ETHICAL ISSUES FOR THE PROSECUTION

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Houston Bar Association – Chair, Interprofessional Relations/Physicians Committee (1994-95); Associate Editor, The Houston Lawyer (1994-96); Law Day Committee (1996); Co-Chair, Administration of Justice Committee (2005-06).
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Harris County District Attorney’s Office Training Sessions
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Houston Bar Association
* 1997 Criminal Law and Procedure Section Lecture: “Defending an Ethics Complaint”
* 1997 Continuing Legal Education Committee Lecture: “Legal Aspects of Voir Dire”
* 2001 Continuing Legal Education Committee Lecture: “Identity Theft”
* 2002 Computer and Online Law Committee luncheon: “Identity Theft”
* 2003 Continuing Legal Education Committee Lecture: “Ethics for Prosecutors”

State Bar of Texas
* 2001 State Bar Summer School: “Identity Theft”
* 2002 Government Lawyers’ Section CLE: “Identity Theft”
* 2003 Public Affairs Committee CLE: "Open Records/Open Meetings"
* 2003 Government Lawyers’ Section CLE: "Ethics for Government Lawyers"
* 2003 Advanced Criminal Law Seminar: "Confessions"
* 2004 Government Lawyers' Section CLE: "Ethics: Consanguinity and Revolving Door Issues"
* 2004 Advanced Criminal Law Seminar: "Brady, Banks and Beyond: Special Ethical Rules for Prosecutors"
* 2005 Government Lawyers' Section CLE: "Open Records/Open Meetings"

Texas District and County Attorneys Association
* 1997 Civil and Criminal Law Update: “Avoiding the Costly Landmines: The Latest on Prosecutor Liability & Immunity” and “Open Records Update”
* 2000 Appellate Law Seminar: “Appellate Ethics”
* 2002 Civil and Criminal Law Update: "Records Management"

University of Texas School Law Conference

Publications
* Ineffective Assistance in Texas: The Good, the Bad and the Ugly, 30 HOU. LAWYER 17 (May-June 1993).
* Confidential Documents, TEX. PROSECUTOR (September-October 1998) at 26.
* An Employer’s Guide to Employees’ Military Leave, TEX. PROSECUTOR (January/February 2003) at 16.
* Pointers on the Public Information Act, TEX. PROSECUTOR (November-December 1999) at 30.
* Identity Theft – Strategies for the Information Age, TEX. PROSECUTOR (September/October 2001) at 1.
* Recent Developments in Open Government Statutes, GOVERNMENT LAWYERS SECTION NEWSLETTER (October 2005) at 2.
* Identity Theft: How to Defend Against It and Fight Back, THE COLLEGE BULLETIN (Fall 2005) at 8.
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PART I – BRADY, BANKS AND BEYOND: A LOOK AT SPECIAL ETHICAL ISSUES FOR PROSECUTORS

I. INTRODUCTION

Two years ago, I wrote a paper addressing the roots of Brady v. Maryland, 373 U.S. 83 (1963), the aftermath of that decision, and its evolution in the Supreme Court to present day, which includes the Supreme Court's decision in Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256 (2004). Where appropriate, I have updated this paper. As before, I must acknowledge the original assistance I derived from Edward "Chip" Wilkinson's treatise on prosecutorial ethics. As before, any mistakes herein are entirely my own.

II. WHAT DOES BRADY MEAN?

In our business, defendants lend their names as shorthand notations for complex concepts. We don't generally speak about challenges to the discriminatory exercise of peremptory challenges in jury selection: we simply invoke Batson. We don't demand a hearing outside the presence of the jury on a motion to suppress a defendant's statement on the ground of involuntariness: we simply ask for a Jackson/Denno hearing.

Although Brady is obviously one of those venerable terms, exactly what does it invoke? Its holding, simply stated:

[T]he 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, 373 U.S. at 87. It is this proposition we will address.

III. PRE-BRADY DECISIONS

Brady was not decided out of whole cloth. The rule of law announced by the Court was supported by three cases cited in the opinion: Mooney, Pyle, and Napue.


Thomas J. Mooney was a prisoner serving a life sentence for capital murder in California. Submitting a motion for leave to file a petition for original writ of habeas corpus, Mooney argued that "the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him." Mooney, 294 U.S. at 110.

The California Attorney General did not engage Mooney on the merits of his accusation. Instead, the Attorney General argued that "the acts or omissions of a prosecuting attorney can [never] in and by themselves, amount either to due process of law or to a denial of due process of law." Only "where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied." Id. at 111-12. In other words, California was arguing that due process comes from the courts, not the adversary parties.

The Supreme Court declined to adopt California's "narrow view of the requirement of due process," however. The Court held that due process in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Id. at 112. In finding that the knowing use of perjured testimony would be a violation of the Fourteenth Amendment due process clause, the Court concluded that California was obliged to provide a "corrective judicial process to remedy the alleged wrong." Id. at 113. (The Court denied Mooney's motion, however, because he had not yet raised this ground in the state habeas proceedings.)


Seven years after Mooney, the Court considered the pro se application for habeas corpus relief of Harry Pyle. Pyle, who was serving a life sentence for a horrific home invasion and murder, alleged that the Kansas prosecutors obtained his conviction by the presentation of testimony known to be perjured, and by the suppression of testimony favorable to him. Pyle, 317 U.S. at 214. The Court ordered the State of
allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody.

Id. at 215-16.


In 1959, these premises were the basis for the reversal of a murder conviction in Napue. In that case, Henry Napue, George Hamer and two other men entered a Chicago cocktail lounge and announced their intent to rob those present. An off-duty police officer, present in the lounge, drew his service revolver and began firing at the four men. In the melee that followed, one of the robbers was killed, the officer was fatally wounded, and Hamer was seriously wounded. Napue helped carry Hamer to a getaway car. In due course, Hamer was apprehended, tried for the murder of the policeman, convicted on his plea of guilty and sentenced to 199 years. Napue, 360 U.S. at 265-66.

Hamer later testified against Napue. The prosecutor developed testimony from Hamer that he had received no promise of consideration in return for his testimony. Napue was convicted and sentenced to 199 years confinement. Id.

The prosecutor then filed a writ of error coram nobis, asking the court for a reduction of Hamer's sentence in accordance with a pre-existing deal the prosecutor had struck with Hamer for his testimony. Napue found out about the coram nobis proceeding and filed a post-conviction petition, alleging that his conviction was tainted by the prosecutor's knowing submission of false testimony. The Illinois courts of appeal denied him relief, despite finding that the perjurious nature of the testimony had been known to the prosecutor. Id. at 267-68.

