UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
vs.	§	**CASE NO. 2:17-390**
	§	
DAVID KEITH WILLS	§	

MOTION AND ORDER CONCERNING DISCLOSURE OF EVIDENCE PURSUANT TO TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT RULES 3.09 & 3.04

TO THE HONORABLE NELVA GONZALES RAMOS, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION:

COMES NOW, defendant **DAVID KEITH WILLS**, by and through undersigned counsel, moves this Honorable Court for an order requiring the Government to disclose all evidence 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 and in support thereof would show unto this Honorable Court the following:

The Defendant is not requesting the disclosure of previously ordered *Brady* evidence but seeks the required disclosure of evidence or information outside the constitutional scope of *Brady* that tends to negate the guilt of the accused and is mitigating of the alleged offense. Disclosure of evidence under the Rules of

Professional Conduct is not limited solely to "material evidence."

All prosecutors in the United States Attorney's Office in the Southern District are bound by the Texas Disciplinary Rules of Professional Conduct. "An attorney for the Government shall be subject to ***State laws and rules, and local rules***, governing attorneys in each where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 USC § 530B(a) (emphasis added). Further the local rules mandate, "[l]awyers who practice before this court are required to act as mature and responsible professionals, ***and the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct.***" Local Rules, p. 25 (emphasis added). Texas Rule of Professional Conduct Rule 3.09, entitled "Special Responsibilities of a Prosecutor", requires the prosecutor in a criminal case shall:

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

Tex. R. Prof. Conduct 3.09(d) (emphasis added). Rule 3.09 requires a prosecutor to disclose "all evidence or information" not only material or admissible information. Rule 3.09 disclosure encompasses more evidence than what is constitutionally required to be disclosed under the *Brady* decision.

A DUTY BROADER THAN BRADY

The Board of Disciplinary Appeals appointed by the Supreme Court of Texas ("Board") stated, "[b]ased on the plain language of Rule 3.09(d) and significant differences between the purpose and application of the duty under the disciplinary rule and the constitutional duty under *Brady*, ***we hold that Rule 3.09(d) is broader than Brady.***" *Schultz v. Comm'n for Lawyer Discipline*, p.1 (Tex. Bd. Disp. App. 55649, December 17, 2015) (emphasis added) (attached as Exhibit 1). The goal of Rule 3.09(d) is to impose on a prosecutor a professional obligation to "see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information know to the prosecutor." Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) cmt. 1. Rule 3.09(d) is identical to the American Bar Association Model Rule 3.8(d). Model rules of Prof'l Conduct 3.8(d) (2015).

Unlike *Brady*, the rule imposes this obligation on the prosecutor without regard for the anticipated impact of the information on the outcome of a trial. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) (attached as Exhibit 2). The ethics rules make clear that there is evidence disclosable under Professional Conduct rules that would not be disclosable under *Brady*. The U.S. Supreme Court also has recognized the expansive scope of disclosure under the

Professional Conduct Rules.

The Court stated, "[t]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (citing ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a)). It is a recognized principle of American jurisprudence that, "the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." *Cone v. Bell*, 556 U.S. 449, 470 n. 15 (2009) (citing ABA Model Rule 3.8(d)). The duty of disclosure under the ethical rules are more stringent than under *Brady*, "Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution." ABA Formal Op. 09-454.

NO MATERIALITY INQUIRY

Ethically, "under Rule 3.09(d) the prosecution must turn over any information that 'tends to negate the guilt' or mitigate the offense. There is no materiality requirement. No analysis is necessary to determine whether disclosure would have probably have led to a different outcome of the trial." *Schultz v. Comm'n for Lawyer*,

p. 10 (Tex. Bd. Disp. App. 55649, December 17, 2015). Moreover, the information does not need to be admissible at trial and the information must be disclosed "timely," that is "as soon as reasonable practicable so that the defense can make meaningful use of it." ABA Formal Op. 09-454.

It is the prosecutor's role to disclose impeachment information. Rule 3.09(d) is specifically intended to advise—and prevent—a prosecutor from making an incorrect judgement call. The clarity of Rule 3.09(d) is a safeguard for prosecutors and citizens alike: if there is ***any way a piece of information could be viewed as exculpatory, impeaching, or mitigating—err on the side of disclosure***. *Schultz v. Comm'n for Lawyer Discipline*, p. 11 (Tex. Bd. Disp. App. 55649, December 17, 2015) (emphasis added). The Board held "that the materiality standard under *Brady* does not apply to Rule 3.09(d). We further hold that a failure to disclose information otherwise required by law to be disclosed, regardless of intent, constitutes unlawfully obstructing another party's access to evidence in violation of Rule 3.04(a)." *Schultz v. Comm'n for Lawyer Discipline*, p. 4 (Tex. Bd. Disp. App. 55649, December 17, 2015).

Further, Rule 3.04(a) requires that: "A lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person

to do any such act." Tex. R. Prof. Conduct 3.04(a). The Texas Rules of Professional Conduct mandate that a prosecutor cannot prevent access to evidence and that a prosecutor must disclose ***all*** evidence that tends to mitigate the guilt of the Defendant.

The Court's rulings and professional ethics opinions demonstrate that there are two classes of evidence that must be disclosed. There is *Brady* evidence which must be disclosed, that is evidence which is favorable to an accused and is subject to materiality analysis. The second class of evidence, which is required to be disclosed pursuant to Texas Rules of Disciplinary Conduct does not require materiality analysis. The Defendant request all evidence that is in the second tier, evidence that is subject to disclosure under the Texas Rules of Disciplinary Conduct.

Forty-nine states, Guam, the United States Virgin Islands and the District of Columbia have adopted versions of the ABA Model Rule of Professional Conduct 3.8 (Special Responsibilities of a Prosecutor) from which the Texas rule binding prosecuters came. This Texas Rule binds the prosecutors in this court under the Local Rules.

This request for an order is not any personal accustation against a particular prosecutor or office, but is a principled position to address what we now know happens too often. Having a clear order from this court will privde clarity regarding the disclosure obligations of ethical prosecutors. See 96 Judicature 328 and note

32(June 2013).

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this motion for an order to disclose evidence pursuant to Texas Rules of Professional Conduct be granted.

