IN THE DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE: **STEPHEN P. JONES, BPR #16764**
Respondent, an Attorney Licensed to Practice Law in Tennessee (Shelby County)

DOCKET NO. 2016-2534-9-KH

BOARD'S RESPONSE AND MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT

Comes now the Board of Professional Responsibility ("Board") to respond in opposition to the Motion for Summary Judgment filed by the Respondent, and respectfully requests that the motion be denied in its entirety for the reasons set forth below.

STANDARD FOR SUMMARY JUDGMENT

As the moving party, Mr. Jones has the burden to affirmatively negate an essential element of the Board's claim or demonstrate that the Board's evidence at the summary judgment stage is insufficient to establish its claim or defense. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264–65 (Tenn. 2015), cert. denied, 136 S. Ct. 2452 (2016)

In response, the Board must demonstrate "... the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." *Id.* The Board has responded to each fact presented by Mr. Jones in the manner provided by Tenn. R. Civ. P. 56 by: "(1) pointing to evidence establishing material factual disputes that were overlooked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for the trial; or (4)

submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06." *Boyce v. LPP Mortgage Ltd.*, 435 S.W.3d 758, 763–64 (Tenn. Ct. App. 2013), citing *Martin v. Norfolk Southern Railway. Co.*, 271 S.W.3d 76, 84 (Tenn.2008) (citations omitted).

STATEMENT OF FACTS

Mr. Jones became involved as co-counsel to another prosecutor in the Shelby County District Attorney's office in the lead up to the February 2009 trial of the Noura Jackson case. Mr. Jones was not the lead prosecutor handling the trial. The trial lasted for two weeks and the State called more than 45 witnesses and introduced more than 300 exhibits at trial. One of the State's more than 45 witnesses in the Noura Jackson case was Andrew Hammack. (See Board's Response to SUMF # 1-4)

Mr. Hammack provided two formal statements to the police regarding his interactions with Ms. Jackson during the night of June 4, 2005, and the early morning of June 5, 2005 – the time period for which it was alleged that Ms. Jackson's mother was murdered. Mr. Hammack provided a third statement, which was the handwritten statement at issue in this case. On June 13, 2005, Detective Miller collected Mr. Hammack, interviewed him at the police station, and received the handwritten statement prepared by Mr. Hammack. The third statement provided details on Mr. Hammack's whereabouts, the location of his cell phone, and possible impairment from drug use. (See Board's Response to SUMF #5: Appendix, Part 1 - July 17, 2009 transcript of hearing on Motion for New Trial, pp. 53, 55; Amended Answer to Petition for Discipline, Exhibit 1, Attachments A and B; Amended Answer to Petition for Discipline, para 16)

According to Detective Miller's testimony, he added Hammack's handwritten statement to the police file after receiving it. (Appendix, Part 2 - July 17, 2009 transcript of hearing on Motion for New Trial, pp. 58-59)

Immediately following the formal charges and initiation of the prosecution against Noura Jackson, the defense began discovery efforts. In 2005, the defense filed motions for discovery. In 2007, the defense filed a comprehensive motion to compel which included a request related to Mr. Hammack. Multiple pre-trial hearings were held on defense counsel's motions to compel Brady material. The prosecution was well aware that the defense had been requesting such statements for years. Although Mr. Jones did not join the prosecution until January 2009, he has testified that he received a copy of the file and began familiarizing himself with it before January 1, 2009. Mr. Jones was also responsible for "providing discovery that has not already been provided" which he accomplished by going page by page through the trial notebook and asking co-counsel if the information had previously been provided. On January 31, 2009 and February 9, 2009, Mr. Jones informed the Court that there was no other exculpatory material or Jencks material that needed to be provided. At that same hearing, Mr. Jones and the Court engaged in a discussion about the kind of information that the prosecution would be required to produce. This demonstrates that Mr. Jones had knowledge and notice prior to receiving a copy of the Hammack statement that a newly discovered witness statement would need deliberate and thoughtful review by the prosecution as to whether it should be produced immediately. (See Board's Response to SUMF #6: Appendix, Part 3 – Jones' deposition, pp. 29, 77, 85; Appendix, Part 4 – Excerpt from Pretrial Hearing held January 21, 2009, pp. 19, 37-40; Appendix Part 5 – Motion for Discovery; Appendix Part 6 – Motion to Compel Discovery; Appendix Part 7 – Motion for

