4; Duff Wilson, *Hearing Ends in Disbarment for Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at A21.

3. Neil A. Lewis, *Tables Turned On Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009, at A1.

4. *Id.*

tendency' he had observed among prosecutors to stretch the boundaries of ethics restrictions and conceal evidence to win cases."[5]

Even more recently, prosecutorial failures to disclose exculpatory information have continued to draw both national and international attention. In the federal manslaughter prosecution of five Blackwater employees for shooting civilians at a public square in Bagdad, Iraq, Judge Ricardo M. Urbina dismissed the charges due to prosecutorial misconduct.[6] Although the primary focus of his lengthy opinion was improper use of statements made by the defendants, Judge Urbina also criticized the prosecutors for a variety of disclosure failures.[7] On March 2, 2010, an article on the first page of the National Section of the *New York Times* described prosecutorial failure in a Louisiana capital murder case to disclose a videotaped interview of the state's key eyewitness contradicting her trial testimony on several important points.[8]

In this Article, I assess the apparent prospects for increased disciplinary enforcement of state ethics rules based on Rule 3.8(d) of the American Bar Association's ("ABA") Model Rules of Professional Conduct that mandates prosecutorial disclosure of exculpatory information. In particular, I focus on whether it makes sense to view recent ABA Formal Opinion 09-454,[9] in which the ABA gave an expansive reading to Model Rule 3.8(d), as the bellwether of an era of increased enforcement of ethical disclosure rules for prosecutors.

II. DISCIPLINARY ENFORCEMENT

Criminal defense and civil rights lawyers along with legal scholars have complained for decades that the bar fails to adequately discipline prosecutors. In public debates about prosecutorial immunity, for example, those hostile to immunity point out that it undermines specific and general deterrence of prosecutorial wrongdoing.[10] Proponents of prosecutorial immunity counter this concern about inadequate deterrence by arguing that the threat of ethical disciplinary sanctions fills the deterrence gap created by immunity.[11] Critics of immunity respond by

5. *Id.*

6. Del Quentin Wilber, *Charges Against 5 Blackwater Guards Dismissed*, WASH. POST, Jan. 1, 2010, at A1.

7. United States v. Slough, 677 F. Supp. 2d 112, 118-19, 122-26 (D.D.C. 2009).

8. Campbell Robertson, *New Evidence Surfaces in New Orleans Killings*, N.Y. TIMES, Mar. 2, 2010, at A12.

9. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) [hereinafter Formal Op.].

10. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 141, 146-47 (2005).

11. *Id.* at 58-60.

arguing that ethics rules against prosecutors across the country are dramatically under-enforced.[12]

Pottawattamie County v. Harrington,[13] a civil rights immunity case recently before the U.S. Supreme Court, supports the critics' under-enforcement argument.[14] The plaintiffs in the case, two African-American men, were convicted of murder based primarily on the testimony of a sixteen-year-old cooperating witness.[15] The Iowa Supreme Court found that the prosecutors had violated their disclosure duty under *Brady v. Maryland*[16] and overturned the convictions.[17] The convicted men then brought a civil rights action alleging that the prosecutors in the case had fabricated evidence by coercing and coaching the cooperating witness, who later recanted.[18] The key issue before the Supreme Court was the scope of prosecutorial immunity.[19] The plaintiffs supported their argument against application of prosecutorial immunity by pointing out that ethics authorities had never even investigated, much less disciplined, the prosecutors in the case, despite the fact that the Iowa Supreme Court had found that the prosecutors had violated their constitutional *Brady* disclosure obligations.[20]

Bennett Gershman, a professor and former prosecutor, has written in his treatise on prosecutorial misconduct that "[a] prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by the courts, and almost never by disciplinary bodies."[21] What empirical support exists for such complaints of lack of enforcement of ethics disclosure rules against prosecutors? To answer this question, Professor Richard Rosen conducted a broad search of available printed sources such as reported opinions, books, and

12. *Id.* at 60, 65.

13. 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009), *and cert. dismissed*, 130, S. Ct. 1047 (2010).

14. *Id.* at 933. The Supreme Court dismissed the case on January 4, 2010, and the lawyers announced that the parties had arrived at a $12 million settlement. Bobby G. Frederick, *Pottawattamie County Case Settled for $12 Million*, S.C. CRIM. DEF. BLOG (Jan. 5, 2010), http://www.southcarolinacriminaldefenseblog.com/2010/01/pottawattamie_county_case_sett.html.

15. *Harrington*, 547 F.3d at 926-27; *see* Brief of Black Cops Against Police Brutality as Amicus Curiae in Support of Respondents at 5, 36, Pottawattamie County v. Harrington, 129 S. Ct. 2002 (2009) (No. 08-1065).

16. 373 U.S. 83, 87 (1963).