Respectfully Submitted,

By: ___/s/ *Cynthia E. Orr*_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been electronically delivered to Assistant United States Attorney Hugo Martinez, as a registered participant to the CM/ECF document filing system, on this the 14th day of September 2017.

By: _____*/s/ Cynthia E. Orr*_____
CYNTHIA E. ORR

CERTIFICATE OF CONSULATIATION

Counsel has attempted to confer with Assistant United States Attorney Hugo Martinez regarding this motion, but did not hear back from him as of this time.

By: _____*/s/ Cynthia E. Orr*_____
CYNTHIA E. ORR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
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vs.	§	**CASE NO. 2:17-390**
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DAVID KEITH WILLS	§	

ORDER

ON THIS THE _____ day of _____, 2017, came to be heard Defendant's Motion for an Order Concerning Disclosure of Evidence pursuant to Texas Disciplinary Rules of Professional Conduct Rules 3.09 & 3.04 and it appears to the Court that this motion should be:

(GRANTED) (DENIED)

_____
HON. NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

JUDGMENT OF PROBATED SUSPENSION AFFIRMED

Opinion and Judgment Signed and Delivered December 17, 2015.

BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS

No. 55649

WILLIAM ALLEN SCHULTZ, APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS, APPELLEE

On Appeal from the Evidentiary Panel 14-3 (Denton) for the
State Bar of Texas District 14 Grievance Committee

SBOT Case No. D0121247202

Opinion and Judgment on Appeal

COUNSEL:

R. Ritch Roberts, Robert R. Smith, Fitzpatrick Hagood Smith & Uhl, LLP, Dallas, Texas, for Appellant William Allen Schultz.

Linda A. Acevedo, Chief Disciplinary Counsel, Laura Bayouth Popps, Deputy Counsel for Administration, Cynthia Canfield Hamilton, Senior Appellate Counsel, Office of the Chief Disciplinary Counsel of the State Bar of Texas, Austin, Texas, for Appellee Commission for Lawyer Discipline of the State Bar of Texas.

OPINION

In this attorney discipline case of first impression, we must determine whether the Texas Disciplinary Rules of Professional Conduct Rule 3.09(d) codifies the constitutional duty to disclose exculpatory evidence imposed under *Brady v. Maryland*, 373 U.S. 83 (1963).[1] No Texas appellate court has yet determined whether the ethical duty of a prosecutor to disclose to the defense information that "tends to negate the guilt of the accused" pursuant to Rule 3.09(d) is limited to the scope of "materiality" in *Brady*. Based on the plain language of Rule 3.09(d) and significant differences between the purpose and application of the duty under the disciplinary rule and the constitutional duty under *Brady*, we hold that Rule 3.09(d) is broader than *Brady*.

The evidentiary panel found that William Allen Schultz violated Rules 3.09(d) and 3.04(a), Tex. Disciplinary Rules Prof'l Conduct, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) ("Rule(s)"), and imposed a six-month fully probated suspension.[2] Rule 3.09(d) requires a prosecutor in a criminal case to:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, 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.

Rule 3.04(a) requires that:

> a lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

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[1] The United States Supreme Court has issued numerous opinions modifying or clarifying the original holding in *Brady v. Maryland*. This opinion will refer to those cases collectively simply as "*Brady*," mindful that the prosecutor's ethical duty to disclose impeachment evidence is specifically discussed in *Giglio v. United States*, 405 U.S. 150 (1972).

[2] Schultz completed the six-month probation prior to submission of this appeal. He does not challenge the disciplinary sanction imposed but only the findings of misconduct.

Schultz, Assistant District Attorney for Denton County, admitted during the underlying criminal proceedings and during the disciplinary hearing that he did not disclose to the defense the limited ability of the state's key witness to identify her attacker because he did not think it was either exculpatory or material. He relied on his interpretation of what was required under *Brady* in his own defense that disclosure of this information was not legally required.

Schultz later conceded at the disciplinary hearing that the information should have been disclosed. Further, the District Attorney's office stipulated during the criminal proceeding that the information should have been disclosed. The trial judge in the criminal case found that Schultz's failure to disclose the information violated *Brady* and granted a mistrial to which double jeopardy attached.

Schultz argues that he did not violate Rule 3.09(d) because the evidence in question was not material or exculpatory; therefore, his ethical duty under Rule 3.09(d) cannot exceed the legal obligations of *Brady*. He further asserts that any failure to disclose information would violate Rule 3.09(d) only if there were a reasonable probability that the information or evidence withheld would be admissible and make a difference in the outcome of the trial. Schultz also argues that he lacked actual knowledge of some of the information in question. Moreover, as to Rule 3.04(a) he argues that the rule prohibits only intentional destruction of evidence and he did not intend to conceal evidence. Finally, for the first time on appeal, Schultz challenges the term "unlawfully" in Rule 3.04(a) as unconstitutionally vague.

The Commission for Lawyer Discipline[3] ("Commission") argues that the disciplinary judgment should be affirmed based on the evidence in the record that Schultz knew and failed to

[3] The Commission for Lawyer Discipline is a permanent committee of the State Bar of Texas that exercises all rights characteristically reposed in a client in lawyer disciplinary and disability proceedings. Tex. Rules Disciplinary P. R. 1.06D and 4.06A, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1 (West 2013). The Chief Disciplinary Counsel of the State Bar of Texas represents the Commission in disciplinary proceedings.

disclose to the defense that the state's key witness had only assumed her assailant to be her husband, i.e. the identification was based on indirect factors as opposed to actually seeing his face. The Commission also argues that limiting Rule 3.09(d) to the constitutional duty to disclose exculpatory, impeaching, and mitigation evidence under *Brady* is not supported by the plain language or purpose of the rule. The Commission further contends that Schultz argues for an intent element not found in Rule 3.04(a). Finally, the Commission urges that we should affirm the judgment because there is substantial evidence in this record that Schultz violated *Brady*.

We hold that the materiality standard under *Brady* does not apply to Rule 3.09(d). We further hold that failure to disclose information otherwise required by law to be disclosed, regardless of intent, constitutes unlawfully obstructing another party's access to evidence in violation of Rule 3.04(a). Finally, there is substantial evidence in this record to support the findings that Schultz failed to make timely disclosure of all evidence known to him that tended to negate the accused's guilt and, in so doing, unlawfully obstructed another party's access to evidence. Therefore, we affirm.