Exculpatory Evidence; Appendix Part 8 – Affidavit of Valerie Corder; Amended Answer to Petition for Discipline, para 13-14)

Mr. Jones admits that the prosecution provided Jencks material to the defense before the trial began. He also admits that the June 13, 2005 summary of Detective Mark Miller, the one which references the third Hammack statement, was provided by the prosecution to the defense prior to trial. (See Board's Response to SUMF #7)

Mr. Jones was responsible for the examination of Detective Miller at trial. As Mr. Jones prepared for Detective Miller's testimony during a break in the trial, he reviewed the June 13, 2005 summary by Detective Miller. According to Mr. Jones, that is when he noticed a reference to the third statement by Mr. Hammack. (See SUMF # 6)

It is at this point that Mr. Jones engaged in several actions and inactions that were intentional, knowing, and which resulted in the failure of Mr. Jones to produce the statement. Mr. Jones requested and received a copy of Hammack's third statement from law enforcement prior to the examination of both Detective Miller and Mr. Hammack. Mr. Jones was responsible for the direct examination of Detective Miller. His co-counsel was responsible for the direct examination of Mr. Hammack. He gave the statement a cursory review and then placed it into a "trial notebook." The "trial notebook" was a master file that neither he nor his co-counsel were using. According to Mr. Jones, he and his co-counsel were "working out of our own files." From his cursory review, he decided that the statement did not need to be delivered to the defense. Mr. Jones did not give a copy to his co-counsel, either before or after Hammack's testimony. Mr. Jones could have discussed it with co-counsel, but he thought the statement was a "non-issue" and not material. During Mr. Hammack's testimony, both prosecution and defense asked questions about the statements he gave to the police. Mr. Jones testified that he could not

remember whether those examination questions about statements given to the police reminded him of the third statement that he placed in the trial notebook. Further, Mr. Jones was responsible for giving the first part of the prosecution's closing statement. As the trial came to an end, Mr. Jones was focused on "the most important job" of closing argument and assembling the "puzzle pieces" of testimony and evidence. In closing argument, Mr. Jones relies on the texts and phone calls made by the defendant to Mr. Hammack, and Mr. Hammack's trial testimony, to show that the defendant "needed a cover up." (See Board's Response to SUMF #12: Appendix – Part 3, Jones' deposition, pp. 92, 95-98, 110-101, 104-107, 112-113, 116; Appendix – Part 9, Testimony of Hammack; Appendix – Part 10, Testimony of Detective Miller; Appendix – Part 11, Jones' Closing Argument, pp. 21-22, 30; *also see* Board's Response to SUMF # 6: Appendix, Part 3 – Jones' Deposition, p. 93-94; Amended Answer to Petition for Discipline, Exhibit 1)

After Mr. Hammack testified on direct examination at trial, the prosecution did not give the defense a copy of the third statement. The defense did not make a formal motion for the statement under Tenn. R. Crim. P. 26.2; however, defense counsel and the prosecution engaged in an informal process for requesting Jencks material as each witness testified. After the conclusion of the trial, Mr. Jones filed "State's Notice of Omitted Jencks Statement In Relation to the Testimony of Andrew Hammack" alerting the defense and Court that the statement had been improperly omitted. In the Notice of Omitted Jencks Statement filed by Mr. Jones, he states that the prosecution voluntarily produced all Jencks statements "then in its possession" before trial, which demonstrates that the prosecution was not relying on formal motions. (See Board's Response to SUMF #9: Appendix, Part 8 – Affidavit of Valerie Corder; Amended Answer to Petition for Discipline, Exhibit 1)

As stated above, Mr. Jones filed a "State's Notice of Omitted Jencks Statement In Relation to the Testimony of Andrew Hammack" after the trial to explain the error. In the hearing on the Motion for New Trial, Judge Craft stated that the document was not intentionally withheld from the defense and was not a Brady violation. However, Judge Craft did state the following: "**I find it wasn't proper for the state to forget it. It was not proper for the state not to turn it over**, but it was unintentional." (See Board's Response to SUMF #14: Appendix – Part 12, July 17, 2009 transcript of hearing on Motion for New Trial, p. 108)