17. Harrington v. State, 659 N.W.2d 509, 522-23, 525 (Iowa 2003).

18. *Id.* at 512, 516-17.

19. *Id.* at 521-25.

20. Brief for Respondents at 56, Pottawattamie County v. Harrington, 129 S. Ct. 2002 (2009) (No. 08-1065).

21. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT, at v, ix (2d ed. 2006).

articles.[22] In addition, he surveyed lawyer disciplinary bodies throughout the United States.[23] Professor Rosen published the results in a 1987 law review article[24] and concluded that "despite numerous reported cases showing violations of [disclosure] rules, disciplinary charges have been brought infrequently and meaningful sanctions rarely applied."[25]

Has the level of enforcement of ethical disclosure rules for prosecutors changed since 1987? The evidence on this question is mixed. There are encouraging signs suggesting that enforcement attitudes regarding prosecutorial disclosure violations may be changing. But there continue to be discouraging signs as well, that resistance to enforcing ethical disclosure rules against prosecutors remains a problem.

A. Signs of Change

1. ABA Formal Opinion 09-454

The ABA recently sent an encouraging signal about enforcement of ethics disclosure rules against prosecutors. In July 2009, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 09-454, providing guidance on the scope of the ethical disclosure obligation imposed on prosecutors by Model Rule 3.8(d).[26]

Model Rule 3.8(d) states that the prosecutor in a criminal case shall:

> [M]ake 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.[27]

Although the Model Rules have included Rule 3.8(d) since their creation in 1983,[28] and the predecessor to the Model Rules, the 1969

---

22. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 693, 700-01 & nn.38-42 (1987).

23. *See generally id.*

24. *Id.* at 693.

25. *Id.* at 697; *see also id.* at 697-703, 720-31 (noting cases that considered disciplinary action).

26. Formal Op., *supra* note 9, at 1-8 (discussing the prosecutor's duty to disclose evidence and information favorable to the defense).

27. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007).

28. CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 140-43 (1987).

ABA Model Code, included a similar provision,[29] very few judicial or state or local ethics opinions over that forty-year period have interpreted state analogs to Rule 3.8(d). For example, in 2005 the Louisiana Supreme Court stated that it had never before had occasion to consider its version of Rule 3.8(d).[30]

ABA Formal Opinion 09-454 is, without question, a promising step toward more robust enforcement of the prosecutor's ethical disclosure duties. It clarifies the differences between the ethical disclosure duty and the constitutional disclosure duty,[31] a point on which many prosecutors, ethics authorities, and courts continue to be confused. It also reemphasizes the importance of prosecutorial disclosure in our criminal justice system.[32] This clarification and emphasis should help both to educate prosecutors about their disclosure obligations and to encourage ethics authorities to enforce those obligations. Since almost every jurisdiction has adopted the language of Model Rule 3.8(d),[33] this opinion should have considerable influence as highly persuasive authority on a prosecutor's ethical disclosure duty.

The ABA Standing Committee in Opinion 09-454 thoroughly examined the relationship between Rule 3.8(d) and the prosecutor's constitutional obligation under *Brady*.[34] The Committee explained that the ethical duty under Model Rule 3.8(d) is separate from, and more expansive than, the constitutional disclosure obligation in several significant ways.

a. Materiality

A key feature of current *Brady* doctrine is its materiality requirement. Under the *Brady* line of cases, a prosecutor need only disclose exculpatory evidence if it is material, meaning that it would likely affect the outcome of the case.[35]

The text of Model Rule 3.8(d) contains no such materiality limitation. Accordingly, Opinion 09-454 states that Rule 3.8(d) requires a prosecutor to inform the accused of all known information favorable to

29. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (1980); *see also* Formal Op., *supra* note 9, at 3 (discussing the 1969 adoption of the Model Code of Professional Responsibility).

30. *In re* Jordan, 913 So. 2d 775, 781 (La. 2005) ("This is a case of first impression in the State of Louisiana. Never before have we been confronted with the issue of disciplining a prosecutor for failing to disclose 'evidence or information' . . . [under the Rules of Professional Conduct].").

31. Formal Op., *supra* note 9, at 1-5.

32. *See id.* at 1.

33. *See* Rosen, *supra* note 22, at 715-16 & nn.118-22.