I. Background

A. Underlying criminal prosecution

This disciplinary case arises out of the Denton County District Attorney's prosecution of Silvano Uriostegui for aggravated assault with a deadly weapon of his estranged wife, Maria Uriostegui. She was attacked and stabbed in the bedroom of her apartment at night. The only light in the apartment was from a TV in another room. When interviewed, Maria told the police that Silvano had attacked her. She later testified in a hearing on a protective order that Silvano had attacked her. Maria's primary language is Spanish. During the various interviews and hearings made a part of this

record, most of the questions to her were translated into Spanish, and her statements and testimony were translated into English.

Appellant Schultz was assigned to prosecute the Uriostegui case in 2011 when he became the head of the family violence section of the Denton County District Attorney's office. He was the second assistant district attorney assigned as the lead prosecutor. Schultz was licensed to practice law in Texas in 1995 and had been a state and federal prosecutor for over 16 years.

Victor Amador was appointed to defend Silvano in March 2011. He was Silvano's third defense attorney. Amador requested and received the initial production of discovery from Mike Shovlin, the original prosecutor. In June, 2011 Amador requested additional discovery, including broad requests for all evidence favorable to the defendant. He met with Schultz several times to discuss discovery.

In January 2012, one month before the case was set for trial, Schultz and several other people from his office met with Maria. During the interview, Maria disclosed that she thought the person who attacked her was Silvano Uriostegui based on his smell, the sole of his boot, and his stature as seen in his shadow. Maria, through a translator, said "I couldn't see his face." Schultz did not believe that any of this information was exculpatory. Schultz did not disclose Maria's statements to the defense.

B. Sentencing hearing and mistrial

On February 13, 2012 Silvano entered a plea of guilty to the indictment, but exercised his right to have a jury determine his sentence. On February 14, 2012, after a jury was selected, the State began its case-in-chief at sentencing. Schultz called Maria as a witness. Maria testified that she did not see her attacker's face and that she did not know whether her attacker was Silvano. Maria also testified that she had told the prosecutor earlier that she did not see who had attacked her. She

explained that she had testified at the protective order hearing that Silvano was her attacker because she had assumed it was him from his smell and boot.

Schultz told the trial court that Maria had told him that she had identified Silvano by his smell, boot, and stature, but that he did not think that the information was exculpatory. Schultz believed her statement that she did not see her attacker's face was at most a prior inconsistent statement. Counsel for Schultz makes a similar argument on appeal. Both the evidentiary panel and this Board reject this argument based on Schultz's own actions: during his investigation, Schultz had enough concern that Maria's attacker might be Alvero Malagon, a man who had previously assaulted her that he investigated and confirmed that Malagon was incarcerated on the date of the attack. The defense attorney was unaware of any of this until the testimony during the sentencing trial. Based on Maria's testimony, defense counsel moved for a mistrial. The court found that the undisclosed information was exculpatory and granted the mistrial.

C. Habeas corpus hearing

Defense counsel filed an application for writ of habeas corpus seeking to have double jeopardy attach to Silvano's mistrial (thereby preventing a retrial)[4] because the evidence was exculpatory, violated *Brady*, and was intentionally suppressed. The district judge who had presided at the criminal trial heard the habeas application. Two assistant district attorneys representing the state at the habeas hearing stipulated that the manner in which the victim had identified her assailant could have been useful to the defendant and should have been disclosed.[5]

Schultz was called as a witness at the hearing on the writ of habeas corpus. Schultz testified

[4] Double jeopardy may attach where a defendant's mistrial was "necessitated primarily by the State's 'intentional' failure to disclose exculpatory evidence." *Ex parte Masonheimer*, 220 S.W.3d 494, 507-08 (Tex. Crim. App. 2007).

[5] The state also stipulated that neither Shovlin nor Schultz had disclosed the lack of direct identifying information to either of Silvano's former attorneys.

that he did not directly ask Maria during the January interview whether she actually saw her attacker's face. He knew before trial that Maria had not seen her attacker's face but did not disclose it to the defendant because "I had no doubts that she was telling me that he [Silvano] is the attacker." It never occurred to Schultz that this could be *Brady* material. In hindsight, though, Schultz said that he should have told the defense how Maria arrived at the conclusion that Silvano was her attacker.

Forest Beadle was Schultz's co-counsel in the Uriostegui case. He testified at the hearing that he first learned that Maria had not seen her attacker's face during the January interview when he heard the statement from the translator. He knew he had information favorable to the defense before the plea but told no one. In retrospect, he agreed that the information should have been disclosed.[6]

The court granted the habeas relief and allowed Silvano to withdraw his guilty plea. The court further held that double jeopardy attached because the state had purposefully withheld exculpatory information and intentionally goaded the defense into pleading and seeking a mistrial.

Thereafter, the Denton District Attorney reported Schultz's conduct to the State Bar of Texas but excused it as unintentional. Amador obtained a copy of the letter sent to the State Bar by the District Attorney after receiving an opinion from the Texas Attorney General that the letter should be released. Amador then filed a grievance against Schultz with the State Bar that is the basis of this disciplinary proceeding.

II. Standard of review

This case requires BODA to review both legal issues interpreting the substantive rules of professional conduct and the evidentiary panel's fact findings of misconduct. BODA reviews the legal conclusions of the evidentiary panel *de novo*. *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994)

[6] According to the record on appeal, a disciplinary case against co-counsel was opened but ultimately dismissed.

(questions of law are always subject to *de novo* review); *Comm'n for Lawyer Discipline v. A Texas Attorney*, 2015 WL 5130876 *2 (Texas Bd. Disp. App. 55619, August 27, 2015; no appeal); *Weir v. Comm'n for Lawyer Discipline*, 2005 WL 6283558 at *2 (Texas Bd. Disp. App. 32082, June 30, 2005; no appeal).

