

PROSECUTORIAL ETHICS AS USUAL

Bruce A. Green*

Prosecutors have different responsibilities and serve different roles than other attorneys. Professor Green argues that the prosecutor's duty to "seek justice" should give rise to a host of particular professional responsibilities that are different from those of other lawyers. However, the Ethics 2000 Commission declined to augment prosecutors' special responsibilities and did not expand any of the existing provisions of Model Rule 3.8. Professor Green explores the rationale for the Commission's inaction, and concludes that the inaction cannot be explained on substantive grounds but rather was motivated by political and procedural considerations. He believes that new rules governing prosecutorial ethics should be drafted, with substantial input from the judiciary, because Rule 3.8 is not the best of all possible rules of prosecutorial ethics.

Prosecutors' work is different from that of other lawyers. The differences can have significance for the Model Rules of Professional Conduct (Model Rules or Rules) in either of two ways.¹ First, prosecutors might be exempted from disciplinary restrictions that apply to lawyers generally,² such as those regulating fact gathering,³ trial conduct,⁴ or con-

* Louis Stein Professor of Law, Fordham University School of Law; Director, Louis Stein Center for Law and Ethics.

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1. See generally MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 213 (1990) (observing that "[s]pecial ethical rules are appropriate for prosecutors because the role of the prosecutor is significantly different from that of other lawyers"); Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1472 (2000) (concluding that "in certain areas prosecutors are held to different or special standards," that "the prosecutor's dual role [as advocate and minister of justice] sometimes strikes a different balance between cooperative and adversarial stances," and that the difference is "only in degree"); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).

2. See generally Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 472-73 (1996) (discussing liberal interpretation of the no-contact rule as applied to criminal investigations); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 398, 399 & n.62 (2002) (noting that "courts often take a liberal approach to interpreting professional rules with regard to prosecutors," and providing example of liberal application of rule regulating witness compensation).

3. See Zacharias & Green, *supra* note 1, at 229-32.

flicts of interest.⁵ Second, prosecutors might be subjected to additional restrictions, such as those included in Model Rule 3.8, titled “Special Responsibilities of a Prosecutor.”⁶ Commentary on prosecutorial ethics has suggested the need to revise the Model Rules in both directions.⁷

The Ethics 2000 Commission⁸ (the Commission) ultimately recommended two minor changes to lighten the disciplinary obligations of prosecutors under the generally applicable provisions of the Model

4. For example, with regard to offering inducements to trial witnesses, see George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000); David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509 (1999); Zacharias & Green, *supra* note 1, at 232.

5. See Zacharias & Green, *supra* note 1, at 233.

6. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2000). For a discussion of the relatively sparse case law applying Rule 3.8, see Casey P. McFaden, *Prosecutorial Misconduct*, 14 GEO. J. LEGAL ETHICS 1211 (2001).

7. Regarding the need to exempt prosecutors from restrictions that apply across-the-board to lawyers, much of the focus has been on Model Rule 4.2, which restricts communications with represented persons. See, e.g., Communications with Represented Persons, 59 Fed. Reg. 39,910 (Aug. 4, 1994) (to be codified at 28 C.F.R. § 77); Jamie S. Gorelick & Geoffrey M. Klineberg, *Justice Department Contacts with Represented Persons: A Sensible Solution*, 78 JUDICATURE 136 (1994); F. Dennis Saylor & J. Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459 (1992); see also Jocelyn Lupert, Note, *The Department of Justice Rule Governing Communications with Represented Persons: Has the Department Defied Ethics?*, 46 SYRACUSE L. REV. 1119 (1996); Todd S. Shulman, Note, *Wisdom Without Power: The Department of Justice's Attempt to Exempt Federal Prosecutors from State No-Contact Rules*, 71 N.Y.U. L. REV. 1067 (1996). Attention has also been paid to the application of the rule restricting deceitful conduct, see Green & Zacharias, *supra* note 2, at 385 n.5, and the rule requiring candor in *ex parte* proceedings, see *infra* notes 37–42 and accompanying text.

Regarding the need for additional restrictions, see, e.g., FREEDMAN, *supra* note 1, at 216–34; Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1422–24 (2000) (proposing that the ABA amend Model Rule 3.8 “to specify the prosecutor's ethical obligation to learn of exculpatory evidence known to law enforcement investigators”); Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923 (1996); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005 (1999); Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525 (1999); Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Rule of Confidentiality?*, 63 FORDHAM L. REV. 1809 (1995); Ryan E. Mick, Note, *The Federal Prosecutors Ethics Act: Solution or Resolution?*, 86 IOWA L. REV. 1251, 1284–86 (2001); Lynn R. Singband, Note, *The Hyde Amendment and Prosecutorial Investigation: The Promise of Protection for Criminal Defendants*, 28 FORDHAM URB. L.J. 1967 (2001); Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3458–63 (1999). *But see* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 566–67 (1999) (“Although efforts are continuously made, it is likely futile, and most likely foolish, to try to fill the gaps with hard and fast rules.”); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1710–12 (2000) (identifying reasons why prosecutor's obligation to present exculpatory evidence to the grand jury should not be moved “from policy to law”).

8. “Ethics 2000 Commission” is the popular name of the American Bar Association Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), chaired by Chief Justice E. Norman Veasey of the Delaware Supreme Court. The Commission was appointed in 1997 and submitted its Report of the Commission on Evaluation of the Rules of Professional Conduct [hereinafter Ethics 2000 Report] in November 2000. The Commission's recommendations were adopted almost in their entirety by the American Bar Association House of Delegates in February 2002.

Rules, and the American Bar Association (ABA) House of Delegates adopted both proposals.⁹ The Commission was less inclined to augment prosecutors' special responsibilities, however. It did not recommend expanding any of the existing provisions of Rule 3.8 or adding responsibilities to those already included in this rule. Nor did the House of Delegates originate any proposals to expand or increase prosecutors' obligations. So from the perspective of the ABA's model disciplinary rules, prosecutorial ethics remains essentially as it was.

What can be made of the ABA's disinclination to adopt meaningful new restraints on prosecutors' conduct? As this article describes, the existing provisions of Rule 3.8 do not adequately cover the full range of troubling prosecutorial conduct. But the Commission had good reason to conclude that strengthening the rule would be an unprofitable expenditure of time, energy, and good will because the Commission's personnel and process made it unlikely that prosecutors and defense lawyers would accept its proposed additions, and because the inevitable firestorm would potentially eclipse its other work. The Commission could only have been motivated by political and procedural considerations such as these, since its inaction cannot be explained on substantive grounds. While there are reasons for a disciplinary code to contain no special provisions for prosecutors, many special provisions, or only a few select ones, there is no principled reason for a disciplinary code to include only the particular provisions now included in Model Rule 3.8. Whether a different ABA commission should be appointed to focus specifically on prosecutorial ethics is far from certain, however, not because the existing restrictions are complete, but because it is questionable whether prosecutors' professional conduct ought to be regulated by special disciplinary provisions and, if so, whether the ABA should take the lead in developing them.

I. DISCIPLINARY RESTRICTIONS ON PROSECUTORIAL CONDUCT

Disciplinary codes make relatively few distinctions based on the different settings in which lawyers work or the nature of their clientele. For example, specific disciplinary rules apply to lawyers in advocacy, but they generally do not recognize different responsibilities depending on whether the lawyer is advocating on behalf of a class, a corporation, or an individual, or before a court, administrative agency, or arbitrator.¹⁰

9. See *infra* notes 36–41 and accompanying text.

10. The Model Rules do make some contextual distinctions, however. See, e.g., MODEL RULES R. 1.2(a) (identifying client's decisions in criminal cases); *id.* R. 1.5(d) (forbidding contingency fees in domestic relations matters and criminal cases); *id.* R. 1.11 (addressing conflicts of interest of government lawyers and former government lawyers); *id.* R. 3.1 (notwithstanding general prohibition on frivolous defenses, criminal defense lawyer may put the prosecution to its proof); *id.* R. 3.3 cmt. (recognizing debate regarding representation of perjurious client in criminal cases); *id.* R. 6.4 (liberalizing conflict of interest rules for lawyers in legal services programs).

Although some commentators maintain that the normative expectations should vary depending on the context in which questions of professional conduct arise,¹¹ the Model Rules reflect the presumption that professional obligations are generally the same for all lawyers.

Disciplinary codes have always recognized, however, that criminal prosecutors should be treated differently from other lawyers. When the ABA adopted the Model Code of Professional Responsibility (Model Code) in 1969, it included a provision, Disciplinary Rule 7-103, that applied uniquely to government lawyers in criminal cases.¹² When the ABA adopted the Model Rules in 1983, it included a similar provision, Model Rule 3.8, titled "Special Responsibilities of a Prosecutor."

The distinctive rule for prosecutors reflects a well-accepted normative understanding that, in some respects, prosecutors should conduct themselves differently from other lawyers. There are at least four reasons why this might be so.

First and foremost, prosecutors face questions of professional conduct that other lawyers do not face because prosecutors perform work that other lawyers do not perform. Prosecutors employ the power of the police or other government investigative agencies, issue grand jury subpoenas and question witnesses before the grand jury, seek arrest warrants, search warrants, and wiretap authorization, seek indictments, and grant immunity from prosecution. The ordinary expectations regarding how lawyers should conduct their work may not address many questions that prosecutors encounter in exercising authority that is unique to the government in criminal cases.¹³ Further, the expectations for lawyers serving private clients in analogous contexts are not necessarily well suited to government lawyers in the criminal context. Therefore, there are additional norms that address the otherwise unanswered questions and different norms that are more appropriately tailored to the work of prosecutors.

Second, prosecutors are subject to different legal obligations than other lawyers. For example, prosecutors at trial are subject to a different standard of proof than other trial lawyers: the reasonable-doubt standard. They have different disclosure obligations under the Due Process Clause, statutes, and rules of procedure. They are governed by constitutional provisions and statutes that regulate how government officials may

11. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 138-69 (1998); Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 381-82 (1998); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, Scholer, 66 S. CAL. L. REV. 1145 (1993).

12. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (1969).

13. See Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000) (discussing prosecutors' discretionary decision making and proposing that, in the absence of guidelines, prosecutors' decision making should be improved through education).

gather evidence and other aspects of their conduct. Although the normative expectations for lawyers are not exclusively a product of the underlying law governing lawyers, the law shapes those expectations. Prosecutors are subject to different normative expectations in part because of the different legal expectations governing their conduct.