The Supreme Court applied Mooney and Pyle to find a due process violation from the prosecutor's knowing use of perjured testimony. The Court also created an affirmative duty to correct perjured testimony, holding that the Fourteenth Amendment was violated even when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. at 269. Moreover, the Court held that the perjured testimony was a material violation even when it was solely impeachment evidence, adopting the reasoning of a New York court of appeals:

It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.


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

The essential facts of Brady were undisputed at trial: John L. Brady and Charles Donald Boblit lay in wait for the victim, William Brooks, placing a log across his private driveway, in order to obtain possession of his car and money. Boblit was armed with a shotgun and Brady with a pistol. When Brooks got out of his car, Boblit struck him on the head with the barrel of the shotgun. They placed Brooks in the car, and after driving a certain distance, they carried Brooks into the woods, where one of them throttled him with Boblit's shirt. Each claimed that the other had actually strangled Mr. Brooks. They concealed the body, and divided the contents of Brooks' pocketbook containing some $250. They abandoned the car near Lynchburg, Virginia. Boblit went home, Brady fled to Florida.

Their trials were separate, Brady being tried first. Prior to the trial, Brady's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. In several prior statements, Boblit had stated that Brady did the killing (and later so testified at his own trial). The prosecution made these statements available to Brady's counsel before trial, but withheld one dated July 9, 1958, in which Boblit admitted the actual homicide.

At his trial, Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. In his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.' The jury rejected Brady's plea for leniency, found him guilty of murder in the first degree, and sentenced him to death.
At the ensuing trial of Boblit, the State publicly revealed for the first time the existence of Boblit's confession to strangling Brooks, offering it into evidence. The trial court excluded the confession, however, because it was unsigned. Brady, now having learned of Boblit's confession, then sought post-conviction relief because of the prosecution's failure to disclose Boblit's inculpatory statement.

The Maryland Court of Appeals held that suppression of the evidence by the prosecution denied Brady due process of law and remanded the case for a retrial of the question of punishment. Notably, the Maryland Court observed that there was no element of "guile" alleged against the prosecutors – they had withheld the confession simply because they believed that the unsigned third party confession itself was inadmissible. The Supreme Court granted Maryland's writ of certiorari on the issue of "whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment."

William O. Douglas, writing for a six judge majority, affirmed the Maryland court's conclusion that Brady's due process rights had been violated. The Court expanded its prior due process holdings on a defendant's rights to be free from the knowing presentation of perjured testimony (Mooney) and the State's "deliberate suppression of evidence favorable to him" (Pyle) to now find a due process violation from the "suppression" of exculpatory evidence:

We now hold that 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.

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.

**V. THE BRADY PROGENY**

While *Brady* significantly advanced the due process right of a defendant to access exculpatory evidence, it left many questions unanswered. In three cases that followed *Brady*, the Supreme Court clarified the duty of the prosecutors to disclose and how material the nondisclosure would have to be to establish a due process violation.


At about 4:30 p.m. on September 24, 1971, Linda Agurs and James Sewell registered in a motel as man and wife. They were assigned a room without a bath. Sewell was wearing a bowie knife in a sheath, and carried another knife in his pocket. Less than two hours earlier, according to the testimony of his estranged wife, he had had $360 in cash on his person.

About 15 minutes later three motel employees heard Agurs screaming for help. A forced entry into their room disclosed Sewell on top of Agurs struggling for possession of the bowie knife. She was holding the knife; his bleeding hand grasped the blade; according to one witness, he was trying to jam the blade into her chest. The employees separated the two and summoned the authorities. Agurs departed without comment before they arrived. Sewell was dead on arrival at the hospital.

Circumstantial evidence indicated that the parties had completed an act of intercourse, that Sewell had then gone to the bathroom down the hall, and that the struggle occurred upon his return. The contents of his pockets were in disarray on the dresser and no money was found; the jury may have inferred that Agurs took Sewell's money and that the fight started when Sewell re-entered the room and saw what she was doing. On the following morning, Agurs surrendered to the police. She was given a physical examination which revealed no cuts or bruises of any kind, except needle marks on her upper arm. An autopsy of Sewell disclosed that he had several deep stab wounds in his chest and abdomen, and a number of slashes on his arms and hands, characterized by the pathologist as "defensive wounds." A jury took about twenty-five minutes to find Agurs guilty of second-degree murder.

Three months later defense counsel filed a motion for a new trial asserting that he had discovered (1) that Sewell had a prior criminal record that would have further evidenced his violent character; (2) that the prosecutor had failed to disclose this information to the defense; and (3) that a recent opinion of the United States Court of Appeals for the District of Columbia Circuit made it clear that such evidence was admissible even if not known to the defendant. Sewell's prior record included a plea of guilty to a charge of assault.
and carrying a deadly weapon in 1963, and another guilty plea to a charge of carrying a deadly weapon in 1971. Although the trial court overruled the motion, the Court of Appeals reversed, finding that the evidence of the prior criminal record was material.

Writing for a 7-2 majority, Justice Stevens addressed the issue of whether the prosecutor had a constitutional duty to disclose Sewell's prior criminal record and, if so, whether it had been breached in this case.

The Court observed that the duty to disclose *Brady* evidence does not require an affirmative request from the defendant, reasoning that it is the character of the evidence, not the character of the request that defines the duty:

If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.

*Agurs*, 427 U.S. at 107.

Having established that the State has a general duty to disclose exculpatory evidence, the Court turned to the question of whether Sewell's prior criminal record was actually exculpatory. The Court rejected the idea that "the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict," finding such a standard too broad:

For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.

Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. . . . The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

*Id.* at 109-10.

Instead, the Court announced a sliding scale of materiality based on the form of notice to the prosecutor. When a prosecutor knowingly fails to disclose perjury, materiality is established if there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury." When a prosecutor fails to provide exculpatory evidence in response to a specific and relevant request, "the failure to make any response is seldom, if ever, excusable." When there is no specific request, the standard of materiality is based upon the reasonable doubt raised (or not raised) by the withheld evidence:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

*Id.* at 112-13.

In applying this standard, the Court concluded that the failure to disclose Sewell's criminal history was not material: Sewell's prior record did not contradict any evidence offered by the prosecutor, and was largely cumulative of the evidence that Sewell was wearing a bowie knife in a sheath and carrying a second knife in his pocket when he registered at the motel. *Id.* at 113-14.


In October 1977, Hughes Anderson Bagley was indicted in the Western District of Washington on fifteen charges of violating federal narcotics and firearms statutes.