34. Formal Op., *supra* note 9, at 1-5.

35. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 698-700 (1985).

the defendant even if the prosecutor does not believe that the information would affect the outcome of the case at trial.[36] According to the opinion, while the ethical "obligation may overlap with a prosecutor's other legal obligations" it is more expansive and requires the prosecutor to turn over information even if the prosecutor believes that it "has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable."[37]

b. Evidence and Information

Model Rule 3.8(d) requires the prosecutor to disclose "all evidence *or information*" that is exculpatory.[38] As this language makes clear, the ethical duty is not limited to admissible evidence. The ABA points out in Opinion 09-454 that Model Rule 3.8(d) requires disclosure of "information" that may be inadmissible but which "may lead a defendant's lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations."[39]

c. Timing

Opinion 09-454 also addresses the timing of disclosure. The text of Model Rule 3.8(d) requires "timely disclosure."[40] Opinion 09-454 explains that disclosure must be made early enough so that defense counsel may use the evidence and information effectively.[41] Reasoning that defense counsel can use favorable evidence and information most effectively the sooner it is received, the opinion finds that disclosure is required "as soon as reasonably practical" once it is known to the prosecutor.[42]

The ABA Committee also examined how and when defense counsel may use favorable evidence and information, such as in conducting a defense investigation, deciding whether to raise a defense, determining trial strategy in general, and in advising the defendant whether to plead guilty.[43] Thus, "[t]he obligation of timely disclosure of favorable evidence and information requires disclosure to be made

36. Formal Op., *supra* note 9, at 4.
37. *Id.* at 1, 5.
38. MODEL RULES OF PROF'L CONDUCT R 3.8(d) (2007) (emphasis added).
39. Formal Op., *supra* note 9, at 5.
40. MODEL RULES OF PROF'L CONDUCT R 3.8(d).
41. Formal Op., *supra* note 9, at 6.
42. *Id.*
43. *Id.*

sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information."[44]

The ABA Committee specifically addressed the critical issue of whether prosecutorial disclosure requirements apply in the context of a guilty plea.[45] Emphasizing how important defense counsel's evaluation of the strength of the prosecutor's case is to a defendant considering whether to plead guilty, the opinion states that timely disclosure under Rule 3.8(d) requires disclosure of evidence and information "prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment."[46] The interpretation of Rule 3.8(d) to require disclosure prior to a guilty plea contrasts sharply with the Supreme Court's interpretation of the *Brady* rule in *United States v. Ruiz*.[47]

d. Waiver

Another important issue regarding prosecutorial disclosure in the guilty plea context is waiver. Opinion 09-454 makes clear that a defendant may not waive or consent to the prosecutor's abrogation of the ethical disclosure duty, and "a prosecutor may not solicit, accept or rely on the defendant's consent" as a mechanism to avoid Rule 3.8(d).[48] The opinion notes that a third party may not absolve a lawyer of an ethical duty except in specifically authorized instances, such as consent to certain conflicts of interest.[49] Unlike ethics rules such as Model Rule 1.6, dealing with confidentiality,[50] and Model Rule 1.7, dealing with conflicts of interest,[51] Rule 3.8(d) does not explicitly permit third party consent to exempt a prosecutor from fulfilling Rule 3.8(d)'s disclosure obligation.[52]

The opinion states that Rule 3.8(d) is designed both to protect the defendant and "to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions."[53] Allowing the prosecutor to obtain a defendant's waiver of disclosure of favorable evidence and information undermines defense counsel's ability to advise the defendant

44. *Id.*
45. *Id.*
46. *Id.*
47. 536 U.S. 622, 629-30, 633 (2002).
48. Formal Op., *supra* note 9, at 7.
49. *Id.* at 7.
50. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).
51. *Id.* R. 1.7.
52. *See id.* R. 3.8(d).
53. Formal Op., *supra* note 9, at 7.

whether to plead guilty and may lead a factually innocent defendant to plead guilty.[54]

In *Ruiz*, the Supreme Court held that a plea agreement could require a defendant to waive the right to receive *Brady* material that could be used to impeach critical witnesses.[55] Nonetheless, the ethics opinion states that even if the courts were to hold that a defendant could entirely waive the right to favorable evidence for constitutional purposes, "the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure."[56]

e. Supervisory Responsibility

Supervisory lawyers in a prosecutor's office are obligated to ensure that subordinate lawyers comply with Rule 3.8(d).[57] This obligation requires the supervisory lawyer who directly oversees a trial prosecutor to ensure that the trial prosecutor meets his or her ethical disclosure obligation.[58] A supervisory lawyer is "subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations."[59] The opinion advises such managerial lawyers to promote compliance with Rule 3.8(d) by adequately training subordinate lawyers and by having internal office procedures that facilitate compliance.[60]

The opinion discusses a case in which work is distributed among several different prosecutors.[61] In such a situation, the opinion advises that there should be an internal policy requiring all prosecutors on the case to convey all files containing favorable evidence or information to the prosecutor responsible for discovery.[62] Another useful internal policy would require that favorable information conveyed orally to a prosecutor be memorialized in writing.[63] The opinion also recommends requiring a prosecutor who obtains information favorable to a defendant in another case to provide it to the colleague responsible for the other case.[64]

---

54. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 991-92 (1989); Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 658-61 (2007).