Third, the professional role of prosecutors is different from that of lawyers who represent private clients in the adversary context. In a private representation, the client defines the objectives of the representation after consultation, and as long as the objectives are lawful, the lawyer seeks to achieve them. In the case of a criminal prosecution, in contrast, the prosecutor is not only a lawyer for the government but also a government official who makes the decisions on behalf of the government that would ordinarily be made by the client.¹⁴ Further, the prosecutor makes these and other decisions in light of various government objectives that derive from the law and legal traditions and that differ from the ordinary objectives of private clients. The government's objectives might include not only convicting and punishing individuals who commit crimes, but also assuring fair and proportional punishment of the guilty, protecting the innocent from punishment, assuring fair treatment of those affected by the criminal process, and assuring compliance with constitutional and other legal provisions regulating criminal investigations and prosecutions.¹⁵ The prosecutor's distinctive role, that is captured by the characterization of the prosecutor as a "minister of justice,"¹⁶ leads to distinctive professional expectations, which are summed up by the duty to "seek justice."¹⁷

Finally, the traditional understandings relating to prosecutors' conduct are distinctive. Nineteenth-century judicial decisions reflected the understanding that lawyers had to conduct themselves differently when they served as public prosecutors,¹⁸ and this understanding was carried over into the Canons of Professional Ethics,¹⁹ adopted by the ABA in 1908. Canon 5, which was specifically directed at prosecutors, provided: "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 ac-

14. See Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515, 524 (1992).

15. The comment to Model Rule 3.8 identifies two "specific obligations": "to see that the defendant is accorded procedural justice and that guilt is decided on the basis of sufficient evidence."

16. MODEL RULES R. 3.8 cmt. (2002) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.")

17. See generally Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991) [hereinafter Zacharias, *Structuring the Ethics*].

18. See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest*, 41 B.C. L. REV. 789, 792-93 (2000) (discussing early authorities); Green, *supra* note 17, at 612-14 (same).

19. CANONS OF PROF'L ETHICS (1908).

cused is highly reprehensible.”²⁰ Prosecutors’ distinctive traditions are an additional source of different normative expectations.

The distinctive disciplinary rule for prosecutors reflects not only a normative understanding but also an understanding about how prosecutors should best be regulated. Courts should adopt disciplinary provisions that incorporate the distinctive prosecutorial norms so that prosecutors who violate these norms will be subject to disciplinary sanction. This understanding is far from self-evident, however. Although the existence of additional or different normative standards relating to the work of prosecutors is uncontroversial, it does not invariably follow that the norms should be codified and made enforceable, much less that they should be incorporated in rules of professional conduct and made enforceable by state disciplinary authorities.

When it first developed model disciplinary rules for adoption by state courts, the ABA might have declined to include a special rule for prosecutors for any number of reasons. Although the normative expectations are different for prosecutors, it may have seemed too difficult to draft provisions that fairly articulate either the desired standard of conduct or a minimally acceptable one, or to reach agreement on what the distinctive provisions should be. It may have seemed unnecessary to clutter up the disciplinary code with provisions specifically aimed at a small subgroup of practitioners such as prosecutors. This may have been because it was not sufficiently important to enforce prosecutors’ special obligations, because these obligations could be adequately enforced outside the disciplinary process, or because these obligations could be enforced by disciplinary agencies under existing rules. In particular, it might have been thought that prosecutorial conduct was adequately addressed by rules that were broadly and vaguely worded, such as those prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation”²¹ and “conduct prejudicial to the administration of justice,”²² or that, even in the absence of an applicable rule, prosecutors could be disciplined for engaging in prosecutorial misconduct. Or for various reasons, it may have seemed that distinctive provisions regulating prosecutors’ conduct should be enforced by authorities other than disciplinary agencies or that prosecutorial norms should be exclusively self-enforced. Evidently, when it incorporated a specific provision for criminal prosecu-

20. *Id.* Canon 5.

21. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2002).

22. *Id.* R. 8.4(d). Additionally, the Code of Professional Responsibility included a catch-all provision forbidding “any other conduct that adversely reflects on [the lawyer’s] fitness to practice law.” MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(6) (1969). This provision was not included in the Model Rules.

On the employment of general standards versus specific rules as the basis of disciplinary regulation of prosecutors, see Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

tors in the Model Code, the ABA was unpersuaded by considerations such as these.

Although the ABA apparently recognized the value of a special disciplinary rule for prosecutors, its initial rule, Disciplinary Rule 7-103 of the 1970 Model Code, addressed only two areas of prosecutorial conduct—the initiation of criminal charges²³ and the disclosure of evidence to the defense.²⁴ In the following decades, the ABA augmented the rule only modestly. Model Rule 3.8, when it was originally adopted in 1983, incorporated the two earlier provisions²⁵ and three others. These addressed the prosecutor's duty to assure the unrepresented defendant an opportunity to obtain counsel,²⁶ to refrain from asking unrepresented defendants to waive important pretrial rights,²⁷ and to prevent other law enforcement personnel from making extrajudicial statements that the prosecutor was personally prohibited from making.²⁸ In 1990, the ABA adopted a highly controversial subsection, which it pruned back in 1995, regulating the issuance of grand jury subpoenas to criminal defense lawyers.²⁹ And in 1994, in the context of modifying a general provision regu-

23. MODEL CODE DR 7-103(A) (“A public prosecutor or other governmental lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.”).

24. *Id.* DR 7-103(B).

A public prosecutor or other government lawyer in criminal litigation 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.

Id.

25. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (1983) (“The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”).

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

Id. R. 3.8(d) (1983).

26. *Id.* R. 3.8(b) (1983) (“The prosecutor in a criminal case shall . . . make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.”).

27. *Id.* R. 3.8(c) (1983) (“The prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.”).

28. *Id.* R. 3.8(e) (1983) (“The prosecutor in a criminal case shall . . . exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.”). After the recent amendments, the substance of this provision was combined with that of Rule 3.8(g) and included as the new Rule 3.8(f). MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2002).

29. “The prosecutor in a criminal case shall . . . not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.” MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (1995). After the recent amendments, this provision became Rule 3.8(e). *See id.* R. 3.8(e) (2002).

lating litigators' communications with the media, the ABA added a provision specifically aimed at prosecutors' public statements.³⁰

Over this same period of time, the nature of criminal prosecutions changed in ways that raised new questions of prosecutorial conduct.³¹ The academic and professional literature paid increasing attention to prosecutorial ethics and identified troublesome aspects of prosecutorial conduct that Rule 3.8 did not address.³² Prosecutors' offices and bar associations have filled in gaps by developing guidelines for prosecutorial conduct that, unlike disciplinary rules, are not meant to be enforceable in the disciplinary context. Most notably, the U.S. Department of Justice published the U.S. Attorney's Manual,³³ and the ABA adopted Standards Relating to the Administration of Criminal Justice (the ABA Standards),³⁴ which included a set of standards on the Prosecution Func-

30. The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (1994). The impetus for amending the provisions on extrajudicial speech was to conform the rules to the Supreme Court decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). See Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837 (1996). See generally L. Cooper Campbell, Note, *Gentile v. State Bar and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pretrial Publicity*, 6 GEO. J. LEGAL ETHICS 583 (1992); Gerald F. Uelmen, *Leaks, Gags and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943 (1997).

31. See generally Symposium, *The Changing Role of the Federal Prosecutor*, 26 FORDHAM URB. L.J. 7 (1999).

For example, particularly in federal cases, prosecutors have assumed greater responsibility for conducting investigations. See Flowers, *supra* note 7, at 925. This raises the question of whether, because prosecutors are lawyers or because they wield authority that criminal investigators generally do not possess, there is a need for ethical restrictions on prosecutorial investigative conduct to supplement the legal restrictions imposed generally on criminal investigations.

Similarly, the adoption of federal sentencing guidelines raised questions about how prosecutors should make charging, plea bargaining, and sentencing decisions. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); Elizabeth A. Parsons, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 29 VAL. U. L. REV. 417 (1994); William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. VA. L. REV. 373 (1995); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999); David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434 (1997); Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187 (1993); Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245 (2000); Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253 (1994).

32. See, e.g., Aaron, *supra* note 7 (discussing absence of rule regulating the disclosure of nonevidentiary information); Singband, *supra* note 7 (discussing the absence of a rule regulating the investigation of exculpatory evidence); Williams, *supra* note 7.

33. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1997).

34. ABA STANDARDS FOR CRIMINAL JUSTICE (3d ed. 1993) [hereinafter ABA STANDARDS].

tion.³⁵ A wide range of public material was available for the Ethics 2000 Commission to review in considering whether to revise or expand the provisions on prosecutorial ethics.

II. THE ETHICS 2000 COMMISSION CONSIDERATION OF PROSECUTORIAL ETHICS

The Ethics 2000 Commission received many submissions from lawyers and representative organizations proposing amendments to the Model Rules, but few of these addressed prosecutorial ethics. Further, much of the interest in prosecutorial ethics came from prosecutors who were concerned about the restrictiveness of generally applicable rules. The Commission responded with two amendments that eased the burden on prosecutors.

First, the Commission addressed a disagreement about whether prosecutors should have a duty under the disciplinary rules to disclose exculpatory evidence to the grand jury. The original drafters of the Model Rules believed that such a duty was imposed by Rule 3.3(d),³⁶ which requires lawyers in *ex parte* proceedings to disclose adverse facts to the tribunal. A Comment to Rule 3.8 stated that this obligation applied to grand jury proceedings.³⁷ Further, the ABA Standards recognized that “[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.”³⁸ At least in federal proceedings, however, the Supreme Court had made clear that prosecutors had no legal duty to disclose adverse facts to the grand jury,³⁹ and the Department of Justice had initiated litigation to establish that state disciplinary codes could not impose such an obligation.⁴⁰ Possibly seeking to avert a showdown, the Commission recommended eliminating the Comment’s reference to grand jury proceedings, explaining that the rule was meant to apply only to “adjudicatory proceedings.”⁴¹

35. *Id.*, PROSECUTION FUNCTION [hereinafter PROSECUTION FUNCTION]; see also NATIONAL DISTRICT ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS (2d ed. 1991).

36. MODEL RULES OF PROF’L CONDUCT Rule 3.3(d) provides: “In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” MODEL RULES OF PROF’L CONDUCT R. 3.3(d) (2002). This provision was changed by the Ethics 2000 Commission.

37. *Id.* R. 3.8 cmt. 1 (1983).

38. PROSECUTION FUNCTION, *supra* note 35, Standard 3-3.6(b).

39. See *United States v. Williams*, 504 U.S. 36 (1992). See generally R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361 (2000); Susan M. Schiappa, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 CATH. U. L. REV. 311 (1993).