The Government's two principal witnesses at the trial were James F. O'Connor and Donald E. Mitchell. O'Connor and Mitchell were state law-enforcement officers employed by the Milwaukee Railroad as private security guards. Between April and June 1977, they assisted the federal Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent. O'Connor and Mitchell
were social acquaintances of Bagley, with whom they often shared coffee breaks. At trial, they testified that on two separate occasions they had visited Bagley at his home, where Bagley had responded to O'Connor's complaint that he was extremely anxious by giving him Valium pills. In total, Bagley received $8 from O'Connor, representing the cost of the pills. At trial, Bagley testified that he had a prescription for the Valium because he suffered from a bad back.

During discovery, the Government produced a series of affidavits that O'Connor and Mitchell had signed between April 12 and May 4, 1977, while the undercover investigation was in progress. These affidavits recounted in detail the undercover dealings that O'Connor and Mitchell were having at the time with Bagley. Each affidavit concluded with the statement, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it."

Bagley waived his right to a jury trial and was tried before the court in December 1977. At the trial, O'Connor and Mitchell testified about both the firearms and the narcotics charges. On December 23, the court found respondent guilty on the narcotics charges, but not guilty on the firearms charges. On December 23, O'Connor and Mitchell testified about both the firearms and the narcotics charges. On December 23, the court found respondent guilty on the narcotics charges, but not guilty on the firearms charges.

In mid-1980, Bagley used the federal Freedom of Information Act to obtain ATF form contracts that O'Connor and Mitchell had signed, offering $300 for each report they submitted as undercover informants working with the ATF in the investigation of Bagley. Bagley filed a motion to vacate the sentence, arguing that the failure to disclose these contracts violated Brady. The trial court denied the motion, but the Ninth Circuit held that the government's failure to provide requested Brady information to Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal.

On writ of certiorari, the Supreme Court reconsidered the materiality standard it had announced in Agurs. The Court first observed that the impeachment evidence withheld by the Government was Brady evidence: it was evidence favorable to the accused that, if disclosed and used effectively, could have made the difference between conviction and acquittal. Id. at 676.

The Court then considered what standard of materiality to apply to the impeachment evidence. Eschewing the sliding scale standard discussed in Agurs, the Court adopted a single standard to assess the materiality of improperly withheld evidence – the Strickland v. Washington standard:

We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 682. The Court remanded the matter to the Washington state court for an assessment of materiality. The state court found the nondisclosure material and ordered a new trial.


At about 2:20 p.m. on Thursday, September 20, 1984, 60-year-old Dolores Dye left the Schwegmann Brothers' store on Old Gentilly Road in New Orleans after doing some food shopping. As she put her grocery bags into the trunk of her red Ford LTD, a man accosted her and after a short struggle drew a revolver, fired into her left temple, and killed her. The gunman took Dye's keys and drove away in the LTD.

An informant named "Beanie" stated that he had purchased a red Ford LTD from Curtis Lee Kyles, who Beanie said was a robber who carried two guns "all the time." Kyles was eventually arrested, and the murder weapon was recovered from his apartment. Kyles' fingerprints were also discovered on a Schwegmann's receipt in the LTD, and Dye's purse, identification and other belongings were found in some rubbish outside of Kyles' apartment building.

Prior to trial, Kyles filed a Brady motion. The prosecutor responded that there was "no exculpatory evidence of any nature." The prosecutor failed to disclose:

- Beanie's various contradictory statements to the police.
- The six contemporaneous eyewitness statements taken by the police following the murder.
- A computer print-out of the license plate numbers of cars parked at Schwegmann's on the night of the murder, which did not include Kyles' car.
- An internal memorandum from a police investigator who wrote that he had "reason to believe the victims personal papers and the Schwegmann's bags will be in the trash" nearby Kyles' apartment.

Kyles, 514 U.S. at 428-29. At trial, Kyles claimed an alibi and theorized that he had been framed by Beanie. The jury could not reach a verdict and a mistrial was declared. On retrial, however, a second jury found
Kyles guilty of first-degree murder and sentenced him to death. *Id.* at 431.

Having exhausted his appeals, Kyles sought and received review in the Supreme Court. A 6-3 majority found that Kyles was entitled to a new trial. The Court conducted a four-point clarification of the Bagley standard of materiality:

- **Probability of acquittal is not the standard for materiality.** A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Id.* at 434.

- **Bagley materiality is not a sufficiency of the evidence test.** A defendant need not demonstrate that, after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but 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. *Id.* at 434-35.

- **Once there is a finding of Bagley error, there is no need for further harmless error review.** Assuming, arguendo, that a harmless-error enquiry were to apply, a Bagley error could not be treated as harmless, since a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict. *Id.* at 435-36.

- **Bagley error is not assessed on an item-by-item basis, but on the cumulative impact of all the nondisclosures.** While the definition of Bagley materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable. *Id.* at 436-37.

The Court also rejected Louisiana's claim that it should not be held accountable for evidence known only to police investigators and not to the prosecutor, observing that

any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

*Id.* at 438.

Finally, the Court rejected Louisiana's request for a more rigorous standard for materiality given the difficulty of a prosecutor at trial to determine what may be determined exculpatory in hindsight, pointing out that the standard was already sufficiently deferential:

At bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government's only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to
disclose, absent a further showing of materiality. Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial’s outcome as to destroy confidence in its result.

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative...of a sovereignty... whose interest... in a criminal prosecution is not that it shall win a case, but that justice shall be done." And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

_Id._ at 439-40 (citations omitted). Applying these standards to Kyles' claim, the Court concluded that the prosecutor's failure to disclose the various items of exculpatory evidence destroyed confidence in the jury's verdict and the fairness of the trial. _Id._ at 454.

After three retrials ended in hung juries, Kyles was released in 1998 and now works as a bricklayer in New Orleans. Richard Serrano, _Withheld Evidence Can Give Convicts New Life_, LOS ANGELES TIMES (May 29, 2001).


In the next Supreme Court case that considered _Brady_ claims after _Whitley_, the Court synthesized the _Brady_ standard into a three-step analysis:

There are three components of a true _Brady_ violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

_Strickler_, 527 U.S. at 281-82.

Which leads us to Delma Banks, a capital murder defendant whose _Brady_ claims the Court characterized as follows:

The State advised Banks's attorney there would be no need to litigate discovery issues, representing: "[W]e will, without the necessity of motions[,] provide you with all discovery to which you are entitled." Despite that undertaking, the State withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. The State did not disclose that one of those witnesses was a paid police informant, nor did it disclose a pretrial transcript revealing that the other witness' trial testimony had been intensively coached by prosecutors and law enforcement officers.

