NORTH CAROLINA LAW REVIEW

Volume 65 | Number 4 Article 2

4-1-1987

Disciplinary Sanctions against Prosecutors for Brady Violations: A Paper Tiger

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DISCIPLINARY SANCTIONS AGAINST PROSECUTORS FOR *BRADY* VIOLATIONS: A PAPER TIGER

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The integrity of our criminal justice system is of vital importance to all of us. The presentation of false evidence by prosecutors or their concealment of exculpatory evidence clearly undermines this integrity. Moreover, over the last eighty years a body of legal and ethical rules has developed that imposes on prosecutors a duty to reveal exculpatory evidence and to prohibit the presentation of false evidence. However, the development of these rules has given rise to a second question: To what extent have these rules been applied to deter prosecutors from engaging in such conduct? In this Article Professor Rosen considers this question, focusing on the ethical rules that require prosecutors to reveal exculpatory evidence and prohibit them from presenting false evidence. To determine the extent to which the rules have been applied, Professor Rosen surveyed all available printed sources. In addition, he surveyed the lawyer disciplinary bodies in each of the fifty states and the District of Columbia. The research indicates that disciplinary charges have been brought infrequently under the applicable rules and that meaningful sanctions have been applied only rarely. Professor Rosen concludes with three recommendations intended to alleviate this problem.

I. INTRODUCTION

Preparing for trial in a robbery case, a prosecutor reads a police report containing information that an eyewitness identified someone other than the defendant as the lone robber. In another case that is already on trial, a prosecutor, listening to the cross-examination of a prosecution witness, hears the witness state that the government made no promises to him in return for his testimony. Two weeks previously, *this* prosecutor had personally promised *this* witness that all charges would be dismissed against him if he testified for the government.

Should these prosecutors reveal this evidence concerning the identification of another suspect and the promise to the witness? Both legally and ethically, the answer is clearly yes. Over the last eighty years a body of legal and ethical

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rules has developed that requires prosecutors to reveal evidence favorable to the defense and prohibits them from presenting false testimony. The development of these rules, however, has given rise to a second question: To what extent have the rules been applied to deter prosecutors from withholding exculpatory evidence or presenting false evidence?

The answer to this question is of utmost importance to our criminal justice system. Prosecutorial suppression of exculpatory evidence or presentation of false evidence is not an isolated phenomenon.[1] Whenever a prosecutor suppresses exculpatory evidence or presents false evidence, these actions cast doubt on the integrity of our legal system and the accuracy of the determinations of guilt and punishment.

Of course, suppression or falsification of relevant evidence by any lawyer undermines the integrity and accuracy of a legal proceeding, but this effect is compounded in the case of a prosecutor because of the prosecutor's dominant role in the criminal justice system. A prosecutor at the local, state, or federal level, who has at his or her disposal a large array of investigative capabilities, generally commands resources vastly superior to those available to the defense attorney,[2] who most often represents an indigent client.[3] In civil cases extensive discovery may help to equalize any inequality in resources, but in criminal cases

1. *See infra* notes 19-52 and accompanying text.

2. As Professor Goldstein has noted, "Both doctrinally and practically, criminal procedure, as presently constituted, does not give the accused 'every advantage' but, instead, gives overwhelming advantage to the prosecution." Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960); *see also* Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 112 (1972) [hereinafter Comment, Brady v. Maryland] (discussing government's "vastly superior ability to discover information concerning the alleged crime"); Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 142-43 (1964) [hereinafter Comment, *The Prosecutor's Constitutional Duty*] (defendant's facilities to gather evidence before trial "are usually meager especially when compared to those of the state"); Note, *Toward A Constitutional Right To An Adequate Police Investigation: A Step Beyond* Brady, 53 N.Y.U. L. REV. 835 (1978) (noting imbalance in resources). Professor Nakell describes several of the tools that give the prosecutor a decided advantage in obtaining information: (1) because the police often arrive on the scene of a crime promptly, they can begin gathering evidence immediately; (2) the prosecution has available trained and experienced personnel, laboratory and technical facilities, accumulated intelligence, and cooperation from other law enforcement agents; (3) the prosecution usually has the cooperation of citizens in obtaining evidence and acquiring witnesses; (4) the prosecution can also use several pretrial procedures to gather information, including grand jury investigations, coronor inquests, and various means of questioning the accused. Nakell, *Criminal Discovery For The Defense And The Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 439-442 (1972).

3. One study conducted in 1972-73 found that 65% of criminal felony defendants were indigent. NATIONAL DEFENDER SURVEY, NATIONAL LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 83, Table 117 (1973). Counsel for an indigent defendant usually cannot obtain expert or investigative assistance without permisssion from the court. *See, e.g.*, State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974) (interpreting a statute providing for the services of medical experts to indigent defendants as entitling defendants to assistance only when a showing is made that it is reasonably necessary for proper defense); 18 U.S.C. § 3006A(e)(2) (1982) (counsel must receive prior authorization of court for expenditures exceeding $150 and expenses reasonably incurred); N.C. GEN. STAT. § 7A-454 (1981) (giving the court discretion to approve a fee for supporting services); TENN. CODE ANN. § 40-14-207(b) (Supp. 1986) (providing that an indigent defendant in a capital case may receive investigative or expert services only if the court determines in an *ex parte* hearing that the services are necessary to protect the defendant's constitutional rights); *see* Annotation, *Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert*, 34 A.L.R.3d 1256 (1970).

each side can keep much of their potential evidence hidden from the other until trial.[4]

Because of this inequality in resources and the prosecutor's role as the representative of the state, our legal system imposes special responsibilities on the prosecutor. Although all lawyers are officers of the court, most owe primary loyalty to their clients.[5] A prosecutor, who has no individual client, has different obligations. The prosecutor's role as an advocate is tempered by an obligation of fairness, a duty to ensure that each trial results in an accurate determination of guilt and punishment.[6] At the very core of this duty are the

4. Civil discovery requires total, mutual disclosure of each party's evidence and is based on the belief that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507 (1947); *see also* FED. R. CIV. P. 26 (authorizing discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action"). Traditionally, little if any discovery was available to the criminal defendant. Note, *Defendant Access to Prosecution Witness Statements in Federal and State Criminal Cases*, 61 WASH. U.L.Q. 471, 473 (1983).

Although the American Bar Association (ABA) has called for essentially open-file discovery, *see* 2 STANDARDS FOR CRIMINAL JUSTICE Standard 11-2.1 (2d ed. 1980), most discovery by criminal defendants is still far more limited. For instance, Federal Rule of Criminal Procedure 16 provides for discovery on request of any statement made by the defendant, defendant's prior record, documents or tangible objects, and reports of examinations or tests. FED. R. CRIM. P. 16. The rule does not provide for pretrial disclosure of the identity of prospective witnesses or witness statements. *See also* N.C. GEN. STAT. § 15A-903 (1983) (discovery statute patterned after FED. R. CRIM. P. 16); VT. R. CRIM. P. § 16.2 (discovery statute patterned after FED. R. CRIM. P. 16); WIS. STAT. ANN. § 971. 23 (West 1985), (discovery statute patterned after FED. R. CRIM. P. 16); Note, *supra*, at 501-02 (as of 1983 only 14 states provide for a right to pretrial defense access to witness statements). The limitations on a criminal defendant's rights to pretrial discovery have been widely criticized. *See, e.g.*, Beatty, *The Ability To Suppress Exculpatory Evidence: Let's Cut Off The Prosecutor's Hands*, 17 IDAHO L. REV. 237 (1981); Brennan, *The Criminal Prosecution: Sporting Event Or Quest For Truth?*, 1963 WASH. U.L.Q. 279; Nakell, *supra* note 2, at 438; Norton, *Criminal Discovery: Experience Under the American Bar Association Standards*, 11 LOY. U. CHI. L.J. 661 (1980); Comment, *A Proposal For Discovery Depositions For Criminal Cases In Illinois*, 16 J. MARSHALL L. REV. 547 (1983).

Although constitutional considerations historically have made discovery by the prosecution from the defense even more limited, changes over the last decade have considerably expanded the prosecutor's right to discovery. *See* Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567 (1986) (arguing that many of the recent expansions in the prosecutor's right to discovery violate the fifth and sixth amendments).

5. Ethical Consideration 5-1 of the Model Code of Professional Responsibility states:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1981); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment 1 (1983) ("Loyalty is an essential element in the lawyer's relationship to a client."). Professor Dershowitz quotes British barrister Henry Brougham in describing the lawyer's role:

> "An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself,—is the highest and most unquestioned of his duties . . . ."

A. DERSHOWITZ, THE BEST DEFENSE XV (1982) (quoting Henry Brougham).

6. The prosecutor's obligation of fairness is reflected in Justice Sutherland's oft-quoted statement in Berger v. United States, 295 U.S. 78 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite

aforementioned rules requiring the prosecutor to disclose evidence favorable to the defense and to correct false testimony.

Courts and commentators have written a great deal about the constitutional rules that require prosecutors to disclose to the defense exculpatory evidence and to take steps to correct false testimony.[7] These rules, known collectively as the *Brady*[8] doctrine, are based on the due process clause of the fifth and fourteenth amendments and require reversal of a defendant's conviction on a finding that suppressed or falsified evidence was material.[9] This Article focuses not on the constitutional doctrine, but on the related ethical rules that require a prosecutor to turn over exculpatory evidence and prohibit a prosecutor from presenting false evidence, regardless of the materiality of the evidence.

Every state has adopted Disciplinary Rules,[10] based primarily on models promulgated by the American Bar Association (ABA), that define the ethical standards for lawyers and presumably regulate their conduct. The Disciplinary Rules governing what can be described as "*Brady*-type" misconduct by prosecutors fall into two categories. In the first category are rules that govern the conduct of all lawyers. These include general prohibitions on dishonest activity[11] and specific bans on presenting false testimony.[12] In the second category are rules specifically aimed at the prosecutor, rules that require a prosecutor, in contrast to other lawyers, to reveal exculpatory evidence to the opponent.[13] Taken as a whole, the disciplinary codes provide a comprehensive network of prohibitions that, together with the constitutional standards, outlaw *Brady*-type prosecutorial misconduct.

These Disciplinary Rules, of course, can be an effective deterrent only if they are applied with enough regularity and severity to discourage prosecutors from committing *Brady*-type misconduct. To determine how effectively these rules have been applied, an exhaustive search of the available printed sources

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> sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88; *see also* United States v. Peyro, 786 F.2d 826, 831 (8th Cir. 1986) (prosecutor's "special duty as the government's agent is not to convict, but to secure justice"). This view of the prosecutorial function is also reflected in comment 1 to rule 3.8 of the ABA's Model Rules of Professional Conduct, which states: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 comment 1 (1983).

7. *See infra* sources cited in note 144; notes 67-85 and accompanying text.

8. The doctrine derives its name from the United States Supreme Court's decision in Brady v. Maryland, 373 U.S. 83 (1963). *See infra* notes 31-32 and accompanying text.

9. For a discussion of the materiality requirements, see *infra* notes 65-86 and accompanying text.

10. *See infra* notes 87-123 and accompanying text. Because these rules serve both as standards for imposing discipline and as ethical guidelines, they can accurately be described as both Ethical Rules and Disciplinary Rules, and this Article uses the terms interchangeably.

11. *See infra* note 112 and accompanying text.

12. *See infra* notes 104-07 and accompanying text.

13. *See infra* notes 92-102 and accompanying text.

was conducted.[14] To supplement this research, the lawyer disciplinary bodies in each of the fifty states and the District of Columbia were surveyed. The results of this research demonstrate that despite the universal adoption by the states of Disciplinary Rules prohibiting prosecutorial suppression of exculpatory evidence and falsification of evidence,[15] and despite numerous reported cases showing violations of these rules,[16] disciplinary charges have been brought infrequently and meaningful sanctions rarely applied.[17] The result is a disciplinary system that, on its face, appears to be a deterrent to prosecutorial misconduct, but which has had its salutary impact seriously weakened by a failure of enforcement. Because the other available sanctions for *Brady*-type misconduct, such as removal from office or contempt citations, are rarely if ever used,[18] and because the development of strict materiality standards has lessened the chance that a conviction will be reversed because of this misconduct, at present insufficient incentive exists for a prosecutor to refrain from *Brady*-type misconduct.

This Article concludes with three specific recommendations to correct this problem. First, it suggests that instead of relying solely on complaints from individuals, bar disciplinary bodies should also review reported cases and initiate disciplinary proceedings whenever the opinions suggest possible *Brady*-type misconduct. Second, the bar disciplinary bodies and the courts reviewing the decisions of these bodies need to sanction *Brady*-type misconduct more severely. Last, the courts should adopt a bad-faith standard in *Brady* cases and should reverse a defendant's conviction whenever a prosecutor has intentionally suppressed exculpatory evidence or presented false evidence.

II. THE SCOPE OF THE PROBLEM

This Article does not suggest that the level of integrity of prosecutors is any different from that of other lawyers. Most prosecutors undoubtedly take their ethical responsibilities seriously, as evidenced by the cases in which prosecutors, on detecting perjury or discovering exculpatory evidence, immediately make disclosure to the defense.[19] There are, however, enough reported cases containing strong evidence of intentional prosecutorial withholding of exculpatory evidence and presentation of false evidence to demonstrate that this kind of misconduct occurs frequently enough to generate considerable concern about devising an effective remedy.

Not every reported case in which a defendant complains of prosecutorial suppression or falsification of evidence contains evidence of prosecutorial ethical

14. *See infra* notes 139-146.

15. *See infra* notes 120-22 and accompanying text.

16. *See infra* notes 19-52 and accompanying text.

17. *See infra* notes 150-231 and accompanying text.

18. *See infra* notes 53-56 and accompanying text.

19. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (on discovering new evidence after trial that was favorable to defendant, prosecutor immediately informed Governor); United States v. Rosetti, 768 F.2d 12 (1st Cir. 1985) (on learning that witness had committed perjury, prosecuting attorney immediately informed court); United States v. Dupry, 760 F.2d 1492 (9th Cir. 1985) (prosecutor acted in good faith when prompt disclosure was made on discovery of document favorable to defendant).

violations. Many claims turn out to be baseless.[20] Others involve constitutional violations that may not be ethical violations, such as cases in which the prosecutor did not personally know of the falsity of the evidence or the existence of the suppressed evidence,[21] or in which the suppressed evidence was only arguably exculpatory, thus lessening the chance that the prosecutor intentionally violated his or her ethical responsibilities.[22] Even disregarding these categories of cases, however, a disturbingly large number of published opinions indicate that prosecutors knowingly presented false evidence or deliberately suppressed unquestionably exculpatory evidence.

The most prominent of these are four Supreme Court cases, *Miller v. Pate*,[23] *Alcorta v. Texas*,[24] *Brady v. Maryland*,[25] and *Napue v. Illinois*.[26] In *Miller*[27] the prosecutors misled the jury by representing that stains on a pair of shorts alleged to be defendant's were comprised of the victim's blood when in fact the prosecutors knew that the stains were mostly paint.

Defendant in *Alcorta* was convicted of murder with malice and sentenced to death for stabbing and killing his wife. He admitted killing his wife, but claimed he lacked malice because he killed her after finding her kissing a Mr. Castilleja. Alcorta thus claimed that he was guilty only of a lesser degree of murder.[28] Castilleja was the only eyewitness to the killing. He testified for the prosecution and claimed he had only a casual friendship with Mrs. Alcorta. The prosecutor concluded Castilleja's direct testimony with the following colloquy:

> Q. Natividad [Castilleja], were you in love with Herlinda [Mrs. Alcorta]?
>
> A. No.

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20. *See, e.g.*, Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978) (defendant's claim that prosecutor failed to disclose that witness was negotiating a lighter sentence in exchange for testimony was without any basis), *cert. denied*, 106 S. Ct. 1386 (1986); Parker v. State, 145 Ga. App. 205, 243 S.E.2d 580 (1978) (defendant's claim that prosecution failed to disclose allegedly exculpatory evidence was without merit).

21. *See, e.g.*, United States v. Bagley, 105 S. Ct. 3375, 3378 n.4 (1985) (prosecutor did not know of contracts between Bureau of Alcohol, Tobacco, and Firearms agents and witnesses promising payment in return for testimony); Giglio v. United States, 405 U.S. 150 (1972) (prosecutor at defendant's trial did not know that other prosecutor in office had promised witness immunity in exchange for testimony); Barbee v. Warden of Md. Penitentiary, 331 F.2d 842 (4th Cir. 1964) (prosecutor unaware of police department ballistics reports exculpating defendant). For a discussion of the requirement that an ethical violation is not usually committed unless the prosecutor acts knowingly, see *infra* note 113.

22. *See, e.g.*, State v. Connell, 478 So. 2d 1176 (Fla. Dist. Ct. App. 1985); Johnson v. State, 427 So. 2d 1029 (Fla. Dist. Ct. App.), *cert. denied*, 464 U.S. 1048 (1983); State v. Bartholomew, 98 Wash. 2d 173, 654 P.2d 1170 (1982), *cert. denied*, 463 U.S. 1212 (1983).

23. 386 U.S. 1 (1967).

24. 355 U.S. 28 (1957) (per curiam).

25. 373 U.S. 83 (1963).

26. 360 U.S. 264 (1959).

27. For a detailed discussion of *Miller*, see *infra* notes 150-63 and accompanying text.

28. *Alcorta*, 355 U.S. at 29. Alcorta relied on Texas statutes that allowed for a conviction of murder without malice, with a maximum punishment of five years imprisonment, on finding that a defendant killed "under the influence of a 'sudden passion arising from an adequate cause . . . as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection . . . .'" *Id.* (quoting TEX. PENAL CODE ANN. Arts. 1257a, 1257b & 1257c (Vernon 1948)).

Q. Was she in love with you?
A. No.
Q. Had you ever talked about love?
A. No.
Q. Had you ever had any dates with her other than to take her home?
A. No. Well, just when I brought her from there.
Q. Just when you brought her from work?
A. Yes.[29]

Castilleja later testified at a post-conviction hearing that he had been having an affair with Mrs. Alcorta and had engaged in sexual intercourse with her five or six times. Both Castilleja and the prosecutor testified at this hearing that the prosecutor knew about this and had told Castilleja to withhold this information unless specifically asked about it. The prosecutor also admitted purposefully leaving this information out of a written statement taken from Castilleja that was shown to the defense.[30]

The issue in *Brady* involved evidence relevant only to the determination whether defendant would receive life in prison or the death sentence for a murder committed during the course of a robbery. Brady admitted that he had participated in the robbery and that the victim was killed during the robbery, thus conceding he was guilty of murder under the felony murder rule. Brady also testified, however, that he did not kill the victim, but that his codefendant Boblit did. Brady's attorney argued this circumstance to the jury, who under Maryland law at the time could, at its discretion, set the punishment at either life imprisonment or death.

Prior to trial, Brady's attorney asked to see Boblit's confessions. The prosecutor showed him two confessions, both of which identified Brady as the killer.[31] After Brady was sentenced to death Boblit was brought to trial. At this trial the prosecutor attempted to obtain the death penalty for Boblit by introducing a third confession in which Boblit had admitted killing the victim himself.[32]

Napue concerned evidence of intentional presentation of perjured testimony. Napue's conviction of murder was based largely on the testimony of an accomplice.[33] The accomplice, who already had been convicted of the murder,

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29. *Id.* at 30.

30. *Id.* at 31-32. The Supreme Court, although not finding that Castilleja had perjured himself, reversed the conviction because Castilleja's testimony had given the jury a "false impression" about Castilleja's relationship with Mrs. Alcorta. The true facts about this relationship not only would have impeached Castilleja's testimony, but also would have corroborated Alcorta's claim that he had seen the couple embracing on the night of the murder. *Id.*

31. *Brady*, 373 U.S. at 84.