40. See, e.g., *United States v. Colorado*, 871 F. Supp. 1328 (D. Colo. 1994).

41. MODEL RULES R. 3.8 cmt. 1 (Proposed Rules 2000); Ethics 2000 Report, *supra* note 8, at 314, 316.

Second, the Commission waded into a roiling controversy regarding Rule 4.2, which restricts communications with represented persons.⁴² Over the course of two decades, prosecutors—and, particularly, federal prosecutors—had complained vociferously that the rule undermines their ability to conduct investigations and that it should be replaced by a less restrictive rule tailored specifically to law enforcement officials.⁴³ The Commission discussed this problem over the course of many meetings.⁴⁴ In collaboration with another ABA entity, the Standing Committee on Ethics and Professional Responsibility, the Commission drafted a detailed amendment that was meant to alleviate prosecutors' concerns by providing greater clarity about how the restriction applied to them.⁴⁵ However, the Department of Justice never endorsed the Commission's work, and the Commission eventually decided that there was no point in proposing an extensive provision without the Department's support.⁴⁶ In the end, the Commission simply proposed adding a few words to the existing provision to confirm that prosecutors, among others, could avoid running afoul of the restriction by obtaining a court order authorizing

42. Prior to its amendment, the rule provided: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law." MODEL RULES R. 4.2 (1983).

43. For commentary discussing the controversy and the efforts of the U.S. Department of Justice to exempt federal prosecutors from the no-contact rule, see Green, *supra* note 2, at 469–82; Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 *FORDHAM L. REV.* 429, 429–30 nn.1–7 (1996); see also *supra* note 7.

44. See, e.g., Minutes of November 10, 2001 meeting (noting that the Commission voted not to reconsider three of its earlier decisions regarding Model Rule 4.2); Minutes of July 7–8, 2000 meetings (noting discussion of various Comments to Model Rule 4.2); Minutes of May 5–7, 2000 meetings (describing discussion in which a Department of Justice representative participated regarding possible changes to Comment to Model Rule 4.2, and discussion that prosecutors may seek a court order either for an "interpretive ruling" regarding the scope of the rule or "to justify contact in exceptional circumstances"); Minutes of August 6–8, 1999 meetings (reporting withdrawal of the joint proposal of the Standing Committee on Ethics and Professional Responsibility (Ethics Committee) and the Commission); Minutes of May 7–8, 1999 meetings (describing discussion of Ethics Committee's draft amendments, prepared in response to earlier proposal of the Department of Justice); Minutes of February 5–6, 1999 meetings (noting that the Commission and Ethics Committee's continued efforts to draft amendments to Model Rule 4.2; noting that Commission rejected a motion to eliminate the exception for communications "authorized by law" and adopted a proposal to add an exception for communications authorized "by court order"); Minutes of December 11–12, 1998 meetings (discussing efforts of the Commission and the Ethics Committee to agree on a joint draft of amendments to Model Rule 4.2); Minutes of September 27–28, 1998 meetings (summarizing Commission's discussion of Model Rule 4.2 and comments of a Department of Justice official who appeared at the meeting concerning the rule's application to prosecutors); Minutes of July 31–August 1, 1998 meetings (noting that the Commission and the Ethics Committee had agreed to coordinate efforts to revise Model Rule 4.2 and summarizing discussions about whether changes should be included in the text of the rule or in a comment, and whether it is sufficient to leave it to case law to clarify the application of the rule to prosecutors); Minutes of May 31, 1998 meeting (noting that the Commission discussed a proposed amendment circulated by the Ethics Committee as well as the alternative of accommodating the Department of Justice by creating an exception to the restriction of Model Rule 4.2 when lawyers are authorized by court order to communicate with represented persons); Minutes of April 17–18, 1998 meetings (noting that "[t]he Commission discussed the need to accommodate the legitimate concerns of the Department of Justice while making minimal changes to the current Model Rule").

45. See *supra* notes 8–9 and accompanying text.

46. *Id.*

them or their investigators to communicate directly with a represented person.⁴⁷ The amendment, adopted by the ABA House of Delegates, acknowledged the judiciary's authority to interpret the no-contact rule in situations where it was ambiguous and, in special cases, to relieve prosecutors of restraints that the rule otherwise imposed on them as lawyers.

There might have seemed to be a greater need to impose new restraints on prosecutors than to exempt prosecutors from some generally applicable restrictions. After all, as the amendment to Rule 4.2 reflected, courts had authority to interpret the general rules to accommodate reasonable prosecutorial conduct, and in general, they had done so. It would be harder for courts, in the context of overseeing criminal prosecutions, to impose new disciplinary obligations in order to address prosecutorial misconduct about which the existing disciplinary rules were silent. An individual judge might consider it unfair to punish a prosecutor for prior conduct that, although wrongful from the judge's perspective, was not explicitly condemned by a disciplinary provision; at the same time, the judge might lack authority to rule that similar misconduct will be sanctioned in the future.

Among those submitting comments to the Commission, however, there was little interest in prosecutors' special responsibilities. No ABA entity or major organization representing prosecutors or criminal defense lawyers sought changes to Rule 3.8. Only a handful of bar associations and individual attorneys, of whom I was one,⁴⁸ raised concerns about this rule.⁴⁹

Even so, it was made evident to the Commission that Rule 3.8 left ample room—if anything, too much room—for additional work. The Commission solicited, and received in December 1999, a comprehensive report prepared by Niki Kuckes, who then chaired the Criminal Justice

47. MODEL RULES R. 4.2 (Proposed Rules 2000); Ethics 2000 Report, *supra* note 8, at 322, 324. The rule now provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." MODEL RULES R. 4.2.

48. See E-mail from Bruce Green to Nancy Moore, Chief Reporter for the ABA Commission on Evaluation of the Rules of Conduct (Nov. 8, 1999, 10:55:29 EST) (on file with the University of Illinois Law Review).

49. See, e.g., Letter from Rex S. Heinke, President, Los Angeles County Bar Association, to Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct (Feb. 27, 2001) (on file with the University of Illinois Law Review) (objecting to inclusion of sentence in Comment which would note that the discovery obligation established by Model Rule 3.8 "goes beyond the duty imposed upon prosecutors by constitutional law"); Letter from Robert E. O'Malley, Chair, District of Columbia Bar Rules of Professional Conduct Review Committee, to ABA Commission on Evaluation of the Rules of Professional Conduct (Mar. 2, 2001) (on file with the University of Illinois Law Review) (recommending the addition of a provision forbidding a prosecutor from interfering with the independence of the grand jury or abusing its process, and requiring a prosecutor to bring to the grand jury's attention "material facts tending substantially to negate the existence of probable cause").

Standards Committee of the ABA Criminal Justice Section.⁵⁰ Her report demonstrated that Model Rule 3.8 was far from a model of perfection.

Kuckes's report analyzed the existing provisions of Rule 3.8, identifying alternative versions that individual states had adopted, discussing criticisms that had been leveled, and recommending whether and, if so, how the Commission should respond.⁵¹ Although the report concluded that most of the existing provisions were not in need of revision, it identified problems with Rule 3.8(a), which requires a prosecutor to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." The report proposed that the Commission consider amending Rule 3.8(a) both to clarify its scope⁵² and to impose a higher standard than "probable cause."⁵³

As importantly, Kuckes's report demonstrated that the seven provisions of Rule 3.8 did not fully address prosecutors' professional conduct. The report identified a host of possible new provisions, drawing on state disciplinary codes, the ABA Standards, and other sources.⁵⁴ Further, Kuckes's report underscored that disciplinary rules can have a significant role to play in regulating prosecutors, not so much because prosecutors are regularly disciplined,⁵⁵ but because there are often no legal means

50. NIKI KUCKES, REPORT TO THE ABA COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT CONCERNING RULE 3.8 OF THE ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY 39-40 & nn.110-17 (Dec. 1, 1999) [hereinafter KUCKES REPORT].

51. *Id.* at 1.

52. The report noted that Rule 3.8(a) presently fails to make clear that there is a duty not only to refrain from initiating charges in the absence of probable cause, but also a duty to refrain from maintaining charges if, upon the receipt of new information, the prosecutor knows that the charges are no longer supported by probable cause. *Id.* at 13-14. Additionally, it explained that the provision may fail to make clear that it is improper for a prosecutor to present an indictment to the grand jury when the prosecutor believes that there is insufficient evidence to support an indictment. *Id.* at 15-16.

53. The report recognized that the "probable cause" standard is widely considered too low, including by the ABA Standards, which provides that a prosecution should not be instituted or continued unless there is "sufficient admissible evidence to support a conviction." *Id.* at 14 (referring to PROSECUTION FUNCTION, *supra* note 35, Standard 3-3.9(a)).

54. *Id.* at 39-42. For example, Kuckes's report identified the following provisions of state ethics codes that had no counterpart in Rule 3.8 of the Model Rules: D.C. RULES OF PROF'L CONDUCT R. 3.8(d) (2000) (providing that a prosecutor shall not "intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense"); *id.* R. 3.8(a) (providing that a prosecutor shall not, "in exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person"); *id.* R. 3.8(h) (providing that a prosecutor shall not "peremptorily strike jurors on grounds of race, religion, national or ethnic background, or sex"); ME. CODE OF PROF'L RESPONSIBILITY R. 3.7(i)(3) (2000) (providing that a prosecutor shall not "conduct a civil or criminal case against any person whom the lawyer represents or has represented as a client"); *id.* R. 3.7(i)(4) (mandating that a prosecutor "shall not conduct a civil or criminal case against any person relative to a matter in which the lawyer represents or has represented the complaining witness"); MASS. RULES OF PROF'L CONDUCT R. 3.8(h) (2001) (providing that a prosecutor shall "not assert personal knowledge of the facts in issue, except when testifying as a witness"); *id.* R. 3.8(i) (requiring that a prosecutor shall "not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein."); VA. RULES OF PROF'L CONDUCT R. 3.8(b) (2001) (stating that a prosecutor shall "not knowingly take advantage of an unrepresented defendant").