Furthermore, the prosecution raised no red flag when the informant testified, untruthfully, that he never gave the police any statement and, indeed, had not talked to any police officer about the case until a few days before the trial. Instead of correcting the informant's false statements, the prosecutor told the jury that the witness "ha[d] been open and honest with you in every way," and that his testimony was of the "utmost significance." Similarly, the prosecution allowed the other key witness to convey, untruthfully, that his testimony was entirely unrehearsed. Through direct appeal and state collateral review proceedings, the State continued to hold secret the key witnesses' links to the police and allowed their false statements to stand uncorrected.

_Banks_, 124 S.Ct. at 1263.

The issue considered by the Court was whether Banks was procedurally barred from an evidentiary hearing on his _Brady_ claim in federal court because of his failure to produce evidence that one of the State's witnesses was a paid police informant. The burden on Banks: to show cause for his failure to develop the facts in state court proceedings and actual prejudice resulting from that failure. _Id._ at 1272.

The Court restated a three-step analysis developed in _Strickler_ to address the question of whether there was "cause" for the failure to assert the _Brady_ violation in state court:

- The prosecution withheld exculpatory evidence
- Banks reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence.
- The State confirmed petitioner's reliance on the open file policy by asserting during state habeas
proceedings that petitioner had already received everything known to the government.

The Court also found that Banks was not obliged to assume that the State would fail to correct the informant's misrepresentations in testimony:

It has long been established that the prosecution's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." If it was reasonable for Banks to rely on the prosecution's full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction.

Id. at 1274. The Court also declined to impose draconian procedural bars to defendants who fail to exercise diligence in seeking out prosecutorial misconduct:

A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. See Kyles, 514 U.S., at 440, 115 S.Ct. 1555 ("The prudence of the careful prosecutor should not ... be discouraged.").

Id. at 1275. Given the informant's claim that Banks (who had no criminal record) had a propensity to commit violent acts, and the suspicion that juries traditionally accord to informants, the failure to disclose the witness's status as an informant was sufficiently prejudicial to warrant further evidentiary review. Id. at 1279.

VI. CONCLUSION

Although the proposition for which Brady stands remains relatively simple -- a prosecutor must disclose exculpatory evidence to the defendant -- the nuances of that proposition continue to evolve. In adhering to the letter (and spirit) of Brady, the careful prosecutor should remember the following:

- When in doubt, disclose. Although it may be difficult at an early stage of the proceedings to place evidence in its true materiality context, the Supreme Court's assumption is going to be that the materiality of the exculpatory evidence is (or should have been) apparent to the prosecutor.

- The obligation to disclose is continuing, and Brady error can be avoided, even with a late disclosure, as long as the disclosure is made in time for the defense to make use of the information. Apolinar v. State, 106 S.W.3d 407, 421 (Tex. App.–Houston [1st Dist.] 2003, pet. granted); Davis v. State, 992 S.W.2d 8, 12 (Tex. App.–Houston [1st Dist.] 1996, no pet.)

- The Brady determination need not be made alone. The burden of determining the exculpatory and material nature of the evidence can be shared with the trial court. See Keith v. State, 916 S.W.2d 602, 605 (Tex. App.–Amarillo 1996, no pet.) Submit the information in camera to the trial court with sufficient information to permit an informed assessment of the exculpatory nature of the evidence.

- An open file policy is not a panacea for Brady claims. Although such a policy goes a long way to addressing claims of nondisclosure, at least one court has suggested that the State could still violate Brady by burying an exculpatory report in the midst of an open file. See Vega v. State, 898 S.W.2d 359, 362 (Tex. App.–San Antonio 1995, pet. ref'd) (suggesting that "even with an 'open file' policy that there would be a violation of Brady v. Maryland" where exculpatory evidence is not brought to the attention of the defense, but declining to reverse because defendant was aware exculpatory report was forthcoming and did not exercise diligence in reviewing open file).

Moreover, as in Strickler and Banks, other evidence may be maintained by the State, but not stored in the "open" file. The prosecutor has a continuing responsibility to seek out information known to his or her staff and police investigators and to supplement Brady disclosures. No fault can be assigned to a defendant for the State's failure to disclose information exclusively held by the State.

- While there is no present obligation to disclose inadmissible exculpatory evidence, see Ex parte Kimes, 872 S.W.2d 700, 703-04 (Tex. Crim. App. 1993), the Supreme Court has suggested that the Brady obligation does not turn on the admissibility of the evidence, but on the Strickland-style analysis of whether it is reasonably likely that the outcome may have been different had the
evidence been disclosed. See Wood v. Bartholomew, 516 U.S. 1 (1995). Wilkinson notes, however, that this obligation may be "closely circumscribed" by the speculative nature of the analysis:

[The Court] emphasized that the test remained whether it was "reasonably likely" that disclosure would have resulted in a different outcome. The implication, of course, is that the more speculative the theory as to how a defendant might have used material that he could not have directly introduced into evidence, the less "reasonably likely" it is that disclosure would have affected the outcome of the trial.


- Constitutional minimums are only the beginning of the discussion: state statutes and ethical codes place additional responsibilities on prosecutors in Texas. See TEX. DISCIPLINARY R. PROF. COND. 3.09(d) (a prosecutor 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, shall 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. CODE CRIM. PROC. art. 2.01 (district attorneys "shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused"). There appears to be some new emphasis on the part of the State Bar to enforce compliance with these standards of conduct.

Prosecutors hold a unique place in the criminal justice system. As the Bagley court observed:

By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty. . . whose interest. . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Bagley, 473 U.S. at 675 n.6. If we, as prosecutors, remember our special role in the administration of justice, compliance with the dictates of Brady and its progeny should not be a problem.

PART II: SOME UNDER-APPRECIATED ETHICAL ISSUES FOR PROSECUTORS

I. INTRODUCTION

As a representative of the State with the power to seek imprisonment (or worse), a prosecutor is subject to more regulation and review than any other kind of lawyer. Constitutional restraints, statutory dictates, regular appellate review enforcing these rights – all of these and more regularly limit prosecutors in the exercise of their considerable discretion.

Often overlooked, however, are the constraints of the Texas Disciplinary Rules of Professional Conduct. Although prosecutors have a healthy respect for ethical standards, there is often a sense that the rules of ethics run parallel to the constraints of due process and common sense. In other words, there is an assumption that lawful conduct must be ethical as well.