55. United States v. Ruiz, 536 U.S. 622, 629-30 (2002).

56. Formal Op., *supra* note 9, at 7. n.33.

57. *Id.* at 8.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

f. Sentencing

The duty to disclose to the defense and the tribunal "in connection with sentencing" all unprivileged mitigating information known to the prosecutor differs from the disclosure obligation that applies before a guilty plea or trial in four ways. First, the information differs because the duty requires disclosure of mitigating information that might lead to a more lenient sentence, such as a defendant having a lower level of involvement in a crime than a co-defendant.[65] Second, the prosecutor must make the disclosure to the tribunal as well as to the defendant.[66] Third, information that would only mitigate a sentence need not be disclosed prior to a trial but only after a guilty plea or verdict.[67] Fourth, Rule 3.8(d) permits the prosecutor to withhold privileged mitigating information in connection with a sentencing.[68]

2. *In the Matter of Field*

A recent California opinion, *In the Matter of Field*,[69] provides an example of state ethics authorities taking prosecutorial disclosure failures seriously[70] and is another encouraging sign of change in enforcement attitudes. The California state bar sought discipline of a career prosecutor for a variety of ethical violations in four different cases over a ten year period.[71] Two of the four cases involved disclosure failures.[72]

One of the disclosure failures occurred in a habeas corpus case brought by two prisoners seeking review of their sexual assault convictions.[73] The habeas petitioners knew of a witness to whom the fifteen-year-old victim had made a statement inconsistent with her trial testimony—that "she made up the sexual assault allegations to avoid punishment for missing curfew."[74] But the petitioners did not know the present location of this key witness.[75] An investigator working with the

65. *Id.* at 7.
66. *Id.*
67. *Id.* at 7-8.
68. *Id.* at 8.
69. No. 05-O-00815; 06-O-12344 (Cal. State Bar 2010).
70. *Id.* at 1.
71. *Id.*
72. *Id.* at 3. The other violations involved improper closing argument and violating various court orders. *Id.*
73. *Id.* at 3, 6.
74. *Id.* at 6.
75. *Id.*

prosecutor used telephone records to locate and interview the witness.[76] During the interview, the investigator obtained a tape recorded statement from the witness confirming the victim's statement that she had "made up" the allegations.[77]

But the prosecutor failed to reveal the location of the witness, the interview, or the recorded statement.[78] Instead, he actively concealed the information about the witness by filing a misleading status conference statement in which he implied that the witness had *not* been found.[79] He also instructed his investigator to file a declaration that excluded the fact that he had found and interviewed the witness.[80] The prosecutor revealed the information only after the defense had independently located the witness and learned that the prosecution's investigator had previously found and interviewed him.[81]

Oddly enough, California has no ethical equivalent of Model Rule 3.8(d).[82] Instead of finding that the prosecutor had violated an ethical disclosure duty, the *Field* court found that the prosecutor had violated a California ethics provision stating that "any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."[83] The court concluded that the prosecutor's conduct regarding the location of, and interview with, the impeachment witness constituted an act of moral turpitude because it reflected dishonesty.[84]

The second charge in the *Field* case involving failure to disclose arose in a robbery and murder trial.[85] The prosecutor failed to reveal impeachment evidence regarding bias of a key state witness—that the witness was an accomplice to the charged robbery rather than a mere bystander.[86] Again the prosecutor failed to reveal this impeachment evidence until the defense discovered it independently a week before the trial.[87] In regard to this disclosure failure, the *Field* court focused on the statutory discovery obligations of the prosecutor[88] and found that

---

76. *Id.* at 6-7.
77. *Id.* at 7.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 8.
82. Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 463, 482-83 (2009).
83. CAL. BUS. & PROF. § 6016 (West 2003); *In re* Field, 05-O-00815; 06-O-12344, at 9-11.
84. *Id.* at 10.
85. *Id.* at 14-16.
86. *Id.* at 15-16.
87. *Id.* at 16.
88. The court found statutory violations of California Penal Code Section 1054.1(b) and (f). *Id.* at 16-17.

because the prosecutor failed to meet these statutory obligations, he had violated his ethical duty "[t]o support the . . . laws . . . of this state."[89]

The most promising aspect of the *Field* case, in my view, is that those involved in the disciplinary process in *Field* all appear to have taken the disclosure violations seriously. Unlike a recent Louisiana case, discussed in Section II(B)(2) below,[90] state bar counsel who prosecuted the case, the hearing judge, and the three judges of the review court showed no ambivalence and little disagreement regarding either the violations or the appropriate sanction.[91] State bar counsel sought a three year suspension but both the hearing judge and the review court recommended a four year suspension,[92] a significant sanction.