55. Reported decisions suggest that professional discipline is in fact used relatively infrequently in cases involving alleged prosecutorial misconduct. See Fred C. Zacharias, *The Professional Disci-*

other than professional discipline by which to enforce prosecutors' compliance with ethical obligations.⁵⁶ Civil remedies are generally unavailable for individuals who are harmed by prosecutorial misconduct,⁵⁷ and courts have limited ability to punish prosecutorial misconduct by dismissing indictments, reversing convictions, suppressing evidence, or imposing contempt sanctions.⁵⁸

Nonetheless, the report discouraged the Commission from undertaking a wholesale revision of the rule. One reason was that, although Rule 3.8 "is incomplete in the obligations it imposes," and "some of the prosecutor's obligations *not* detailed in the rule . . . are more significant than some of the obligations that *are* included in Rule 3.8,"⁵⁹ making broad changes to Rule 3.8 "is certain to provoke substantial debate and controversy."⁶⁰

As the report described, prior years had seen heated debate over whether the ABA and, later, state and federal courts, should adopt the attorney-subpoena rule. In the end, few state courts followed the ABA's lead.⁶¹ There had also been bitter disputes over how Rule 4.2, the "no-contact rule," applied to prosecutors.⁶² Further, debate continued to surround the McDade Amendment, which mandates that federal prosecutors comply with state ethics rules.⁶³ Prosecutorial ethics had presented some of the most contentious ethics debates in the recent past and there remained a "high degree of flux caused by recent political and legal developments."⁶⁴

Other reasons to leave Rule 3.8 alone were implicit in the report's observations about the process by which Rule 3.8 should ideally be

pline of Prosecutors, 79 N.C. L. REV. 721, 743-65 (2001); see also Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995).

56. KUCKES REPORT, *supra* note 50, at 8-11 (reviewing alternatives to regulating prosecutors other than the enforcement of disciplinary rules and concluding that "while prosecutors are subject to a variety of other disciplinary mechanisms that seek to deter unethical conduct, there are many limitations on these alternative sanctions").

57. *Id.* at 10. See generally Williams, *supra* note 7.

In federal prosecutions, a limited civil remedy is now afforded by the Hyde Amendment, which authorizes attorneys' fee awards to prevailing federal criminal defendants who have privately retained counsel and who have been prosecuted vexatiously, frivolously, or in bad faith. 18 U.S.C. § 3006A note (Supp. V 1999). For commentary on the Hyde Amendment, see Singband, *supra* note 7; Lawrence Judson Welle, Note, *Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorneys' Fee Law*, 41 WM. & MARY L. REV. 333 (1999).

58. KUCKES REPORT, *supra* note 50, at 8-10. See generally Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995); Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083 (1994).

59. KUCKES REPORT, *supra* note 50, at 39 (emphasis in original) (citing Green, *supra* note 17, at 616).

60. *Id.* at 42.

61. *Id.* at 5-6; see also *id.* at 28-34.

62. *Id.* at 5.

63. *Id.* at 4-7.

64. *Id.* at 3; accord *id.* at 8, n.18.

amended. The report urged that to “best ensure acceptance [of amendments] among prosecutors, defense counsel and the courts,” Rule 3.8 should be reviewed comprehensively “over a period of time with participation from the ground up from all of the groups involved.”⁶⁵ The Ethics 2000 Commission was evidently not the best constituted body to develop provisions governing prosecutorial conduct. Further, making significant revisions would require a lengthy process that might take away too much time from the rest of the Commission’s work. After reading the report, one might have even wondered whether rule making for prosecutors should be undertaken by the ABA at all or whether this responsibility was better left to a representative body of the judiciary such as the Judicial Conference of the United States or the Conference of State Chief Judges.

In the end, the Commission opted to make no significant changes or additions to the rule on prosecutorial ethics. Although it added some explanatory comments and consolidated two of the existing disciplinary provisions of Rule 3.8,⁶⁶ it made no substantive changes to these provisions, despite some discussion of doing so.⁶⁷ Nor did it identify any new prosecutorial obligations or restrictions. The Chair’s introduction to the Commission’s final report did not refer to the Commission’s decision to leave the prosecutorial ethics rule essentially untouched, and it is unclear how this decision generally accorded with his description of the Commission’s philosophy: “to be comprehensive, but at the same time conserva-

65. *Id.* at 3; *accord id.* at 7–8:

[T]o be effective, any changes that are made will require the participation and support of many different constituencies in the criminal justice community. Therefore, before the Commission undertakes any major revision of Rule 3.8, if it is inclined to do so, it should initiate a process that will include, at a minimum, participation and input from those groups within the ABA with expertise in criminal justice, federal and state prosecuting authorities and public defenders, defenders’ and prosecutors’ associations on the federal and state level, standard-setting bodies, and trial and appellate judges in courts handling criminal matters.

66. The new Model Rule 3.8(f), which combined the former Rules 3.8(e) and (g), now provides: The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve the legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Ethics 2000 Report, *supra* note 8, at 84.

67. Some discussion addressed the possibility of expanding the existing provisions of Rule 3.8(a), *see* Minutes of December 10–12, 1999 meetings (describing Commission’s rejection of proposal to amend Model Rule 3.8(a) to provide that it is improper to maintain a prosecution in the absence of probable cause), but more focused on the possibility of eliminating provisions of Model Rule 3.8, *see, e.g.*, Minutes of July 7–8, 2000 meetings (noting Commission’s rejection of Department of Justice proposal to eliminate Model Rule 3.8(f)), or of fine-tuning the rule or the accompanying Comment; Minutes of December 10–12, 1999 meetings (describing Commission’s discussion of possible elimination of Model Rule 3.8(c) or (e)); Minutes of September 15–17, 2000 meetings (describing discussion of addition to Comment 7); Minutes of July 7–8, 2000 meetings (noting discussion of proposed changes to Comment).

tive, and to recommend change only where necessary.”⁶⁸ It seems fair to say that with regard to prosecutorial ethics, the Commission decided to err on the side of conservatism rather than comprehensiveness.

III. THE LIMITED REACH OF MODEL RULE 3.8

Model Rule 3.8 is now comprised of a half dozen disciplinary provisions addressing five areas of prosecutorial conduct: the exercise of prosecutorial discretion; prosecutorial conduct affecting the waiver or exercise of procedural rights by the accused; the prosecutor’s disclosure obligations; the prosecutor’s exercise of investigative authority; and public communications by the prosecution team. The accompanying comment indicates that the rule does not exhaust the list of possible obligations assumed by a prosecutor as a “minister of justice,” but that it is debatable how far a prosecutor must go “to see that the defendant is accorded procedural justice and that guilt is decided on the basis of sufficient evidence.”⁶⁹

As discussed below, the responsibilities imposed by Rule 3.8 are neither demanding nor extensive. It seems plain that the prosecutor’s duty to “seek justice” should give rise to a host of particular professional responsibilities that are different from those of other lawyers. These responsibilities are, to some extent, reflected in judicial decisions commenting on the conduct of particular prosecutors, in the ABA Standards, and in other writings. Within the five areas covered by the rule, there is much prosecutorial conduct that might be considered improper but that the disciplinary provisions do not proscribe.⁷⁰ Further, the provisions do not address other aspects of prosecutors’ work that might be regulated. If the courts, which generally oversee the conduct of lawyers, were to draw on their experience and on the prior literature to develop a comprehensive list of prosecutors’ special responsibilities, and were to add new ones as necessary when new problems of prosecutorial conduct came to their attention, the list would include many responsibilities that are not presently reflected in the specific provisions of the Model Rules.⁷¹

A. *Prosecutorial Discretion*

The most distinctive and significant aspect of prosecutorial conduct is the exercise of discretion concerning such questions as whom to inves-

68. Chair’s Introduction to the Report of the Commission on Evaluation of the Rules of Professional Conduct 1 (Aug. 2001) (on file with the University of Illinois Law Review).

69. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2002).

70. See Levenson, *supra* note 7, at 557–66 (discussing “gaps in the rules guiding the prosecutor’s behavior”).

71. See Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001) (describing how prosecutors’ general truth-seeking obligations imply a range of specific obligations and restrictions, many of which are not embodied in the disciplinary provisions of the ABA Model Rules).

tigate, whom to charge and what charges to bring, whether to negotiate the terms of a guilty plea, whether to grant immunity from prosecution, whether to drop charges or continue a case to trial, what sentence to seek, and whether to move to vacate a conviction or sentence.⁷² Rule 3.8(a) deals with only one aspect of prosecutorial discretion—the core decision whether to prosecute a criminal charge—and incorporates a standard that is both too low and incomplete.⁷³

The prosecutor's obligation as a "minister of justice" to prevent the conviction and punishment of innocent people is generally thought to imply a "gate-keeping" function. It would be unfair for a prosecutor to subject someone who is innocent, or who is expected to be acquitted, to the burdens of an indictment and criminal trial. Further, the trial process is fallible and can result in convictions of innocent people. For both reasons, prosecutors are expected to bring prosecutions only when the guilt of the accused is sufficiently certain. The question on which there is ample room for debate is how certain the evidence must be to warrant a prosecution. Rule 3.8(a), which addresses this question, forbids prosecution of "a charge that the prosecutor knows is not supported by probable cause." Since the law requires criminal charges to be supported by probable cause, however, this provision adds nothing to the standard already established by law.⁷⁴

Under the probable cause standard, it does not have to be "more likely than not" that the accused is guilty. All that is needed is a fair possibility of guilt, something more than a "reasonable suspicion."⁷⁵ Just to illustrate how minimal this standard is, it would allow a prosecutor to charge two individuals in two separate cases with the same criminal conduct even when the prosecutor knows that only one of the two could possibly have engaged in the alleged conduct. Some prosecutors have done so, leaving it to the separate juries to decide whether to convict one, neither, or both.⁷⁶

This may be a fair standard with regard to whether to make an arrest and perhaps even whether to file formal criminal charges, but few would consider it fair with regard to whether ultimately to take an in-

72. See generally Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001) (discussing aspects of prosecutorial discretion); see also Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 432–38 (discussing arguable abuses of prosecutorial charging power). But see Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 385 (2001) (arguing that "most prosecutors have very little discretion" because prosecutors in supervisory positions deny it to them).