BODA reviews the evidence supporting the findings of fact leading to the conclusion that an attorney committed professional misconduct under a substantial evidence standard. Tex. Gov't Code Ann. § 81.072(b)(7) (West Supp. 2014); Tex. Rules Disciplinary P. R. 2.24; *Wilson v. Comm'n for Lawyer Discipline*, 2011 WL 683809 *2 (Tex. Bd. Disp. App. 46432, January 30, 2011; aff'd March 3, 2012). BODA is not subject to the Texas Administrative Procedure Act, Tex. Gov't Code Ann. §§ 2001.001—2001.092, but cases construing substantial evidence under the Act are instructive. *In re Humphreys*, 880 S.W.2d at 404. "At its core, the substantial evidence rule is a reasonableness test or a rational basis test." *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994). BODA must affirm a judgment "if it may be upheld on any basis that has support in the evidence under any theory of law applicable to the case." *Vickery v. Comm'n for Lawyer Discipline,* 5 S.W.3d 241, 252 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

Under the substantial evidence standard, the reviewing court focuses on whether there is a reasonable basis in the record for the decision below rather than on the correctness of the decision. *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d at 185. "The findings, inferences, conclusions, and decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise." *Id.* Showing the record lacks substantial evidence is a difficult burden for the appellant to meet:

> Although substantial evidence is more than a mere scintilla, *Alamo Express, Inc. v. Union City Transfer,* 158 Tex. 234, 309 S.W.2d 815, 823 (1958), the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence. *Lewis v. Metropolitan Savings and*

> *Loan Association,* 550 S.W.2d 11, 13 (Tex. 1977). . . . A reviewing court is not bound by the reasons given by an agency in its order, provided there is a valid basis for the action taken by the agency. *Railroad Commission v. City of Austin,* 524 S.W.2d 262, 279 (Tex. 1975). Thus, the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action. *Suburban Utility Corp. v. Public Utility Commission,* 652 S.W.2d 358, 364 (Tex. 1983).

Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452-53 (Tex. 1984).

III. Duty to disclose under Texas Disciplinary Rules of Professional Conduct Rule 3.09(d)

Schultz asks BODA to limit the scope of the ethical duty to disclose information under Rule 3.09(d) to the due process requirement to disclose exculpatory evidence under *Brady*. Schultz's main justification for limiting the duty to disclose information under Rule 3.09(d) to material evidence under *Brady* is to avoid multiple confusing standards for prosecutors that could result in an unfair sanction when no constitutional violation of the right to a fair trial has occurred. He argues that expanding Rule 3.09(d) beyond the materiality standard of *Brady* would result in strict liability for prosecutors.

We do not find this argument persuasive, particularly because of the recent amendment to Texas criminal procedure that now mandates the same standard for disclosure as Rule 3.09(d):

> Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

Tex. Code Crim. Proc. Ann. art. 39.14(h) (West Supp. 2014) (effective January 1, 2014). Although art. 39.14 is not dispositive in this case, its promulgation refutes Schultz's position that imposing a broader duty on prosecutors to disclose information to the defense than *Brady* creates an unworkable burden. That "unworkable burden," if there is one, already exists.

A. Rule 3.09(d) is unambiguous

The disciplinary rules are treated like statutes, *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988). A fundamental rule of statutory construction is to ascertain and give effect to the drafter's intent. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003). Rule 3.09(d) is identical to the American Bar Association Model Rule 3.8(d). Model Rules of Prof'l Conduct 3.8(d) (2015). The goal of Rule 3.09(d) is to impose on a prosecutor a professional obligation to "see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor." Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) cmt. 1. Unlike *Brady*, the rule imposes this obligation on the prosecutor without regard for the anticipated impact of the information on the outcome of a trial. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

Ethically, under Rule 3.09(d) the prosecution must turn over any information that "tends to negate the guilt" or mitigate the offense. There is no materiality requirement. No analysis is necessary to determine whether disclosure would probably have led to a different outcome of the trial. The information need not be admissible at trial, and the information must be disclosed "timely," that is, "as soon as reasonably practicable so that the defense can make meaningful use of it." ABA Formal Op. 09-454. In addition, unlike *Brady*, Rule 3.09(d) limits the information to that actually known by the prosecutor. Under the disciplinary rules, actual knowledge may be inferred from circumstances. Tex. Disciplinary Rules Prof'l Conduct Terminology; *Cohn v. Comm'n for Lawyer Discipline*, 979 S.W.2d 694, 699 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

The ethics rules acknowledge that a prosecutor shall not make a determination of materiality in his ethical obligation to disclose information to the defense. In an adversarial system,

it is the role of both parties to develop arguments why certain evidence is irrelevant, immaterial, and inadmissible. It is the prosecutor's role to disclose impeachment information, the defense lawyer's role to present the impeaching information as evidence, and the trial court's role to determine whether the information is admissible evidence. Rule 3.09(d) is specifically intended to advise—and prevent—a prosecutor from making an incorrect judgment call, such as that Maria's "inconsistent statements" did not rise to the level of *Brady*-mandated disclosure. The clarity of Rule 3.09(d) is a safeguard for prosecutors and citizens alike: if there is any way a piece of information could be viewed as exculpatory, impeaching, or mitigating—err on the side of disclosure.

B. Distinct and independent duty from *Brady*

The goal of *Brady* and its progeny, on the other hand, is to ensure that a criminal conviction is not tainted by the failure of the justice system to provide constitutional due process. Rather than demanding individual accountability, as does Rule 3.09(d), *Brady* holds 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." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Whether the prosecutor deliberately withheld evidence or negligently failed to disclose it is irrelevant: "inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler v. Greene*, 527 U.S. 263, 288 (1999).

The state is not required under *Brady* to turn over evidence that is only "generally useful" to the defense. *Iness v. State*, 606 S.W.2d 306, 311 (Tex. Crim. App. 1980). For nondisclosure to result in a due process violation, the evidence in question must be "material." Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley,* 514 U.S. 419, 433 (1995); *Hampton v. State*,

86 S.W.3d 603, 612 (Tex. Crim. App. 2002). A "reasonable probability" is probability sufficient to undermine confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 678 (1985). Materiality applies to suppressed evidence "collectively, not item by item." *Kyles v. Whitley*, 514 U.S. at 436. The question is not whether the defendant would have received a different verdict with the disclosed evidence, but "whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. at 434.

A *Brady* violation is established by showing "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. at 435. "Harmless error analysis does not apply." *Id.* "*Brady* applies equally to evidence relevant to the credibility of a key witness in the state's case against a defendant." *Graves v. Dretke*, 442 F.3d 334, 339 (5th Cir. 2006) (citing *Giglio v. United States,* 405 U.S. 150 (1972)).