This is a fair assumption in most cases, but in some instances, conduct that may be constitutional (or at least harmless on appeal) may nonetheless be unethical. With calls in academia for more aggressive ethics enforcement against prosecutors, and ethics prosecutions becoming more prevalent against prosecutors in Texas, it is high time to reacquaint the prosecutorial bar with some of the rules that we may overlook.

This second half of the paper will cover three broad areas, and the rules that apply to prosecutors: (1) maintaining public confidence in the justice system; (2) communications between prosecutors and others; and (3) ensuring the fairness of the trial proceedings. In my discussion, I will suggest what the "careful prosecutor" should do to maintain an ethical position.

References to "Disciplinary Rule" in the text are references to the Texas Disciplinary Rules of Professional Conduct. A valuable resource for this paper was Edward Wilkinson's LEGAL ETHICS & TEXAS CRIMINAL LAW: PROSECUTION & DEFENSE (Texas District and County Attorneys Association 2006) (hereinafter cited as "Wilkinson"), which is the definitive work on criminal ethics in this state. It is available for purchase at www.tdcaa.com and was an extremely useful resource in the preparation of this paper. I highly recommend it. Any errors, of course, are my own.

II. MAINTAINING PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM

The criminal justice system works to the extent that the community retains confidence in the integrity of the system and the people who serve in it. As recipients of the public's trust, the careful prosecutor
must be conscious of what impact certain conduct will have on the perception that justice is being done.

A. Statements about Judicial and Legal Officials

Disciplinary Rule 8.02(a) provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

This rule forecloses false or reckless statements about the qualifications or integrity of a judge, adjudicatory official, or public legal officer. The intent of this rule is to maintain public confidence in the judicial system. Wilkinson at 230 (citing Robert P. Schuwerk & John F. Sutton, Commentary on the Texas Disciplinary Rules of Professional Conduct, Texas Lawyer's Professional Ethics 1-137 (3rd ed.)). This is not a total prohibition, however. The comments to Rule 8.02(a) recognize that "assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office," so fair comments on the trial court's fitness are an appropriate part of public discourse.

The careful prosecutor should do the following before speaking out against a judge or adjudicatory official:

• Assess whether the truth or falsity of the statement is a fact question subject to challenge. A statement of uncontroverted fact does not expose the speaker to ethical liability. Opinions, speculation, and controverted facts may create a basis for further review, including factfindings by an evidentiary panel or jury. In other words, if there is a chance that a jury may conclude that what the speaker said was untrue, and that the speaker has some reason to know it was untrue, the statement should not be said.

• Assess the value of making the statement at all. Most public criticism of the judiciary is prompted by a decision with which the prosecutor disagreed. Unless the decision is beyond the zone of reasonable disagreement, the criticizing prosecutor will be perceived as making a "sour grapes" statement and will have alienated not only the judge in question, but many other members of the judiciary. Instead, the prosecutor may wish to express his sentiments in a more directly responsive forum like the State Commission on Judicial Conduct.

B. Statements About Opposing Counsel

Although there is no provision governing a prosecutor's public statements about opposing defense counsel, the Lawyer's Creed, an aspirational document, provides:

I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. . . . I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

Adherence to the parameters of Disciplinary Rule 8.02's prohibition against false or reckless statements against the judiciary is reasonable as well with respect to comments about defense counsel. Although a prosecutor may have qualified immunity against a defamation suit by opposing counsel, see Oden v. Reader, 935 S.W.2d 470, 476 (Tex. App.–Tyler 1996, no writ), the careful prosecutor should ask the same questions before publicly criticizing opposing counsel: (1) Can I prove the truth of what I am saying; and (2) Why make the statement at all?

C. Statements to and About the Jury

Disciplinary Rule 3.06 states:

After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

This rule governs post-verdict discussions with jurors. The careful prosecutor, after an adverse verdict, should ask:

• What do I want to learn from this jury? If the prosecutor's honest answer to that question is, "There is nothing they can tell me that will justify their decision," then that prosecutor should not go back to the jury room. Send a supervisor, or waive the right to talk to them.

• What do I want to say to this jury? By rule, the prosecutor cannot embarrass, harass or influence future jury service during the discussion with the panel. If the prosecutor wants to argue with the jury about their verdict, that prosecutor should not
go back there. Basically, the prosecutor's communications with the jury should be, "Thank you for your service" or nothing at all.

- **What do I want to say to the public about this jury?** Although this rule does not govern public statements about the jury or its verdict, the spirit of this rule would dictate that respect be given to the jury's service, if not necessarily its conclusions. If unhappy about the verdict, the careful prosecutor should write neutral speaking points about the jury and verdict and stick to them, or simply issue a written statement.

**D. Soliciting Employment from Opposing Counsel or Defendant**

For financial reasons, most prosecutors are not career prosecutors – they obtain valuable experience trying cases or writing briefs and then pursue careers as defense attorneys or civil lawyers. The careful prosecutor should do a conflicts check, however, before negotiating new employment.

Disciplinary Rule 1.10(e)(1) states that "a lawyer serving as a public officer or employee shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially." It does not matter if there is a quid pro quo or not – the appearance of impropriety from negotiating employment with opposing counsel while acting as an advocate against that attorney diminishes public confidence in the outcome of the case.

Accordingly, before negotiating partnership (or even an office-sharing arrangement) with a criminal defense attorney, the careful prosecutor should make sure that there are no matters on his docket involving that attorney. It goes without saying that the careful prosecutor has no business doing business with a criminal defendant.

**E. Prosecuting a Former Client**

Disciplinary Rule 1.10(e)(1) provides that "a lawyer serving as a public officer or employee shall not participate in a matter involving a private client when the lawyer had represented that client in the same matter."

(1) Any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction involving a specific party or parties.

(2) Any other action or transaction covered by the conflict of interest rules of the appropriate government agency.

Fundamentally, the rule governing conflicts arising from prosecuting former clients is premised on two concerns paralleling constitutional due process concerns: (1) preserving the confidential nature of the information shared by the defendant with his former attorney; and (2) avoiding the possibility that the prosecutor is compromised by loyalty to his former client. See, e.g., *Ex parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979) ("When a district attorney prosecutes someone whom he previously represented in the same case, the conflict of interest is obvious and the integrity of the prosecutor's office suffers correspondingly. Moreover, there exists the very real danger that the district attorney would be prosecuting the defendant on the basis of facts acquired by him during the existence of his former professional relationship with the defendant.")