On appeal, the Court of Criminal Appeals affirmed the trial court's ruling likewise finding no Brady violation had occurred. However, the Court of Criminal Appeals, like the trial court, held that "...it is clear that the defendant's requests for discovery included the third statement of Hammack, and **the trial court found that, at the least, the statement should have been provided following his testimony**. Additionally, the court found that the State's failure to timely provide the statement was an inadvertent mistake. **Certainly, the statement should have been provided.**" (*State v. Jackson*, 2012 Tenn. Crim. App. LEXIS 1003 (Tenn. Crim. App., Dec. 10, 2012) (emphasis added)

The Tennessee Supreme Court determined that both lower courts were in error, finding that a *Brady* violation requiring reversal of Ms. Jackson's conviction occurred as a result of the untimely disclosure of the third Hammack statement. *State v. Jackson*, 444 S.W.3d 554 (Tenn. 2014) The Tennessee Supreme Court explained its differing conclusion as to *Brady* on the basis that there were a number of ways that counsel for Ms. Jackson could have used the contents of Mr. Hammack's third statement to challenge the State's case during trial. *Id.* at 596.

In a footnote, the Tennessee Supreme Court declined to find the third statement was intentionally withheld:

> By our holding we do not disturb the trial court's finding that the prosecutor did not intentionally withhold Mr. Hammack's third statement. We observe, however, that this is not the first time prosecutors in the Thirtieth Judicial District have withheld evidence that should have been disclosed. See, e.g., *State v. Coleman*, No. W2001–01021–CCA–R3–CD, 2002 WL 31625009, at 9 (Tenn.Crim.App. Nov. 7, 2002) (stating that the prosecution offered an "untimely revelation" of an oral statement defendant made to the police, resulting in a thirty-day continuance); *Roe v. State*, No. W2000–02788–CCA–R3–PC, 2002 WL 31624850, at 11 (Tenn.Crim.App. Nov. 20, 2002) (stating that the prosecution improperly withheld information favorable to the defendant, although no Brady violation resulted as the information was not material).

State v. Jackson, 444 S.W.3d 554, 597 (Tenn. 2014)

However, the Court's opinion also makes clear that the prosecution was on notice that the defense was seeking any statements made by Hammack:

> The record in this appeal demonstrates that Defendant satisfied the first requirement of a Brady claim **by requesting, on March 9 and March 23, 2007, any statements Mr. Hammack had provided to the State.** Defendant identified Mr. Hammack as the suspect from whom the police had taken fingerprints and a DNA sample. **In two pre-trial hearings, the defense sought to compel the prosecution to produce evidence related to Mr. Hammack, including statements to the police, which were specifically referenced.** At least four pre-trial hearings were held on defense motions to compel production of Brady materials in general. The defense renewed its request for Brady materials at trial. Thus, the record clearly demonstrates that the defense requested Brady materials and specifically requested any statements Mr. Hammack had given to the police.

Id. at 594. (emphasis added) The Court also makes it clear that the third Hammack statement was in the possession of the prosecution:

> Second, the record also shows that Mr. Hammack's third statement was in the prosecution's possession. Mr. Hammack gave the statement to the police on June 13, 2005, long before Defendant's trial. Although the prosecution apparently did not obtain a copy of the statement from the police until midway through Defendant's trial, the Brady duty of disclosure applies even to evidence in police possession which is not turned over to the prosecution. *Kyles*, 514 U.S. at 438, 115 S.Ct. 1555; *Johnson*, 38 S.W.3d at 56. The record is thus undisputed that, for purposes of Brady, **the prosecution had Mr. Hammack's third statement in its**

> **possession from June 13, 2005, and actually had the statement in its physical possession before Mr. Hammack testified, but did not provide the statement to the defense.** Defendant has therefore established the second element of her Brady claim.