32. *See* Brady v. State, 226 Md. 422, 426, 174 A.2d 167, 169 (1961), *aff'd*, 373 U.S. 83 (1963). The prosecutor could not have failed to appreciate the significance of the third statement because he knew before Brady's trial that Brady was relying solely on the hope that the jury would not sentence him to death if it believed his testimony that Boblit did the killing. *Id.* The Supreme Court did state that the prosecutor's actions were "not 'the result of guile' to use the words of the Court of Appeals." *Brady*, 373 U.S. at 88 (quoting *Brady*, 226 Md. at 427, 174 A.2d at 169). The Maryland Court of Appeals never actually said that the prosecutor's actions were not "the result of guile," but only that "the appellant here does not contend that failure to produce Boblit's statement in issue was the result of guile." *Brady*, 226 Md. at 427, 174 A.2d at 169.

33. *Napue*, 360 U.S. at 266. The murder took place in 1938 during a robbery in a cocktail

testified on cross-examination that "ain't nobody promised me anything" for his testimony.[34] On redirect, the prosecutor asked, " 'Have I promised you that I would recommend any reduction of sentence to anybody?' " The witness answered, " 'You did not.' "[35] After Napue's conviction the same prosecutor, now a private attorney, filed a *coram nobis* petition seeking a reduction of the accomplice's sentence in which he admitted that before Napue's trial he had promised the accomplice that he would recommend such a reduction if he would testify against Napue.[36]

Not surprisingly, these Supreme Court cases represent a much wider pattern of *Brady*-type misconduct than reflected in state and lower federal court decisions.[37] In some cases the prosecutors concealed evidence that another suspect actually committed the crime,[38] in others the prosecutors concealed or presented false testimony about physical evidence.[39] There are cases in which

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lounge. One defendant was convicted and executed. A second defendant, Hamer, was convicted and sentenced to 199 years in prison. Napue and a fourth defendant, Webb, were arrested some years later. Hamer testified against Napue and Webb, and they each received 199 year sentences. *Id.* at 266-67.

34. *Id.* at 267 n.2.

35. *Id.* at 271 (quoting trial court testimony of the witness).

36. *Id.* at 266 n.1. Napue, upon learning of the *coram nobis* petition, filed a post-conviction motion challenging his conviction because of the prosecutor's knowing use of false testimony. At the hearing on this motion the former prosecutor claimed that he may have "used some language that [he] should not have used" in the *coram nobis* petition and that he actually had promised to help Hamer only if Hamer's story about being a reluctant participant in the robbery turned out to be true. The court hearing the motion accepted this testimony and denied Napue relief. *See id.* at 267. The Illinois Supreme Court disagreed and found that the prosecutor had promised to help Hamer in return for his testimony, but affirmed the denial of relief because Hamer had admitted that a public defender was "trying to get something did" for him in return for his testimony. *Id.* at 268. When appearing before the United States Supreme Court the State did not contest the finding that a promise had been made, and a unanimous Court reversed Napue's conviction after finding that the testimony about the public defender did not vitiate the prejudice caused by the false testimony concerning the agreement with the prosecutor. *Id.* at 267, 270-71.

37. *See* Mooney v. Holohan, 294 U.S. 103 (1935). *Mooney* is not included in the textual discussion because the Supreme Court never ruled on the merits of the allegations of prosecutorial misconduct. Instead, it dismissed the habeas corpus petition because Mooney had not exhausted his state remedies. Independent investigation, however, showed that the prosecutors had encouraged every one of the state's witnesses to lie and had suppressed highly exculpatory evidence. *See* R. FROST, THE MOONEY CASE (1968); Comment, *The Prosecutor's Constitutional Duty*, *supra* note 2, at 137 & nn.3, 7.

38. *See, e.g.*, Cannon v. Alabama, 558 F.2d 1211 (5th Cir. 1977) (prosecutor concealed existence of eyewitness who identified someone other than defendant); Wilkinson v. Ellis, 484 F. Supp. 1072 (E.D. Pa. 1980) (prosecutor destroyed third party's tape-recorded confession to committing the offense); Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962) (prosecutor concealed evidence that eyewitness had seen two persons other than defendant run to a car near the place and time of the killing); Nelson v. State, 59 Wis. 2d 474, 208 N.W.2d 410 (1973) (accomplice/witness testified at trial that defendant shot victim; prosecutor suppressed evidence of witness' confession to cellmate that he had shot victim himself).

39. *See, e.g.*, United States v. Badalamente, 507 F.2d 12 (2d Cir. 1974) (suppression of letters written by key government witness claiming coercion by government), *cert. denied*, 421 U.S. 911 (1975); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952) (suppression of bullet and ballistics report that showed police, not defendant, killed victim); People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1973) (prosecutor suppressed deceased's gun and ballistics report that supported defendant's self-defense claim); People v. Loftis, 55 Ill. App. 3d 456, 370 N.E.2d 1160 (1977) (rape victim testified defendant ripped her clothes; prosecutor concealed unripped clothing); People v. Wisniewski, 8 Ill. App. 3d 768, 290 N.E.2d 414 (1972) (defendant claimed he killed victim after victim struck him with a pipe; prosecutor suppressed pipe found at scene); Arline v. State, 156 Ind. App. 95, 294 N.E.2d 840 (1973) (prosecutor suppressed knife that supported defendant's self-defense

the exculpatory or false evidence related to prior inconsistent statements of government witnesses[40] and other cases in which psychiatric evidence that exculpated the defendant was suppressed.[41] The nature of what was suppressed or falsified obviously depends on the facts of each case.[42]

One pattern often repeated is that exemplified by the facts of *Napue*—the intentional concealment of deals prosecutors made with prosecution witnesses to procure their testimony.[43] If the defense attorney never specifically asks the

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claim); Commonwealth v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984) (prosecutor concealed existence of one knife and misled defense attorney about facts surrounding discovery of second knife; knives supported self-defense claim); State v. Thompson, 396 S.W.2d 697 (Mo. 1965) (prosecutor suppressed shells found at scene that supported defendant's claim that he did not fire gun).

40. *See, e.g.*, Lindsey v. King, 769 F.2d 1034 (5th Cir.) (suppression of prior statement by eyewitness, who positively identified defendant at trial, that he could not identify perpetrator of murder), *reh'g denied*, 775 F.2d 301 (5th Cir. 1985); Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980) (prior inconsistent statement of important government witness); United States v. Anderson, 574 F.2d 1347 (5th Cir. 1978) (prior statement showing witness' participation in crime); Davis v. Heyd, 479 F.2d 446 (5th Cir. 1973) (prior inconsistent statements of witness that supported defendant's accidental killing defense); Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961) (prior inconsistent statement of accomplice who testified for State); State v. Cohane, 193 Conn. 474, 479 A.2d 763 (1984) (inconsistent prior statement of key eyewitness), *cert. denied*, 469 U.S. 900 (1984); Schwartzmiller v. Winters, 99 Idaho 18, 576 P.2d 1052 (1978) (victim's prior statement admitting perjury at preliminary hearing); People v. Sumner, 43 Ill. 2d 228, 252 N.E.2d 534 (1969) (inconsistent statements of two witnesses).

41. *See, e.g.*, Ashly v. Texas, 319 F.2d 80 (5th Cir. 1963) (suppression of evidence that both defendants were legally incompetent to stand trial); Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961) (evidence of mental illness of key witness, including three different hospitalizations in mental institutions); Wallace v. State, 88 Nev. 549, 501 P.2d 1036 (1972) (psychiatric report revealing defendant's mental illness that was relevant both to voluntariness of confession and to degree of guilt).

42. *See, e.g.*, Chaney v. Brown, 730 F.2d 1334 (10th Cir.) (prosecutor withheld reports relevant to mitigating and aggravating circumstances in a capital case), *cert. denied*, 469 U.S. 1090 (1984); United States v. McElroy, 697 F.2d 459 (2d Cir. 1982) (prosecutor concealed police report that showed defendant had invoked his *Miranda* rights and misled defense attorney about contents of report); Perkins v. Lefevre, 691 F.2d 616 (2d Cir. 1982) (witness testified that criminal record involved only parking violation; even after specific request for victim's record prosecutor concealed that witness had four prior felony convictions); United States v. Iverson, 637 F.2d 799 (D.C. Cir. 1980) (prosecutor failed to correct witness' false testimony that she had not yet been sentenced); Lockett v. Blackburn, 571 F.2d 309 (5th Cir.) (prosecutors hid eyewitness who would have testified favorably for defendant), *cert. denied*, 439 U.S. 873 (1978); United States v. Hibler, 463 F.2d 455 (9th Cir. 1972) (suppression of evidence of police officer's observations supporting defendant's theory of defense); United States v. Miller, 411 F.2d 825 (2d Cir. 1969) (prosecutor suppressed evidence of pretrial hypnosis of principal witness); Hamric v. Bailey, 386 F.2d 390 (4th Cir. 1967) (prosecutor suppressed evidence and allowed false testimony about condition of victim's shirt); United States *ex rel.* Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963) (prosecutor suppressed statement of eyewitness that defendant and victim engaged in a struggle before killing); Anderson v. State, 542 F. Supp. 725 (D.S.C. 1982) (exculpatory autopsy report suppressed); Knight v. State, 478 So. 2d 332 (Ala. Crim. App. 1985) (prosecutor suppressed expert's report that showed defendant could not have been attacker who smoked cigarettes in victim's home); *In re* Ferguson, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971) (defendant convicted of kidnapping and sexual offenses claimed that victim and her husband consented; prosecutor suppressed evidence of husband's felony conviction and juvenile conviction for a sexual offense); People v. Murdock, 39 Ill. 2d 553, 237 N.E.2d 442 (1968) (prosecutor suppressed evidence of unlocked door in victim's home that supported defendant's defense); People v. De Stefano, 30 Ill. App. 3d 935, 332 N.E.2d 626 (prosecutor concealed evidence that before murder police had beaten victim and threatened to kill him), *cert. denied*, 404 U.S. 957 (1975); State v. Perkins, 423 So. 2d 1103 (La. 1982) (prosecutor suppressed statement made by nontestifying eyewitness that corroborated defendant's defense); Hall v. State, 650 P.2d 893 (Okla. Crim. App. 1982) (prosecutor failed to correct false testimony of witness, who was also a suspect, that he did not know murder victim); Commonwealth v. Wallace, 500 Pa. 270, 455 A.2d 1187 (1983) (prosecutor failed to correct false testimony concerning background of chief government witness).

43. One reason so many reported cases have involved the concealment of deals made with

witness about agreements with the government, the misconduct consists of concealing exculpatory evidence.[44] If defense counsel asks and the witness denies the existence of any inducements, the prosecutor is guilty of presenting or failing to correct false or perjured testimony.[45]

There are reported cases in which the prosecutor advised a witness to testify falsely,[46] and others in which the falsification or suppression continued even after a specific request for the evidence by the defendant.[47] In some cases the prosecutors further exploited their misconduct by relying on the false impression created by their suppression or falsification in argument to the judge or jury.[48]

This Article does not attempt to catalog all of the reported cases that contain evidence of intentional prosecutorial suppression of exculpatory evidence or prosecutorial presentation of false evidence.[49] In addition to the reported cases, a large number of cases undoubtedly occur in which the suppression or falsification is never discovered. Once a trial is over most defendants no longer have counsel actively seeking exculpatory evidence, and most witnesses are effectively unavailable to the defense. Thus, the occasions when defendants do find out about suppressed or falsified evidence usually result from fortuitous

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prosecution witnesses is that the making of such agreements is a widespread practice, necessitated by the exigencies of criminal prosecutions. It is also likely, however, that many of these cases come to light because the prosecutor, as in *Napue*, has to take some public action to consummate the agreement, thus increasing the chances that the defendant will learn of the hidden agreement.

44. *See, e.g.*, United States *ex rel.* Marzeno v. Gengler, 574 F.2d 730 (3d Cir. 1978); United States v. McCrane, 547 F.2d 204 (3d Cir. 1976).

45. *See, e.g.*, United States v. Barham, 595 F.2d 231 (5th Cir. 1979), *cert. denied*, 450 U.S. 1002 (1983); Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979); United States v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977); Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); United States v. Pope, 529 F.2d 112 (9th Cir. 1976); United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974); Sellers v. United States, 574 F. Supp. 767 (W.D.N.C. 1983); *see also* Commonwealth v. Hallowell, 477 Pa. 232, 383 A.2d 909 (1978) (former prosecutor misled court by testifying under oath that no deal had been made with witness).

46. *See, e.g.*, Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975) (prosecutor advised investigative agent not to mention a lab report that showed stains on defendant's clothing to be varnish or paint and not blood), *vacated*, 424 U.S. 961 (1976); Turner v. Ward, 321 F.2d 918 (10th Cir. 1963) (prosecutor told physician who examined victim to conceal that examination did not show evidence of intercourse).

47. *See, e.g.*, Lindsey v. King, 769 F.2d 1034 (5th Cir.), *reh'g denied*, 775 F.2d 301 (5th Cir. 1985); Chancey v. Brown, 730 F.2d 1334 (10th Cir.), *cert. denied*, 459 U.S. 1090 (1984); United States v. McElroy, 697 F.2d 459 (2d Cir. 1982); Perkins v. Lefevre, 691 F.2d 616 (2d Cir. 1982); Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980); United States v. McCrane, 547 F.2d 204 (3d Cir. 1976); Anderson v. South Carolina, 542 F. Supp. 725 (D.S.C. 1982); Knight v. State, 478 So. 2d 332 (Ala. Crim. App. 1985); State v. Perkins, 423 So. 2d 1103 (La. 1982); Commonwealth v. Wallace, 500 Pa. 270, 455 A.2d 1187 (1983).

48. United States v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977); Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974); Sellers v. United States, 574 F. Supp. 767 (W.D.N.C. 1983); People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1973); State v. Cohane, 193 Conn. 474, 479 A.2d 763, *cert. denied*, 469 U.S. 990 (1984); People v. Wisniewski, 8 Ill. App. 3d 768, 290 N.E.2d 414 (1972); Arline v. State, 156 Ind. App. 95, 294 N.E.2d 840 (1973); State v. Thompson, 396 S.W.2d 697 (Mo. 1965).

49. For discussions of other reported cases involving *Brady* violations, see Comment, *Prosecutorial Misconduct: A National Survey*, 21 DE PAUL L. REV. 422 (1971); Annotation, *Withholding or Suppression of Evidence by Prosecution in Criminal Case as Vitiating Conviction*, 34 A.L.R.3d 16 (1970); Annotation, *Right of Accused in State Courts to Inspection or Disclosure of Evidence in Possession of Prosecution*, 7 A.L.R.3d 8, 32-36 (1966); *see also* Annotation, *Right of Accused to Inspection or Disclosure of Evidence in Possession of Prosecutors*, 52 A.L.R. 207 (1928) (pre-*Brady* cases involving defendants' rights to discovery).

circumstances.[50]

Significantly, the opinions in a large number of reported cases suggest that the prosecutor violated one or more Disciplinary Rules.[51] This is not to say the prosecutor in each of these cases was, in fact, guilty of ethical violations. Guilt is a matter to be determined by the disciplinary bodies and reviewing courts after an investigation in each case.[52] The cases do demonstrate, nevertheless, that *Brady*-type prosecutorial misconduct is a recurring problem and that the disciplinary bodies of the various jurisdictions have had numerous opportunities to apply the Disciplinary Rules that forbid this type of misconduct.

III. LEGAL SANCTIONS FOR *BRADY*-TYPE MISCONDUCT

To appreciate the significance of the Disciplinary Rules that prohibit *Brady*-type misconduct, it is helpful to understand the degree to which other methods have been used to punish such behavior. Theoretically a number of sanctions are available to deter prosecutors who might consider suppressing exculpatory evidence or presenting false evidence. The later discovery of the misconduct might result in a reversal of the convictions. The prosecutor could be sanctioned by a contempt citation,[53] criminal prosecution,[54] or removal from office.[55] Because these latter sanctions are rarely, if ever, applied to *Brady*-type misconduct, however, they have little deterrent value.[56]

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50. *See, e.g., Napue*, 360 U.S. 264 (defendant learned of deal when codefendant filed for post-conviction relief); Davis v. Heyd, 350 F. Supp. 958, 961 (E.D. La. 1972) (defense counsel learned of exculpatory written statements when state answered defendant's motion for a new trial in 1968), *rev'd*, 479 F.2d 446 (5th Cir. 1973); *Brady*, 226 Md. at 423, 194 A.2d at 169 (defense learned of codefendant's exculpatory confession when prosecutor attempted to use it at codefendant's trial); Commonwealth v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984) (defense counsel learned that prosecutor had misled him about existence of exculpatory evidence during cross-examination of witness); *see also* Fulford v. Maggio, 692 F.2d 354 (5th Cir. 1982) (defense attorney discovered exculpatory police report and third party confession from informant at police department), *rev'd*, 462 U.S. 11, *reh'g denied*, 463 U.S. 1236 (1983).

51. For a detailed discussion of these Disciplinary Rules, see *infra* notes 87-116 and accompanying text.

52. For a discussion of the procedures used to discipline lawyers, see *infra* notes 124-38 and accompanying text.

53. *See, e.g.*, FLA. STAT. ANN. § 900.04 (West 1985); N.J. STAT. ANN. § 2A:10-1 (West 1952); R.I. GEN. LAWS § 8-8-5 (1985).

54. 18 U.S.C. § 242 (1982) provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

55. *See, e.g.*, MO. ANN. STAT. § 106.220 (Vernon 1966); OKLA. STAT. ANN. tit. 51, § 91 (West 1962); S.C. CODE ANN. § 1-3-240 (Law. Co-op. 1986).

56. No cases could be found in which a prosecutor was found in contempt for *Brady*-type misconduct. Professor Alschuler also has found that there does not appear to be a single case in which a prosecutor had been found in contempt for courtroom misconduct. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 673-74 (1972). Because *Brady*-type misconduct usually is not discovered until after the trial is over, a court is even less likely to use its contempt power in this situation than in a case in which the misconduct occurs in the judge's presence. In the one case found in which a trial court did seek sanctions for *Brady*-type misconduct,

Prosecutors historically have also enjoyed absolute immunity, guaranteed by common law or statutory provisions, from civil liability for misconduct connected to their prosecutorial function.[57] In 1976, in *Imbler v. Pachtman*,[58] the Supreme Court extended to prosecutors similar immunity from suits brought against them under title 42, section 1983 of the United States Code,[59] alleging the suppression of exculpatory evidence or the presentation of false evidence.[60] This decision has eliminated potential civil liability as a deterrent.

The Supreme Court in *Imbler* based its decision mainly on the common-law immunity granted prosecutors and the potential harm to the criminal justice system if equivalent immunity were not afforded under section 1983.[61] Notably, the Court also relied on the existence of Disciplinary Rules, which supposedly act to control prosecutorial misconduct, as a responsible alternative to actions for damages. The Court noted the prosecutor's "unique" amenability to profes-

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the trial judge referred the matter to the state bar instead of using his contempt power. *See* United States v. Kelly, 543 F. Supp. 1303 (D. Mass. 1982). For a discussion of *Kelly*, see *infra* notes 179-93 and accompanying text.

Only one case was found in which a prosecutor was criminally convicted for suppressing exculpatory evidence. *See* Brophy v. Committee on Professional Standards, 83 A.D.2d 975, 442 N.Y.S.2d 818 (1981). For a discussion of *Brophy*, see *infra* notes 194-98 and accompanying text.

No cases could be found in which a prosecutor was removed from office for falsifying or suppressing exculpatory evidence. There is, however, presently pending in Minnesota a petition seeking removal of a prosecutor for numerous acts of misconduct, including the suppression of exculpatory evidence, allegedly committed in relation to a highly publicized child sexual-abuse case. *See* State of Minnesota, Commission Established by Executive Order No. 85-10 Concerning Kathleen Morris, Scott County Attorney—Report to Governor Rudy Perpich, 8-15 (unpublished). Given the reluctance of courts and disciplinary bodies to impose more than minor sanctions for *Brady*-type misconduct, *see infra* notes 150-231 and accompanying text, it is extremely unlikely that the more severe sanctions of criminal prosecution or removal from office will ever be credible deterrents.

57. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 132 (W. Keeton 5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 895 comment c (1977); Note, *Immunizing the Investigating Prosecutor: Should the Dishonest Go Free or the Honest Defend*, 48 FORDHAM L. REV. 1110, 1112-14 (1980). This absolute immunity stems from a prosecutor's quasi-judicial capacity in performing his or her official functions. Creelman v. Svenning, 67 Wash. 2d 882, 883, 410 P.2d 606, 607 (1966). A prosecutor usually enjoys only qualified immunity for activities deemed extraneous to this quasi-judicial function. Mancini v. Lester, 630 F.2d 990 (3d Cir. 1980); Note, *supra*, at 1125-26.

58. 424 U.S. 409 (1976).

59. Section 1983 of the United States Code title 42, which was originally § 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

60. Imbler was convicted and sentenced to death for murder. After the conviction Pachtman, who had prosecuted Imbler, wrote a letter to the Governor of California describing evidence he had discovered during a post-trial investigation that corroborated Imbler's alibi and impeached the State's prime witness. Thereafter, Imbler filed a post-conviction motion. Imbler's conviction was eventually reversed and he was freed when the State decided not to retry him. Only then did Imbler file suit against Pachtman and a number of police officers seeking redress for violating his constitutional rights by suppressing exculpatory evidence. *Imbler*, 424 U.S. at 410-15.

61. *Id.* at 421-28. The Court found that anything less than absolute immunity would "cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

sional discipline,[62] which it described in a later case as the "comparatively well developed and pervasive mechanism" of disciplinary sanctions available to punish prosecutors.[63]

Therefore, besides disciplinary sanctions, the only potential deterrent to *Brady*-type misconduct is the prospect that the conviction of the defendant will be reversed. It is probably safe to assume that prosecutors would prefer not to have a conviction reversed. Not only does a retrial take a lot of time, expense, and effort, but it also gives the defendant another chance to gain an acquittal. When prosecutorial misconduct causes the reversal, the prosecutor is further subject to embarrassment and criticism from the legal profession.[64]

Unfortunately, the deterrent effect of a potential reversal has been undermined by the Supreme Court's development of strict materiality requirements in *Brady* cases. Materiality has a special meaning in the *Brady* due process context, for to be material in a *Brady* case false or suppressed evidence must be of sufficient importance that, when viewed in light of all of the evidence in the case, its presence or absence would affect the outcome of the case.[65] In this sense the concept of materiality in a *Brady* case is equivalent to the concepts of prejudice or harmless error courts employ in other areas of criminal law.[66] Only if sufficient prejudice or harm to the defense arises from the absence of the undisclosed evidence or from the presence of the false evidence will the suppressed or false evidence be considered material and the conviction reversed.

The earliest Supreme Court *Brady* cases[67] did not discuss materiality.

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62. The Court noted: "Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Id.* at 429.

63. Malley v. Briggs, 106 S. Ct. 1092, 1097 n.5 (1986). In *Malley* the Supreme Court refused to extend absolute immunity to police officers sued under § 1983.

64. *See, e.g.*, Alschuler, *supra* note 56, at 646-47. For an extensive discussion of the effectiveness of appellate reversal as a deterrent in this area, see *infra* notes 257-66 and accompanying text.

65. *See infra* notes 67-85 and accompanying text. In non-*Brady* cases evidence usually does not have to be outcome-determinative to be material. "Materiality ordinarily relates to the pertinency of offered evidence to the issue in dispute or to the issue of credibility." Ladd, *Objections, Motions and Foundation Testimony*, 43 CORNELL L.Q. 543, 547 (1958); *see, e.g.*, State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973); *see also* MCCORMICK ON EVIDENCE § 185, at 541 (E. Cleary 3d ed. 1984) ("Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.").

66. Justice Blackmun's plurality opinion in United States v. Bagley, 105 S. Ct. 3375 (1985), confirms the equivalency of the materiality standards in *Brady* cases with harmless error and prejudice tests. He noted that "the standard of review applicable to the knowing use of perjured testimony is equivalent to the [Chapman v. California, 386 U.S. 18 (1967)] harmless error standard," *Bagley*, 105 S. Ct. at 3382 n.9, and that the materiality standard applicable to nondisclosure of exculpatory evidence is identical to the test for prejudice formulated in Strickland v. Washington, 104 S. Ct. 2052 (1984), *Bagley*, 105 S. Ct. at 3383-84.

67. The Supreme Court first applied the due process clause in this area in Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam), in which the Court held that a prosecutor's knowing use of perjured testimony could violate due process. Due process, the *Mooney* Court stated,

> 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.

Mooney v. Holohan[68] and *Pyle v. Kansas*[69] were decided in a procedural posture that made the issue irrelevant.[70] In *Miller v. Pate*[71] and *Alcorta v. Texas*[72] there was evidence of egregious prosecutorial misconduct, and the Court simply reversed the convictions after finding a due process violation without discussing materiality.[73] *Brady* introduced the notion of materiality by holding that due process is violated if the suppressed evidence is "material either to guilt or punishment, irrespective of the good or bad faith of the prosecution," but provided no further definition for what the court meant by "material."[74]

Only in *Napue v. Illinois*[75] and *Giglio v. United States*,[76] in which the Court reversed convictions because of perjury that concealed the existence of deals made with prosecution witnesses, did the Court refer at all to the quantum of prejudice that must be present before a court could find a due process violation. In both cases, however, the Court failed to discuss this question extensively. Instead, it reversed both convictions after finding in *Napue* that the false testimony "may have had an effect on the outcome of the trial"[77] and in *Giglio* that it " 'in any reasonable likelihood [could] have affected the judgment of the

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Id. at 112.

Since *Mooney* the Supreme Court has continually expanded its prohibition on the knowing use of perjured testimony. The Court has held that due process can be violated when the testimony leaves the jury with a "false impression," whether or not perjury was committed. *Alcorta*, 355 U.S. 28. It has prohibited the use of false evidence relevant only to a witness' credibility, United States v. Bagley, 105 S. Ct. 3375 (1985); Giglio v. United States, 405 U.S. 150 (1972); *Napue*, 360 U.S. 264, and has imputed one prosecutor's knowledge of the falsity of the evidence to other prosecutors in the same office, *Giglio*, 405 U.S. at 150 ("prosecutor's office is an entity"). In *Brady* the Court held that due process can be violated even when there is no perjury or false testimony, if the prosecutor suppresses evidence that has been requested by the defense that is exculpatory in regard to either guilt or sentencing. *Brady*, 373 U.S. at 87. United States v. Agurs, 427 U.S. 97 (1976), made clear that the *Brady* rule also applies even when no request has been made. Due process can be violated by negligent as well as intentional prosecutorial conduct, *Giglio*, 405 U.S. at 150, and irrespective of the good or bad faith of the prosecutor, *Brady*, 373 U.S. at 83.

68. 294 U.S. 103 (1935) (per curiam).

69. 317 U.S. 213 (1942).

70. *Mooney* involved a request for leave to file an original writ of habeas corpus in the Supreme Court. Despite holding that Mooney's claims, if proven, demonstrated a due process violation, the Supreme Court denied the request because *Mooney* had not exhausted his state remedies by filing a habeas petition in state court. *Mooney*, 294 U.S. at 115. Pyle's petition for a writ of habeas corpus had been denied without a hearing by the Kansas courts. Finding, as in *Mooney*, that defendant's petition alleged facts showing a violation of due process, the Supreme Court remanded the case for a hearing on the allegations. *Pyle*, 317 U.S. at 216.

71. 386 U.S. 1 (1967).

72. 355 U.S. 28 (1957) (per curiam).

73. In *Miller* the Court simply stated: "More than 30 years ago this Court held that the fourteenth amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle. There can be no retreat from that principle here." *Miller*, 386 U.S. at 7 (citations omitted). In *Alcorta* the Court noted only that Alcorta's defense "might well have been" accepted by the jury if the witness had not been allowed to testify falsely. *Alcorta*, 355 U.S. at 32.

74. *Brady*, 373 U.S. at 87. Subsequent to *Brady* courts generally defined materiality to correspond to a likelihood that the suppressed evidence would have affected the verdict, but differed as to the precise effect required. Babcock, *Fair Play: Evidence Favorable to the Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1146 n.46 (1982).

75. 360 U.S. 264 (1959).

76. 405 U.S. 150 (1972).

77. *Napue*, 360 U.S. at 272.

jury.' "[78]

It was not until the 1976 opinion in *United States v. Agurs*[79] that the Court provided more substantial guidance on the meaning of the materiality requirement. The majority opinion in *Agurs* divided the prosecutorial suppression and falsification cases into three categories. First are the cases in which the prosecutor used perjured or false testimony. The Court held that these cases should be reversed when, as in *Giglio*, there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury."[80] Second are cases in which the prosecutor received a specific request from the defense for the exculpatory evidence, but failed to turn it over. The *Agurs* Court defined materiality in this situation to mean that the suppressed evidence "might have affected the outcome of the trial."[81] The majority noted also that a failure to turn over specifically requested information would be "seldom, if ever, excusable."[82] In the third category are cases in which exculpatory evidence was suppressed, in which there was no perjury or false testimony, and in which there was no specific request for the exculpatory evidence by the defense. In this situation, the defendant is granted a new trial if the suppressed evidence "creates a reasonable doubt that did not otherwise exist."[83]

The existence of a separate standard of materiality for cases in which the defense attorney has made a specific request for the exculpatory evidence was, however, short-lived. In *United States v. Bagley*[84] the Court eliminated specific-request cases as a separate category with their own standard of materiality. Instead, it merged this category with the no-request cases and their "reasonable doubt that did not otherwise exist" materiality standard.[85]

As a consequence of the materiality standards, a prosecutor knows that a decision to withhold or falsify evidence, even if discovered, will not necessarily

78. *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

79. 427 U.S. 97 (1976).

80. *Id.* at 103.

81. *Id.* at 104.

82. *Id.* at 106.

83. *Id.* at 112. The *Agurs* Court included within this category cases in which the defense counsel made no request or only a general request for "all *Brady* material" or "anything exculpatory." *Id.* at 106-07.

84. 105 S. Ct. 3375 (1985) (plurality opinion).

85. *Id.* at 3384. For a discussion of how lower courts applied the *Agurs* specific-request materiality standard prior to *Bagley*, see Babcock, *supra* note 74, at 1148 n.56. In *Bagley* five Justices seemingly voted to eliminate the separate category for specific-request cases, even though the Government had conceded that a materiality standard more favorable to the defense would be justified when a specific request had been made. *Bagley*, 105 S. Ct. at 3384. These five Justices were unable to agree, however, on what significance should be given to a specific request. Justice Blackmun found the reasonable doubt that did not otherwise exist standard "sufficiently flexible" to encompass no-request, general-request, and specific-request cases. *Id.* He was joined in this holding by Justices O'Connor, White, Rehnquist, and Burger. Only Justice O'Connor, however, joined in his further explanation that a specific request could "impair the adversary process" and affect materiality by causing the defense to alter its preparation and presentation of the case. *Id.* Justice White, joined in his concurrence by Chief Justice Burger and Justice Rehnquist, saw "no reason to attempt to elaborate on the relevance to the inquiry of the defense's request for disclosure." *Id.* at 3385 (White, J., concurring). The response of the lower courts to *Bagley*'s treatment of specific-request cases is discussed in Note, *Specific Requests and the Prosecutorial Duty to Disclose Evidence*, 1986 DUKE L.J. 892.

result in a reversal of the conviction. This is true no matter how flagrant or intentional the prosecutor's misconduct. The prosecutor knows that before reversing a conviction a reviewing court still will have to conclude, after examining all of the evidence in the case, that the absence of the suppressed evidence or the presence of the falsified evidence had enough significance to have affected the outcome of the trial.

As a reflection of the concern with the fairness of an individual defendant's trial in a specific case, the materiality standards may make sense. The standards also, however, reflect a determination that the due process clause "is not a code of ethics for prosecutors"[86] and that it is not the appropriate vehicle for solving the problem of deterring prosecutorial suppression or falsification of evidence.

In this respect, the Court's decision in *Bagley* to jettison the more lenient materiality standard for specific-request cases is especially significant. If the defense counsel has made no request for the exculpatory evidence, the prosecutor can always claim that he or she did not realize that the evidence was exculpatory or that its significance was overlooked. Once the evidence is specifically requested this excuse largely disappears. It is hard to see any justification for a prosecutor's failure to turn over requested evidence, or at least to submit the matter to a judge for an *ex parte* evaluation. Failure to do either raises a strong inference of deliberate misconduct. Therefore, by grouping the specific-request cases with the no-request cases and their stricter materiality standard, the Supreme Court has further undermined the deterrent potential of the due process requirements.

IV. THE "WELL-DEVELOPED AND PERVASIVE MECHANISM"—DISCIPLINARY RULES PROHIBITING *BRADY*-TYPE MISCONDUCT

This section of the Article is devoted to a discussion of the ethical rules that apply to prosecutors who suppress exculpatory evidence or present false evidence. The section examines four major ethical codes formulated by the ABA—the 1908 Canons of Professional Ethics,[87] the 1969 Model Code of Professional Responsibility (Model Code),[88] the 1983 Model Rules of Professional Conduct (Model Rules),[89] and the 1979 Standards Relating To The Administration of

86. *See* Mabry v. Johnson, 467 U.S. 504, 510-11 (1984). In *Mabry* a unanimous Court held that a defendant's acceptance of a prosecutor's proposed plea bargain did not create a constitutional right to have that bargain enforced. *Id.*

87. For a history of the adoption of the 1908 Canons, see H. DRINKER, LEGAL ETHICS 23-25 (1953). By 1914, 31 states had adopted the Canons. *Id.* at 25. The Canons were not designed to have statutory force, but were instead intended to be guidelines reflecting the proper standards of conduct for the legal profession. *Id.* at 26-30; C. WOLFRAM, MODERN LEGAL ETHICS 55-56 (1986).

88. The Model Code originated with a special committee appointed by ABA President (now Supreme Court Justice) Lewis F. Powell, Jr., in 1964. The Code was adopted by the ABA in August of 1969. *See* Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255 (1970). The Code contains three types of provisions. The Canons are general statements of axiomatic norms, the Disciplinary Rules are intended to be mandatory standards governing lawyer conduct, and the Ethical Considerations are aspirational statements of objectives. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble (1969).

89. In 1977 the President of the ABA, William B. Spann, Jr., appointed a Committee on the Evaluation of Professional Standards. This Committee drafted the Model Rules of Professional

Criminal Justice.[90]

These ethical codes represent the formal expression of the nationwide organized bar concerning the ethical duties of lawyers. Courts and bar disciplinary bodies have always recognized these codes as the primary standards to guide decisionmaking in the realm of lawyer discipline,[91] and to the extent that they have been adopted as standards by individual jurisdictions, they constitute the law of disciplinary regulation.

With regard to prosecutors who suppress exculpatory evidence or present false evidence, the rules can be divided into two parts. There are rules that apply solely to prosecutors, and there are others that apply to all lawyers, including prosecutors.

A. *Prosecutor Specific Prohibitions*

Long before the Supreme Court applied the due process clause to prohibit the prosecutorial suppression of exculpatory evidence, the ABA adopted Canon 5 of the Canons of Professional Ethics, which reads, in pertinent part: "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."[92] Consistent with the entire Canon of Ethics, this particular passage is more hortatory than mandatory, yet it establishes that as early as 1908 the bar recognized that prosecutors had a special obligation to reveal evidence favorable to the opponent.

The ABA expanded and strengthened the general language of Canon 5 by adopting the Model Code of Professional Responsibility's Disciplinary Rule 7-103(B):

A public prosecutor or other government lawyer in criminal litigation

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Conduct, which were adopted by the ABA House of Delegates in August 1983. L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 1-4 (1982); C. WOLFRAM, *supra* note 87, at 61-63. The Model Rules consist of 52 Rules, each with an accompanying explanatory comment. They contain no Canons or Ethical Considerations.

90. The ABA Standards Relating to the Administration of Criminal Justice were drafted by a committee headed by Judge (later Chief Justice) Warren E. Burger. The Standards relating to the prosecution function and the defense function were adopted initially in 1971 and as amended in 1979. For a history of the Standards, see 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, introduction, at xx-xxix.

91. *See* City of Los Angeles v. Decker, 18 Cal. 3d 860, 870, 558 P.2d 545, 551, 135 Cal. Rptr. 647, 653 (1977); *In re* Friedman, 76 Ill. 2d 392, 396, 392 N.E.2d 1333, 1335 (1979) (Code of Professional Responsibility, although not yet formally adopted by state supreme court, used as guide for standards of professional conduct); H. DRINKER, *supra* note 87, at 26-30.

92. CANONS OF PROFESSIONAL ETHICS Canon 5 (1965). The portion of Canon 5 that deals with the responsibilities of defense attorneys vividly demonstrates the different roles the legal profession envisions for the defense attorney and prosecutor:

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

Id.

> 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 or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.[93]

Along with the inclusion of the mandatory "shall," which reflects the overall shift from the Canons' hortatory tone to the Model Code's rule-making orientation,[94] Disciplinary Rule 7-103(B) describes the obligations of the prosecutor more explicitly than does Canon 5. Disclosure of exculpatory evidence must be timely under Disciplinary Rule 7-103(B).[95] Canon 5 leaves open the possibility that the prosecutor may fulfill the duty of disclosure by revealing the evidence to the court, but Disciplinary Rule 7-103(B) makes clear that the disclosure must be made to the defense. Reflecting the developments in the due process cases, Disciplinary Rule 7-103(B) no longer limits the duty to disclose, as does Canon 5, to facts or witnesses capable of establishing the innocence of the defendant. Instead, it extends the disclosure requirement to evidence that would negate the defendant's guilt, mitigate the degree of the offense, or reduce the punishment.[96]

The ABA's latest formulation of the duty to disclose exculpatory evidence is reflected in Model Rule 3.8(d), which states that the prosecutor must

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, 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

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93. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) (1980). The Model Code also contains Ethical Consideration 7-13, which states:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

Id. EC 7-13 (1980).

94. *See supra* notes 87-88.

95. The Model Code does not define what is meant by "timely." Most courts have held that disclosure at any time prior to or during trial is timely unless the defendant can prove prejudice from the delayed disclosure. *See, e.g.*, United States v. Holloway, 740 F.2d 1373 (6th Cir.) (disclosure of inconsistent statements at trial not prejudicial), *cert. denied*, 469 U.S. 1021 (1984); United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981) (disclosure two days prior to trial not prejudicial).

96. For an acknowledgment of the impact of the due process cases on Disciplinary Rule 7-103(B), see ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY Rule 7-103(B) comment (1979). Although *Brady* only discussed exculpatory evidence material to guilt or punishment, the earlier decision in *Alcorta*, in which the Court reversed the conviction because the false evidence could have influenced the jury not to reduce the conviction from murder with malice to murder without malice, made clear that the due process clause is also implicated when the suppressed or falsified evidence is material only to reduce the degree of the offense. *See Alcorta*, 355 U.S. at 31.

responsibility by a protective order of the tribunal.[97]

With the exception of the last phrase allowing a protective order,[98] the changes from Disciplinary Rule 7-103(B) in Model Rule 3.8(d) seem directed toward clearing up possible ambiguities in Disciplinary Rule 7-103(B) and ensuring full disclosure by prosecutors. Disciplinary Rule 7-103(B) requires the disclosure only of "the existence of evidence." This theoretically allows the prosecutor merely to inform the defense that the evidence exists without actually turning it over. Model Rule 3.8(d), by requiring the disclosure of "evidence," mandates that the evidence itself must be given to the defense. The requirement in Model Rule 3.8(d) for disclosing "information" as well as evidence makes clear that the admissibility of the exculpatory facts is irrelevant. No longer can a prosecutor justify a decision to withhold evidence by arguing that the evidence was inadmissible.