No one disputes that a prosecutor is foreclosed from prosecuting a former client in the same matter in which he previously represented the client. Here are two variations on that theme, however:

- **Previous representation of defendant on another matter** – A defendant's due process rights are violated when an attorney represents a client and then participates in the prosecution of that client in the same matter or another matter with a substantial relationship to the first. Wilkinson at 122. This "substantial relationship" standard for possible due process violations is practically identical to the civil disqualification standard for conflicted representations. See, e.g., *Metro. Life Ins. Co. v. Syntek Fin. Corp.*, 881 S.W.2d 319, 320 (Tex. 1994). The "substantial relationship" test is not a disciplinary rule standard, however: it arises from common law. See *In re Cap Rock Elec. Coop.*, 35 S.W.3d 222, 230 (Tex. App.–Texarkana 2000, orig. proceeding).

The disciplinary rule is more forgiving. It is only unethical for a prosecutor to participate in "matter involving a private client" when the prosecutor "represented that client in the same matter." That said, the due process considerations dictate that the careful prosecutor screen herself from substantially related litigation, even if not foreclosed by the disciplinary rule.

- **Other prosecutors in the same office prosecuting the former client** – This is governed by a "top down" analysis. If the district or county attorney is disqualified, his staff is necessarily disqualified as well because the assistants serve at
that official's will and pleasure. See, e.g., State v. May, 270 S.W.2d 682, 684 (Tex. Civ. App.–San Antonio 1954, no writ). If an assistant district attorney is disqualified, however, the disqualification does not extend upward and laterally to the district attorney and other prosecutors in the same office. See, e.g., State ex rel. Eidson v. Edwards, 793 S.W.2d 1, 6 n.6 (Tex. Crim. App. 1990, orig. proceeding) (favorably quoting American Bar Association's Committee of Professional Ethics that when an individual government attorney is separated from any participation on matters affecting his former client, "vicarious disqualification of a government department is not necessary or wise"); Marbut v. State, 76 S.W.3d 742, 748-49 (Tex. App.–Waco 2002, pet. ref'd) ("If [a district attorney] is disqualified because of an actual (not imputed) conflict of interest, all assistant district attorneys in the district are also disqualified. However, if only an assistant is disqualified, the entire staff is not."); accord Clarke v. State, 928 S.W.2d 709, 721-22 (Tex. App.–Fort Worth 1996, pet. ref'd) (finding no due process violation because conflicted assistant was screened from participation in prosecution). But see State ex rel. Sherrod v. Carey, 790 S.W.2d 705, 709 (Tex. App.–Amarillo 1990, orig. proceeding) (affirming disqualification of entire staff by virtue of former representation of defendant in same matter).

Notably, Disciplinary Rule 1.10 expressly does not extend the disqualification to other prosecutors in the same office. See TEX. DISCIPLINARY R. PROF'L COND. 1.10, cmt. 9 ("Paraphrase (e)(1) does not disqualify other lawyers in the agency with which the lawyer in question has become associated. Although the rule does not require that the lawyer in question be screened from participation in the matter, the sound practice would be to screen the lawyer to the extent feasible.")

F. Ex Parte Communications with the Court

Despite the many formal admonishments and proceedings compelled by constitutional and state law, the criminal justice system remains a fairly informal system with many unilateral proceedings. As a matter of law, the State may engage in ex parte communications with a judge to seek arrest and search warrants, to disclose confidential information for Brady review, or to empanel or discuss grand jury proceedings. It is precisely this informality and access that may create a false sense of entitlement for a prosecutor to discuss other substantive matters with a judge in the absence of opposing counsel.

Rule 3.05(b) sets the parameters for ex parte communications with the court. It provides:

A lawyer shall not, except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:

1. in the course of official proceedings in the case;
2. in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;
3. orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

See also Canon 3(B)(8), Code of Judicial Conduct (similarly prohibiting judge's ex parte communications with counsel).

The spirit of this rule is simple: common courtesy and respect for opposing counsel (plus a desire to be treated in the same way) dictates that counsel notify the opposing party before submitting substantive information to the court. As such, before approaching the judge in the absence of opposing counsel, the careful prosecutor should ask:

- **What am I going to discuss with the judge?** The careful prosecutor should be honest with herself: if the substance of the communication may "influence" the judge's decision, notice should be given to opposing counsel before approaching the judge. See Wilkinson at 227 (“The rule implicitly rejects the narrow position that a prohibited ex parte communication should be limited to communications concerning the merits of a case for a broader approach 'where the critical issue is whether the purpose of the communication was to influence the tribunal concerning the matter in question.'”) Contact with the court for the sole purpose of generating good will with the judge may fall within the scope of this rule.

- **What do I want to accomplish in this contact with the judge?** The rules against ex parte communications do not simply apply to controverted matters. Contact with the court on purely ministerial acts may be ex parte as well. The careful prosecutor should determine whether there is an explicit right to obtain an ex parte order or ruling. If there is not, notice the other party.

- **What would I think if opposing counsel did what I'm about to do?** Sometimes, there can be a sense of myopia about the perception left by an
ex parte communication with a judge. It is useful to (1) imagine the reaction of the opposing counsel or his client upon learning of the communication; and (2) imagine your own reaction if opposing counsel did the same thing.

It is not a huge imposition to call opposing counsel, or to send them a notice of your intent to approach the judge, but it is very hard to explain why you did not bother to do so when called upon by the State Bar.

III. COMMUNICATIONS BETWEEN PROSECUTORS AND OTHERS

The second category of ethical rules concerns the manner in which prosecutors communicate with others. This discussion starts with the universal duty to be truthful, and then goes through the various persons with whom a prosecutor may communicate.

A. Truthfulness

The Disciplinary Rules place a high premium on truthfulness, regardless of whether the statement is made to the court, opposing counsel, or a member of the public.

Disciplinary Rule 3.03 sets out the relevant rules for communications between prosecutors and judges. Prosecutors shall not make false statements of material fact or law to a tribunal; fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or offer or use evidence that the lawyer knows to be false. In an ex parte proceeding, it is likewise unethical to fail to disclose to the tribunal an unprivileged fact that the lawyer reasonably believes should be known by that entity for it to make an informed decision.

With respect to "third persons," Disciplinary Rule 4.01(a) states that, "[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."

Again, common sense and personal ethics should dictate the careful prosecutor's course of action. Actual knowledge that the fact in question is false should foreclose the prosecutor from asserting it to the tribunal or anyone. In situations where the truth is unknown (or unknowable), the prosecutor has some latitude to leave such determinations to the fact finder so long as the prosecutor does not violate the dictates of Rule 3.09(a) against prosecuting a case without probable cause.