73. See *supra* note 53.

74. See *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972).

75. See *Texas v. Brown*, 460 U.S. 730, 742 (1983) (describing flexibility of probable cause standard).

76. See English, *supra* note 7, at 525–28 (discussing cases); see also Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423 (2001); Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. REV. 853 (2002).

dictment to trial.⁷⁷ Both the ABA Standards and the Department of Justice agree that a prosecutor should not try a defendant unless the prosecutor reasonably believes that there is legally sufficient evidence for a jury to convict the accused of the crimes charged.⁷⁸ Additionally, many would agree that charges should not be brought unless the prosecutor reasonably believes that the accused is guilty of the crimes charged.⁷⁹ Therefore, a prosecutor should not bring a case to trial if he believes, based on the available evidence, that there is merely a fair possibility that the defendant is guilty.⁸⁰ Some commentators would set a higher threshold.⁸¹

Even assuming that there is sufficient evidence to convince both the prosecutor and a jury of the defendant's guilt, the prosecutor's exercise of discretion to prosecute the defendant may raise concerns. It is generally accepted, for example, that prosecutors should not allow personal or political considerations to influence their decisions,⁸² should not make prosecuting decisions for other impermissible reasons,⁸³ and generally

77. See FREEDMAN, *supra* note 1, at 221–22 (criticizing ethics rules).

78. UNITED STATES ATTORNEYS' MANUAL, *supra* note 33, 9 DEPARTMENT OF JUSTICE MANUAL 9-27.220(A) (1987) ("The attorney for the government should commence or recommend Federal prosecution if he/she believes the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction."); *id.* 9-27.220(B) ("[B]oth as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact."); *id.* 9-27.200(B) (noting that the probable cause standard is "a threshold consideration only" and that, while "failure to meet the minimal requirement of probable cause is an absolute bar to initiating a Federal prosecution," the presence of probable cause "does not automatically warrant prosecution"); PROSECUTION FUNCTION, *supra* note 35, Standard 3-3.9(a), (c), (f).

79. See, e.g., FREEDMAN, *supra* note 1, at 219 ("[C]onscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty."); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 178–79 (1965); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 700 (1992) ("Prosecutors do not serve the interests of society by pursuing cases where the prosecutors themselves have reasonable doubts as to the factual guilt of the defendants."). But see Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard*, 71 MICH. L. REV. 1145, 1155–59 (1973).

80. Suppose, for example, that a murder was committed and circumstantial evidence established probable cause to believe one Jones was to blame. A prosecutor might authorize Jones's arrest, even though the prosecutor was not personally convinced that Jones was guilty and that there was sufficient evidence to secure a conviction, because it would be reasonable to take a possibly dangerous person off the street and prevent his flight while the investigation continued. But if the investigation turned up no additional evidence, so that it remained equally likely, if not more likely, that someone other than Jones committed the murder, it would be wrong for the prosecutor to allow the case to proceed to trial.

81. See, e.g., Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 522 (1993) (A prosecutor should "assure herself that she is morally certain that the defendant is both factually and legally guilty, and that criminal punishment is morally just."); cf. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

82. PROSECUTION FUNCTION, *supra* note 35, Standard 3-3.9(d).

83. Possible examples would include bringing charges that are harsher than deserved or that are unlikely to be provable in order to bargain them away in exchange for the defendant's agreement to dismiss meritorious civil charges. See *infra* note 84.

should not make arbitrary distinctions in deciding whether to prosecute.⁸⁴ But Rule 3.8(a) sets no limits except with respect to the sufficiency of the evidence. It does not even incorporate other limits recognized in constitutional decisions.⁸⁵

Beyond that, Rule 3.8(a) fails to address aspects of prosecutorial decision making other than the decision whether to prosecute. For example, it gives no guidance with regard to the decision whether to conduct an investigation. It does not require a reasonable basis for exercising investigative authority or identify improper motivations for doing so,⁸⁶ nor does it impose any obligation to seek readily available evidence that is exculpatory, so that the decision whether to prosecute can be based on reasonably complete, not one-sided, information.⁸⁷ Similarly, it does not address prosecutorial discretion in plea bargaining, and thus places no limits on the prosecutor's authority to bring charges that are unprovable or disproportionately harsh to extract a guilty plea to charges that the prosecutor regards as just, to compel the defendant to give information or to testify,⁸⁸ or to achieve other ends.⁸⁹ It also does not address the prosecutor's sentencing discretion, and therefore, for example, it does not require federal prosecutors to employ good faith in deciding whether to assent to a lenient sentence in light of the defendant's coop-

84. See, e.g., *In re Rook*, 556 P.2d 1351, 1357 (Or. 1976) (finding that a prosecutor should not bring an action against another when he knows the action would merely serve to harass or injure that person).

85. For example, the Supreme Court has held that the Due Process Clause forbids "vindictive" prosecutions—that is, the initiation of criminal charges, or the filing of more serious charges, in retaliation for a defendant's invocation of constitutional rights. See generally *Thigpen v. Roberts*, 468 U.S. 27 (1984); *Blackledge v. Perry*, 417 U.S. 21 (1974); Note, *Breathing New Life into Prosecutorial Vindictiveness Doctrine*, 114 HARV. L. REV. 2074 (2001) [hereinafter *Breathing New Life*]. The Court has also recognized that while "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," the Equal Protection Clause forbids the prosecutor from choosing to prosecute the defendant on the basis of an arbitrary classification such as race or religion. *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

86. Cf. *United States v. Van Engel*, 15 F.3d 623 (7th Cir. 1993). See generally *Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723 (1999).

87. See PROSECUTION FUNCTION, *supra* note 35, Standard 3-3.11(c) (providing that "[a] prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused").

88. Existing rules may restrict the offer of inducements to influence a witness not to testify. See *In re Disciplinary Proceedings Against Bonet*, 29 P.3d 1242 (Wash. 2001) (disciplining prosecutor for offering the codefendant witness the benefit of having the charges against him dismissed in exchange for absencing himself from the trial through the invocation of a constitutional right to remain silent, which the codefendant witness did not otherwise intend to invoke). See generally *Bruce A. Green, Limits on a Prosecutor's Communications with Prospective Defense Witnesses*, 25 CRIM. L. BULL. 139 (1989). The rules would not address the more subtle practice of naming potential witnesses as "unindicted coconspirators" in an indictment in order to induce them to assert the Fifth Amendment privilege. See, e.g., *United States v. LaHue*, 261 F.3d 993 (10th Cir. 2001); *United States v. Bros. Constr. Co.*, 219 F.3d 300 (4th Cir. 2000).

89. See generally *Fred C. Zacharias, Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998); see also *Bruce A. Green, "Package" Plea Bargaining and the Prosecutor's Duty of Good Faith*, 25 CRIM. L. BULL. 507 (1989) (discussing practice of charging or threatening to charge an individual, then offering leniency in the event that another individual pleads guilty).

eration with the prosecution.⁹⁰ Finally, it is silent about the prosecutor's exercise of discretion after a conviction has been obtained. It does not identify a duty to "confess error" when a conviction has been procured through wrongful means⁹¹ or a duty to seek redress when post-trial evidence makes plain that an innocent person was convicted.⁹²

B. Protecting the Accused's Exercise of Procedural Rights

Two other provisions reflect the understanding that, as a "minister of justice," the prosecutor has a unique responsibility to ensure the fairness of the investigative and adjudicative process, even if doing so may be contrary to the government's interest in securing the conviction of a person it believes to be guilty of a crime. In particular, these provisions require prosecutors to respect individuals' ability to exercise certain procedural rights. But they are limited in which rights and whose rights they protect.

The first provision, Rule 3.8(b), imposes a responsibility on prosecutors to ensure that the accused has an opportunity to obtain counsel.⁹³ The responsibility rarely comes into effect, however, because it is considered sufficient, at the time an unrepresented defendant is first brought to court, if the prosecutor "simply lets the judge raise this subject with the accused."⁹⁴ The prosecutor must intervene only in the rare case that the court forgot to advise the defendant of the right to counsel. The second provision, Rule 3.8(c), forbids a prosecutor from seeking "from an unrepresented accused a waiver of important pretrial rights such as the right to a preliminary hearing."⁹⁵ It would be rare for a prosecutor to want to seek such a waiver, however, since even apart from the rule, a defendant's waiver of a preliminary hearing prior to the appointment of counsel would likely be unenforceable.

Neither provision prevents prosecutors from inducing unrepresented defendants to waive constitutional rights that are in far greater need of protection. Prosecutors and their investigative agents frequently seek to induce arrested defendants to waive their right to remain silent and to counsel in the context of interrogations, but these provisions impose no restraint on prosecutors with regard to doing so. Increasingly,

90. See generally Galin, *supra* note 31, at 1250–59.

91. See *Young v. United States*, 315 U.S. 257, 258 (1942) (stating that "[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when . . . a miscarriage of justice may result from their remaining silent").

92. See, e.g., *Houston v. Partee*, 978 F.2d 362, 368–69 (7th Cir. 1992). See generally Green, *supra* note 17, at 637–42; Uviller, *supra* note 7, at 1704–05 (arguing that when there is "a firmly based charge that . . . an innocent person was convicted, . . . [a]ll efforts must be bent to the diligent investigation of the claim and, if substantiated, it is incumbent upon the [prosecutor] . . . to urge immediate remedy to assist the court in righting the wrong").

93. See *supra* note 26.

94. KUCKES REPORT, *supra* note 50, at 19 n.51 (citing ABA STANDARDS, PROSECUTION FUNCTION, *supra* notes 34–35, Standard 3-3.10(a), Cmt., at 79).

95. See *supra* note 27.

prosecutors have also sought to induce *represented* defendants to waive certain rights, such as the right to discovery of exculpatory evidence or the right to appeal, as a condition of receiving a favorable guilty plea offer.⁹⁶ Further, in cases where criminal investigators may have violated a suspect's civil rights, prosecutors have required the individual to forego civil claims as a condition of forbearance from prosecution or leniency.⁹⁷ There may be a need for ethical limitations on a prosecutor's ability to interfere with these various rights to supplement whatever restrictions are imposed by the law. But none are included in Rule 3.8.

C. Prosecutors' Disclosure Obligations

The prosecutor's role as a "minister of justice" suggests that the prosecutor has a greater duty of candor than other lawyers both in dealing with others—especially criminal defendants—and in dealing with the court. Rule 3.8(d) addresses only one narrow aspect of the prosecutor's disclosure obligation: the duty to disclose evidence to the accused prior to or during the trial. The provision requires the prosecutor to disclose exculpatory evidence and evidence that mitigates the charged offense as well as, if the defendant is convicted, unprivileged evidence that mitigates the sentence.⁹⁸ This obligation is already imposed in large part by the Due Process Clause.⁹⁹ To a small degree, the provision imposes an additional disclosure obligation,¹⁰⁰ in that it requires disclosure of *any* exculpatory evidence whereas the constitutional case law requires exculpatory evidence to be produced only when it is "material" to the defense.¹⁰¹

96. See, e.g., *United States v. Ruiz*, 2002 U.S. LEXIS 4650 (2002) (waiver of *Brady* rights); *United States v. Cannady*, 2002 U.S. App. LEXIS 4737 (4th Cir. 2002) (waiver of right to seek collateral review of conviction); *United States v. Case*, 2002 U.S. App. LEXIS 4606 (D.C. Cir. 2002) (waiver of appeal and other challenges to conviction); N.C. Eth. Op. RPC 129, 1992 WL 753137 (waiver of appellate and post-conviction rights). See Shane M. Cahill, Note, *United States v. Ruiz: Are Plea Agreements Conditioned on Brady Waivers Unconstitutional?*, 32 GOLDEN GATE U. L. REV. 1 (2002); see also John G. Douglas, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001); Corinna Barret Lain, *Accuracy Where it Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1 (2002); *Breathing New Life*, *supra* note 84 (arguing that prosecutors use threat of vindictive charging and plea bargaining decisions to discourage defense attorneys from asserting defendants' rights).