In regard to the first of the disclosure charges, the prosecutor in *Field* argued that disclosure of exculpatory information is not required in a habeas corpus proceeding.[93] Another significant aspect of *Field* is the fact that the California ethics authorities rejected this argument and found that the prosecutor's failure to reveal the exculpatory information in the context of a post-conviction habeas corpus proceeding did violate his ethical obligations.[94] In finding a post-conviction disclosure obligation, the California authorities aligned themselves with the ABA's current position, set forth in Model Rule 3.8(e).[95]

Also encouraging in *Field* is that the California ethics authorities did not allow the fact that the defense independently discovered the exculpatory evidence to insulate the prosecutor from ethical liability.

3. Other cases

In the last two decades, disciplinary authorities in a number of states have shown a willingness to enforce their equivalents to Model Rule 3.8(d). In a number of published cases, ethics authorities sought and obtained sanctions against prosecutors for disclosure violations.[96]

---

89. CAL. BUS. & PROF. § 6068(a) (West 2003); *In re* Field, 05-O-00815; 06-O-12344, at 17.

90. *See infra* notes 142-63.

91. *In re* Field, 05-O-00815; 06-O-12344, at 27-28.

92. *Id.* at 28. The prosecutor disciplined in *Field* may appeal the Review Court's findings and recommendation to the California Supreme Court. CAL. R. OF CT. 9.16(a), *available at* http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_9.pdf.

93. *Id.* at 8-9.

94. *Id.* at 9.

95. MODEL RULES OF PROF'L CONDUCT R 3.8(e) (2007) ("The prosecutor in a criminal case shall (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.").

96. *See, e.g.*, *In re Jordan*, 91 P.3d 1168, 1173, 1175 (Kan. 2004) (public censure); *In re*

The most famous such case, and the one imposing the most severe sanction, is the North Carolina bar's disbarment of Michael Nifong, mentioned above.[97]

Like the *Field* case, a number of these cases show encouraging signs about ethical enforcement. In several, ethics authorities sought and obtained serious sanctions. Michael Nifong was disbarred.[98] The California ethics court recommended a four-year suspension for Benjamin Field.[99] In *Committee on Professional Ethics v. Ramey*,[100] the Iowa Supreme Court imposed an indefinite license suspension,[101] and in *Office of Disciplinary Counsel v. Jones*,[102] the Ohio Supreme Court imposed a six-month suspension.[103] It should be kept in mind that typically, these cases involve charges of other ethical violations in addition to charges of disclosure failures and that factors such as the prosecutor's prior record of ethical violations, or lack thereof, have an impact on the sanction.[104]

Some of these cases show willingness to enforce the prosecutor's ethical disclosure obligations in the context of a guilty plea, as recent ABA Opinion 09-454 states is appropriate.[105] For example, the South Carolina Supreme Court disciplined a prosecutor for a Model Rule 3.8(d) violation for failing to reveal key impeachment evidence regarding an important witness for the state despite the fact that the defendant had pled guilty.[106]

A Kansas case, *In re Carpenter*,[107] shows a state supreme court willing to use an aggressive—and, I think, controversial—reading of its ethics code to discipline a prosecutor who failed to reveal key

---

Grant, 541 S.E.2d 540, 540 (S.C. 2001) (public reprimand by consent); Comm. on Prof'l Ethics v. Ramey, 512 N.W.2d 569, 572 (Iowa 1994) (indefinite suspension with no possibility of reinstatement for three months); Office of Disciplinary Counsel v. Jones, 613 N.E.2d 178, 180 (Ohio 1993) (six-month suspension); *In re* Carpenter, 808 P.2d 1341, 1346 (Kan. 1991) (public censure); State Bar v. Hoke & Graves, No. 04-DHC 15, at 668-69, 671 (N.C. State Bar 2004) (public reprimand).

97. *See supra* note 2 and accompanying text.

98. Wilson, *supra* note 2, at A21.

99. *In re Field*, 05-O-00815; 06-O-12344, at 28.

100. 512 N.W.2d 569.

101. *Id.* at 572.

102. 613 N.E.2d 178.

103. *Id.* at 180.

104. *See, e.g.*, *Ramey*, 512 N.W.2d at 572; *Jones*, 613 N.E.2d at 179; *In re Field*, 05-O-00815; 06-O-12344, at 1.

105. Formal Op., *supra* note 9, at 6; *see, e.g.*, *Ramey*, 512 N.W.2d at 572; *Jones*, 613 N.E.2d at 179; *In re Field*, 05-O-00815; 06-O-12344, at 1.

106. *See In re* Grant, 542 S.E.2d 540, 540 (S.C. 2001).