Id. (emphasis added)

At every level of this case, the courts determined that it was improper for the prosecution to withhold the third Hammack statement. Although only the Tennessee Supreme Court held that the error was sufficient enough for a new trial, no court absolved the prosecution from the error. (Appendix – Part 12, July 17, 2009 transcript of hearing on Motion for New Trial, p. 108; *State v. Jackson*, 2012 Tenn. Crim. App. LEXIS 1003 (Tenn. Crim. App., Dec. 10, 2012); *State v. Jackson*, 444 S.W.3d 554 (Tenn. 2014))

ARGUMENT

As a prosecutor, Mr. Jones is subject to a great deal of responsibility. He is accountable to the State, the public, victims of crimes, the accused, and the criminal justice system. While prosecutors are subject to all of the Rules of Professional Conduct, the Rules of Professional Conduct ("RPC") impose upon prosecutors a special responsibility through the requirements of RPC 3.8.

Throughout this case, Mr. Jones has asserted that his actions and inaction with respect to the third Hammack statement were inadvertent and a mistake. This assertion seeks to minimize all of the surrounding circumstances related to his handling of the third statement. This was not simply one mistake. It was a series of intentional and knowing decisions, and some negligence, that contributed to the waste of judicial resources and injury to the defendant.

This disciplinary proceeding is the appropriate venue to review all of the facts concerning Mr. Jones' actions and apply them to the Rules of Professional Conduct, as contemplated by

Tenn. Sup. Ct. R. 9. It is the Board of Professional Responsibility, and this hearing panel, who have the authority to make findings, conclusions, and impose disciplinary sanctions:

> Any attorney admitted to practice law in this State, including any formerly admitted attorney with respect to acts committed prior to surrender of a law license, suspension, disbarment, or transfer to inactive status, or with respect to acts subsequent thereto which amount to the practice of law or constitute a violation of this Rule or of the Rules of Professional Conduct, and any attorney specially admitted by a court of this State for a particular proceeding, is subject to the disciplinary jurisdiction of the Court, the Board, panels, the district committees and hearing panels herein established, and the circuit and chancery courts of this State.

Tenn. Sup. Ct. R. 9, § 8.

1. <u>The Facts Demonstrate That Mr. Jones Violated RPC 3.8(d).</u>

When Mr. Jones joined the prosecution team in or around January 2009, the case had been pending for approximately four (4) years. Throughout that period of time, the defense pressed an aggressive campaign seeking material held by the prosecution that was discoverable pursuant to applicable rules of criminal procedure or exculpatory under the *Brady* doctrine. At several points, the defense specifically referred to information related to Mr. Hammack and, more generally, to witness statements. This historical context is important because it illustrates that (1) the technical record was replete with these types of requests from the defense to the prosecution and (2) the arguments related to *Brady* or *Jencks* material immediately preceding the trial, and during the trial, were going to be an obvious point of contention.

After joining the case, Mr. Jones was responsible for producing exculpatory and discoverable material to the defense. Mr. Jones has testified that he received a copy of the file and began familiarizing himself with it before January 1, 2009. Mr. Jones was also responsible for "providing discovery that has not already been provided" which he accomplished by going page by page through the trial notebook and asking co-counsel if the information had previously

been provided. On January 31, 2009 and February 9, 2009, Mr. Jones informed the Court that there was no other exculpatory material or Jencks material that needed to be provided. At that same hearing, Mr. Jones and the Court engaged in a discussion about the kind of information that the prosecution would be required to produce. Mr. Jones had knowledge and notice prior to receiving a copy of the third statement by Hammack that a newly discovered witness statement would need deliberate and thoughtful review by the prosecution as to whether it should be produced immediately.

On or around February 15, 2009, Mr. Jones began his preparation for the testimony of Detective Miller, a State's witness. Upon reading Detective Miller's June 13, 2005 summary, Mr. Jones noticed reference to a statement by Mr. Hammack that had not been produced (referred to as the "third statement"). Notably, the prosecution had given the defense a copy of Detective Miller's summary before trial and, it must be assumed, Mr. Jones did not notice the reference in any review of materials at that time. Mr. Jones asked a police officer to retrieve a copy of the third statement.