97. See FREEDMAN, *supra* note 1, at 225–28; Ken Takahashi, Note, *The Release-Dismissal Agreement: An Imperfect Instrument of Dispute*, 72 WASH. U. L.Q. 1769 (1994).

98. See *supra* note 26.

99. See *United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). In the absence of this special provision, prosecutors could be disciplined for failing to disclose exculpatory evidence and other evidence that the law requires them to produce, because lawyers are generally subject to sanction for "unlawfully obstruct[ing] another party's access to evidence." MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2002).

100. A proposed comment to Rule 3.8 would make explicit that the provision "goes beyond the duty imposed upon prosecutors by constitutional law." Ethics 2000 Report, *supra* note 8, at 314, 316. An addition to the comment would also clarify that the rule applies to "evidence that materially tends to impeach a government witness." *Id.* at 314, 316. Such evidence must be disclosed under the Due Process Clause. See *Giglio*, 405 U.S. 150.

101. See *Strickler v. Greene*, 527 U.S. 263, 280–82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 432–41 (1995). See generally Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69

However, as far as one can tell, courts do not invoke the disciplinary rule as a source of additional disclosure obligations, and courts and disciplinary authorities do not sanction prosecutors for failing to disclose evidence as required by the rule but not by other law.¹⁰²

Various other questions regarding disclosure are unanswered by the Due Process decisions. Does the prosecutor ever have a responsibility to disclose nonevidentiary information to the accused, such as when the prosecution's only witness has died or is otherwise unavailable to testify?¹⁰³ Does the prosecutor have any duty to communicate with crime victims?¹⁰⁴ And, most importantly, does the prosecutor have special disclosure obligations to the court?¹⁰⁵ There is case law that suggests a number of unique obligations, including a duty: (1) to disclose to the tribunal material facts necessary to correct the court's apparent or possible misunderstanding of the facts bearing on the court's decision;¹⁰⁶ (2) to refrain in closing argument from drawing inferences from circumstantial evidence that are contradicted by extra-record evidence which the prosecutor knows to be accurate;¹⁰⁷ (3) to refrain from seeking a legal ruling that the prosecutor knows to be contrary to law;¹⁰⁸ (4) to call the court's attention to legal or procedural errors,¹⁰⁹ and (5) to correct testimony of a

FORDHAM L. REV. 1205 (2000) (discussing difference between disclosure obligations under the Due Process Clause and Model Rule 3.8(d)). In essence, the provision requires prosecutors to err on the side of disclosure when evidence is clearly exculpatory but not necessarily material—an approach that makes sense given that the materiality of evidence often cannot be determined prospectively. See Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1577–79 (2000) (suggesting that Model Rule 3.8(d) does not include a “materiality” limitation, because “any limitation like ‘materiality’ invites prosecutors and their law enforcement assistants to make their own biased judgments about materiality”).

102. Indeed, discipline is relatively infrequent even for the failure to comply with obligations to disclose evidence that arise under the Constitution, statutes, or rules. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Zacharias, *supra* note 55.

103. See, e.g., *People v. Jones*, 375 N.E.2d 41 (N.Y. 1978). See generally, Aaron, *supra* note 7; Gregory S. Sender, Note, *A Search for the Truth or a Game of Strategy? The Circuit Split over the Prosecution's Obligations to Disclose Inadmissible Exculpatory Information to the Accused*, 51 SYRACUSE L. REV. 139 (2001).

104. See Stacy Caplow, *What if There is No Client?: Prosecutors as “Counselors” of Crime Victims*, 5 CLINICAL L. REV. 1 (1998).

105. See generally Zacharias, *Structuring the Ethics*, *supra* note 17.

106. See, e.g., *United States v. Jones*, 983 F.2d 1425 (7th Cir. 1993); *In re Norton*, 608 A.2d 328 (N.J. 1992).

107. See, e.g., *United States v. Lusterino*, 450 F.2d 572, 574–75 (2d Cir. 1971); *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962).

108. For example, the prosecutor may not knowingly offer inadmissible evidence. See, e.g., *United States v. Ince*, 21 F.3d 576 (4th Cir. 1994); *United States v. Eason*, 920 F.2d 731 (11th Cir. 1990).

109. For example, do prosecutors have an obligation to call the court's attention to the defense lawyer's incompetent representation? See Vanessa Merton, *What Do You Do When You Meet a “Walking Violation of the Sixth Amendment” if You're Trying to Put That Lawyer's Client in Jail?*, 69 FORDHAM L. REV. 997 (2000). Do prosecutors have an obligation to call the attention of the defense lawyer and/or the court to facts that may give rise to a conflict of interest on the part of defense counsel? See Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323 (1989).

prosecution witness, including testimony elicited by defense counsel on cross-examination, if the prosecutor knows or reasonably should know it is false.¹¹⁰ On these disclosure questions, however, Rule 3.8 is silent, and it is unclear whether they are adequately answered by the provisions on candor and confidentiality applicable to lawyers generally.¹¹¹

D. Prosecutor's Exercise of Authority to Compel Testimony

Prosecutors have unique means of obtaining testimony and other evidence, particularly through the grand jury process, and their exercise of this authority may have substantial impact on those from whom evidence is sought. Model Rule 3.8 regulates one aspect of this authority: the issuance of subpoenas to lawyers in order to obtain evidence concerning past or present clients.¹¹² It forbids a prosecutor from issuing such a subpoena unless the prosecutor believes it is necessary to do so because the evidence is essential to the prosecution, is not privileged, and is unavailable from other sources.

Given the strength of prosecutors' opposition to this provision, one might think that it imposed a significant restraint on criminal investigations and prosecutions, but that is not so. It is uncommon for a prosecutor to seek evidence from a lawyer concerning the lawyer's client, because lawyers are not generally likely to possess helpful information that is not privileged. When a prosecutor does seek such evidence, the rule imposes relatively modest restraint, since the standard it imposes is a subjective one and therefore not likely to be enforced.

Commentators and judicial decisions have brought to light many other possible excesses in the use of prosecutors' investigative power. For example, concerns have been raised about prosecutors' use of trickery in the grand jury process (e.g., failing to disclose to grand jury witnesses that they are targets of the grand jury investigation or inducing witnesses to commit perjury).¹¹³ Concerns have also been raised when prosecutors compel evidence from family members and others (aside from lawyers) who are in a confidential or intimate relationship with the person under investigation. Rule 3.8 does not address these concerns, however.

110. See, e.g., *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991).

111. See, e.g., MODEL RULES OF PROF'L CONDUCT Rules 3.1, 3.3(a)(1), 3.3(a)(4) (2002).

112. See *supra* note 29. For commentary on the history of this provision and the controversy surrounding it, see Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917 (1992).

113. See, e.g., *United States v. Regan*, 103 F.3d 1072, 1079 (2d Cir. 1997); *Wheel v. Robinson*, 34 F.3d 60, 67-68 (2d Cir. 1994); *United States v. Babb*, 807 F.2d 272 (1st Cir. 1986). See generally Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1 (1999).

E. Public Communications

All lawyers are restricted in their communications with the media regarding pending judicial proceedings because of the need to ensure the fairness of the trial,¹¹⁴ but there is an additional interest that calls for restraint on prosecutors' communications with the media. That is the interest in protecting presumptively innocent individuals from unwarranted public opprobrium. The point of criminal charges is to provide notice to the individual accused and a framework for the jury's deliberations, but not in itself to serve as punishment by tarring an individual's reputation.

Consequently, Rule 3.8(f) provides in part that prosecutors may not make "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."¹¹⁵ It recognizes an exception, however, for those "statements that are necessary to inform the public" of what the prosecutor is doing and "that serve a legitimate law enforcement purpose."¹¹⁶ The exception affords prosecutors substantial discretion to communicate with the media concerning matters that prosecutors regard as necessary, informative, and legitimate.

Rule 3.8(f) also requires prosecutors to "exercise reasonable care to prevent" their investigators and other personnel from making impermissible extrajudicial statements.¹¹⁷ This provision does not impose a new obligation on prosecutors, but is a specific application of two obligations that are generally imposed on lawyers under the Model Code: (1) a duty not to violate the rules "through the acts of another"¹¹⁸ and; (2) a duty to "make reasonable efforts to ensure" that nonlawyers over whom they have direct supervisory authority act consistently with the lawyers' professional obligations.¹¹⁹

These provisions, which are generally of import only in high-profile cases, do not address the indirect ways in which a prosecutor may heighten the public's condemnation of the accused—for example, by making gratuitous references to embarrassing information about the accused in a complaint, indictment or other public filing, or in statements in court.¹²⁰ Nor do they address the ways in which a prosecutor may, for no legitimate reason, heighten public condemnation of individuals who are

114. MODEL RULES R. 3.6.

115. *See supra* note 66. The current Rule 3.8(f) combines former subsections (e) and (g) into a single provision.

116. MODEL RULES R. 3.8(f).

117. *Id.*

118. MODEL RULES R. 8.4(a).

119. *Id.* R. 5.3(b).

120. *See, e.g.,* United States v. Smith, 992 F. Supp. 743 (D.N.J. 1998); *see also* FREEDMAN, *supra* note 1, at 233 (noting that "[t]he biggest loophole that the rules provide for the prosecutor is the permission to state information that is contained in a public record").

not charged with a crime.¹²¹ For example, they do not address the possibility of naming uncharged individuals as “unindicted coconspirators” in complaints, indictments, or sentencing memoranda when there is no need to do so. Nor do they restrict prosecutors from making improper statements to the press concerning the guilt of uncharged individuals.