Similarly, the requirement of Disciplinary Rule 7-103(B) for disclosure of evidence "mitigating the degree of the offense" theoretically allows the prosecutor to make a judgment whether the exculpatory evidence in his or her possession would actually result in the defendant being convicted only of a lesser crime than the one charged. For example, under Disciplinary Rule 7-103(B) a prosecutor could reasonably decide in a murder prosecution that evidence negating malice, such as evidence of provocation by the deceased, would not, in the face of other strong evidence of malice, actually reduce the offense to manslaughter. By using the term "mitigating the offense" instead of "mitigating the degree of the offense," Model Rule 3.8(d) eliminates this element of discretion.

Model Rule 3.8(d) also eliminates discretion with regard to the disclosure requirements relating to sentencing. Disciplinary Rule 7-103(B) requires disclosure only of evidence that would "tend to reduce the punishment." Under Model Rule 3.8(d), the prosecutor must reveal "information" as well as evidence, and this information must be revealed if it is "mitigating," whether or not it would, in the judgment of the prosecutor, be likely to reduce the punishment.

Unlike the Model Code and Model Rules, which were enacted, as their names connote, to serve as models for adoption by the states as disciplinary codes, the purpose of the ABA Standards is to offer guidelines for the implementation of reforms in the criminal justice system.[99] Standard 3-3.11(a) covers the prosecutor's duty to disclose exculpatory evidence:

(a) It is unprofessional conduct for a prosecutor intentionally to fail to

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97. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1983).

98. Although Disciplinary Rule 7-103(B) has no provision for a protective order, it is hard to imagine that a prosecutor, even under the Model Code, would violate his or her ethical responsibilities if the evidence was withheld under the specific authority of a court order.

99. The ABA Standards provide as follows:

> [T]he standards are not model codes or rules, and hence were not drafted in such language. Rather, they are guidelines and recommendations intended to help criminal justice planners design a system, set goals and priorities to achieve it, and propose procedures for adoption by the legislature, courts, and practitioners to operate and keep it viable—all targeted toward achieving a criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future.

1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, introduction, at xx.

> make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.[100]

The most significant difference between Standard 3-3.11(a), on the one hand, and Disciplinary Rule 7-103(B) and Model Rule 3.8(d) on the other, is the replacement of the requirement to make "timely" disclosure with the duty to disclose at the "earliest feasible opportunity." Standard 3-3.11(a) also does not separately call for disclosure of evidence that mitigates the degree of the offense, although one could read this requirement into its disclosure provision for evidence that negates guilt "as to the offense charged." Otherwise, the thrust of Standard 3-3.11(a) is identical to that of Disciplinary Rule 7-103(b) and Model Rule 3.8(d).

Although only the ABA Standards For Criminal Justice expressly prohibit prosecutorial presentation of false testimony,[101] the prosecutorial presentation of false evidence necessarily violates the rules prohibiting the suppression of exculpatory evidence. If a witness testifies falsely, and the prosecutor knows that fact and fails to reveal it, the prosecutor is suppressing the exculpatory evidence that would show the falsity of the witness' testimony. A prosecutor thus violates the rules requiring the disclosure of exculpatory evidence every time he or she presents false evidence.[102]

B. *General Prohibitions*

A prosecutor is generally subject to the ethical rules applicable to other lawyers.[103] Thus, in addition to violating the rules specifically prohibiting suppression of exculpatory evidence, a prosecutor who presents false testimony or suppresses exculpatory evidence can violate a number of other ethical rules.

A prosecutor who knowingly allows a witness to testify falsely violates Dis-

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100. 1 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, at Standard 3-3.11(a).

101. Standard 3-5.6(a) reads: "It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity." *Id.* Standard 3-5.6(a).

102. For example, in *Napue* the prosecutor, by allowing the witness to testify falsely that no deal had been made in return for his testimony, also suppressed the evidence that the deal existed. *See supra* notes 33-36 and accompanying text.

103. Most courts have held that prosecutors may be subjected to discipline for misconduct. *See, e.g., In re* Bloom, 19 Cal. 3d 175, 561 P.2d 258, 137 Cal. Rptr. 168 (1977); People v. Green, 405 Mich. 273, 274 N.W.2d 448 (1979); State *ex rel.* Oklahoma Bar v. Scanland, 475 P.2d 373 (Okla. 1970); *see* Annotation, *Disciplinary Action Against Attorney for Misconduct Related to Official Duties as Prosecuting Attorney*, 10 A.L.R.4th 605, 613-17 (1981). In 1975 the Alabama Supreme Court held that a district attorney could not be disciplined by the State Bar during his term of office. Simpson v. Alabama State Bar, 294 Ala. 52, 56, 311 So. 2d 307, 310 (1975). The court reasoned that under the Alabama State Constitution a prosecutor could be removed from office only by impeachment and thus was not subject to *any* professional discipline, even a reprimand or censure. *Id.* at 54-57, 311 So. 2d at 308-10. The court has also extended this protection to deputy district attorneys. Watson v. Alabama State Bar, 294 Ala. 57, 58, 311 So. 2d 311, 311-12 (1975). The *Simpson* court did note that the recently adopted Alabama Code of Professional Responsibility might allow disciplining of a prosecutor, *Simpson*, 294 Ala. at 56, 311 So. 2d at 310, and in 1980 the court stated that it had not "foreclosed" application of the Code of Professional Responsibility to district attorneys, Honeycutt v. Simpson, 388 So. 2d 990 (Ala. 1980) (per curiam).

ciplinary Rule 7-102(A)(4), which states that a lawyer shall not "knowingly use perjured testimony or false evidence"[104] and Model Rule 3.3(a)(1), which states that a lawyer shall not "offer evidence that the lawyer knows to be false."[105] If the prosecutor takes a more active role and advises or assists the witness in testifying falsely, the prosecutor also violates Disciplinary Rule 7-102(A)(6) by "[participating] in the creation or preservation of evidence when he knows or it is obvious that the evidence is false"[106] and Model Rule 3.4(b) by "counsel[ing] or assist[ing] a witness to testify falsely."[107] Should the prosecutor go further and argue the false evidence to the judge or jury, he or she has also violated Disciplinary Rule 7-102(a)(5), which prohibits a lawyer from "knowingly mak[ing] a false statement of law or fact"[108] and Model Rule 3.3(a)(1), which prohibits a lawyer from knowingly "mak[ing] a false statement of material fact or law to a tribunal."[109]

In addition to violating the prosecutor-specific rules, a prosecutor who suppresses exculpatory evidence also risks falling afoul of Disciplinary Rule 7-102(A)(3), Disciplinary Rule 7-109(A), and Model Rule 3.4(a), all of which require a lawyer to reveal that which the law requires be revealed.[110] If the suppression of exculpatory evidence continues after a specific request by the defense, the requirement of Model Rule 3.4(d) that a lawyer shall not "fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party" is implicated.[111] Finally, a prosecutor who suppresses excul-

104. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1980).

105. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (1983). Model Rule 3.3(a)(4) also provides: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." *Id.* Rule 3.3(a)(4). Canon 22 of the 1908 Canons notes that "[i]t is unprofessional and dishonorable to deal other than candidly . . . in the presentation of causes." CANONS OF PROFESSIONAL ETHICS Canon 22 (1965). Canon 29 states that "counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities." *Id.* Canon 29; *see also* STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, at Standard 3-5.6(a) (1986) (discussing prosecutor's ethical responsibility with respect to presenting false evidence and suppressing other evidence).

106. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(6) (1980).

107. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1983).

108. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1980).

109. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (1983).

110. Disciplinary Rule 7-102(A)(3) states that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal," MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1980), and Disciplinary Rule 7-109(A) reads: "A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce," *id.* DR 7-109(A). Model Rule 3.4(a) notes that a lawyer shall not "[u]nlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1983). It is questionable whether these standards are violated in cases in which a reviewing court has concluded that the exculpatory evidence suppressed was not sufficiently material to require a reversal. Justice Blackmun stated in *United States v. Bagley* that there is no due process duty to disclose exculpatory evidence unless the evidence is material. *Bagley*, 105 S. Ct. at 3383. Thus, a finding of nonmateriality means that under Disciplinary Rule 7-102(A)(3) the disclosure is not "required by law," and under Model Rule 3.4(a) the concealment is not "unlawful." Disciplinary Rule 7-109(A), however, requires only an "obligation to reveal or produce," and this obligation theoretically could be based on Disciplinary Rule 7-103(B), which has no materiality requirement, as well as the due process clause. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) (1980). All three of these provisions are violated whenever a court finds that the suppressed evidence was material.

111. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d) (1983).

patory evidence or presents false evidence is also subject to discipline under the umbrella provisions of the Model Code and Model Rules proscribing conduct involving fraud, deceit, dishonesty, or misrepresentation and prohibiting conduct prejudicial to the administration of justice.[112]

To violate these ethical rules, both specific and general, the prosecutor usually must have personal knowledge of the existence of the exculpatory evidence or the falsity of the evidence presented.[113] The ethical rules, in this sense, are thus more restrictive than the due process rules, which can be violated even if the prosecutor did not know that the evidence was false or that the exculpatory evidence existed.[114]

The ethical duties imposed by all three of the modern codes, however, are significantly broader than the due process standard in one important respect—the absence of a materiality requirement. To fulfill ethical obligations the prosecutor must disclose all exculpatory evidence and must correct all false testimony, whether or not the evidence presented or omitted is important enough, in the context of all of the evidence presented at trial, to warrant a reversal of the conviction.[115] An ethical violation can, and often will, be present even when due process is not violated.[116]

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112. Under Disciplinary Rule 1-102, a lawyer shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation [or] [e]ngage in conduct that is prejudicial to the administration of justice." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4), (5) (1980). Model Rule 8.4 states, in part, that it is unprofessional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation, [or to] engage in conduct that is prejudicial to the administration of justice." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1983).

113. Both MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) (1981) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1983) require that the evidence be known to the prosecutor. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3), (4), & (5) (1980) ("knowingly"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) ("knowingly"). Some rules do not specifically state that the suppression or falsification has to be done knowingly. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(A) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1983). The Preamble to the Model Rules states that " 'knowingly,' 'known' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983).

114. *See, e.g.*, *Bagley*, 105 S. Ct. 3375 (due process can be violated even though prosecutor does not know of suppressed evidence); *Giglio*, 405 U.S. 150 (knowledge of other prosecutor imputed to trial prosecutor); Barbee v. Warden of Md. Penitentiary, 331 F.2d 842 (4th Cir. 1964) (knowledge of police officers imputed to prosecutor).

115. The comment to Disciplinary Rule 7-103(B) acknowledges that this omission of a materiality requirement makes the ethical rule broader than the due process duty:

> Given the restrictive qualifying language of *Agurs*, it appears that a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's disclosure duty as a matter of ethics. Disciplinary Rule 7-103(B) does not limit the prosecutor's ethical duty to disclose to situations in which the defendant requests disclosure. Nor does it impose a restrictive view of "materiality." Disciplinary Rule 7-103(B) states that the prosecutor has a duty to make a timely disclosure of any evidence that tends to negate guilt, mitigate the degree of the offense, or reduce the punishment. It appears possible, therefore, that a prosecutor may comply with the constitutional standards set forth in *Brady* and *Agurs* and still be in violation of Disciplinary Rule 7-103(B). See *State v. Harwood*, 94 Idaho 615, 495 P.2d 160, 162 (1972), in which the court stated that Disciplinary Rule 7-103 and Ethical Consideration 7-13 imposed a duty on the prosecution "to make available all evidence which tends to aid in ascertaining the truth."

ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 96, at 330.

116. United States v. Anderson, 574 F.2d 1347 (5th Cir. 1978); United States *ex rel.* Marzeno v.

C. *Adoption by the States*

However persuasive their logic, and however compelling as an expression of the intent of the organized bar, the Model Code and Model Rules are only what they purport to be—models. They may serve to guide, but they have no binding legal effect unless adopted by individual jurisdictions. Once adopted by a jurisdiction, however, ethical rules have the force of law and serve as the basis for disciplining lawyers within the jurisdiction.

Over the last twenty years every state[117] has adopted rules for lawyer discipline.[118] All of the states have based their disciplinary codes to some degree on either the Model Code or Model Rules.[119] All of the states have adopted general prohibitions against fraud, deceit, and conduct prejudicial to the administration of justice.[120] Without exception, the states prohibit the presentation of false testimony and require a lawyer to divulge that which is required by law.[121] The vast majority of the states have also followed the ABA's lead in enacting rules specifically prohibiting prosecutorial suppression of exculpatory evidence.[122]

Gengler, 574 F.2d 730 (3d Cir. 1978); Ruiz v. Cadry, 548 F. Supp. 764 (E.D. Wis. 1982); Nelson v. State, 59 Wis. 2d 474, 208 N.W.2d 410 (1973).

117. In this and following sections "state" also refers to the District of Columbia.

118. *See* 1-4 NAT'L REP. ON LEGAL ETHICS AND PROF. RESPONSIBILITY (Univ. Publ. of Am. 1986) [hereinafter NATIONAL REPORTER]. The ethical rules generally are adopted by either a state's highest court or a state's bar. *See id.* at AL:1 (Alabama State Bar adopted Code of Professional Responsibility); *id.* at ID:1 (Idaho Supreme Court approved the Code of Professional Responsibility as adopted by the Idaho State Bar); *id.* at GA:1 (Georgia State Bar adopted the ABA Code of Professional Responsibility). That the states have broad power to regulate the practice of law is beyond question. United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).

119. According to the Law. Man. on Prof. Conduct (ABA/BNA) 01:3 (Feb. 18, 1987), the following states have adopted ethical rules based on the ABA Model Rules of Professional Responsibility: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Louisiana, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina (takes structure and substance from both Model Rules and the Model Code), Oregon (amended Model Code incorporating substance of some Model Rules), Virginia (amended Model Code incorporating substance of some Model Rules), Washington, and Wyoming. Those states basing their rules primarily on using the ABA Model Code of Professional Conduct are: Alabama, Alaska, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wisconsin. *See* 1-4 NATIONAL REPORTER, *supra* (although Idado, Indiana, Louisiana, Missouri, and Wyoming are included in the *National Reporter* material, the current information included in the Lawyer's Manual indicates that effective January 1987 these states have adopted ethical roles based on the Model Rules). California has adopted an abbreviated set of ethical rules based on the Model Code that are supplemented by statutes found in the California Business and Professions Code. *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT (1974); CAL. BUS. & PROF. CODE §§ 6067-6228 (West 1954).

120. *See, e.g.*, 2 NATIONAL REPORTER, *supra* note 118, at IN:11, MN: Rules: 93 (Indiana's adoption of Disciplinary Rule 1-102(A)(4) and (5), and Minnesota's adoption of Rules 8.4(c) and (d), respectively).

121. *See* 1-4 NATIONAL REPORTER, *supra* note 118.

122. Forty-four jurisdictions have adopted verbatim the language of Disciplinary Rule 7-103(B) or Model Rule 3.8(D). Of the others the new North Carolina Rule 7.3(D) parallels 3.8(d) with only minor changes; Rule 3.7 (I)(2) of Maine's Code of Professional Responsibility tracks the language of Disciplinary Rule 7-103(B) but omits the requirement that the suppressed evidence be "known to the prosecutor or other government lawyer"; Massachusetts has added to its Disciplinary Rules a set of additional rules for prosecutors based on the ABA's Standards Relating to the Prosecution Function—PF 7(a), which requires disclosure by the prosecutor of exculpatory evidence, has language taken both from Standard 3-3.11 of the ABA Standards for the Prosecution Function and Discipli-

Looking at the rules contained in the disciplinary codes, it seems obvious that the Supreme Court was correct in describing the system of disciplinary rules available to punish prosecutors for suppressing exculpatory evidence or presenting false evidence as a "well-developed and pervasive mechanism."[123] For this mechanism to be meaningful, however, it must operate to punish prosecutors who violate it.

V. THE IMPOSITION OF DISCIPLINARY SANCTIONS FOR *BRADY*-TYPE MISCONDUCT—THE MISSING LINK

A. *A Brief Discourse On Lawyer Disciplinary Systems*

Most states have adopted procedures for lawyer discipline based on the 1979 ABA Standards for Lawyer Discipline and Disability Proceedings.[124] Under this model, individuals, most often clients, trigger disciplinary investigations by making complaints.[125] A full-time bar counsel[126] initially investigates the complaints and recommends a course of action to the chairperson of a hear-

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nary Rule 7-103(B); New Jersey's RPC 3.8(d) is based on Model Rule 3.8(d), but it leaves out "or information" and substitutes "supports innocence" for "tends to negate the guilt of the accused"; Virginia's Disciplinary Rule 8-102 (A)(4) imposes a duty specifically on prosecutors to disclose to a defendant "all information required by law"; only Alabama, California, and Georgia do not have a code provision specifically prohibiting prosecutorial suppression of exculpatory evidence. *See* 1-4 NATIONAL REPORTER, *supra* note 118. Because it is presently unclear whether prosecutors in Alabama are even subject to discipline, *see supra* note 103, such a provision would obviously be superfluous in that state. As Price v. State Bar of Cal., 30 Cal. 3d 537, 638 P.2d 1311, 179 Cal. Rptr. 914 (1982), makes clear, the other California rules and statutes can be used to punish a prosecutor for actions that deceive the court. *See infra* notes 199-214 and accompanying text. In Georgia a prosecutor who suppresses evidence could still be subject to discipline under the Georgia Code of Professional Responsibility for violating Disciplinary Rules 1-102(A)(4), 1-102(A)(5), 7-102(A)(3), and 7-109(A), all of which mirror their Model Code counterparts. *See* 1 NATIONAL REPORTER, *supra* note 118, at GA. Georgia has also adopted Ethical Consideration 7-13, which condemns prosecutorial suppression of exculpatory evidence. *Id.* In addition to the Disciplinary Rules and Ethical Considerations, Georgia has adopted 67 "Standards of Conduct," each of which sets out an ethical duty and a concomitant maximum punishment. Standard 56 states that a lawyer may be punished by disbarment for suppressing any evidence that the lawyer or his or her client have an obligation to produce. *Id.*

123. Malley v. Briggs, 106 S. Ct. 1092, 1097 n.5 (1986).

124. STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1983) [hereinafter STANDARDS FOR LAWYER DISCIPLINE]. The Standards for Lawyer Discipline and Disability Proceedings were approved by the ABA House of Delegates in February 1979. In 1984 the ABA Center for Professional Responsibility published a Survey of Lawyer Disciplinary Procedures. The information contained in the Survey was obtained from the disciplinary offices of individual jurisdictions that had adopted disciplinary procedures modeled on the STANDARDS FOR LAWYER DISCIPLINE. *See* SURVEY OF LAWYER DISCIPLINARY PROCEUDRES IN THE UNITED STATES preface (1984).

125. *See* Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 206-07. This Article contains a study of complaints filed with the New York City Bar Association in 1970 which reveals that 713 of the 996 total complaints filed related to offenses against clients. *Id.* at 212-13; *see also* C. WOLFRAM, *supra* note 87, at 100 (discussing the complaint process in general).

126. STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 3.2 suggests that the prosecutorial function should be performed by a lawyer—a bar counsel—hired on a full time basis. Standard 3.9 describes the duties of this bar counsel. *Id.* Standard 3.9. Standard 8.4 calls for the bar counsel to screen the complaint to make sure it concerns a lawyer who is licensed to practice in the jurisdiction and that, if true, it alleges facts which would constitute misconduct. *Id.* Standard 8.4. According to Standard 8.5 counsel should, after the requirements of Standard 8.4 are met, investigate the allegations. *See id.* Standard 8.5.

ing committee.[127]

Following the initial investigation, which includes notice to the attorney-respondent and an opportunity to be heard,[128] bar counsel can recommend that the complaint be dismissed as meritless,[129] or that the attorney receive a minor sanction such as probation or an admonition.[130] Up until this point the proceedings generally are confidential.[131] If bar counsel finds probable cause as to the charges of misconduct and deems the misconduct serious, a formal complaint is issued, and the disciplinary process is opened to the public.[132]

After the filing of a formal complaint, the attorney is entitled to an adversary hearing before a hearing committee.[133] The hearing committee issues a written report containing findings of fact and recommended disposition.[134] The sanctions include probation, censure, suspension from practice for a specified period, disbarment, and reprimand.[135] The recommendations of the hearing committee are reviewed by a disciplinary board, which may approve, modify, or disapprove the recommendations.[136]

Either side may appeal the board's recommendations to the highest court of the state.[137] Most state supreme courts reserve the right to impose the harshest sanctions—suspension or disbarment.[138]

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127. STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standards 3.6, 3.7 describe the composition and function of the hearing committee. Standard 8.11 calls for the recommendation of bar counsel to be reviewed by the chairperson of the hearing committee, who may approve, modify, or disapprove counsel's recommendation or order further investigation. *Id.* Standard 8.11.

128. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 8.8.

129. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 8.9 (counsel must make initial recommendation for disposition of matter); *id.* Standard 8.10(a) (action should be dismissed if there is not probable cause to believe that misconduct has occurred). In a study of California complaint files in 1969-70, 74.5% of the complaints were dismissed at this early stage. *See* Marks & Cathcart, *supra* note 125, at 215.

130. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 8.10(b) (admonition to be issued if the misconduct is minor and isolated); *id.* Standard 8.10(c) (probation should be imposed when appropriate); *id.* Standard 6.7 & commentary (probation limited to two years; probation appropriate when the respondent has problems that require supervision, but still can perform legal services).

131. STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 8.24 states that disciplinary proceedings should normally not be public until formal charges are filed.

132. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 8.25 (discussing the public nature of disciplinary proceedings once formal charges have been filed and served). In contrast to the general acceptance of the other Disciplinary Standards, in 1983 only 16 of the 54 reporting jurisdictions had adopted rules for public disciplinary proceedings after the filing of formal charges. SURVEY, *supra* note 124, at 22.

133. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standards 8.26 to 8.40 (describing the procedures before the hearing committee).

134. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 8.41.

135. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standards 6.1 to 6.10.

136. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standards 8.42 to 8.44, 8.49.

137. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 8.47.

138. *See* STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 8.49 & commentary; *id.* Standard 8.48 (report of the Board must be filed with the court unless the matter has been dismissed without an appeal or a reprimand has been issued and there is no appeal); *id.* Standards 6.1 to 6.4 (providing that the court has the exclusive power in matters of suspension or disbarment). Forty-five of the fifty-four jurisdictions responding to the 1983 Survey reported that the state's highest court had the exclusive power to disbar a lawyer. SURVEY, *supra* note 124, at 10. Forty-four indicated that the exclusive power to suspend a lawyer rested with the highest court. *Id.*

B. *Methodology*

No reporter service collects and publishes all cases involving disciplinary sanctions. To determine the extent to which prosecutors are disciplined for *Brady*-type violations, those printed sources that are available were reviewed and this review was supplemented with survey forms sent to bar counsel in every state.

The published materials examined include the ABA/BNA Lawyers Manual on Professional Conduct;[139] The National Reporter on Legal Ethics and Professional Responsibility;[140] reports published by the ABA Center for Professional Responsibility;[141] books discussing professional responsibility and legal ethics;[142] books and articles on prosecutorial misconduct;[143] numerous articles

139. The Law. Man. on Prof. Conduct (ABA/BNA) is a looseleaf service and guide to handling ethical dilemmas that are commonly encountered by lawyers. The manual is divided into different problem areas and contains full-text reprints of the ABA Model Rules, other important professional standards, ABA ethics opinions, case citations, and digests of ethics opinions from state and local bar associations. It is supplemented monthly and is accompanied by a second binder, Current Reports, which reviews the latest court decisions, ethics opinions, disciplinary proceedings, and legislative action related to legal ethics.

140. *See* 1-4 NATIONAL REPORTER, *supra* note 118. This is a four-binder collection of state bar ethics opinions, state and federal court cases, literature and court case bibliographies, and comprehensive ethics opinion and court case indexes.

141. *See* ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1980); ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM (6th ed. 1983); ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, STATISTICAL REPORT REGARDING FACTUAL INFORMATION ON PUBLIC DISCIPLINE IMPOSED AGAINST LAWYERS BY STATE JURISDICTIONS 1980-81 (1983); ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT (1984).

142. *See* ABA DISCIPLINARY WORKSHOP (June 9-11, 1977); R. ARONSON, J. DEVINE & W. FISCH, PROBLEMS, CASES AND MATERIALS IN PROFESSIONAL RESPONSIBILITY (1985); M. BLOOM, THE TROUBLE WITH LAWYERS (1968); J. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR (1966); G. COSTIGAN, JR., CASES AND OTHER AUTHORITIES ON LEGAL ETHICS (2d ed. 1933); H. DRINKER, *supra* note 87; EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER (D. Weckstein ed. 1970); M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); G. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW (1978); F. HICKS, ORGANIZATION AND ETHICS OF THE BENCH AND BAR (1932); H. JESSUP, THE PROFESSIONAL IDEALS OF THE LAWYER: A STUDY OF LEGAL ETHICS (1925); LAWYERS' ETHICS: CONTEMPORARY DILEMMAS (A. Gerson ed. 1980); J. LIEBERMAN, CRISIS AT THE BAR (1978); F. MARKS, K. LESWING & B. FORTINSKY, THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY (1972); R. MATHEWS, PROBLEMS ILLUSTRATIVE OF THE RESPONSIBILITIES OF MEMBERS OF THE LEGAL PROFESSION (6th Printing 1974); NATIONAL ORG. OF BAR COUNSEL, DISCIPLINARY MANUAL (1973); L. PATTERSON, *supra* note 89; O. PHILLIPS & P. MCCOY, CONDUCT OF JUDGES AND LAWYERS (1952); J. PIKE, BEYOND THE LAW (1963); M. PIRSIG, CASES AND MATERIALS ON LEGAL ETHICS (1949); PRACTICAL ISSUES OF PROFESSIONAL RESPONSIBILITY IN THE PRACTICE OF LAW (Legal Medical Studies, Inc. 1984); P. STERN, LAWYERS ON TRIAL (1980); THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (D. Luban ed. 1983); S. TISHER, L. BERNABEI & M. GREEN, BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS (1977); W. TRUMBULL, MATERIALS ON THE LAWYER'S PROFESSIONAL RESPONSIBILITY (1957); R. WISE, LEGAL ETHICS (2d ed 1970); C. WOLFRAM, *supra* note 87.

143. *See* B. DAVIDSON, INDICT AND CONVICT (1971); B. GERSHMAN, PROSECUTORIAL MISCONDUCT (1986); J. LAWLESS, JR., PROSECUTORIAL MISCONDUCT (1985); NATIONAL ASS'N OF ATTORNEYS GEN., PROSECUTOR TRAINING AND ASSISTANCE PROGRAMS (1972); NATIONAL COLLEGE OF DISTRICT ATTORNEYS, THE PROSECUTOR IN AMERICA (J. Douglass ed. 1977); THE PROSECUTOR (W. McDonald ed. 1979); Alschuler, *supra* note 56; Gershman, *The Burger Court and Prosecutorial Misconduct*, 21 CRIM. L. BULL. 217 (1985); Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131 (1986) [hereinafter Gershman, *Why Prosecutors Misbehave*]; Singer, *Forensic Misconduct by Federal Prosecutors—And How It Grew*, 20 ALA. L. REV. 227 (1968); Comment,

discussing the *Brady* doctrine;[144] published compilations of state disciplinary decisions;[145] and American Law Reports Annotations dealing with the disciplining of lawyers and prosecutors.[146] Computer searches were also conducted.

To complement the above research, a letter and accompanying survey form were sent to bar counsel in all of the states.[147] The letter and survey asked for information concerning disciplinary actions for the time period from January 1, 1980, until May 15, 1986.[148] The bar counsel were asked to report all disciplinary actions involving prosecutorial suppression of evidence and presentation of false evidence. Cases falling into two categories were specifically requested:

Actions Against Prosecutors Who Suppress or Falsify Evidence, 47 TEX. L. REV. 642 (1969); Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946 (1954); Note, *Sticks and Stones in Connecticut Criminal Courts*: State v. Couture, 18 CONN. L. REV. 407 (1986) [hereinafter Note, *Sticks and Stones*]; Note, *Refusal to Discipline Deceitful Illinois Prosecutor—In Re* Friedman, 29 DE PAUL L. REV. 657 (1980) [hereinafter Note, *Refusal to Discipline*].

144. *See* Alderstein, *Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems*, 6 HOFSTRA L. REV. 755 (1978); Babcock, *supra* note 74; Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984); Caron, *The Capital Defendant's Right to Obtain Exculpatory Evidence from the Prosecution to Present in Mitigation Before Sentencing*, 23 AM. CRIM. L. REV. 207 (1985); Smoot, *Discovery in Texas Criminal Cases: How Far Have We Come?*, 8 AM. J. CRIM. L. 91 (1980); Comment, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960) [hereinafter Comment, *The Duty of the Prosecutor*]; Comment, *supra* note 49; Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure*, 59 IOWA L. REV. 433 (1973); Comment, *Disclosure to the Guilty Pleading Defendant*: Brady v. Maryland *and the* Brady *Trilogy*, 72 J. CRIM. L. & CRIMINOLOGY 165 (1981); Comment, Brady v. Maryland, *supra* note 2; Comment, *Prosecutor's Duty to Disclose Reconsidered*—United States v. Agurs, *96 S. Ct. 2392 (1976)*, 1976 WASH. U.L.Q. 480; Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887 (1981); Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004 (1986); Note, *The Prosecutor's Dilemma—A Duty to Disclose or A Duty Not to Commit Reversible Error*, 40 LA. L. REV. 513 (1980); Note, *The Prosecutorial Duty to Disclose Exculpatory Information*, 34 S.C.L. REV. 67 (1982); Note, *The* Brady *Doctrine in Florida*, 31 U. FLA. L. REV. 356 (1979); Note, *The Prosecutor's Duty to Disclose After* United States v. Agurs, 1977 U. ILL. L.F. 690; Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 WASH. & LEE L. REV. 110 (1981); Note, *Prosecutorial Duty to Disclose Unrequested Impeachment Evidence: The Fifth Circuit's Approach*, 61 WASH. U.L.Q. 163 (1983).

145. *See* H. HAYNSWORTH, IV, HANDBOOK ON LEGAL ETHICS FOR SOUTH CAROLINA LAWYERS (1986); LOS ANGELES COUNTY BAR ASS'N & THE LOS ANGELES DAILY JOURNAL, ETHICS OPINIONS (I. Sherman ed. 1967); NEW YORK STATE BAR ASS'N COMM. ON PROF. DISCIPLINE, THE STATE OF DISCIPLINE IN NEW YORK STATE (1984); OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION (1985); SELECTED OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS OF THE FLORIDA BAR (1968).

146. *See* Annotation, *Communication With Party Represented by Counsel as Ground for Disciplining Attorney*, 26 A.L.R.4th 102 (1983); Annotation, *supra* note 103; Annotation, *Fabrication or Suppression of Evidence as Ground of Disciplinary Action Against Attorney*, 40 A.L.R.3d 169 (1971) [hereinafter Annotation, *Fabrication*].

147. The letter and survey form are attached to this Article as an appendix. They were sent to individuals included in the 1985-86 Roster of Trial Counsel of the National Organization of Bar Counsel, as effective September 1985. In several instances the individuals who received the letter happened not to be directly connected with disciplinary enforcement, but graciously forwarded the letter to the proper office.

148. Although the author initially intended to ask for information for a much longer period of time, he was dissuaded by several bar counsel who informed him that, because of inadequate record keeping, many bar counsel would be unable to supply this information. For a discussion of the problems of inadequate record keeping by bar disciplinary organizations, see ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970) [hereinafter PROBLEMS AND RECOMMENDATIONS].

those in which formal complaints were issued, and those not resulting in a formal complaint, but in which some private informal sanction was imposed.[149]

C. *Reported Cases in Which Disciplinary Action Considered*

What is most surprising about the published reports of disciplinary actions against prosecutors for *Brady*-type violations is their limited number. With the ethical rules so clear and the large number of opinions containing evidence of intentional misconduct, one would expect bar disciplinary bodies and courts to be busy dealing with this problem. The opposite is true—only nine cases were uncovered in which discipline was even considered. Because these cases comprise the bulk, if not all, of the reported instances of discipline for *Brady*-type misconduct, they are worth discussing in some detail.

1. *Miller v. Pate*

Miller v. Pate[150] is the only United States Supreme Court *Brady* case for which there is any record of a disciplinary proceeding. Miller was convicted of the gruesome murder of a young child. A crucial piece of evidence used against Miller at trial was a pair of shorts with large reddish-brown stains allegedly worn by him during the murder. After the prosecutors had successfully resisted a defense request for independent scientific examination of the shorts, a State Bureau of Crime Identification chemist testified for the state that the stains consisted of blood of the victim's grouping type.[151] The prosecution repeatedly represented that the shorts were a " 'garment heavily stained with blood.' "[152] The jury convicted Miller and sentenced him to death.[153]

During a hearing on his federal habeas corpus petition Miller was finally permitted to get an independent expert to test the shorts. This expert tested threads from each of the ten reddish-brown stains on the shorts. He found that

149. The author considered asking for information about all cases in which allegations of *Brady*-type misconduct were investigated, but was advised by several bar counsel that this information would be extremely difficult to provide because of a lack of proper indexing. Although many disciplinary organizations now keep records of all matters investigated, they usually have no subject matter index. Thus, to provide this information a respondent would have had to look at each file to see if it fell within the requested category, an exceedingly onerous task. Several respondents in smaller jurisdictions nevertheless undertook this exhaustive search on their own before returning the survey form.

150. 386 U.S. 1 (1967).

151. *Id.* at 2-4. The chemist testified:

> I examined and tested "People's Exhibit 3" to determine the nature of the staining material upon it. The result of the first test was that this material upon the shorts is blood. I made a second examination which disclosed that the blood is of human origin. I made a further examination which disclosed that the blood is of group "A."

Id. at 4. The Court described the stained shorts as "an important link in the chain of circumstantial evidence" against Miller. *Id.*

152. *Id.* at 6. The prosecutors twice referred to the stained shorts in their argument to the jury. Both Miller, who testified at trial and denied ownership of the shorts, and the Illinois Supreme Court, which affirmed Miller's conviction and sentence, described the shorts as stained with blood. *Id.* at 4.

153. *Id.* at 2.

the stains were in fact paint, and could find no traces of blood.[154] The prosecutors admitted that they knew there was paint on the shorts at the time of trial and also that they had a memorandum from the police to this effect in their possession during the trial.[155] The Supreme Court reversed the conviction, finding that the prosecutors were guilty of "consistent and repeated misrepresentation" and had "deliberately misrepresented the truth."[156]

Because of the notoriety of the case the Illinois State Bar Association, on its own motion, conducted an investigation of the case, and then took the unusual step of publishing its findings.[157] The Committee refused to bring any disciplinary charges against the two prosecutors involved, finding that the Supreme Court had "misapprehended the facts of the case."[158]

In refusing to find misconduct the Committee relied on the chemist's testimony from the original trial that there was blood on the shorts. It pointed out that Miller had never fully refuted this testimony because his expert could not state that there never had been blood on the shorts.[159] Because the prosecutors were not guilty of putting on false testimony by presenting evidence that there was blood on the shorts, the Committee reasoned that the only possible ethical violation concerned the prosecutors' decision not to inform the defense that there was paint in addition to blood on the shorts. The Committee found that the presence of paint on the shorts was not a material issue at trial and that the prosecutors had no reason to believe that the evidence of the paint would have been helpful to the defense.[160]

Whether through negligence or by design, the Grievance Committee totally misconstrued the nature of the misconduct that so bothered the Supreme Court.[161] The Supreme Court never held that the prosecution had presented perjured testimony in putting up evidence that there was blood on the shorts.[162] Nor did the Court reverse the conviction solely because the prosecutors had suppressed exculpatory evidence. Instead, the Court reversed Miller's conviction because the prosecutors consistently and repeatedly misrepresented to the jury that the large stains on the shorts were blood when in fact they were paint, and had relied on the "[incalculable] gruesomely emotional impact upon the jury"[163] of these vivid stains in obtaining a conviction and death penalty, even though they knew that the stains were mostly paint.

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154. *Id.* at 5.

155. *Id.* at 6.

156. *Id.*

157. *See Grievance Committee's Findings Re Prosecution of the Miller Murder Case*, 56 ILL. BAR J. 955 (1968).

158. *Id.* at 956.

159. *Id.* at 956-57.

160. *Id.* at 956.

161. Professor Alschuler described the Committee's decision as "disingenuous." Alschuler, *supra* note 56, at 672.

162. Alschuler, *supra* note 56, at 672. The Court never resolved the question whether there was in fact blood on the shorts, although it clearly had doubts about this. *Miller*, 386 U.S. at 5 n.12.

163. *Miller*, 386 U.S. at 5.

2. *In re Stender*

In *In re Stender*[164] Albert Stender, an assistant prosecutor in New Jersey, was prosecuting a narcotics case arising from the arrest of eight persons. One of those arrested was an undercover police officer and another was an informant. Stender prepared and filed complaints for six of the defendants, but not for the officer and informant. Prior to trial, defense counsel for the six other defendants, obviously suspicious, made discovery requests for information about the officer and informant, and the trial court ordered Stender to turn over the information.[165]

Instead of seeking a protective order, Stender fabricated complaints for the officer and informant. The complaints contained false names, addresses, and bail information. Stender gave them to defense counsel along with a fictitious memorandum containing more false information.[166]

The New Jersey Disciplinary Review Board found that Stender had violated Disciplinary Rules 1-102(A)(4), 1-102 (A)(5), 7-102(A)(3), and 7-102(A)(5) by supplying "incomplete, incorrect and misleading information" to the defense attorneys.[167] The Board recommended that, because of Stender's inexperience, unblemished prior record, and cooperation with the investigation, he should only be publicly reprimanded, and the New Jersey Supreme Court followed the recommendation of the Board.[168]

3. *People v. Steele*

In *People v. Steele*[169] Mark Steele was convicted in a New York court of compulsory prostitution and sentenced to ten to twenty years imprisonment. A key part of the prosecution's case was the testimony of two women, Culberson and Mondelli, who testified that Steele had forced them into prostitution.[170] The defense attacked their credibility at trial, claiming that the women met before trial and concocted their stories together. Both witnesses denied under oath that they had met or discussed the case prior to trial.[171] The prosecutor argued to the jury that this lack of collusion between the witnesses reinforced their credibility. In addition, the prosecutor, when asked by the trial court,

164. 78 N.J. 616 (1978). The published opinion reveals only that Stender was punished for violating Disciplinary Rules 1-102(A)(4), 1-102(A)(5), 7-102(A)(3), and 7-102(A)(5) in connection with his actions as a prosecutor. The facts of the case are taken from the Decision and Recommendation of the Disciplinary Review Board, No. DRB 78-59 (Oct. 16, 1978) (unpublished) [hereinafter Decision and Recommendation], which is mentioned in the published opinion.

165. Decision and Recommendation, *supra* note 164, at 2. The Decision and Recommendation does not discuss the exact nature of the requests or court order.

166. Decision and Recommendation, *supra* note 164, at 2. The memorandum indicated that the complaints had been dismissed, when in fact they never had been filed. It also falsely represented that the informant had no prior criminal record. *Id.* at 2.

167. Decision and Recommendation, *supra* note 164, at 1-2.

168. *Stender*, 78 N.J. at 617.

169. 65 N.Y.S.2d 214 (1946).

170. *Id.* at 217-18.