107. 808 P.2d 1341, 1345-46 (Kan. 2001).

exculpatory evidence in a rape case.[108] The defendant in the case, an employee at a nursing home, was charged with having raped a mentally and physically disabled resident of the nursing home.[109] Just prior to the trial, the complainant, her mother, and her social worker told the prosecutor that the complainant had contracted gonorrhea during the rapes.[110] The prosecutor advanced this claim at trial, cross-examined the defendant about it when he testified, and brought it up at the time of sentencing.[111] During the trial, the prosecutor asked an employee of the district attorney's office to contact the local hospital to corroborate that the complainant contracted gonorrhea.[112] The hospital told the employee that tests of the complainant for gonorrhea had come back negative and thus she had never been diagnosed with or treated for gonorrhea.[113] Despite the fact that the prosecutor had requested this information, she claimed never to have been informed about the hospital's response to her request until the defendant filed a new trial motion.[114]

It was clear then that the prosecutor's office did know, and that the individual prosecutor should have known, about the exculpatory evidence.[115] But Model Rule 3.8(d) requires that a prosecutor herself *know* about exculpatory evidence or information in order to be found in violation of the rule.[116] And DR 7-103(B), the Model Code precursor to Model Rule 3.8(d) in force at the time in Kansas, also required knowledge on the part of the prosecutor.[117] To avoid having to resolve the issue of the prosecutor's knowledge, the Kansas Supreme Court did not rely on DR 7-103(B) to discipline the prosecutor,[118] even though that rule bore most directly on disclosure of exculpatory evidence. Instead, it disciplined her for violating two other and more general rules for failing to seek out and learn of the exculpatory evidence. The court found that she engaged in conduct prejudicial to the administration of justice[119] and conduct that adversely reflected on her fitness to practice law.[120]

---

108. *Id.* at 1345-46.
109. *Id.* at 1342.
110. *Id.*
111. *Id.* at 1343-44.
112. *Id.* at 1342.
113. *Id.*
114. *Id.*
115. *Id.*
116. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007).
117. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (1980).
118. *See In re Carpenter*, 808 P.2d at 1346 (finding the prosecutor in violation of DR 1-102(A)(5) and (6)).
119. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102 (A)(5).
120. *See id.* DR 1-102 (A)(6).

B. Signs of Continuing Resistance

Published cases in the last two decades also offer evidence of continuing resistance to enforcement of prosecutors' ethical disclosure duties.

1. *Disciplinary Counsel v. Kellogg-Martin*

A recent Ohio Supreme Court case, *Disciplinary Counsel v. Kellogg-Martin*,[121] makes clear that it is a mistake to overstate the significance of ABA Opinion 09-454 in assessing whether enforcement attitudes regarding prosecutor disclosure are changing. The prosecutor charged a defendant with multiple counts based on his having had sexual intercourse with a minor.[122] The most serious of these charges, carrying a potential life sentence, alleged that the victim was under thirteen at the time of the intercourse and that the defendant used force.[123] The disclosure issues giving rise to the disciplinary charges dealt with information relating to the victim's age at the time of the offense and the use of force.[124] In speaking with a social worker, the complainant gave inconsistent statements about the dates on which the intercourse took place, some indicating that she was twelve at the time, others indicating that she was thirteen.[125] In speaking with a detective, the victim stated that she did not resist either verbally or physically.[126] The prosecutor did not turn over to the defendant prior to him pleading guilty written reports containing the victim's prior statements implying that she was thirteen at the time and saying that that she did not resist.[127] Both her age and the use of force were key factors in determining the gravity of the offense and the defendant's potential sentence.[128]

Ohio's disciplinary counsel filed charges against the prosecutor and both a panel of Ohio's Board of Commissioners on Grievances and Discipline and the entire Board sustained the charges, with the Board recommending a one year suspension with six months stayed.[129] With only one justice dissenting, however, the Ohio Supreme Court reversed and found that no ethical violation had occurred.[130] In doing so, it

121. 923 N.E.2d 125, 127 (Ohio 2010).
122. *Id.* at 127, 130.
123. *Id.* at 133.
124. *Id.* at 133-34.
125. *Id.* at 128.
126. *Id.* at 130.
127. *Id.* at 129.
128. *Id.* at 133.
129. *Id.* at 127.
130. *Id.* at 127, 133.

reached a number of conclusions diametrically opposed to ABA Opinion 09-454.