Thus, *Brady* seeks to protect the integrity of the outcome of a trial without regard for any individual prosecutor's culpability. The ethics rule and disciplinary proceedings serve an entirely different purpose: protection of the public. The ethics rule protects the public, in part, because prosecutors have absolute immunity from suit, regardless of malicious or dishonest action, under 42 U.S.C. § 1983, *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976), or under state law. *Charleston v. Allen,* 420 S.W.3d 134, 137-38 (Tex. App.—Texarkana 2012, no pet.).

The ethical standard's independent purpose of protecting the public is further apparent in this case where the withheld information came to light during the proceeding. Determining the materiality of undisclosed evidence by applying a *Brady* test in the context of an aborted prosecution is speculative. Therefore, limiting the ethical duty, as opposed to the constitutional duty, to disclose information would limit prosecutors' accountability to the public because the failure to disclose would only arise if a conviction had occurred.

Courts and commentators have recognized that the ethical obligation to disclose is more extensive than the constitutional duty. The United States Supreme Court has acknowledged that the ethical duty to turn over information to the defense is broader than the *Brady* requirements: "[t]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.…" *Kyles v. Whitley*, 514 U.S. at 437 (also citing ABA Model Rule 3.8(d)). "[T]he obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." *Cone v. Bell*, 556 U.S. 449, 470 n. 15 (2009) (citing ABA Model Rule 3.8(d)).

The ABA has explained in detail that the Model Rule does not codify *Brady*: "Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence… without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution." ABA Formal Op. 09-454. The drafters of Model Rule 3.8(d) deliberately made no attempt to codify the evolving constitutional law. *Id.* "A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions." *Id.* The opinion also notes that the requirement that the prosecutor have actual knowledge of the evidence or information "limits what might otherwise appear to be an obligation substantially more onerous than [the] prosecutor's legal obligations under other law." *Id.*

The ABA opinion further explains that the ethical obligation's usefulness to the defense in plea bargaining is a key difference from the duty under *Brady*. "Among the most significant purposes for which disclosure must be made under [the rule] is to enable defense counsel to advise the defendant regarding whether to plead guilty." Thus, timely disclosure requires a prosecutor to disclose

information under the rule prior to a guilty plea proceeding. *Id.* "[T]he ethical duty of disclosure … also requires disclosure of favorable information [t]hough possibly inadmissible itself … [that] may lead a defendant's lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations." *Id.*

The ABA opinion also emphasizes that evaluating the usefulness of the information is up to the defense. "Nothing suggests a *de minimus* exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable." *Id.* "The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use." *Id.*

In a disciplinary proceeding against a prosecutor arising from a criminal case similar to the one here, the D.C. Court of Appeals held that the "retrospective materiality analysis" of *Brady* does not apply to Rule 3.08(e).[7] *In re Kline*, 113 A.3d 202, 208 (D.C. Cir. 2015). The reliability of the state's eyewitness was the principal issue at trial. The victim had originally told police that he did not know who shot him. The police made Kline aware of this statement but Kline told the defense only that he did not have any truly exculpatory evidence. Kline defended his disciplinary case by testifying that he did not believe that the evidence was *Brady* material and that the "gist" of the undisclosed evidence was in the police reports turned over to the defense.

The trial court challenged Kline that his assumptions prevented him from recognizing exculpatory evidence: "Because you are sure you have the guy, no one could conjure up a *Brady* argument? … That is why *Brady* doesn't leave it up to the prosecutor, for that very reason. You are

[7] District of Columbia Rules of Professional Conduct Rule 3.8(e) prohibits a prosecutor in a criminal case from intentionally failing to disclose to the defense any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused. *In re Kline*, 113 A.3d 202, 204 (D.C. Cir. 2015).

always sure you have got the right guy or you wouldn't be prosecuting." *Id.* at 205. The court affirmed the disciplinary judgment, holding that where the prosecutor consciously decided that information was not exculpatory and therefore did not have to be produced, he had acted deliberately and therefore intentionally. *Id.* at 214.

The North Dakota Supreme Court emphasized the plain wording of the disciplinary rule and the fundamentally different purposes of the underlying criminal action and the disciplinary proceeding in holding that its rule 3.8(d)[8] did not require a materiality element. *In re Disciplinary Action Against Feland*, 2012 ND 174, ¶ 14, 820 N.W.2d 672 (2012). The court was not persuaded by that respondent's argument that interpreting North Dakota's Rule 3.8(d) in a "wholly separate way from the well-established discovery doctrine" of *Brady* would result in an "unworkable system." *Id.* at ¶ 12. The court also stated that potential prejudice to the defendant might affect the sanction imposed but should not affect the initial determination whether a violation had occurred. *Id.* at ¶ 13. The court further held that Rule 3.8(d) could be violated negligently, noting that the plain language of the rule does not create an exception for unintentional violations. *Id.* at ¶¶ 18-19.

Schultz has attempted to minimize during this appeal whether his conduct violated *Brady*, despite the trial judge's determination that there was a *Brady* violation and the relief granted as a result of the *Brady* violation. The judge, who was in the best position to determine whether the information was material and whether nondisclosure was intentional, found the prosecutors so "evasive" and "disingenuous" that he banned Schultz and his co-counsel from appearing in his court.[9]

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[8] North Dakota Rule of Professional Conduct 3.8(d) provides that a prosecutor in a criminal case shall "disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . . ." *In re Disciplinary Action Against Feland*, 2012 ND 174, ¶ 11, 820 N.W.2d 672 (2012).

[9] At the conclusion of the habeas hearing the judge remarked:

> I can't fathom how they do not understand this is a Brady violation only in retrospect. My jaw dropped to the ground when Mrs. Uriostegui testified the way that she did. I was shocked. And for the state to actually know this and not disclose it…, the only good thing I can say from this miserable

A *Brady* violation—which requires a finding of materiality—is a higher evidentiary standard and carries with it significant legal relief. On the contrary, a prosecutor's Rule 3.09(d) violation alone provides no legal relief for a criminal defendant and would not have prevented Silvano from being re-tried absent a *Brady* violation.