171. *See id.* at 216.

stated that Culberson had not made a pre-trial statement.[172]

A post-trial hearing revealed not only that the witnesses had met with each other before the trial, but had done so in the presence of the prosecutor and the police. It also was revealed that during this meeting Culberson had made a statement to the prosecutor concerning her proposed testimony against Steele.[173] The judge ordered a new trial, holding: "A fraud has been perpetrated on the Court, which requires me to act. A prosecutor cannot be permitted to profit by his own concealment of the true facts, in derogation of the rights of the defendant."[174]

The New York State Bar subsequently investigated the matter.[175] The official referee, in a report accepted by the Appellate Division, found the prosecutor guilty only of knowingly using the false testimony of one of the witnesses in his summation. Because the prosecutor delivered his summation " 'extemporaneously from notes,' " and because " 'his train of thought had been interrupted' " by an objection just before the relevant portion of his argument, the referee concluded and the court agreed that the misconduct was " 'due to overzealousness.' "[176] Finding no "deliberate and premeditated intent to deceive the trial court and jury," the court ordered that the prosecutor be censured.[177]

The opinion does not explain how the prosecutor could have used the false testimony in his summation without also eliciting the testimony during his examination of the witness. If the prosecutor knew that the former was false, then a fortiori he knew the latter was false. And, of course, the excuses regarding extemporaneity and the interruption of the argument were not available to justify the deliberate elicitation of the false testimony.[178]

4. *United States v. Kelly*

As compared to the three previous cases discussed, all of which present clear evidence of disciplinary violations warranting severe sanctions, *United States v. Kelly*[179] presents a close question whether any disciplinary action was appropriate. Kelly was a former Massachusetts state senator charged with extortion. After his trial ended in a mistrial, he filed a motion to dismiss the indictment based on alleged prosecutorial misconduct. All of the misconduct centered around the testimony of three witnesses: Masiello, an architect who

172. *Id.* at 220.

173. *Id.* at 219.

174. *Id.* at 221.

175. *See In re* Dreiband, 273 A.D. 413, 77 N.Y.S.2d 585 (1948). The opinion states that the investigation "resulted from charges made by a Judge of the Court of General Sessions of New York County against the respondent, an assistant district attorney, who conducted a trial before him. (*People v. Steele*, 65 N.Y.S.2d 214)." *Id.* at 413, 77 N.Y.S.2d at 585. It is unclear whether the judge personally referred the matter to the bar or the bar began an investigation on its own because of the judge's comments in his published opinion.

176. *Id.* at 414, 77 N.Y.S.2d at 585.

177. *Id.* at 414, 77 N.Y.S.2d at 586.

178. In the view of one commentator, the punishment imposed in *Dreiband* was apparently lighter than that imposed on ordinary attorneys in similar cases arising in New York. *See* Comment, *The Duty of the Prosecutor*, *supra* note 144, at 870 n.79.

179. 543 F. Supp. 1303 (D. Mass. 1982).

allegedly paid cash bribes to Kelly in return for certain favors, Masiello's secretary Rawson, and Rawson's attorney Olsson. At issue was whether anyone besides Masiello, whose credibility was questionable,[180] could testify that he or she had made cash payments to Kelly.

At trial Masiello testified that except for one occasion when Rawson sent money directly to Kelly, he personally paid Kelly the cash. In contrast to her pre-trial statements, in which she denied ever sending money to Kelly, Rawson testified at trial that she had on several occasions sent money directly to Kelly, and further that she had told Olsson about this before trial.[181] Olsson was not present during Rawson's testimony. The prosecutor contacted Olsson and learned that Olsson would contradict Rawson if called to testify, and that he already had talked to the defense attorney and was planning to testify. The prosecutor did not reveal this to the court.[182]

Olsson eventually did testify for the defense that Rawson had not told him about sending money to Kelly.[183] After Olsson's testimony the prosecutor asked for a recess to contact Rawson. The prosecutor telephoned her and she admitted to him that in her testimony she had gone "beyond" what she had told Olsson, but the prosecutor did not ask her directly if she had committed perjury, instead changing the subject.[184] The prosecutor reported to the judge that there were "[c]ontradictions, . . . but not such that I would ask the court to delay the course of the trial," and did not recall Rawson as a witness.[185]

At the hearing on Kelly's motion to dismiss, the prosecutor admitted that he believed Masiello was testifying falsely about who made the cash payments.[186] He also admitted that he purposefully did not ask Rawson whether she had perjured herself about sending money directly to Kelly and did not report the full facts of his telephone conversation with Rawson to the judge.[187]

The trial court found that the prosecutor had acted unethically by presenting the testimony of Masiello even though he believed it to be false; by failing to correct false testimony because he failed to report that Olsson would contradict

180. Massiello admitted to having committed perjury in the past and to having engaged in many acts of corruption and bribery during his work on contracts for the state. *Id.* at 1305.

181. *Id.*

182. *Id.* at 1306-07.

183. *Id.* at 1307.

184. *Id.* at 1307-08.

185. *Id.* at 1308.

186. The prosecutor testified as follows:

Q. You believed he was testifying incorrectly on the point, is that correct?

A. Yes.

Q. If incorrectly equals falsely, you will agree he was testifying falsely on the point?

A. Yes.

Q. However, you felt that you were entitled to put this evidence into the record without bringing it to the attention of myself or Judge Tauro because you formed the opinion that, although Massiello was giving inaccurate testimony, which you knew was inaccurate, he wasn't intentionally or deliberately doing so, is that right?

A. Yes.

Id. at 1306.

187. *Id.* at 1307-08.

Rawson as soon as he knew of this fact;[188] by failing to pursue in his phone call to Rawson evidence of possible perjury because it would have been helpful to the defense;[189] and by materially misleading the court and defense counsel in his report on the phone conversation with Rawson.[190] Although he refused to dismiss the indictment, the judge referred the matter to the Massachusetts Board of Bar Overseers.[191]

The Board of Bar Overseers refused to initiate formal disciplinary proceedings,[192] finding that: (1) the prosecutor believed that Masiello's testimony represented his best memory, put up other evidence contradicting Masiello's testimony on the relevant question, and Masiello's testimony was, on the relevant point, actually helpful to the defense; (2) the prosecutor did not avoid asking Rawson over the telephone whether she had committed perjury to avoid obtaining evidence helpful to the defense—instead, he did not know he had a duty to seek such information; and (3) there was no ethical violation in failing to reveal the full context of this phone conversation because the conversation was ambiguous, and because he did not know he had a duty to make full disclosure.[193] The Board did not discuss the question of the propriety of the prosecutor's failure to inform the court, as soon as he learned of it, that Olsson would contradict Rawson's testimony as to what she had told him.

The Board of Overseers clearly was correct with regard to Masiello's testimony. The prosecutor did not actually know the testimony was false—he just thought it might be, and in any event the Board was correct in concluding that the testimony as it came out was more helpful to the defense than what the prosecutor believed the truth to be. Because the prosecutor knew that Olsson had already talked to the defense attorney and was planning to testify, it would also be difficult to argue that there was an ethical violation because he did not tell the defense attorney what the attorney already knew. More troubling is the finding that the prosecutor was not guilty of ethical violations in relation to the conduct and reporting of his telephone conversation with Rawson on the ground that he did not know of his ethical obligations. Even if this fact might excuse the failure to press Rawson for further details, it can hardly be used to justify the presentation of a misleading account of the conversation to the judge and defense attorney.

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188. *Id.* at 1311-13. The court cited Ethical Consideration 7-26 and Disciplinary Rule 7-102 as prohibiting the presentation and requiring the correction of false testimony. *Id.* at 1312.

189. *Id.* The court cited that portion of Ethical Consideration 7-13 which requires a prosecutor not to avoid pursuing evidence because it might aid the accused.

190. The court found that the misleading report violated Disciplinary Rule 7-102(A)(3) and Ethical Consideration 7-13. *Id.* at 1312.

191. *Id.* at 1314.

192. *Id.*

193. At the request of the United States Attorney the judge published the letter from the Bar Overseers containing their findings as published, along with other relevant correspondence. *See* United States v. Kelly, 550 F. Supp. 901, 903 (D. Mass. 1982). The court accepted the Overseers' findings after noting that neither the defendant nor the defense attorney had been afforded an opportunity to appear before them. *Id.* at 905-06.

5. *Brophy v. Committee on Professional Standards, Third Judicial Department*

In *Brophy v. Committee on Professional Standards, Third Judicial Department*[194] Patrick Brophy was convicted in the United States District Court for the Western District of New York of willfully depriving an individual of his constitutional rights[195] for willfully "suborn[ing] perjury; fabricat[ing] evidence and materials and introduc[ing] at state proceedings knowingly false, misleading and perjured testimony and suppress[ing] favorable and exculpatory evidence, materials and testimony . . . ."[196] Brophy's sentence consisted of a $500 fine.

Brophy was automatically suspended from the practice of law because of his conviction.[197] Acting on a motion to set aside the suspension, the New York Supreme Court, Appellate Division, lifted the suspension and ordered that Brophy be censured. The court based its decision on Brophy's otherwise unblemished record and because he "ha[d] suffered the stigma of a criminal conviction,"[198] even though the criminal conviction was the initial basis for the automatic suspension.

6. *Price v. State Bar of California*

In the case of *Price v. State Bar of California*,[199] Price was a deputy district attorney who had prosecuted a murder case. During the cross-examination of a cab driver who was testifying for the state, the driver revealed that he had a "trip ticket" detailing his movements on the day in question. The defense attorney made a request for the ticket, and Price, who had not seen it before, got a copy from the driver during a recess.[200]

When he looked at the ticket, Price noticed that the entries were inconsistent with the driver's testimony. He altered a copy to conform it to the testimony and gave it to the defense attorney, telling him that it was a genuine copy. Unconvinced, the defense attorney requested the original ticket. Price then went to talk to the trial judge, *ex parte*, and told him of his alteration of the evidence. The trial judge took no action. Unable to obtain the original, Price got another

194. 83 A.D.2d 975, 442 N.Y.S.2d 818 (1981). The brief opinion does not discuss the facts underlying the conviction, but notes only that Brophy claimed his conviction resulted from an inadvertent *Brady* violation. The author attempted to obtain the briefs and other papers filed in Brophy's appeal of his suspension, but these were unavailable because of the confidentiality of attorney disciplinary proceedings. Letter from New York State Law Librarian (Sept. 29, 1986). The author was able to obtain a copy of the Indictment and Judgment in the criminal case from the office of the Clerk of the United States District Court for the Western District of New York. United States v. Brophy, No. CR-79-65 (W.D.N.Y. 1979).

195. Brophy was convicted of violating 18 U.S.C. § 242 (1982). *Brophy*, 83 A.D.2d at 975, 442 N.Y.S.2d at 819.

196. United States v. Brophy, No. CR-79-65, at 1 (W.D.N.Y. 1979). Brophy was charged in three counts of a five count indictment, but was acquitted of two of the charges.

197. *Id.* The automatic suspension and the provision for setting aside the suspension are contained in N.Y. JUD. LAW § 90 (McKinney 1983).

198. *See supra* note 194.

199. 30 Cal. 3d 537, 638 P.2d 1311, 179 Cal. Rptr. 914 (1982).

200. *Id.* at 543, 638 P.2d at 1314, 179 Cal. Rptr. at 917. The police had kept the original of the ticket for almost two years. *Id.*

copy and gave it, unchanged, to the defense attorney. Noticing the discrepancies, the defense attorney again asked for the original, and Price promised to supply it. Price finally gave the original to the defense attorney, but failed to reveal that he personally had altered the copy.[201]

After the defendant was convicted, Price, in order to conceal his misconduct by preventing appellate review,[202] went to see the defendant without the defense attorney's knowledge. Price offered to try to secure a lighter sentence if the defendant would drop his appeal. The defendant agreed.[203]

After his attempts to secure a lighter sentence were unsuccessful, Price asked a superior in the district attorney's office to help him fulfill his part of the agreement with the defendant. Instead of assisting Price, his superiors suspended him from his job and referred the matter to the Attorney General's office. Price was charged in State Bar proceedings with a number of violations of the California Rules of Professional Conduct and the California Business and Professions Code.[204] The State Bar recommended disbarment.

The California Supreme Court chose a more lenient penalty. The court found that Price violated the Business and Professions Code by entering into an agreement with the defendant,[205] by committing an act of moral turpitude,[206] by violating his attorney's oath and duties,[207] and by misleading the judge, jury,

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201. *Id.* at 544, 638 P.2d at 1314-15, 179 Cal. Rptr. at 917.

202. Price apparently assumed, correctly as it turned out, that neither the defense attorney nor the trial judge would report the matter to the State Bar. Price admitted that his purpose in seeking the agreement with the defendant was to hide his misconduct. *Id.*

203. Perhaps motivated by a reasonable distrust of Price, the defendant ignored the agreement and filed an appeal. *Id.*

204. The rules governing attorney conduct in California are divided between the Business and Professions Code statutes and the Code of Professional Responsibility. *See supra* note 119. Price was charged with and acquitted of a felony for preparing a false record for a deceitful purpose. *Price*, 30 Cal. 3d at 544-45, 638 P.2d at 1315, 179 Cal. Rptr. at 918. For some reason Price was never charged with a misdemeanor offese under applicable sections of the Business and Professions Code. *See infra* notes 205-07.

205. *See* CAL. BUS. & PROF. CODE § 6131(b) (West 1974). The statute provides, in pertinent part:

> Every attorney is guilty of a misdemeanor and, in addition to the punishment prescribed therefor, shall be disbarred . . . [w]ho, having himself prosecuted . . . any action or proceeding in any court as district attorney or other public prosecutor, afterwards, directly or indirectly, advises in relation to or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action upon any understanding or agreement whatever having relation to the defense thereof.

Id.

206. *See id.* § 6106. The statute provides:

> The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, whether the act is felony or misdemeanor or not, constitutes a cause for disbarment or suspension.
>
> If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

207. *Id.* § 6103. The statute provides:

> A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

and defense.[208] The court found also that Price violated the California Rules of Professional Conduct by suppressing evidence that an attorney has an obligation to produce,[209] and by misleading the judge, jury, and defense.[210] Even though the statute prohibiting an agreement between a prosecutor and a defendant seemingly required disbarment,[211] and even though the statute proscribing acts of moral turpitude specifically permitted disbarment,[212] the California Supreme Court ordered only that Price be suspended for five years, with just two years to be actively served.[213] Three justices dissented and called for disbarment, noting that Price's "conduct during [the] trial was calculated, deceitful, knowingly performed for his own advantage, and was followed by a prolonged and complicated attempt to cover his tracks. . . . [A] lawyer's presentations to the court and counsel of deliberately fabricated documentary evidence strikes directly at the very integrity of the judicial process."[214]

It strains the imagination to conceive of more egregious conduct than that in Price's case. Despite a finding that Price was guilty of lying, deceit, fabrication of evidence, collusion with the defendant, and an extended cover-up, Price received only a two-year suspension.

7. *Virginia State Bar v. Read*

In *Virginia State Bar v. Read*,[215] the court ordered Read, the prosecutor in an arson and murder case, to reveal all exculpatory evidence to the defense, including evidence of any witness who failed to identify the defendant as the culprit. The trial court's order also specified that the duty to disclose such evidence was to be a continuing duty.[216]

A key witness in the prosecution's case against defendant was Sils, who saw a man on a bicycle hovering near the fire. Sils picked the defendant's picture out of a photo array, and later identified him at a line-up as the man on the bicycle.

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208. *Id.* § 6128. The statute provides:

Every attorney is guilty of a misdemeanor who either:

(a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.

(b) Willfully delays his client's suit with a view to his own gain.

(c) Willfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for.

209. *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 7-107(A) (1981).

210. *See id.* Rule 7-105(1).

211. *See supra* note 205.

212. *See supra* note 206.

213. *Price*, 30 Cal. 3d at 550, 638 P.2d at 1318, 179 Cal. Rptr. at 921. The court noted that Price had no prior disciplinary record and had been suffering considerable work-related stress. He also had been unable to work as a lawyer during the pendency of the criminal charges and had been denied reinstatement to the district attorney's office. *Id.* at 549-50, 638 P.2d at 1318, 179 Cal. Rptr. at 921.

214. *Id.* at 551, 638 P.2d at 1318, 179 Cal. Rptr. at 921 (Richardson, J., dissenting).

215. For a synopsis of this case, see *Virginia State Bar v. Read*, [Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) Vol. 2, No. 20, at 400 (Oct. 29, 1986). The facts of the case are taken from the unpublished Order of the Virginia State Bar Disciplinary Board in Virginia District *ex rel.* Sixth Dist. Comm. v. Read, No. 86-17 (Sept. 11, 1986) [hereinafter Order].

216. Order, *supra* note 215, at 2.

The state had other evidence linking the man on the bicycle to the crime. After the line-up Sils began to have doubts about his identification of the defendant. He called the prosecutor's office about this and later related his doubts in person to an assistant prosecutor. When Sils saw the defendant at the trial he became convinced that he had identified the wrong man. After Sils told him this Read asked Sils if he could testify that the defendant "looked like" the man on the bicycle. Sils said that he could, but he would also have to say that he was certain the defendant was not the man.[217]

Read did not inform the defense about Sils' change of position. Instead, he had an employee tell Sils that he would not be called as a witness and his presence was no longer required. Sils went home, but later called defense counsel and related what had happened.[218]

The Virginia State Bar Disciplinary Board concluded that Read had intentionally decided not to reveal Sils' change of position, thus violating Virginia's Disciplinary Rule 8-102(A)(4), which requires a prosecutor to "disclose to a defendant all information required by law."[219] The Board ordered the revocation of Read's license to practice law. The final outcome is still in doubt, however, because the case currently is being appealed to the Virginia Supreme Court.[220]

8. Other Cases

Only two other published reports of prosecutors being subject to possible disciplinary actions for *Brady*-type misconduct could be found. In *Turner v. Ward*[221] the United States Court of Appeals for the Tenth Circuit reversed a rape conviction because the prosecutor had advised the victim's physician to conceal the fact the physician's physical examination of the victim did not reveal any evidence of sexual intercourse.[222] A subsequent law review comment indicated, without elaboration, that no disciplinary action was taken against the prosecutor.[223] Finally, a compilation of disciplinary rulings in South Carolina reveals one case in which a prosecutor was "cautioned" because he "lied in his argument to the jury in a murder case" and because his refusal to disclose excul-

217. Order, *supra* note 215, at 2-4.

218. Order, *supra* note 215, at 4-5. The criminal charges were dismissed the next day because of unrelated prosecutorial misconduct. *Id.* at 4 n.1.

219. Order, *supra* note 215, at 5; *see* VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102 (A)(4) (1950). The Board also found that he violated Disciplinary Rule 1-102(A)(3), which provides: "A lawyer shall not . . . [c]ommit a crime or other deliberately wrongful act that reflects adversely on a lawyer's fitness to practice law." *Id.* DR 1-102(A)(3).

220. Telephone interview with Virginia Bar Counsel (Nov. 13, 1986).

221. 321 F.2d 918 (10th Cir. 1963).

222. The doctor's examination revealed evidence only of rectal intercourse. Because the rape charge required proof of vaginal intercourse, the examination results were exculpatory. The doctor testified at the habeas corpus hearing that, minutes before trial, he was advised by the prosecutor to discuss his findings only in general terms of sexual assault and to say nothing about the sodomy unless specifically asked. The prosecutor denied these allegations, but the District Court credited the testimony of the doctor. *Id.* at 919-20.

223. *See* Comment, *supra* note 143, at 643.

patory evidence was "improper."[224]

That is all that could be found—nine cases.[225] Three of them resulted in no disciplinary action. Four prosecutors received relatively minor sanctions—one reprimand, one caution, and two censures. One case is currently on appeal. Only in *Price*, in which the prosecutor engaged in an extended course of unethical behavior, was a major sanction imposed, and that only a suspension.[226]

D. *Survey Results*

The results of the survey confirm the pattern revealed in the previous section concerning both the infrequency of disciplinary actions against prosecutors for *Brady*-type misconduct and the leniency of the sanctions actually imposed. Replies to the letter and survey form were received from forty-one states.[227]

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224. H. HAYNSWORTH, IV, *supra* note 145, at 4-27. No further details of this case are provided.