First, the court found that the prosecutor's ethical disclosure duty is not broader than, but rather co-extensive with, the constitutional duty imposed by *Brady*.[131] Second, the court found that *Brady* does not require disclosure of exculpatory impeachment material prior to a guilty plea,[132] citing the U.S. Supreme Court's opinion in *United States v. Ruiz*.[133] Since the prosecutor's ethical disclosure duty, in the court's view, mirrors the prosecutor's constitutional disclosure duty, the court found that the ethical duty also does not require disclosure of exculpatory impeachment material prior to a guilty plea.[134] The Court explained that this conclusion flows from the waiver of *Brady* rights that a defendant "necessarily makes by pleading guilty."[135] The court found that a guilty plea constitutes an implicit waiver of the constitutional right to disclosure and thus, also waiver of the prosecutor's ethical duty of disclosure.[136]

Each of these key points in the Ohio Supreme Court's analysis in *Kellogg-Martin*—that the ethical duty is not broader in scope than the constitutional duty, that disclosure is not required prior to a guilty plea, and that a defendant can waive a prosecutor's ethical mandate—are at odds with ABA Opinion 09-454. The *Kellogg-Martin* opinion is also seemingly inconsistent with a 2003 Ohio Supreme Court Opinion, *Disciplinary Counsel v. Wrenn*.[137] Like *Kellogg-Martin*, *Wrenn* dealt with a prosecution of charges of sexual misconduct with a minor.[138] Prior to the defendant's guilty plea, the prosecutor failed to disclose results of DNA testing that, while not entirely exculpatory, prompted a significant change in the victim's account of the crime.[139] That change, like the discrepancies in the victim's statements in *Kellogg-Martin*, would have had significant impeachment value for the defense at trial.[140] Unlike in *Kellogg-Martin*, though, where the court used the contours of the *Brady* rule to determine the contours of the ethical disclosure duty, the *Wrenn* court neither mentioned nor cited *Brady* or any of its

131. 373 U.S. 83, 87-88 (1963); *Kellogg-Martin*, 923 N.E.2d at 130.
132. *Kellogg-Martin*, 923 N.E.2d at 130.
133. 536 U.S. 622, 633 (2002).
134. *Kellogg-Martin*, 923 N.E.2d at 131.
135. *Id.*
136. *Id.*
137. 790 N.E.2d 1195, 1198 (2003).
138. *Id.* at 1195.
139. *Id.* at 1196.
140. *Id.* at 1197-98; *see Kellogg-Martin*, 923 N.E.2d at 130.

progeny.[141] And despite the fact that the defendant pled guilty, the court nonetheless found that the prosecutor had violated his ethical disclosure duty.[142]

The *Kellogg-Martin* court failed either explicitly to overrule *Wrenn* or reconcile it with the *Kellogg-Martin* opinion.[143] Indeed, the *Kellogg-Martin* opinion does not even mention or cite *Wrenn*.[144] In addition, the *Kellogg-Martin* court neither cited nor otherwise acknowledged recent ABA Opinion 09-454,[145] the most important ABA pronouncement on the contours of the prosecutorial ethical obligation at issue in the case.

2. *In re Jordan*

A 2005 Louisiana Supreme Court case, *In re Jordan*,[146] exemplifies the contradictory attitudes one finds in recent cases about ethics enforcement and sanctions regarding prosecutorial disclosure failures.

The prosecutor in a capital murder case, *State v. Cousin*,[147] failed to turn over to the defense prior statements by the state's primary witness that the Louisiana Supreme Court later found "obviously" exculpatory.[148] That court overturned the conviction on other grounds, but stated in several footnotes that the statements should have been produced under *Brady* and *Kyles v. Whitley*.[149] Seven years later, a disciplinary case against the prosecutor in the case arising from his failure to disclose in the *Cousin* case, and based on Louisiana's version of Model Rule 3.8(d), came before the same court.[150] The Louisiana Supreme Court found that the prosecutor had violated Rule 3.8(d) and imposed a three-month suspension with the entire suspension deferred subject to the prosecutor committing no further misconduct for a period of one year.[151]

One might view the substantive portions of the Louisiana Supreme Court opinions in *Cousin* and *Jordan* together as a very positive sign. In the first opinion, the court spotted a *Brady* violation.[152] In the second opinion, the court imposed ethical discipline on the prosecutor based on

141. *See Wrenn*, 790 N.E.2d at 1196-97.
142. *Id.* at 1198.
143. *See Kellogg-Martin*, 923 N.E.2d at 130-32.
144. *See id.*
145. *See id.*
146. 913 So. 2d 775 (La. 2005).
147. 710 So.2d 1065 (La. 1998).
148. *Id.* at 1066-67 & n.2.
149. *Id.* at 1066 & nn.2 & 8.
150. *In re Jordan*, 913 So. 2d at 777.
151. *Id.* at 782, 784.
152. *Cousin*, 710 So. 2d at 1066 & n.2.

the conduct that violated *Brady*.[153] This is what prosecutorial critics have long argued that courts should be doing.

But on closer examination, *Jordan* reveals several troubling aspects. Though the case undeniably shows ethics charges being brought against a prosecutor and a court willing to find a prosecutor liable for violating an ethics disclosure rule, imposition took seven years and the sanction—a three-month deferred suspension[154]—seems relatively mild for a disclosure violation in a capital murder case.