B. Custodial Interrogation of Unrepresented Accused

Disciplinary Rule 3.09(b) states:

The prosecutor in a criminal case shall refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.

This rule is extremely limited in scope. Its elements:

- **Custodial interrogation** – The scope of the rule excludes non-custodial questions, probably because the constitutional right to counsel does not attach to such questioning.

- **Accused** – The rule does not apply to non-target witnesses or other persons. See TEX. DISCIPLINARY R. PROF'L COND. 3.07, cmt. 3 ("Paragraph (b) does not ... forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel.")

- **Criminal prosecutor conducting or assisting** – This rule applies to the prosecutor who actually participates in the custodial interrogation. It does not place any heightened responsibility on the prosecutor who simply observes the interrogation (although the careful prosecutor who is present for the interrogation should ensure that constitutional minimums are adhered to).

C. Dealing with Unrepresented Person

Disciplinary Rule 4.03 states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Note that this rule is far less restrictive than Disciplinary Rule 3.09(b): it only requires that the prosecutor ensure that the person who is not represented by counsel understand that the prosecutor is not disinterested in the matter being discussed. Wilkinson explains the special concerns for prosecutors:

The spirit of the rule clearly intends to protect the unsophisticated against the experience and interest of attorneys preparing
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a case for litigation. The possibility that a witness or other person might misunderstand an attorney's role in a case is greater when dealing with a prosecutor who, the person might believe, is acting as a representative of the state in a wholly disinterested capacity.

Wilkinson at 254. Accordingly, in the perfect world, a prosecutor's conversations with unrepresented persons should begin with the phrase, "I represent the State and not you. Do you understand?"

D. Communication with One Represented by Counsel

Disciplinary Rule 4.02 states:

In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

This rule forbids a prosecutor from approaching a person who is represented by counsel in the case about which the prosecutor wants to communicate. It does not, however, foreclose communication with a person on another case for which counsel has not been retained. Neither this rule nor constitutional law forbid contact between a prosecutor and a defendant regarding another matter for which counsel has not been retained. See, e.g., Texas v. Cobb, 532 U.S. 162, 121 S.Ct. 1335 (2001) (finding that Sixth Amendment right to counsel is "offense-specific").

IV. ENSURING THE FAIRNESS OF THE TRIAL PROCEEDINGS

The third area of ethics covers the fairness of the trial proceedings. Each rule here, as it relates to prosecutors, is designed to enhance the likelihood that justice will be done in the case.

A. Duty of Competent Representation

As a threshold matter, Disciplinary Rule 1.01(a)(1) states:

A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter.

The rules define "competence" as "possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client." The comments to Disciplinary Rule 1.01 explain:

Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client. In determining whether a matter is beyond a lawyer's competence, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question.

TEX. DISCIPLINARY R. PROF'L COND. 1.01, cmts. 1 & 2.

Disciplinary Rule 1.01 gets short shrift with respect to government lawyers, mainly because government lawyers seldom have a "client" with standing to complain about incompetence or lack of diligence. The unlikelihood of enforcement, however, does not diminish the ethical responsibility of a prosecutor to competently and diligently represent the State.

A prosecutor's office has to encourage mentoring and supervision of inexperienced prosecutors, making sure that "another lawyer who is competent to handle the matter" can provide advice and experience to neophyte trial lawyers. Although trial prosecutors learn by doing and by making mistakes, pretrial preparation and post-trial review with more experienced hands ensure that the State's interests are protected while the trial prosecutor grows into the job. See also TEX. DISCIPLINARY R. PROF'L COND. 5.01 (making supervisor "subject to discipline" for subordinate's violation of disciplinary rules under certain circumstances).

B. Meritorious Claims and Contentions/No Prosecution of Charges without Probable Cause

Although Disciplinary Rule 3.01 requires that all lawyers "not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous," Disciplinary Rule 3.09(a)
specifically addresses the duty of a prosecutor to "refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause."

Comment 2 explains the scope of Disciplinary Rule 3.09(a):

Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutor's obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.

TEX. DISCIPLINARY R. PROF'L COND. 3.09, cmt. 2.

Based on this comment, it is clear that a prosecutor has latitude to prosecute a case in which it is unclear which crime was committed so long as the prosecutor has probable cause to believe that some crime was committed. It also makes clear that a prosecutor has the responsibility to discontinue a prosecution when it becomes clear that the probable cause giving rise to the charge or indictment was false.

C. Minimizing the Burdens and Delays of Litigation

Disciplinary Rule 3.02 provides:

In the course of representing a client, a lawyer shall not make a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

As it relates to criminal prosecutors, this rule primarily deals with unreasonable delays in resolution of a criminal case. What is "unreasonable" under the rule? The comments suggest the following standard:

The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay undertaken for the purpose of harassing or malicious injuring.

TEX. DISCIPLINARY R. PROF'L COND. 3.02, cmt. 5.

Similarly, if the delay is for the convenience of the lawyer, the comments observe: "Dilatory practices indulged in merely for the convenience of lawyers bring the administration of justice into disrepute and normally will be 'unreasonable' within the meaning of this Rule." TEX. DISCIPLINARY R. PROF'L COND. 3.02, cmt. 3.

With respect to costs and burdens, the impact of this rule on prosecutorial practice is self-evident: the careful prosecutor should not file charges or prosecute a case solely to wear down a defendant and force a plea. This, of course, runs parallel to the dictate of Disciplinary Rule 3.09(a) not to prosecute a case without probable cause.

D. Trial Publicity

Disciplinary Rule 3.07 provides:

In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

TEX. DISCIPLINARY R. PROF. CONDUCT 3.07(a).

This rule is "premised on the idea that preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial." TEX. DISCIPLINARY R. PROF. CONDUCT 3.07(a), cmt. 1.

Areas generally authorized under Rule 3.07 include:

- The general nature of the case
- Information contained in a public record.
- The progress and general scope of a pending investigation (Caveat: To the extent that the information relates to a pending grand jury investigation, you are statutorily barred from discussing the proceedings, see TEX. CODE CRIM. PROC. 20.02(a)).
- The identity of and biographical information concerning the complaining party.
- The scheduling or result of any step in litigation.
- A request for assistance in obtaining evidence, and information necessary thereto.
- A warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.
- The accused person's name, age, residence, employment, marital status, and similar biographical information.
- The amount of bail.
• The identity of the investigating and arresting agency, and the length of the investigation.
• The circumstances of arrest, including time, place, resistance, pursuit and weapons used.