F. *Unregulated Prosecutorial Conduct*

The existing provisions of Model Rule 3.8 address five aspects of prosecutorial conduct, but, as discussed above, they impose relatively little restraint on prosecutors and leave much troublesome conduct unaddressed. Moreover, these provisions entirely fail to regulate other areas of prosecutorial conduct that either are inadequately addressed or entirely unaddressed by the generally applicable rules. For example, because prosecutors have a responsibility to prevent unjust convictions, prosecutors have a special obligation to ensure the truthfulness of their witnesses’ testimony. This includes avoiding techniques for interviewing witnesses and preparing them to testify that are likely to produce false testimony, taking care not to offer inducements to witnesses (such as immunity or leniency) in a manner that encourages false testimony,¹²² and not presenting testimony when there is good reason to doubt its veracity. Relatedly, a prosecutor has a responsibility not to mislead the fact finder by casting doubt on the credibility of testimony the prosecutor knows to be truthful or by urging the fact finder to draw an inference from the evidence that the prosecutor knows to be contrary to fact.¹²³ Prosecutors also have special obligations toward victims and witnesses to a crime, including a duty to take reasonable care to ensure their safety.¹²⁴ Because Rule 3.8 does not address these aspects of prosecutors’ conduct, prosecutors are not put on notice of their additional responsibilities and it is doubtful whether they can be disciplined for failing to abide by them.

121. Cf. Lori K. Weems, *Secrecy in Texas Grand Jury Proceedings: The Accused’s Right to Prosecutorial Silence*, 46 BAYLOR L. REV. 431, 442 (1994) (observing that “whether disclosure by the prosecutor of grand jury proceedings constitutes prosecutorial misconduct often remains unclear”).

122. See generally Joel Cohen, *When Prosecutors Prepare Cooperators*, 23 CARDOZO L. REV. 865 (2002); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829 (2002); H. Richard Uviller, *No Sauce for the Gander: Valuable Consideration for Helpful Testimony from Tainted Witnesses in Criminal Cases*, 23 CARDOZO L. REV. 771 (2002); Ellen Yaroshefsky, *supra* note 31; Melissa W. Rawlinson, Note, *United States v. Singleton and the Witness Gratuity Statute: What Is the Best Approach for the Criminal Justice System?*, 14 BYU J. PUB. L. 227 (2000).

123. See *United States v. Lusterino*, 450 F.2d 572 (2d Cir. 1971); *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962).

124. See, e.g., *Ochran v. United States*, 117 F.3d 495 (11th Cir. 1997); *Wang Zong Xiao v. Reno*, 81 F.3d 808 (9th Cir. 1996); PROSECUTION FUNCTION, *supra* note 35, Standard 3-3.2(d).

IV. IS RULE 3.8 THE BEST OF ALL POSSIBLE RULES OF PROSECUTORIAL ETHICS?

Although Model Rule 3.8 is a woefully incomplete list of obligations that courts would recognize if they were to attempt to catalog the special responsibilities of criminal prosecutors, one might nevertheless consider whether there is a substantive reason to leave Rule 3.8 untouched. If one were starting from scratch, might one conclude that Rule 3.8 should contain precisely the provisions it now contains and no others? As discussed below, the answer is almost certainly “no.” Depending on one’s general views about disciplinary codes and prosecutorial ethics, one might prefer an extensive list of special disciplinary obligations for prosecutors, no rules for prosecutors, or only a handful of special rules. But even if one chose to be highly selective, as the ABA has, it is hard to imagine why the provisions of Rule 3.8 would be the particular ones selected.

Should there be a comprehensive rule of prosecutorial ethics? The argument for an extensive list of special prosecutorial obligations is essentially that absent such a list, prosecutors will act contrary to the courts’ normative expectations—or, at least, contrary to what the courts’ expectations would be if they gave serious thought to questions of prosecutorial ethics. In general, courts are assumed to have the authority and responsibility to regulate lawyers, including prosecutors. Courts do so, in part, by establishing rules of professional conduct that reflect their understanding of the relevant professional norms. By codifying these expectations, they put prosecutors on notice of what the courts expect of them, legally compel prosecutors to act accordingly, and provide a mechanism for sanctioning prosecutors when they fail to do so. If courts do not incorporate their normative expectations into the disciplinary code, it is likely that prosecutors will act contrary to the courts’ expectations for at least two obvious reasons.

First, in the absence of a disciplinary rule telling prosecutors specifically what courts expect of them, prosecutors may not know. The boundaries of proper professional conduct for prosecutors can be debated, and in the absence of a judicial pronouncement, prosecutors acting in good faith can contravene whatever standards the courts would have chosen. Indeed, prosecutors may even be misled by the existing disciplinary provisions to believe that courts expect less of them than they actually do. For example, prosecutors may assume that when there is no special rule relating to particular conduct, they are supposed to conform to the relevant rule regulating lawyers generally.¹²⁵ They may assume that when there *is* a special rule, it sets forth the expected standard

125. For example, courts may expect prosecutors to refrain from offering testimony that they do not believe to be true, but, in the absence of a special rule, prosecutors may believe that like lawyers generally, they may elicit testimony that supports their position as long as they do not know it to be false. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (2002).

of conduct, not simply the minimal standard that will govern disciplinary decisions.¹²⁶ Further, they may assume that when there is neither a relevant rule applicable to lawyers generally nor a special rule for prosecutors, prosecutors are meant to have untrammelled discretion. Even if prosecutors intuit that courts have additional expectations, prosecutors may regard these expectations as somehow aspirational or discretionary. That is, prosecutors may assume that the duty to “seek justice,” and various normative understandings that flow from it, are comparable to the provisions of a nonenforceable civility code¹²⁷ or to the Ethical Considerations of the Model Code,¹²⁸ in that it would be nice for prosecutors to attempt to abide by them but there is no necessity to do so.

Second, prosecutors may be aware that they are professionally obligated to abide by more demanding norms than those contained in the disciplinary rules or otherwise expressed in the enforceable law but nevertheless choose to ignore expectations that are not codified and legally enforceable. Prosecutors have competing objectives of which complying with unenforceable norms relevant to their professional conduct is just one, and perhaps seemingly not the most important. Often, compliance with unwritten professional expectations will undermine other legitimate objectives, such as the need to conduct an effective investigation or to convict and punish someone who is believed to be guilty of a crime. The need to comply with professional expectations that seemingly exist only in the ether is likely to take a backseat to other competing demands.

Although courts might regulate prosecutors through ad hoc decision making rather than disciplinary rule making,¹²⁹ rule making is generally preferable. One reason is that “courts risk acting politically when they act on an ad hoc basis and according to vague standards.”¹³⁰ Another is

126. For example, courts may expect prosecutors to apply a higher standard than “probable cause” to the decision whether to take a case to trial, but prosecutors may understand that the probable cause standard is not just a minimal standard for the imposition of discipline, but the standard that courts actually expect prosecutors to employ. Nothing in the Model Rules suggests that probable cause is a minimal standard selected for disciplinary purposes but that, in practice, prosecutors should actually employ a higher standard. Prosecutors may be unaware that the ABA Standards adopt a higher standard. They may conclude that to deal with the apparent inconsistency between the provisions, they should employ the probable cause standard of Rule 3.8(a), since the disciplinary rule (once it takes effect in the jurisdiction) is enforceable law adopted by the judiciary while the ABA Standards are simply guidelines promulgated by a bar association. Or they may “interpret” the more demanding standard to require nothing more than probable cause.

127. See, e.g., Proposed Standards for Professional Conduct Within the Seventh Federal Judicial Circuit, Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 448 (1992) (“These standards shall not be used as a basis for litigation or for sanctions or penalties.”).

128. MODEL CODE OF PROF'L RESPONSIBILITY, Preliminary Statement (1969) (explaining that “[t]he Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive” but that unlike the Disciplinary Rules, they are not “mandatory in character”).

129. For a discussion of courts' alternative means of regulating prosecutors, see Green & Zacharias, *supra* note 2, at 400–05 (focusing specifically on federal courts' methods of regulating federal prosecutors).

130. *Id.* at 446.

that if courts regularly issue after-the-fact disciplinary rulings based on previously unarticulated rationales, they may interfere with legitimate law enforcement activities by chilling permissible behavior. Prosecutors are better able to do what the courts expect of them without overcompensating when courts adopt clear disciplinary rules that give prosecutors advance warning.¹³¹ In any event, courts have not opted to regulate prosecutors primarily by announcing ethical requirements on a case-by-case basis and then enforcing the requirements thereby established. Courts have assumed that the ethical regulation of prosecutors, like that of lawyers generally, should primarily be achieved through the adoption and enforcement of disciplinary rules.

Should prosecutors be entirely exempt from disciplinary regulation? Although the ABA's model disciplinary codes have always subjected prosecutors both to generally applicable rules and to at least a few special provisions, one might argue that there should be no special rules for prosecutors and, indeed, that prosecutors in their professional work should be exempt from the rules that govern lawyers generally. Two reasons might be offered why courts should defer entirely to prosecutorial self-regulation.

First, there may be reasons for prosecutors rather than judges to set the standards governing prosecutors' conduct. With respect to at least some aspects of prosecutorial conduct, prosecutors may be in a better position than courts to determine what standards should apply, because prosecutors have "superior experience, expertise, or knowledge."¹³² Further, the absence of external regulation may encourage a greater degree of thoughtful self-regulation by prosecutors.¹³³

Second, there may be reasons to conclude that regardless of who sets the standards governing prosecutors' conduct, those standards should not be subject to disciplinary enforcement or other external enforcement. Although disciplinary regulation would promote prosecutors' compliance with the relevant professional norms, this benefit may be outweighed by various harms. For example, disciplinary proceedings based on alleged prosecutorial misconduct in deciding to initiate a criminal prosecution may reveal investigative information and internal processes that ought to be kept confidential.¹³⁴ These proceedings may also chill legitimate decision making because of the risk that disciplinary authorities will fail to recognize when prosecutors have made legitimate judgments.¹³⁵

131. *Id.* at 447.

132. *Id.* at 442.

133. *Id.* at 450.

134. *See id.* at 460–61, 467–68.

135. *Id.*

In the end, although these considerations bear on the question of whether to adopt any particular rule of prosecutorial ethics,¹³⁶ they do not justify categorically exempting prosecutors from disciplinary regulation, as the ABA has evidently recognized. It is unimaginable that courts would leave it to prosecutors' discretion whether, for example, to abide by rules forbidding lawyers from knowingly offering false testimony or making false statements to the court,¹³⁷ or that courts would leave it entirely to prosecutors to enforce these restrictions themselves. Some disciplinary regulation of prosecutors, along with other lawyers, is compelled by the interest in protecting the integrity of judicial proceedings. Thus, there seems to be little disagreement with the general proposition that prosecutorial conduct, like other professional work by lawyers, should be subject to disciplinary regulation.