Also troubling is the *Jordan* court's acknowledgement that "[t]his is a case of first impression in the State of Louisiana. Never before have we been confronted with the issue of disciplining a prosecutor for failing to disclose" under Rule 3.8(d).[155] This acknowledgement by the court reinforces the widely held view that Rule 3.8(d) and its predecessor have rarely been enforced.

Another troubling aspect of the *Jordan* opinion is the divergence of views it reveals among the various actors involved in the disciplinary process, and the reluctance of many of those actors to discipline the prosecutor. The *Jordan* case provides a detailed history of the disciplinary proceedings, which began in 1998 when the defendant in the *Cousin* case and his sister filed a complaint with the Office of Disciplinary Counsel ("ODC").[156] The prosecutor argued that the statement at issue had both incriminatory and exculpatory aspects and that he believed that it "was more inculpatory than exculpatory" and thus exempt from disclosure.[157] Despite the fact that the Louisiana Supreme Court had characterized the prior statements as obviously exculpatory and had stated that they should have been disclosed, after investigation, the ODC dismissed the complaint.[158] On appeal, a hearing committee supported the ODC dismissal.[159] Later, the disciplinary board remanded the matter to the ODC with instructions to file formal charges.[160] A majority of the hearing committee found that the ODC had not proven a Rule 3.8(d) violation while a dissenting member voted in favor of finding a violation.[161] The disciplinary board disagreed with the hearing committee, finding that the prosecutor had "technically violated" Rule

153. *In re Jordan*, 913 So. 2d at 782.
154. *Id.* at 779, 784 (complaint filed against respondent in May 1998 was not resolved until 2005).
155. *Id.* at 781.
156. *Id.* at 777-81.
157. *Id.* at 779.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 780.

3.8(d).[162] But it concluded that no discipline was appropriate and dismissed the charges.[163] The ODC sought review in the Louisiana Supreme Court, which, consistent with its treatment of the issue in 1998, found that the prosecutor had violated Rule 3.8(d) and imposed a three month deferred suspension.[164]

At best, this schizophrenic disciplinary saga suggests ambivalence about disciplining the prosecutor on the part of the participants in the disciplinary process in the *Jordan* case, other than the justices of Supreme Court. At worst, it reflects active resistance to such enforcement. Prior to commencement of the disciplinary process, the Louisiana Supreme Court stated that the prosecutor had been constitutionally compelled to turn over the statement at issue.[165] The language of Model Rule 3.8(d) clearly creates a more expansive disclosure obligation than the constitutional duty created by *Brady*. At the end of the proceedings, the court found that the prosecutor violated Rule 3.8(d).[166] Nonetheless, between these consistent rulings, the ODC had to be compelled to file charges and a majority on the hearing committee voted twice against discipline.[167] The disciplinary board, though mandating the filing of charges, ultimately found that no discipline was appropriate.[168] Thus, though the court ultimately found a violation and imposed a sanction, the fact that the court had never had occasion either to interpret or enforce Rule 3.8(d) prior to *Jordan*, and the pervasive reluctance to sanction the prosecutor displayed by the various participants in the disciplinary process does not bode well for a change in enforcement attitudes.

III. CONCLUSION

Recent developments regarding disciplinary enforcement of prosecutorial disclosure rules reveal a good deal of contradictory evidence. In short, one can find both good news and bad news.

First the bad news. The number of recent high-profile cases revealing disclosure violations by experienced prosecutors, several of which I mentioned in the opening paragraphs of this essay, suggest that serious and consistent disciplinary enforcement has yet to be achieved or viewed as a significant threat by many prosecutors. These cases also

162. *Id.*
163. *Id.* at 780-81.
164. *Id.* at 784.
165. *Id.* at 782.
166. *Id.*
167. *Id.* at 780.
168. *Id.*

suggest that disclosure failures are not simply a product of inexperience, inattention, or lack of resources on the part of prosecutors working at the margin. Another piece of bad news, as I mentioned previously, is the troubling evidence one finds in cases such as *Kellogg-Martin* and *In re Jordan* of continued resistance by state supreme courts and ethics authorities to enforcing disclosure rules that have long been in existence and long been ignored.

What, then, is the good news? The most obviously encouraging developments have been the attention recently given to the issue by the ABA in Formal Opinion 09-454 and the change in attitude on the part of some state ethics authorities and courts, evidenced in cases such as *In the Matter of Field*. I also see as good news the criticism and publicity cases, such as the prosecution of Ted Stevens, have drawn. The criticism indicates that many in the press and public view prosecutorial disclosure failures as unacceptable. This criticism along with the publicity these cases have generated will hopefully place the issue of prosecutorial disclosure on the national radar screen and pressure state ethics authorities to increase enforcement and prosecutors offices to adopt internal measures to reduce violations.