Remember, however, that the ethical standard is flexible: if the dissemination of this information could reasonably impact the ability of the defendant to obtain a fair trial, the careful prosecutor should take care in the decision to disclose.

Areas discouraged under Rule 3.07 include:
• The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the expected testimony of a party or a witness.
• The possibility of a plea of guilty.
• The contents of any admission or confession (or the defendant's refusal to make one).
• The results of (or refusal to perform) any examination or test, including fingerprint, polygraph, ballistic, or laboratory tests.
• Any opinion as to the accused's guilt or innocence.
• Any information that is likely inadmissible as evidence at trial and would create a substantial risk of prejudicing an impartial trial.

Accordingly, a careful prosecutor should:
• **Know what you want to say.** Off-the-cuff public statements are precisely the kind of statements that get prosecutors into trouble. Writing out speaking points in advance, even if the prosecutor doesn't ultimately carry them to the press conference or use them in the interview, is a good way to organize one's thoughts and review the content for ethical violations.
• **Consult with others.** If you have to ask yourself whether you should say something, it is worth running the statement by someone whose good judgment you respect.
• **Stick to the public record.** There is nothing unethical about reciting what is already in the public record. The contents of a probable cause affidavit, witness testimony, and motions filed in court are all substantive sources of information that do not violate Disciplinary Rule 3.07.
• **Make sure that everyone else is on board.** Rule 3.09(e) requires a prosecutor to ensure that persons "employed or controlled by the prosecutor" not violate the terms of Rule 3.07. This means that, at some point in a high-profile case, the lead prosecutor must sit down with everyone involved in the case and decide who will speak for the office and what can (and cannot) be said.

### E. Disclosure of Exculpatory Evidence

Rule 3.09(d) states:

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 standard—calling for disclosure of exculpatory evidence that "tends to negate the guilt of the accused or mitigates the offense" and mitigating sentencing evidence, whether admissible or not—is actually more stringent that the standard set forth by the Brady line of cases, which only require disclosure of evidence that is favorable to the accused that creates a probability sufficient to undermine confidence in the outcome of the proceeding. For a more detailed discussion of the responsibility to disclose such evidence, see Part I of this paper.

### F. Fairness in Adjudicatory Proceedings

With respect to prosecutors, Disciplinary Rule 3.04 sets out a number of rules pertaining to fairness in adjudicatory proceedings, namely:

A lawyer shall not:

(a) 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.

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;
(2) reasonable compensation to a witness for his loss of time in attending or testifying;
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(3) a reasonable fee for the professional services of an expert witness.

c) except as stated in paragraph (d), in representing a client before a tribunal:
   (1) habitually violate an established rule of procedure or of evidence;
   (2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;
   (3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated herein;
   (4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or
   (5) engage in conduct intended to disrupt the proceedings.

d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the clients willingness to accept any sanctions arising from such disobedience.

e) request a person other than a client to refrain from voluntarily giving relevant information to another party . . . .

Most of these obligations are self-evident. The careful prosecutor will remember, however:

- Disciplinary Rule 3.04(a) does not foreclose lawful obstruction to evidence or destruction of evidence. Examples include assertions of privilege, expunction of records, and objections to improper scope of discovery. These lawful acts are subject, however, to the prosecutor's Brady and Rule 3.09(d) obligations to disclose exculpatory evidence.
- Disciplinary Rule 3.04(c)'s prohibitions against misbehavior do not foreclose advocacy. For the most part, the drafters of the rules track the corresponding evidentiary and procedural constraints set forth in Texas law for trials. For example, adherence to the general rule regarding the inadmissibility of a prosecutor's personal opinions will accord with the obligations under this rule.
- Although Disciplinary Rule 3.04(e) forbids a prosecutor from telling a witness not to speak to the defense, it does not foreclose the prosecutor from counseling witnesses that they may choose not to speak to the defense.

G. Prosecutor as Witness

As it relates to prosecutors, Disciplinary Rule 3.08 provides:

   (a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

   (1) The testimony relates to an uncontested issue;
   (2) The testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; . . . or
   (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

   (b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

   (c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyers firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

If it is (or may be) "necessary" for a prosecutor to testify about an "essential fact" for the State, then Disciplinary Rule 3.08(a) applies, and the prosecutor
should disqualify himself unless one of the exceptions applies, not only because of the disciplinary rule, but also because of the possible due process violation arising from the dual role of the prosecutor as witness and advocate. See, e.g., Brown v. State, 921 S.W.2d 227, 231 (Tex. Crim. App. 1996) (Keller, P.J, concurring) (discussing due process implications of prosecutor serving as witness and advocate in same proceeding).

If the prosecutor is likely to be called to testify on a matter that is "substantially adverse" to the State, then the question of whether he should disqualify himself turns on whether the "client consents after full disclosure." Whether the State should "consent" to the prosecutor's dual role as witness and advocate in that scenario is a question that turns on whether the State's best interests are served by the continuation of that prosecutor as an advocate in the case. In most instances, the better approach is reassignment of the case to another prosecutor.

May other prosecutors in the same office pick up the case when a prosecutor is disqualified as a witness? Under an earlier version of the disciplinary rules, the Commission on Professional Ethics held that disqualification of one assistant district attorney is a disqualification of all assistant district attorneys in that office. See Tex. Comm'n on Prof'l Ethics Op. 454, 51 TEX. B.J. 1060 (1988); Tex. Comm'n on Prof'l Ethics Op. 399, 44 TEX. B.J. 201 (1980). Wilkinson disagrees with these holdings:

As numerous federal courts have acknowledged, however, the trend has been "to limit the applicability of the vicarious disqualification rules to private organizations. Application of Rule 3.08(c) and similar rules designed to limit the overreaching of law firms engaged in practice for remuneration is "nonsensical" if applied to multi-assistant prosecutor's offices. Thus, the requirement of wholesale disqualification of an office should not apply to State's attorneys engaged in criminal prosecutions, the Committee on Professional Ethics' conclusion notwithstanding.

Wilkinson at 200.

The careful prosecutor should engage in practices that minimize the likelihood of such a disqualification:

- Early disclosure of Brady evidence developed from such interviews ensures that hard decisions need not be made at a late stage of the litigation, when it may seem too late to effectively litigate the applicability of Rule 3.08(c) or to bring another prosecutor in to lead the case.

V. CONCLUSION

The careful prosecutor, regardless of years of experience, should read the Disciplinary Rules periodically and engage in an honest self-appraisal to see if he or she is adhering to these minimum standards and to the higher standard of seeing that justice is done. The criminal justice system, the people served in the system, and the community as a whole expect nothing less.