IV. Texas Disciplinary Rules of Professional Conduct Rule 3.04(a)

Tex. Disciplinary Rules Prof'l Conduct R. 3.04(a) requires that a "lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act." Schultz argues that (1) he did not violate Rule 3.04(a) because he did not intentionally commit an affirmative act to obstruct a party's access to evidence, (2) at most he acted negligently, and (3) Rule 3.04(a) is unconstitutionally vague on its face. We hold that the evidentiary panel correctly construed the rule to apply to the situation where a prosecutor failed to disclose information tending to negate the guilt of the accused as required by Rule 3.09(d) or other law, regardless of intent. We also hold that the plain language of Rule 3.04(a) is not vague. Therefore, we overrule Schultz's challenges to whether he violated Rule 3.04(a).

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hearing is at least Forrest Beadle told the truth and was not evasive and was straightforward. I don't particularly like his answers, but he at least was honest.

I can't fathom how somebody who's been to law school, let alone practiced law for this period of time, doesn't understand Brady, doesn't understand the law. And based upon their answers, the way they were answered – the questions were answered, the original conduct in trial, I can only find that they intentionally goaded the defense into having to make a motion for mistrial, that they purposefully withheld Brady material.

And how disingenuous it is to get up here and testify that you don't think that it's Brady that the victim can't identify by face or by anything other than smell and a boot who the attacker is, to indicate, as I hear indicated in the original trial that the state even had some doubt as to who the attacker was because she – because the victim could not identify the face, because she had previously been assaulted, but that individual was in prison at the time that this assault occurred.

I don't know what's going on. And on the basis of my ruling, I'm going to have to ban both Mr. Beadle and Mr. Schultz from my courtroom. They're not allowed to appear in this courtroom until I rule otherwise.

A. Justiciability

At no prior point during the disciplinary process has Schultz argued that Rule 3.04(a) is vague, let alone that the Rule should be declared unconstitutional and stricken altogether. Schultz did not challenge the rule either on its face or as applied to him during the evidentiary hearing, and he has not cited to any authority that would permit him to raise the issue for the first time on appeal.

The Court of Criminal Appeals has spoken clearly that a facial challenge to a statute or rule cannot be raised for the first time on appeal. *In re Karenev*, 281 S.W.3d 428 (Tex. Crim. App. 2009); *Sony v. State*, 307 S.W.3d 348, 353 (Tex. App.—San Antonio, 2009, no pet.). Statutes are presumed to be constitutional until it is determined otherwise. *Flores v. State*, 245 S.W.3d 432, 438 (Tex.Crim.App.2008); *Doe v. State*, 112 S.W.3d 532, 539 (Tex. Crim. App. 2003). Similarly, the Texas Supreme Court requires that a constitutional claim be raised in the trial court before it may be considered on appeal. *Wood v. Wood*, 159 Tex. 350, 357, 320 S.W.2d 807, 812 (1959); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993).

We hold that the analysis in *Karenev* and *Wood* similarly applies in a facial challenge to the Texas Disciplinary Rules of Professional Conduct. This standard has been consistently applied throughout the courts of appeals. *See*, *e.g., State Bar v. Leighton*, 956 S.W.2d 667, 671 (Tex. App.—San Antonio 1997), (constitutional due process claim can be waived if not presented to trial court), *pet. denied per curiam*, 964 S.W.2d 944 (1998); *Hernandez v. State Bar of Texas*, 812 S.W.2d 75, 78 (Tex. App.—Corpus Christi 1991, no writ) (failure to assert constitutionality arguments to the trial court); *compare Brown v. Comm'n for Lawyer Discipline,* 980 S.W.2d 675 (Tex. App.—San Antonio 1998) (court went to some length to find that the constitutional issue was raised and preserved for appeal.[10]) Having failed to raise his vagueness challenge to Rule 3.04(a) to the evidentiary panel,

[10] The appellate court in *Brown* decided that reference in Brown's closing argument to "most of those [provisions], when challenged, as applied to specific facts, have been held to be unconstitutionally vague and

Schultz may not now do so for the first time on appeal.

B. "Unlawfully" is not unconstitutionally vague

But even if Schultz had raised his challenge the constitutionality of the term "unlawfully" in Rule 3.04(a) before the evidentiary panel, we find that the Rule is not unconstitutionally vague. "To survive a vagueness challenge, a statute need not spell out with perfect precision what conduct it forbids." *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998) (discussing, *inter alia*, whether Tex. Disciplinary Rules Prof'l Conduct R. 3.06(d) prohibiting certain contact with jurors post-trial was unconstitutionally vague). "[I]n scrutinizing a disciplinary rule directed solely at lawyers we ask whether the ordinary lawyer, with 'the benefit of guidance provided by case law, court rules and the lore of the profession,' could understand and comply with it." *Id.* "Disciplinary rules need not satisfy the higher degree of specificity required of criminal statutes." *Id.* at 438.[11]

A facial challenge is difficult to sustain because the individual advancing the challenge must establish that no set of circumstances exists under which the statute is valid. *Brown v. State*, 468 S.W.3d 158, 173-74 (Tex. App.—Houston [14th Dist.] 2015, pet. filed July 30, 2015); *Pak-a-Sak, Inc. v. City of Perryton*, 451 S.W.3d 133, 138 (Tex. App.—Amarillo 2014, no pet.); *Shaffer v. State,* 184 S.W.3d 353, 364 (Tex. App.–Fort Worth 2006, pet. ref'd). A complainant who engages in some conduct that is clearly proscribed "cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495 (1982*); Pak-a-Sak, Inc. v. City of Perryton*, 451 S.W.3d at 138. "A court should therefore examine the complainant's conduct before analyzing the other hypothetical applications of the law." *Hoffman*

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unenforceable under both Texas law and federal law" was sufficient to preserve the point for appeal. *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.3d at 681.

[11] See discussion under Intent below that "unlawfully" can readily be defined as failure to disclose or concealment contrary to a legal obligation to disclose, whether under law, a court order, or applicable rules of practice or procedure.

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. at 495; *Pak-a-Sak, Inc. v. City of Perryton*, 451 S.W.3d at 138. Schultz has conceded that a violation of the duty to disclose material evidence under *Brady* would violate Rule 3.04(a). Therefore, he has not met his burden of showing that there are no circumstances under which the rule can be valid.