Should prosecutors be exempt from special provisions, and subject only to generally applicable rules? One might concede that the professional conduct of prosecutors, like that of all other lawyers, should be regulated by disciplinary rules, but argue that there should be no *special* rules for prosecutors that are more restrictive than those applicable to lawyers generally. This argument could be advanced in any number of ways. The theory might be that the legal profession is a unified profession and that, to be legitimate, a rule of conduct must therefore make sense for all lawyers. Or it might be argued that rules that apply uniquely to any one group of lawyers, and to prosecutors in particular, are too likely to reflect the biases and limited expertise of bodies that draft the disciplinary rules and courts that adopt them. Alternatively, the concern might be that courts lack legal authority to impose unique ethical obligations on lawyers serving in the prosecutorial role, either because courts' rule-making authority does not go that far or because the constitution circumscribes whatever authority might otherwise exist.

Some individual Commissioners may have favored entirely eliminating Rule 3.8 for any of these or other reasons, but the Commission as a whole evidently did not. This is scarcely surprising, since the ABA has historically recognized the legitimacy and value of special provisions for prosecutors, and courts have concurred. The special treatment of prosecutors in the disciplinary codes reflects a normative understanding identified earlier in this article that the standards of conduct should be different for prosecutors than for other lawyers, as well as a regulatory understanding that stricter standards should not be left entirely to prosecutorial self-enforcement.¹³⁸ The Commission ultimately declined to challenge these long-held understandings.

136. See generally *id.* at 438–73 (arguing that federal prosecutors should not be categorically exempted from external regulation and identifying factors that federal courts should consider in deciding whether to adopt a particular rule of prosecutorial ethics).

137. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1), (4) (2002).

138. See *supra* text accompanying notes 12–20.

Should prosecutors be regulated by a limited number of special provisions? One might argue that the ideal is for a disciplinary code to identify a limited number of special prosecutorial obligations. Prosecutors would be left to determine for themselves how best to proceed in situations on which the disciplinary rules are entirely silent. Further, where a rule sets a standard of conduct for lawyers generally, prosecutors would be left to decide whether to restrict their own conduct to a greater degree than the rule demands. Special provisions for prosecutors would be adopted only when there is good reason for them.

Selectivity has at least five possible virtues. First, it may encourage prosecutorial self-regulation by avoiding the perception that the disciplinary rules fully express the norms of prosecutorial conduct. Second, it may protect the courts' public image by keeping them out of debates on questions of prosecutorial ethics that are highly contentious. Third, it avoids burdening the disciplinary code with provisions that are relatively unimportant or unnecessary, because they simply restate existing law, because they deal with problems that rarely arise, because they protect against trivial harms, or for other reasons.

Fourth, selectivity avoids problems of enforcement. Many conceivable provisions on prosecutorial ethics may be difficult as a practical matter to enforce. This may be true, for example, of provisions that forbid prosecutors from acting upon impermissible motivations rather than proscribing particular conduct, or that address conduct that would be difficult to discover and prove. It may be preferable not to incorporate unenforceable provisions into the disciplinary code.

Finally, selectivity avoids the difficulty of drafting provisions that adequately express what the courts expect of prosecutors. With respect to many areas of conduct, the standard that best captures courts' normative expectations may be one requiring prosecutors simply to act reasonably under all the circumstances and not to abuse their discretion. But such a standard would give little guidance, allow for arbitrary disciplinary decision making, call for intrusive factual determinations, and chill legitimate conduct. The alternative, a rule that more explicitly distinguishes between permissible and impermissible conduct, may either be too restrictive or too permissive. Courts might legitimately conclude that it is sometimes better to have no enforceable restriction than to have one that is over- or underinclusive.

Has the ABA identified the optimal provisions? Suppose one concludes that the ideal is to adopt a select number of special disciplinary provisions for prosecutors rather than adopting a comprehensive set of provisions, on one hand, or deferring entirely to prosecutorial self-regulation, on the other. One might then ask whether the existing provisions are the ones that would reasonably be chosen. The answer is that there is no logic to what Model Rule 3.8 includes and what it leaves out.

The rule defies the obvious principles that one might employ in deciding what questions of prosecutorial conduct to address.¹³⁹

A disciplinary code might focus in a principled way on particular aspects of prosecutorial conduct, but Rule 3.8 does not do so. For example, one might include provisions relating only to prosecutors' courtroom conduct, or to prosecutorial conduct that principally affects courtroom proceedings, on the theory that this is the area where the judicial interest in regulating prosecutors' conduct is strongest. Or, more broadly, one might focus on prosecutors' public conduct but not include provisions that address internal deliberations. Thus, decisions about whom to investigate, what witnesses to call, whom to charge, what charges to bring, and the like, might be off limits on the theory that courts should defer to discretionary decision making on these questions or on the theory that disciplinary inquiries into these decisions are too intrusive. But Rule 3.8 does not reflect such a line drawing. There are many troubling aspects of prosecutors' public conduct, and conduct vis-à-vis courtroom proceedings in particular, that are not addressed. Meanwhile, two existing provisions target internal decision making: Rule 3.8(a), forbidding criminal charges that the prosecutor knows to be unsupported by probable cause, and Rule 3.8(e), forbidding the issuance of subpoenas to defense lawyers when the prosecutor does not believe the evidence to be essential.

Alternatively, one might regulate only when provisions can be drafted so as to give relatively clear notice of what conduct is forbidden. One might decline to regulate at all when the only way to do so fairly is by provisions that incorporate a vague standard, such as one based on "reasonableness," or a subjective standard, such as one depending on the prosecutor's knowledge, belief, or purpose, because the necessary disciplinary inquiries would be intrusive and because violations of such provisions would be difficult to prove. But Model Rule 3.8 does not reflect this principle either. Most of its provisions employ a subjective and/or vague test. For instance, Rule 3.8(a) applies when a prosecutor "knows" probable cause is lacking; Rule 3.8(d) applies when a prosecutor fails to disclose evidence that he "knows" is exculpatory; Rule 3.8(e), applies when a prosecutor subpoenas a defense lawyer without a reasonable belief in the need to do so; and Rule 3.8(f) requires "reasonable care" to prevent employees from making improper extrajudicial statements.

A disciplinary code might attempt to limit itself to provisions on prosecutorial ethics that are important, because they add to the already existing legal and ethical requirements, address recurring problems, and protect against significant harms. But this principle also does not explain Rule 3.8. The rule does not address questions about prosecutorial discretion, witness preparation, and candor to the court that arise frequently and significantly affect the outcome of criminal prosecutions. But it does

139. See KUCKES REPORT, *supra* note 50, at 39.

include provisions that essentially restate the law such as Rule 3.8(a), the probable cause requirement, and Rule 3.8(d), the discovery provision. It includes a provision that is simply a special application of generally applicable ethics rules in Rule 3.8(f), which requires prosecutors to supervise their employees to prevent improper public communications. And it includes provisions dealing with problems that rarely occur, namely, waivers of the right to counsel and preliminary hearings.

Finally, the disciplinary code might avoid provisions that are contentious while incorporating standards of conduct that prosecutors are likely to accept. But the ABA did not adopt that approach either; it adopted and has preserved Rule 3.8(e), the attorney-subpoena provision, which prosecutors oppose and few states have adopted. Meanwhile, Rule 3.8 does not include obligations identified in the ABA Standards and the Department of Justice Guidelines that would enjoy much broader support.

In sum, Rule 3.8 can best be understood as a product of happenstance, politics, and stasis but not principle. If the ABA were drafting a disciplinary code from scratch in the twenty-first century, it seems inconceivable that it would adopt the existing provisions of Rule 3.8 and no others. But when the Ethics 2000 Commission began its work, those were the provisions it started with. It had no reason to eliminate them, since there was little pressure to do so. It had procedural and political reasons to propose no new provisions.¹⁴⁰ And so there was a stand-off that meant leaving the disciplinary provisions of Rule 3.8 essentially untouched.

V. CONCLUSION: THE FUTURE OF RULE 3.8—REFORM OR STASIS?

Two questions remain: Should additional responsibilities be included in state disciplinary codes? If so, should the ABA draft them, as it has drafted other model provisions for adoption by state supreme courts, or should special disciplinary provisions be developed by other entities, such as the state supreme courts themselves? As a matter of both substance and procedure, fair arguments might be made on different sides of these questions.

One can anticipate that both the ABA and state disciplinary authorities would favor the status quo: The ABA drafts rules of prosecutorial ethics that state courts adopt and state disciplinary agencies enforce. Any alternative would diminish the authority of these bodies with regard to lawyer ethics generally. Further, the ABA and state disciplinary authorities can point to their experience and expertise as reasons why they should continue to serve in their traditional role.

140. See *supra* text accompanying notes 59–66.

It might be argued, however, that if prosecutors are to be regulated by rules that recognize their special obligations as “ministers of justice,” the process of developing the rules should be overseen by the judiciary, not by the ABA, and that prosecutors as well as the defense bar should have a far greater role in developing them than they ordinarily have in the ABA rule-making process.¹⁴¹ The judiciary’s active involvement in rule making might reduce the risk that the drafters will refrain from developing appropriate restrictions out of undue concern about opposition by prosecutors’ offices, better ensure that the judiciary’s perspective and experience are adequately considered, and give the ultimate work product greater legitimacy because of the neutrality and objectivity of the sponsoring agency.

It might also be argued that, regardless of who drafts the rules, prosecutorial ethics rules, like the Code of Judicial Conduct, should be separately codified and enforced. A separate enforcement mechanism can be structured to address some of the enforcement concerns that may lead rule makers to refrain from adopting rules regarding certain prosecutorial conduct. For example, the process might be sensitive to law enforcement exigencies such as the need to protect against intrusions into ongoing prosecutions. It can draw on the expertise of prosecutors and others with prosecutorial experience to ensure adequately informed decisions and interpretations of the rules.

Some public consideration of these questions by the ABA, the courts, and others is needed. The Ethics 2000 Commission’s decision to preserve prosecutorial ethics as usual is perfectly understandable. But there is a risk that its inaction may be misunderstood. The Commission would have done well to explain that its decision was political and procedural, not substantive, and that more work must be done with respect to prosecutorial regulation. One should not infer from the Commission’s silence that it considered Rule 3.8 to be the best of all possible rules of prosecutorial ethics. It is not.

141. With respect to the development of ethics rules for federal prosecutors in particular, see Green & Zacharias, *supra* note 2, at 474; cf. Andrew L. Kaufman, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 TUL. L. REV. 149 (2000).