225. Several cases were also found in which prosecutors faced disciplinary sanctions for misconduct not falling precisely within the scope of *Brady*-type misconduct. *See In re* Friedman, 76 Ill. 2d 392, 392 N.E.2d 1333 (1979). In *Friedman* a prosecutor had instructed witnesses in several cases to testify falsely under oath in order to trap defense attorneys who were suspected of bribing witnesses. As part of this scheme the prosecutor had also secreted the complaining witnesses in one case to make it appear that the witnesses were unwilling to proceed with the prosecution. The Illinois Supreme Court found that the prosecutor had violated his ethical responsibilities by presenting perjured testimony and hiding witnesses, but discharged the prosecutor without imposing any discipline because of the lack of precedent and Friedman's belief in the propriety of his conduct. *Id.* at 398-99, 392 N.E.2d at 1336. The refusal to punish Friedman has been criticized. *See* Note, *Refusal to Discipline*, *supra* note 143, at 667-71; *see also In re* Brian F. Malone, 105 A.D.2d 455, 457-59, 480 N.Y.S.2d 603, 606 (1984) (Inspector General of Department of Corrections censured for ordering a guard to testify falsely in front of him in order to protect guard from retaliation by other guards), *aff'd*, 65 N.Y.2d 772, 482 N.E.2d 565, 492 N.Y.S.2d 947 (1985).

One Wisconsin prosecutor received a public reprimand for communicating directly with a defendant and for failing to disclose a defendant's non-exculpatory statement as required by the Wisconsin discovery statutes. *See In re* Robert D. Zapf, 126 Wis. 2d 123, 125-27, 375 N.W.2d 654, 655-56 (1985). A second Wisconsin prosecutor was publicly reprimanded for opposing a defendant's parole request in contravention of a specific provision of a plea agreement. *See* Steil, *Public Reprimand of Rodney A. Zemke*, 58 WIS. BAR BULL. 70, 70 (1985). In *In re* Burrows, 291 Or. 135, 144-46, 629 P.2d 820, 823-24 (1981), a prosecutor received a public reprimand for using a defendant as a witness before a grand jury without the defense attorney's knowledge.

The somewhat bizarre case of Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), *cert. denied*, 423 U.S. 876 (1975), involved a confrontation between a District Court Judge and the U.S. Attorney's office over the location of a key witness in a dispute between the IRS and the Governor of Oklahoma. The judge ordered the U.S. Attorney and several of his assistants disbarred and cited them for contempt for refusing to produce the governor's former secretary, who was being secreted by the IRS. The United States Court of Appeals for the Tenth Circuit reversed, finding that the U.S. Attorney had not directly disobeyed an order of the court; obviously, the court viewed the whole matter as a tempest in a teapot. *Burkett*, 505 F.2d at 224-25.

In all of these cases, as in the *Brady*-type cases, the individual most directly affected by the misconduct was the present or potential criminal defendant. In contrast to the uniformly lenient sanctions imposed in these situations, prosecutors who violate their ethical duties in order to help a criminal defendant often are severely disciplined. *See, e.g.*, Attorney Grievance Comm. v. Green, 278 Md. 412, 365 A.2d 39 (1976) (prosecutor disbarred after convictions of subornation of perjury and obstruction of justice arising out of scheme to illegally expunge a criminal record); Robinson v. Grievance Comm., 70 A.D.2d 209, 211-12, 420 N.Y.S.2d 430, 432 (1979) (prosecutor disbarred for giving confidential information about pending cases to organized crime figures), *cert. denied*, 449 U.S. 830 (1980). *But see* Alschuler, *supra* note 56, at 673 (even in these situations "courts have sometimes exhibited a strange hesitancy to subject prosecutors to the rules that are applicable to other lawyers").

226. Although this cannot be proven definitively the leniency of the sanctions in this area probably reflects special treatment for prosecutors. *See infra* note 239 and accompanying text.

227. Most respondents returned the survey form, although several answered in a letter. Because

Thirty-five states reported that no formal complaints had been filed for *Brady*-type misconduct. The response from one state indicated that three formal complaints had been filed and dismissed after a hearing. Of the five other responses reflecting the issuance of a formal complaint, two involved cases already discussed in this Article,[228] and three referred to the imposition of sanctions for non-*Brady*-type misconduct.[229]

Only two states reported the imposition of informal sanctions in cases in which no formal complaints were filed. One reported the issuance of a letter of caution,[230] and another indicated one minor disciplinary action that could not be specified for reasons of confidentiality.[231]

Taken together, the survey results and the reported cases demonstrate that, at least up to the present, the United States Supreme Court's reliance on the Disciplinary Rules as a deterrent for *Brady*-type misconduct is misplaced. In light of the numerous reported cases that contain evidence of intentional *Brady*-type misconduct, the instances of discipline are too rare, and the sanctions most often imposed too lenient, to support a reliance on the disciplinary codes, as they have up until now been enforced, to deter *Brady*-type misconduct.

VI. THE NEED FOR DETERRENCE

Our system of justice generally assumes that sanctions deter future misconduct, and the need to find an effective deterrent for *Brady*-type prosecutorial misconduct is especially important. Prosecutorial suppression and falsification of evidence strikes at the very heart of our criminal justice system. By definition, *Brady*-type misconduct keeps relevant evidence away from the judge or jury. Thus, not only is it misconduct by the representative of the state, but it also calls into question the accuracy of the mechanism by which our society deprives individuals of their freedom and their lives.

Effectively insulated from disciplinary punishment and immune from civil

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several states still have disciplinary systems that are divided geographically, some multiple responses were received. Responses were received from Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida (four responses), Hawaii, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York (three responses), North Carolina, North Dakota, Ohio (four responses), Oklahoma, Oregon, Pennsylvania (four responses), Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont (two responses), Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Most of the respondents supplied information for the time period requested on the survey form—beginning January 1, 1980. Four responses did not indicate the relevant time period. Two provided information for a shorter period—one beginning with March 1983 and the other August 1, 1983. Five respondents provided information covering a longer period than that requested. One provided information for 14 years, another for 10 years, and 2 for 11 years. One respondent replied that his jurisdiction had never had a case meeting the criteria requested.

228. *See supra* notes 164-68 and accompanying text (discussing *Stender*); *supra* notes 215-20 (discussing *Read*).

229. *See In re* Brian F. Malone, 65 N.Y.2d 772, 482 N.E.2d 565, 492 N.Y.S.2d 947 (1985); *In re* Robert D. Zapf, 126 Wis. 2d 123, 375 N.W.2d 654 (1985).

230. From the description provided in the survey form, it appears that this is the South Carolina case discussed *supra* note 224 and accompanying text.

231. The records concerning informal sanctions were not available in one jurisdiction, and a second did not respond because the information was considered confidential.

suit, a prosecutor contemplating *Brady*-type misconduct knows that the only possible legal consequence of presenting false evidence or suppressing exculpatory evidence is that the defendant may be fortunate enough to discover the evidence and file for post-conviction relief. Even if this does occur, the defendant's only hope, as this prosecutor knows, is for a court retrospectively to decide that the evidence is material enough to warrant a new trial. The prosecutor can take added comfort in the development of strict materiality standards and from the general trend towards restricting post-conviction relief in criminal cases.[232]

Weighed against all of this is the instant, concrete advantage of gaining a conviction. This conviction undoubtedly is important to the prosecutor. A prosecutor, like any other lawyer, wants to win.[233] Prosecutors do not gain renown or reelection for losing cases. It is also likely that in most cases the prosecutor believes the defendant is guilty, and therefore might be motivated by the concern that, in one sense, justice will not be served by revealing evidence which will increase the probability that the defendant will go free. For any of these reasons, the advantage to be gained at times apparently is too much for prosecutors to resist.[234]

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232. *See, e.g.*, Murray v. Carrier, 106 S. Ct. 2639 (1986) (counsel's failure to preserve issue in state court bars habeas corpus relief unless petitioner proves ineffective assistance of counsel); Smith v. Murray, 106 S. Ct. 2661 (1986) (failure to raise issue on direct appeal bars habeas corpus relief even in a capital case); Hill v. Lockhart, 106 S. Ct. 366 (1985) (failure to specifically plead prejudice in habeas corpus petition bars appellate review). For articles discussing this trend, see Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM L. REV. 1050 (1978); Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597 (1986); Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 HOFSTRA L. REV. 297 (1978); Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1 (1978); Note, *Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review*, 38 STAN. L. REV. 463 (1986).

233. As one former prosecutor has candidly admitted, an individual prosecutor's win-loss record affects his or her status within the office and, for an assistant prosecutor, also affects his or her ability to stay in the good graces of the head prosecutor. Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174, 180-181 (1965).

234. The reluctance of prosecutors to follow the *Brady* rules is illustrated by an anecdote related to the Second Circuit Judicial Conference by Jon O. Newman, then United States Attorney for Connecticut:

> I recently had occasion to discuss this problem at a PLI Conference in New York City before a large group of State prosecutors—some of them were very inexperienced—but some of them had considerable experience. I put to them this case: You are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a line-up, and they have said, "This is the man." In the course of your investigation you also have found another customer who was in the back and said, "This is *not* the man."
>
> The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said "that is not the man"? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case—the clearest case for disclosure of exculpatory information!

Discovery in Criminal Cases, 44 F.R.D. 481, 500 (1967). Professor Singer cites a number of reasons for the frequency of forensic misconduct by prosecutors: the political nature of the office, external pressures to win "hot" cases, community pressure, inexperience and lack of training, the adversarial nature of the legal system, and the belief that anyone charged is guilty. Singer, *supra* note 143, at 228-29. Professor Gershman says that prosecutorial forensic misconduct occurs simply "because it works." Gershman, *Why Prosecutors Misbehave*, *supra* note 143, at 133; *see also* Caldwell, *Name*

Obviously a need exists to find effective ways to counteract these pressures and to deter more effectively prosecutors from committing *Brady*-type misconduct. Possible solutions include making changes in both our ethical and legal procedures.

A. *Changes in Disciplinary Proceedings*

As section V of this Article demonstrates,[235] two separate problems arise in the disciplining of prosecutors for suppression or falsification of evidence. The first involves actually getting the prosecutor before the disciplinary body for a review of his or her actions. The second is the reluctance of disciplinary bodies and courts to impose strong sanctions on prosecutors when a case is brought.

To some degree the inadequate reporting and weak discipline in this area reflect wider problems within our system of lawyer discipline. Both of these areas were considered significant problems in the 1970 *Clark* report,[236] which strongly criticized the legal profession's system of disciplinary enforcement.[237] As indicated in the preface to the recently adopted ABA Standards For Imposing Lawyer Sanctions, both problems still persist today.[238] These problems, however, are most likely aggravated when it comes to disciplining prosecutors for *Brady*-type misconduct. First, although it is difficult to make definitive comparisons, it does seem that prosecutors have been treated more leniently than other lawyers facing discipline for similar misconduct. Leaving aside *Read*, in which no final punishment has yet been imposed, the other cases demonstrate a consistent pattern of leniency. The censure in *Brophy*, in which the criminal conviction was treated as a mitigating rather than an aggravating factor, the reprimands in *Steele* and *Stender*, and even the suspension in *Price* stand in marked contrast to cases in which other attorneys have been subjected to suspension or disbarment for presenting false evidence or concealing evidence.[239]

Similarly, there are unique problems in bringing *Brady*-type misconduct to the attention of the disciplinary bodies. As indicated earlier, most disciplinary investigations are triggered by complaints from individuals, and most complaints come from aggrieved clients.[240] Prosecutors do not have individual cli-

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Calling at Trial: Placing Parameters on the Prosecutor, 8 AM. J. TRIAL ADVOC. 397, 409-10 (1985) (noting the short job tenure, overwork, and lack of training for most prosecutors).

235. *See supra* notes 125-231 and accompanying text.

236. *See supra* note 148.

237. PROBLEMS AND RECOMMENDATIONS, *supra* note 148, at 1-2, 167-71.

238. *See* AMERICAN BAR ASS'N NAT'L CENTER FOR PROF'L RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS preface, at 1-2 (approved Feb. 1986 by the ABA House of Delegates).

239. *See, e.g.*, *In re* Ryder, 263 F. Supp. 360 (E.D. Va.) (attorney suspended for 18 months for concealing evidence), *aff'd*, 381 F.2d 713 (4th Cir. 1967); *In re* Murray, 226 Ind. 221, 362 N.E.2d 128 (1977) (attorney disbarred for advising client and other witnesses to testify falsely), *appeal dismissed*, 434 U.S. 1029 (1978); Office of Disciplinary Counsel v. Grigsby, 493 Pa. 194, 425 A.2d 730 (1981) (lawyer disbarred for filing a false sworn pleading in a garnishment action); Smith v. State, 523 S.W.2d 1 (Tex. Ct. App. 1975) (attorney suspended for two and one-half years for advising client to testify falsely during a deposition); *In re* Kerr, 86 Wash. 2d 655, 548 P.2d 297 (1976) (attorney disbarred for attempting to present sworn perjury); *see* Annotation, *Fabrication*, *supra* note 146.

240. *See supra* note 125.

ents. The most likely persons to file a complaint against a prosecutor for *Brady*-type misconduct would be the defendant or the defense attorney, but there are strong constraints which make it unlikely that a defense attorney or defendant will lodge a complaint against a prosecutor for *Brady*-type misconduct.

Paramount among these constraints is that, on uncovering *Brady* evidence, the defendant and the defense attorney are primarily interested in obtaining a new trial for the defendant. A complaint to the bar, however, can undermine the defendant's chances for a new trial. Consider, for instance, the result in *Smith v. Kemp*.[241]

In 1975 John Smith was convicted of murder and sentenced to death in a Georgia trial court. The only witness who placed him at the scene of the crime was an alleged accomplice, John Maree. Maree testified both at Smith's trial and at the separate trial of a codefendant that no promises had been made to him in return for his testimony. The prosecutor argued this fact to the jury in Smith's trial as a reason to believe Maree.[242]

In 1978 the prosecutor testified in a deposition that he had, in fact, promised Maree a recommendation for a life sentence in return for his testimony. In 1983 the prosecutor signed a sworn affidavit to the same effect.[243]

Smith filed a post-conviction motion asking for a new trial based on the prosecutor's use of perjured testimony. A complaint against the prosecutor was also lodged with the Georgia State Bar, which started an investigation into the matter.[244] The State Bar sent the prosecutor a notice of probable cause for disciplinary action, which included a warning that his license to practice law could

241. 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983).

242. *Id.* at 1472-73 (Hatchett, J., concurring in part and dissenting in part). The facts surrounding Maree's testimony and the use made of it are discussed most extensively in Judge Hatchett's dissenting opinion. *See id.* at 1472-76 (Hatchett, J., concurring in part and dissenting in part).

243. In the deposition, which was given in connection with codefendant Machetti's case, the prosecutor stated:

> A. Well, I talked to Mr. Morae [sic] of course, prior to [petitioner Smith's] trial, and he testified in that case and then he testified in Rebecca Machetti's trial . . . .
>
> Q. Did he believe that he was going to get off free or get out with a light sentence by testifying?
>
> A. We had a discussion about this, and I had agreed that if he did testify that I, I would not insist on a trial and would allow him to enter a plea of guilty and receive life sentences.

Id. at 1474 (Hatchett, J., concurring in part and dissenting in part). The pertinent portion of the affidavit reads:

> "Prior to the trial of John Smith, *I offered John Maree*, the only known eyewitness to the crime, sentences [sic] of life imprisonment in exchange for testimony against John Smith and Rebecca Smith/Machetti. *Mr. Maree agreed* to testify against both John Smith and Rebecca Machetti in exchange for sentences [sic] of life imprisonment. I further told John Maree that I would seek the death penalty against him if he did not testify in the trials of John Smith and Rebecca Smith/Machetti. After the trials, John Maree was in fact permitted to plead guilty and did receive sentences of life imprisonment for his role in the Arkins murders."

Id. at 1473-74 (quoting the affidavit) (Hatchett, J., concurring in part and dissenting in part).

244. *Id.* The records relating to the investigation were entered into evidence during Smith's state habeas corpus hearing. *See* Smith v. Warden, Butts Sup. Ct., No. 5588 (Ga. Mar. 24, 1983). A copy of the transcript and exhibits was obtained from Smith's attorney at that proceeding.

be lost as a result of the disciplinary proceedings.[245] At the request of the prosecutor's attorney, the presentation of a formal complaint was postponed until after the prosecutor's testimony at Smith's post-conviction hearing.[246]

At this hearing, with representatives of the State Bar present, the prosecutor repudiated his two prior sworn statements. He testified that he had made no deal with Maree, and that his prior sworn statements were made because "his 'mind had become somewhat confused about what had actually happened.' "[247] The judge conducting the post-conviction hearing found that no deal was made and denied relief. The United States Court of Appeals for the Eleventh Circuit affirmed this finding.[248] No formal complaint was ever filed against the prosecutor[249] and Smith was subsequently executed.

In addition to the possible harmful consequences to the defendant, a defense attorney is also constrained by the potential effect that a complaint to the bar will have on his or her practice. The relationship between a defense attorney and a prosecutor usually is a continuing one, and prosecutors wield tremendous power in this relationship. Prosecutors, by their willingness to allow discovery, by their power in the plea bargaining process, and in innumerable other ways, can seriously affect the life of a defense attorney. Sensible defense attorneys will thus understandably hesitate to jeopardize a practice by filing complaints that will have little chance of resulting in the meaningful discipline, might harm their clients, and might well adversely affect their practices.

There is, of course, another person who could refer the matter to the disciplinary body—the judge. However, judges already have an ethical duty to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware,"[250] yet judges rarely make such referrals.[251]

The most promising solution to this dilemma is to bypass the practice of initiating disciplinary proceedings via complaints from individuals. Instead, the bar counsel's offices should review the reported decisions and institute discipli-

245. "Notice of Finding of Probable Cause," introduced into evidence in Smith v. Warden, Butts Super. Ct., No. 5588 (Ga. Mar. 24, 1983).

246. Letter from Bridget B. Bagley, Assistant Gen. Counsel, Ga. State Bar, to Clayton Sinclair, Jr., State Disciplinary Bd. (Ga. Mar. 31, 1983), introduced into evidence in Smith v. Warden, Butts Super. Ct., No. 5588 (Ga. Mar. 31, 1983).

247. *Smith*, 715 F.2d at 1475 (Hatchett, J., concurring in part and dissenting in part) (quoting trial court testimony).

248. The majority of the Eleventh Circuit panel held that the state court's findings were entitled to a presumption of correctness under Sumner v. Mata, 449 U.S. 539 (1981). *Smith*, 715 F.2d at 1465. Responding to Smith's complaint that he did not get a full and fair hearing in state court because of the presence of the State Bar representatives at the State hearing, the majority found that their presence actually helped Smith because he could have used it to impeach the prosecutor's credibility. *Id.*

249. Telephone conversation with the Office of the Clerk of the Supreme Court of Georgia (Oct. 24, 1986) (confirming that no formal complaint was filed against prosecutor).

250. CODE OF JUDICIAL CONDUCT Canon 3, § B(3) (1972).

251. *See generally* ABA STANDING COMM. ON PROF'L DISCIPLINE; ABA CENTER FOR PROF'L RESPONSIBILITY, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT I.3 (1984) (deploring inaction by trial judges in referring cases of prosecutorial misconduct to the disciplinary bodies). This chapter concludes with a suggestion that, as a matter of policy, the prosecutor should be referred to the bar whenever a conviction is reversed because of prosecutorial misconduct. *Id.* at I.14.

nary proceedings whenever an opinion indicates possible prosecutorial suppression or falsification of evidence, irrespective of due process violations. Without this type of change it is doubtful that disciplinary committees will ever get to review most instances of *Brady*-type misconduct.[252]

The second disciplinary solution is obvious. Both the courts and the bar disciplinary bodies must start punishing *Brady*-type misconduct more harshly. Reviewing more cases will be an empty gesture unless and until prosecutors face serious discipline for suppressing or falsifying evidence.