C. Intent not required

Finally Schultz argues for an interpretation of Rule 3.04(a) to require an intentional affirmative act of concealment or destruction of evidence. Again, we start with the plain and unambiguous language of the rule. The rule contains no intent *mens rea* but requires only that the attorney "unlawfully obstruct a party's access to evidence." Schultz's interpretation of "unlawful" as "illegal" or "criminally punishable" is too narrow. "Unlawfully" in this context means to conceal or fail to disclose contrary to a legal obligation to disclose, whether under law, a court order, or applicable rules of practice or procedure. 48A Robert P. Schuwerk and Lillian B. Hardwick, *Texas Practice Series: Handbook of Lawyer and Judicial Ethics* § 8:4 (2015 ed.) (The predecessor to Rule 3.04(a), Texas Code of Professional Responsibility DR-7-102(A)(3), provided that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."). We have already determined that Schultz had a duty to disclose the information under both Rule 3.09(d) and *Brady*. Because he failed to do so, he violated Rule 3.04(a).

At least two jurisdictions with counterparts identical to Rule 3.04(a) have held that the rule carries no culpable mental state. *People v. Head*, 332 P.3d 117, 131 (O.P.D.J. Colo. 2013); *State of Oklahoma ex rel. Okla. Bar Assn v. Miller*, 2013 OK 49, 309 P.3d 108, 121 (Okla. 2013) (prosecutor violated 3.4(a) by failing to disclose to the defense attempts to assist one of the state's witnesses with his own criminal proceedings). Professor Robert P. Schuwerk, one of the drafters of the Texas rules, concurs: "a lawyer need only be negligent to violate this Rule. A lawyer need not have known of the

evidentiary value of the materials or even recklessly disregarded the possibility that they might have such value, if a competent lawyer would have recognized that fact. Thus, under this rule, a lawyer cannot 'escape liability … by closing his eyes to what he saw and could readily understand.' " 48A Robert P. Schuwerk and Lillian B. Hardwick at § 8:4.

We note that although Rule 3.04(a) does not require intent, the record here contains substantial evidence that Schultz acted intentionally as it pertains to Schultz's "as-applied" challenge.[12] First, Schultz evaluated the information that Maria could identify her attacker only indirectly and decided that it was not exculpatory. This is at least some evidence that his decision not to reveal the information to the defense was deliberate. Second, Schultz understood the significance of the deficiencies of Maria's identification because he took the further step of investigating and confirming that Alvero Malagon, another possible suspect, was incarcerated on the date of the attack. Third, and most importantly, there is substantial evidence that Schultz then affirmatively represented to the defense that he had disclosed all exculpatory evidence when he had not. By misrepresenting that he had provided full discovery, Schultz perpetuated the defense's mistaken belief that it had received all exculpatory evidence. *See, State v. Doyle*, 2010 UT App. 351, 245 P.3d 206, 211, *cert. denied*, 251 P.3d 245 (Utah 2011) (prosecutor's failure to disclose key witness's plea deal in response to defense counsel's request for all exculpatory evidence was "serious misconduct" and violated Utah counterpart to Rule 3.04(a)).[13]

[12] While intent is not required to violate Rule 3.04(a), intent could be considered in assessing the appropriate sanction. *See*, Tex. Rules Disciplinary P. R. 2.18; 48A Robert P. Schuwerk and Lillian B. Hardwick at § 8:4, fn. 17.

[13] *State v. Doyle* illustrates how a prosecutor's failure to disclose information to the defense can be professional misconduct absent a *Brady* violation.

V. Conclusion

Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) imposes a duty to disclose any information that tends to negate the guilt of the accused without regard to whether the information is material under the standard imposed by *Brady v. Maryland* and subsequent cases. This result is consistent with the language and purpose of the disciplinary rule to protect the public and is now codified by Texas Code Crim. Proc. Ann. art. 39.14. Accordingly, we find that there is substantial evidence in the record that (1) Schultz had actual knowledge that the state's key witness could not identify her attacker directly and that he failed to disclose it to the defense and (2) that Schultz's failure to disclose the limited nature of the witness's ability to identify her attacker constituted material evidence under *Brady*. We affirm the finding that Schultz violated Rule 3.09(d).

Tex. Disciplinary Rules Prof'l Conduct R. 3.04(a) encompasses failure to disclose evidence contrary to a duty under other law to do so and does not require intent to conceal or destroy evidence. Accordingly, Schultz's failure to disclose evidence to the defense required by Rule 3.09(d) constitutes a violation of Rule 3.04(a). We affirm the finding that Schultz violated Rule 3.04(a).

The Judgment of Partially Probated Suspension is AFFIRMED in all respects.

IT IS SO ORDERED.

David N. Kitner, Chair

Ramon Luis Echevarria II, Vice Chair

George A. Taylor

Jeanne C. "Cezy" Collins

Roland K. Johnson

Katherine A. Kinser

David M. González

Wendy Adele Humphrey

Mike Mills

Board Members Robert A. Black, John J. McKetta III, and Deborah Pullum not sitting.

No Title in Original

July 8, 2009

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
Formal Opinion 09-454
Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Core Terms

prosecutor's, disclosure, mitigate, ethic, sentence, favorable evidence, guilt, disclosure obligations, guilty plea, professional conduct, tribunal, criminal prosecution, discovery, innocent, suppress, guilt of the defendant, ethical duty, court rule, discipline, withhold, legal obligation, protective order, exculpatory

Text

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

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution. n1 Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established

by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

n1 This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

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

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*, n2 which held that criminal defendants have a due process right to receive favorable information from the prosecution. n3 This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule. n4 Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule. n5 Finally, although courts sometimes sanction prosecutors for violating disclosure obligations, n6 disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

n2 373 U.S. 83 (1963). *See* State v. York, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J., concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), "merely codifies" *Brady*).

n3 *Brady*, 373 U.S. at 87 ("the 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."); *see also* Kyles v. Whitley, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*.")

n4 *See* Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 2001-03 (2001); Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 94-07 (1994); State Bar of Wisconsin, Comm. on Prof'l Ethics, Op. E-86-7 (1986).

n5 *See, e.g.*, Mastracchio v. Vose, 2000 WL 303307 *13 (D.R.I. 2000), *aff'd*, 274 F.3d 590 (1st Cir.2001) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close to violating [Rule 3.8]").

n6 *See, e.g., In re* Jordan, 913 So. 2d 775, 782 (La. 2005) (prosecutor's failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); N.C. State Bar v. Michael B. Nifong, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm'n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re* Grant, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state's key witness in murder prosecution). *Cf.* Rule 3.8, cmt. [9] ("A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.")

The Committee undertakes its exploration by examining the following hypothetical.

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

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

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal. n7 In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law. n8 The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

n7 *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 432-35, United States v. Bagley, 473 U.S. 667, 674-75 (1985).

n8 "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.. . . [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (citations omitted); *see also* United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) ("The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.")

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern 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." n9 Similarly, Comment [1] to Model Rule 3.8 states that: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

n9 Berger v. United States, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor's obligation to seek justice date back more than 150 years. *See, e.g.*, Rush v. Cavanaugh, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor "is expressly bound by his official oath to behave himself in his

office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.")

In 1908, more than a half-century prior to the Supreme Court's decision in *Brady v. Maryland*, n10 the ABA Canons of Professional Ethics recognized that the prosecutor's duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused. n11 This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: "A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The ABA adopted the rule against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation. n12

n10 Prior to *Brady*, prosecutors' disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. *See, e.g.*, Jencks v. United States, 353 U.S. 657, 668, n. 13 (1957), *citing* Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done;" United States v. Andolschek, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) ("While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.")

n11 ABA Canons of Professional Ethics, Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.")

n12 *See, e.g.*, OLAVI MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) ("a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's duty as a matter of ethics"). For example, *Brady* required disclosure only upon request from the defense -- a limitation that was not incorporated into the language of DR 7-103(B), *see* MARU, *id.* at 330 -- and that was eventually eliminated by the Supreme Court itself. Moreover, in United States v. Agurs, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have

established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. MARU, *id*.

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

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor's obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence," n13 and most importantly, "that special precautions are taken to prevent . . . the conviction of innocent persons." n14 A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

n13 Rule 3.8, cmt. [1].

n14 *Id*.

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d) n15 establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation. n16 The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation. n17

n15 For example, Rule 3.4(a) makes it unethical for a lawyer to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value" (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is *prohibited by law*" (emphasis added), and Rule 3.4(c) forbids knowingly disobeying "an obligation under the rules of a tribunal . . . ." These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts

to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

n16 This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative "materiality" test. *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing inter alia*, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* "requires less of the prosecution than" Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny"); PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

n17 The current version provides: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. The accompanying Commentary observes: "This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law."*Id*. at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity."

In particular, Rule 3.8(d) is more demanding than the constitutional case law, n18 in that it requires the disclosure of evidence or information favorable to the defense n19 without regard to the anticipated impact of the evidence or information on a trial's outcome. n20 The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution. n21

n18 *See, e.g.*, United States v. Jones, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); United States v. Acosta, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two

jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the Brady line of cases. *See In re* Attorney C, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof' l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")

n19 Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that "mitigates the offense." Evidence or information mitigates the offense if it tends to show that the defendant's level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

n20 Consequently, a court's determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). *See, e.g.*, U.S. v. Barraza Cazares, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer's statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

n21 *Cf.* Cone v. Bell, 129 S. Ct. at 1783 n. 15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at 439 (prosecutors should avoid "tacking too close to the wind"). In some jurisdictions, court rules and court orders serve a similar purpose. *See, e.g.*, Local Rules of the U.S. Dist. Court for the Dist. of Mass., Rule 116.2(A)(2) (defining "exculpatory information," for purposes of the prosecutor's pretrial disclosure obligations under the Local Rules, to include (among other things) "all information that is material and favorable to the accused because it tends to [c]ast doubt on defendant's guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.")

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof. n22 Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to

be exculpatory when viewed in light of other evidence or information known to the prosecutor.

n22 Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence n23 or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

n23 For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

In the hypothetical, supra, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant's guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses' testimony and argue why the jury

should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor." Knowledge means "actual knowledge," which "may be inferred from [the] circumstances." n24 Although "a lawyer cannot ignore the obvious," n25 Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

n24 Rule 1.0(f).

n25 Rule 1.13, cmt. [3], *cf.* ABA Formal Opinion 95-396 ("[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law. Although the rule requires prosecutors to disclose *known* evidence and information that is favorable to the accused, n26 it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution's proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information. n27

n26 If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend

to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. *Cf.* Rule 3.8, cmt. [9].

n27 Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively. n28 Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

n28 *Compare* D.C. Rule Prof'l Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof'l Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, *supra* note 17 (calling for disclosure "at the earliest feasible opportunity").

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty. n29 Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case, n30 timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment. n31 Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order. n32

n29 *See* ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

n30 In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide "open file" discovery to defense counsel -- that is, they provide access to all the documents in their case file including incriminating information -- to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. *See* N.C. GEN. STAT. § 15A-903 (2007); *see generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

n31 *See* JOY & MCMUNIGAL, *supra* note 16 at 145 ("the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner").

n32 Rule 3.8, Comment [3].

Defendant's Acceptance of Prosecutor's Nondisclosure

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply. n33 For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

n33 It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may require a defendant entirely to waive the right under *Brady* to receive favorable evidence. In United States v. Ruiz, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in Giglio v. United States, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure, as already discussed.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client n34 or another. n35 Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice

system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty, n36 with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed. n37

n34 *See, e.g.*, Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule's protection. *See, e.g.*, Rule 1.7(b)(1).

n35 *See, e.g.*, Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial protective order); Rule 4.2 (permitting communications with represented person with consent of that person's lawyer or pursuant to court order).

n36 *See* Rules 1.2(a) and 1.4(b).

n37 The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.

The Disclosure Obligation in Connection with Sentencing

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

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

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

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

after a guilty plea or verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing. n38

n38 The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.

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

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations. n39 Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, n40 and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations. n41 To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

n39 Rules 5.1(a) and (b).

n40 Rule 5.1(b).

n41 Rule 5.1(c). *See, e.g., In re* Myers, 584 S.E.2d 357, 360 (S.C. 2003).

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the

prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case. n42

n42 In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). *See, e.g.*, Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).

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