Brady-type misconduct *is* serious misconduct. The ABA Standards For Imposing Lawyer Sanctions suggest that:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.[253]

This describes many instances of intentional *Brady*-type misconduct. Of course, not every prosecutor who intentionally presents false testimony or withholds exculpatory evidence deserves to be disbarred or even suspended. Each case has its own aggravating and mitigating circumstances. The decisions by the disciplinary boards in *Price* and *Read* to recommend disbarment for intentional *Brady*-type misconduct are a positive sign that the bar disciplinary bodies, if not the courts, are beginning to recognize the need to impose severe sanctions for this type of misconduct. Only time will tell whether these cases represent the beginning of a trend or are just isolated aberrations. In any event, it is clear that reviewing more cases will be futile unless and until prosecutors are forced to face serious discipline for suppressing or falsifying evidence. Prosecutors, above all other lawyers, know the difference between a slap on the wrist and real punishment.

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252. In proposing this solution, the Author is not unmindful of the potential burden that will be added to the already overworked and understaffed bar counsel's office. A November 1983 Statistical Report published by the ABA Standing Committee on Professional Discipline and the ABA Center for Professional Responsibility is included in the ABA's DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM (1984), and reflects a general pattern of understaffing of bar counsel's office. According to this Report, in 1982 the Indiana State Bar employed 7 lawyers and 1 investigator to respond to the 1512 inquiries received. Georgia had 5 lawyers and 1 investigator to handle the 1246 inquiries received.

Obviously, these figures demonstrate that bar counsel do not have a lot of time to peruse appellate opinions. The initial screening of decisions, however, could easily be done by law students or paralegals, thus lessening the burden on counsel.

253. STANDARDS FOR LAWYER DISCIPLINE, *supra* note 124, Standard 6.11. The commentary to this Standard notes that "lawyers who engage in these practices violate the most fundamental duty of an officer of the court." *Id.* Standard 6.11 commentary. Standard 6.12 states:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Id. Standard 6.12.

B. *The Need for a Bad Faith Standard for Reversal*

Given the overall problems in enforcing lawyer discipline and the history of leniency afforded to prosecutors who commit *Brady*-type misconduct, it would be naive to believe that changes in disciplinary enforcement alone would be sufficient to deter *Brady*-type misconduct. The courts also have an obligation to ensure the integrity and accuracy of judicial proceedings, whether by the exercise of their supervisory power or as a matter of constitutional law. With regard to *Brady*-type misconduct, this can be achieved by adopting a standard that requires reversal of a conviction on a finding that a prosecutor intentionally suppressed exculpatory evidence or presented false evidence; that is, on a finding that the prosecutor acted in bad faith.[254]

To deter police misconduct, the United States Supreme Court has been willing to use the fourth amendment exclusionary rule to keep physical evidence from being admitted at trial, possibly letting a guilty defendant go free, solely because a police officer on the street used inappropriate techniques to obtain the evidence. Significantly, in *United States v. Leon*[255] the Court recently adopted an exception that allows the seized evidence to be admitted if the police officer acted in *good faith* reliance on a search warrant. Under this exception, the evidence would still be inadmissible if the police officer, even with a search warrant, acted without good faith.[256]

If the court can exclude evidence that is probative of guilt and jeopardize an entire criminal prosecution because a police officer acted in bad faith, then it would certainly be appropriate to order a new trial when a representative of the state and officer of the court in bad faith keeps evidence relevant to innocence or punishment from the jury or court. Furthermore, there is reason to believe that a bad faith standard applied in the *Brady* area would be an effective deterrent to intentional prosecutorial misconduct.

One can demonstrate this deterrent effect by viewing this proposed standard in light of the criteria for evaluating the effectiveness of a deterrent propounded by Professor Oaks.[257] Professor Oaks posits seven conditions that affect the efficacy of a rule of deterrence and then examines whether the fourth

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254. Although not couching his suggestion in bad-faith terminology, Justice Marshall recommended an equivalent approach in his dissent in *Bagley*:

> In a case of deliberate prosecutorial misconduct, automatic reversal might well be proper. Certain kinds of constitutional error so infect the system of justice as to require reversal in all cases, such as discrimination in jury selection. See, e.g., Peters v. Kiff, 407 U.S. 493, 92 S. Ct. 2163, 33 L.Ed.2d 83 (1972). A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses anathema to our most basic vision of the role of the State in the criminal process.

Bagley, 105 S. Ct. at 3395 n.6 (Marshall, J., dissenting).

255. 468 U.S. 897 (1984).

256. *See, e.g.*, United States v. Strand, 761 F.2d 449, 456 (8th Cir. 1985) (postal inspector lacked objectively reasonable basis for believing that a warrant authorizing seizure of stolen mail also authorized seizure of normal household goods so as to permit admission of terms under the "good faith" exception to the exclusionary rule); United States v. Nader, 621 F. Supp. 1076, 1084 (D.D.C. 1985) (warrant so general that the executing officers could not reasonably perceive it to be valid).

257. *See* Oaks, *Studying The Exclusionary Rule In Search and Seizure*, 37 U. CHI. L. REV. 665, 724-32 (1970).

amendment exclusionary rule meets each of these conditions.[258] The same methodology can be used to evaluate the proposed bad faith standard.

1. Risk of Detection, Conviction, and Punishment

As described by Professor Oaks, this criteria actually involves only two elements, the risk that the wrongdoing will be discovered and the risk that, once the misdeeds are uncovered, the wrongdoer will be punished. He finds little risk of either in the fourth amendment area.[259] Although there are certainly many cases in which *Brady*-type misconduct is not uncovered, the motivation for a criminal defendant to challenge a conviction on due process grounds and the large number of these cases actually litigated ensure that there is a significant possibility that the misconduct will be discovered. Concerning the risk of punishment, the adoption of a bad faith standard would ensure that, once uncovered, the lawyer's misconduct will be punished.

2. Severity of Penalty

Professor Oaks argues that the exclusionary rule is ineffective because it penalizes the prosecutor instead of the wrongdoing police officer. In his view, "the exclusionary rule is well tailored to deter the prosecutor from illegal conduct."[260] A bad faith standard would operate to punish the wrongdoer—the prosecutor who intentionally withheld the exculpatory evidence or presented the false evidence.

3. Competing Norms of Behavior

Professor Oaks finds that the exclusionary rule is ineffective because the peers and superiors of police officers sympathize with and condone behavior that violates the fourth amendment.[261] To the extent that other prosecutors sympathize with and condone *Brady*-type misconduct, this problem might also be present with regard to the proposed bad faith standard. It is ameliorated, however, by the strong condemnation of *Brady*-type misconduct expressed by both the organized bar and national prosecutors' organizations.[262]

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258. By using these criteria to evaluate the effectiveness of the proposed bad faith standards, this Article is not endorsing Professor Oaks' conclusion that the exclusionary rule has questionable deterrent value. Professor Oaks' conclusions have been sharply criticized. *See, e.g.*, Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398 (1979); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 394-399 (1981).

259. Oaks, *supra* note 257, at 725-26. Professor Oaks notes that a police officer who has something to hide and testifies falsely will most often be believed by the judge. In addition he observes that officers are rarely, if ever, disciplined for violating the fourth amendment. *Id.*

260. Oaks, *supra* note 257, at 726-27.

261. Oaks, *supra* note 257, at 727-29.

262. *See supra* notes 87-123 and accompanying text. NATIONAL PROSECUTION STANDARDS Standard 13.2 C (Nat'l Dist. Attorneys Ass'n 1977) requires disclosure of information that the prosecutor has personal knowledge of that tends to negate or reduce guilt. Standard 17.1 requires counsel for both sides to rectify any deception or misrepresentation. *Id.* Standard 17.1. The United States Department of Justice Manual for United States Attorneys states that the due process guarantee and fair trial right of a defendant are "destroyed" when a prosecutor knowingly uses false testi-

4. Reinforcement by a Sense of Moral Obligation

Professor Oaks finds any sense of moral obligation to comply with the law undermined in the fourth amendment area by the general attitudes of condonation described above.[263] Similarly, condonation by other prosecutors would weaken a prosecutor's sense of moral obligation to avoid *Brady*-type misconduct. Again, however, strong condemnation of *Brady*-type misconduct by the organized bar and prosecutors' organizations should reinforce a prosecutor's sense of moral obligation to avoid this misconduct.

5. Motivation for a Prohibited Act

Professor Oaks notes that in many cases police officers, acting in what they perceive to be an emergency situation, believe they have no choice but to violate the fourth amendment and risk the future consequences.[264] A prosecutor contemplating suppressing or falsifying evidence faces no emergency situation. In addition, although belief in the defendant's guilt does provide some motivation for a prosecutor to obtain a conviction even by using questionable means, this incentive for a prosecutor to suppress or falsify evidence would be negated by the knowledge of a certain reversal if the misconduct is discovered.

6. Effective Communication

In Professor Oaks' view, the deterrent effect of the exclusionary rule is weakened because "channels of communication between police and courts and prosecutors are such as to minimize the deterrent effect of the rule."[265] He notes that police officers often do not understand why courts suppress evidence, and blame the suppression on judges or prosecutors.[266] There is no such problem of communication with prosecutors. They are lawyers and are capable of reading and understanding appellate decisions, especially when the effect of such a decision requires the prosecutor to retry the case.

7. Clarity of Rule

The fourth amendment rules are confusing and complex. A simple rule requiring reversal on a finding of bad faith *Brady*-type misconduct suffers no such defect.

Under this analysis it appears that a standard requiring reversal for bad faith *Brady*-type misconduct would be an effective deterrent. There is, however, a potential roadblock to the adoption of such a rule—the Supreme Court's pronouncement that the decision in a *Brady* case should be made "irrespective of

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mony to obtain a conviction or supresses evidence favorable to a defendant. UNITED STATES DEP'T OF JUSTICE, PROVING FEDERAL CRIMES 8-3 to 8-4 (J. Cissel ed. 1980).

263. Oaks, *supra* note 257, at 729. Professor Oaks does recognize that, over the long term, the sense of moral obligation imposed by the exclusionary rule may grow. *Id.*

264. Oaks, *supra* note 257, at 729-30.

265. Oaks, *supra* note 257, at 730.

266. Oaks, *supra* note 257, at 731 n.193.

the good faith or bad faith of the prosecution."[267]

This roadblock is not necessarily fatal to a bad faith standard. First, state courts are free to adopt this standard either under their state constitutions[268] or, as the Connecticut Supreme Court has already done, by exercising their supervisory power.[269] Second, it is not altogether clear that such a rule is precluded even under existing *Brady* law.

The materiality standards propounded in *United States v. Agurs*[270] and *United States v. Bagley*[271] leave some room for the proposition that the egregiousness of prosecutorial misconduct is a relevant factor in the due process analysis, although the Court's signals in this respect are certainly mixed. The Court in *Agurs* stated that the constitutional obligation to disclose exculpatory evidence is not measured by "the moral culpability or the willfulness, of the prosecutor."[272] Yet, the *Agurs* court also approved a strict standard of materiality for perjured or false testimony not only because it corrupts the truth-seeking function of the trial process, but also because it involves prosecutorial misconduct.[273] The *Agurs* statement that failure to reveal specifically requested evidence is "seldom, if ever, excusable"[274] also demonstrates a concern for

267. *Brady*, 373 U.S. at 87.

268. For a description of the burgeoning development of state constitutional law, see Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371 (1984); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

269. In State v. Cohane, 193 Conn. 474, 479 A.2d 763 (1984), the Connecticut Supreme Court, after finding that the prosecutor's intentional suppression of a witness' prior inconsistent statement violated the materiality standards of *Brady*, expressly invoked its "inherent supervisory authority" to hold that this misconduct also warranted reversal as a matter of state law. *Id.* at 499, 479 A.2d at 778. One commentator has argued that the Connecticut Supreme Court had also implicitly adopted the same rule in cases involving other types of prosecutorial misconduct. *See* Note, *Sticks and Stones*, *supra* note 143. *But see* DeFoor & Kalbac, *Prosecutorial Misconduct In Closing Argument: Remedial Measures*, 8 AM. J. TRIAL AD. 397, 399-403 (1985) (noting reluctance of Florida Supreme Court to reverse a conviction absent evidence of prejudice). It would seem that the supervisory power of the federal courts also could be appropriately used to deter prosecutorial misconduct. *See* United States v. Payner, 447 U.S. 727, 735-736 n.8 (1980) (supervisory power can be used to deter illegal conduct); Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984); Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427 (1982). The Supreme Court's decision in United States v. Hasting, 461 U.S. 499 (1983), however, presents a formidable obstacle. In *Hasting* the United States Court of Appeals for the Seventh Circuit reversed defendant's conviction because of the prosecutor's comment on the failure of defendant to testify. United States v. Hasting, 660 F.2d 301 (7th Cir. 1981), *rev'd*, 461 U.S. 499 (1983). Although not expressly relying on the supervisory power, the court reversed because of the failure of prosecutors to heed its admonitions and conducted only a cursory harmless error review. *See Hasting*, 461 U.S. at 504-05. The Supreme Court interpreted this to mean that the court of appeals was relying on its supervisory power, *id.* at 505, and held that the supervisory power could not be used to reverse a conviction without applying a harmless error analysis, *id.* at 507-09. Because a reviewing court in a *Brady* case already uses the equivalent to a harmless error analysis in applying the materiality standards, the supervisory power as limited by *Hasting* is probably useless as a means to deter a *Brady*-type misconduct.

270. 427 U.S. 97 (1976).

271. 105 S. Ct. 3375 (1985).

272. *Agurs*, 427 U.S. at 110. The Court also stated: "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.*

273. *Id.* at 104.

274. *Id.* at 106.

punishing prosecutorial misconduct.

Both the strict materiality standard for false or perjured evidence and the reasons stated in *Agurs* for the adoption of this standard were left untouched by the *Bagley* decision. The *Bagley* opinion did vitiate the *Agurs* "seldom, if ever, excusable" language by eliminating a separate standard of materiality for specific-request cases,[275] but the issue of prosecutorial misconduct was irrelevant in *Bagley* because the prosecutor did not know that the exculpatory evidence existed.[276]

In *Bagley*, therefore, the Court's pronouncements on the relevance of bad faith clearly are dicta, as they also were in *Brady* and *Agurs*. In each of these cases the prosecutor had, at least in the eyes of the Court, acted in good faith.[277] The Court, in contrast, has always reversed the conviction or sentence when it believed the prosecutor had obviously acted in bad faith.[278] A more precise formulation of the present rule could, therefore, be that the good faith of the prosecutor is irrelevant in determining whether the evidence suppressed was sufficiently material to require a new trial.

The proposed bad faith rule would serve both to protect the integrity of the criminal justice system and to deter future misconduct by removing any incentive for a prosecutor to gamble that a decision to suppress or falsify evidence will be given retrospective approval because of the strength of the other evidence in the case. It need be applied only when the reviewing court is convinced that the prosecutor's actions were knowingly and intentionally done to keep relevant evidence from the judge or jury. It could be applied in cases when there is the intentional use of false or perjured testimony, when there is a deliberate refusal to respond to a specific request for exculpatory material, or when there is a failure to disclose evidence so exculpatory that the prosecutor clearly should have known that disclosure was required.

The proposal to add a bad faith standard to the current *Brady* doctrine is not an attempt to make the due process clause a code of ethics for prosecutors. The purpose is not to punish individual prosecutors, but to deter prosecutors in the future from committing similar misconduct. As with any rule of deterrence,

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275. *See supra* note 85 and accompanying text.

276. The exculpatory evidence consisted of contracts between two witnesses and Alcohol, Tobacco and Firearms Agents calling for payments to the witnesses in return for their testimony. *Bagley*, 105 S. Ct. at 3378. The trial prosecutor stated, in stipulated testimony, that he did not know of the contracts. *Id.* at 3378 n.4.

277. *Agurs*, 427 U.S. 97. As noted *supra* note 32, the Supreme Court's finding in *Brady* that the prosecutor acted "without guile" is open to question. *See also* Babcock, *supra* note 74, at 1143 n.34 (noting "strong argument" that prosecutor in *Brady* acted in bad faith).

278. *See, e.g.*, *supra* notes 150-63 and accompanying text (discussing Miller v. Pate, 386 U.S. 1 (1967)); *supra* notes 33-36 and accompanying text (discussing Napue v. Illinois, 360 U.S. 264 (1959)); *supra* notes 28-30 and accompanying text (discussing Alcorta v. Texas, 355 U.S. 28 (1957)). For the view that these earlier Supreme Court perjury cases were more concerned with punishing deliberate prosecutorial misconduct than with the prejudice to the defendant, see Comment, *The Duty of the Prosecutor*, *supra* note 144, at 864; Comment, *The Prosecutor's Duty*, *supra* note 2, at 138. Professor Babcock notes that, even after *Agurs*, some lower federal courts still took note of the good or bad faith of the prosecutor in deciding whether to grant a new trial. Babcock, *supra* note 74, at 1152 n.71.

the frequency of its application would be in inverse proportion to its effectiveness. If effective, it need be used only sparingly.

V. CONCLUSION

Prosecutors often argue that to be effective punishment must be swift and severe. When it comes to disciplining a prosecutor who commits *Brady*-type misconduct, however, punishment is virtually nonexistent. A prosecutor who suppresses evidence, falsifies evidence, or permits a witness to commit perjury too often remains unpunished. The remedial measures outlined in this Article can be implemented with little difficulty or cost. They are the least the bar and judiciary can do to ensure that future defendants will not be unjustly convicted and punished because of *Brady*-type misconduct.

APPENDIX

To supplement the research done for this Article, the following letter and Survey form were sent to the State Bar disciplinary bodies in each of the 50 states and the District of Columbia.

Dear Bar Counsel:

I am a law professor at the University of North Carolina engaged in a study of bar disciplinary proceedings brought against prosecutors for suppression of exculpatory evidence favorable to the accused or the presentation of false testimony. I plan to include the results of this research in a law review article.

As you perhaps are aware, there are few reported cases in which prosecutors have been the subjects of disciplinary actions. After discussions with several bar counsel, I have concluded that the only way to gather information in this area is through direct contact with Bar Counsels' offices throughout the country.

I know that you are continually besieged with lengthy questionnaires requiring an inordinate amount of your time, so I am only asking for very selective information. What I am interested in are cases since January 1, 1980 in which prosecutors are accused of violating their duty, embodied in Disciplinary Rule 7-103(B) and Model Rule 3.8, to turn over to the defense evidence which is favorable to the accused, or their duty not to present false or perjured evidence as embodied in DR 7-102(A)(4) and Model Rule 3.3(4). Even if a charge is brought under a more general provision of your Code, for example, DR 1-102(A)(4), it should be included if the gist of the complaint is that the prosecutor failed to disclose evidence favorable to the accused or presented false evidence. I should also add that I am interested in cases involving *all* public prosecutors, state and federal.

I would very much appreciate it if you could, within the strictures of confidentiality, provide the details of any cases which fit in the above category. If the cases are reported, of course, a citation would be sufficient.

For your convenience, I have enclosed a brief survey form to be used for your response. I do hope that you will take the time necessary to respond to this letter by June 30, 1986 in the enclosed self-addressed and stamped envelope. If you are uncertain about any aspect of this request, please do not hesitate to call me collect.

Your cooperation in responding to this query is greatly appreciated.

Sincerely,
Richard Rosen
Associate Professor
School of Law
University of North Carolina

Survey of State Bar Disciplinary Actions Against Prosecutors

Explanatory Note

This survey is designed to cover the time period beginning with January 1, 1980 up to May 15, 1986. If figures for a longer period of time are readily available, please indicate and include.

1. Jurisdiction _____
2. Time Period
   Beginning January 1, 1980 Yes ( ) No ( )
   If "No" Please Specify Other Beginning Date _____

3. Number of Disciplinary Proceedings Brought Against Prosecutors For Suppression Of Evidence Favorable To The Accused Or Presentation Of False Evidence:
   a. Resulting In A Formal Complaint. _____
   b. Not Resulting In A Formal Complaint But Involving Some Sanction (e.g., Informal Admonition, Reprimand, Censure). _____

4. Details Of Or Citations To Proceedings Included in #3 (if not confidential). (Use the back of this form or additional pages if necessary)

Date_____

Person Responding

Return to:
Richard A. Rosen
University of North Carolina
School of Law

Title

Address

* Please Complete And Return Even If The Answers To Number 3 Are "0".