It is at this point that Mr. Jones began a series of actions and inaction that ultimately contributed to years of appeals and reversal of the conviction. First, Mr. Jones conducted a cursory review of the third statement and decided that it did not need to be shared with the defense. Second, Mr. Jones placed the third statement in the trial notebook that neither he nor his co-counsel were actively working from. Third, he does not discuss his discovery of the third statement with co-counsel to either alert her to its location, to discuss whether or not it needed to be produced to defense, or whether it already had been produced at some earlier time. Fourth, as the trial moves forward and Detective Miller testifies about Hammack's "statements," Mr. Jones

does not produce the document. Fifth, after Mr. Hammack testifies about the statements he made to police, Mr. Jones does not produce the document.

Sixth, as Mr. Jones prepares and delivers a strong closing argument which references the defendant's attempts to contact Mr. Hammack on the night of the murder, he does not produce the document. This was a complicated trial for the prosecution with many witnesses, exhibits, and circumstantial evidence. It is evident from Mr. Jones' closing argument that the prosecution sought to use Mr. Hammack's testimony to show that the defendant was trying to establish cover for her whereabouts. Therefore, inconsistencies in Mr. Hammack's statements to the police, and the information that he was "rolling on XTC" were material facts that the defense could have used to impeach or to challenge Hammack's own alibi. It is for these reasons that Mr. Jones' initial decision that the third statement was a "non-issue" demonstrates a pattern of knowing behavior.

It is notable that Mr. Jones implores this hearing panel to disregard the Tennessee Supreme Court's unanimous holding that a *Brady* violation occurred, yet insists that the footnote declining to disturb the trial court's finding of inadvertence is of great value. Nevertheless, the Board can agree with one part of Mr. Jones' rationale: the ethical duty of RPC 3.8(d) does differ from *Brady* in some respects.

RPC 3.8(d), titled "Special Responsibilities of a Prosecutor," states:

> The prosecutor in a criminal matter:
>
> (d) **shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense**, and, in connection with sentencing, shall disclose to the defense and, if the defendant is proceeding pro se, 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; (emphasis added)

Tenn. Sup. Ct. R. 8, RPC 3.8(d) (effective March 1, 2003)

RPC 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. "...Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility." (See Exhibit A, ABA Op. 09-454, p. 2) Although Tennessee has little, if any, precedent interpreting RPC 3.8(d), most analysis finds that the ethical obligation is more demanding than the constitutional obligation because "it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome." (See Exhibit A, ABA Op. 09-454, p. 5) (See also *Cone v. Bell*, 556 U.S. 449, n. 15 (2009) noting that "[A]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." (internal citations omitted))

Next, Mr. Jones argues that the hearing panel must find that only "intentional" behavior will suffice to support a violation of RPC 3.8(d). The Board submits that this approach is unnecessary because the rule is clear and unambiguous. Further, this approach would shelter prosecutors from all but the most severe, and likely impossible to prove, misconduct. Non-prosecutors are not protected from attorney discipline when they commit negligence with respect to trust accounts, confidential information, conflicts, discovery violations, etc. Interestingly, Mr. Jones characterizes his conduct as an "unintentional discovery violation in a criminal proceeding." (Memorandum at Law in Support of Motion for Summary Judgment, p. 10) As the

Board's summary of facts demonstrates, there were multiple pre-trial discovery requests and hearings on the subject of witness statements and exculpatory material. Mr. Jones failed to act precipitously to provide a newly discovered witness statement despite the defense's prior reasonable requests for discovery. This is grounds for finding a violation under RPC 3.4(d) whether one is a prosecutor or not.

Mr. Jones correctly assumes that the Board advocates the approach followed in the following examples from other states. In *In Re: Jordan,* a prosecutor failed to provide a second witness statement because he did not believe that it contained exculpatory evidence and did not have to be provided pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *In re Jordan*, 913 So. 2d 775, 780 (La. 2005) The hearing committee, in a split decision, found there was no violation of RPC 3.8(d) because while the prosecutor was in possession of the statement and failed to disclose the second statement to the defense, the prosecutor reasonably believed the statement was inculpatory rather than exculpatory. *Id.* The Disciplinary Board disagreed, in part. The Board found that the conduct was enough to show a violation of RPC 3.8(d); however, there were enough mitigating circumstances to avoid a sanction. The Louisiana Supreme Court disagreed with the Board's decision to impose no discipline and entered a suspended period of suspension. *In Re: Jordan* is distinguishable from Respondent's case in several ways; however, the case demonstrates that a prosecutor will violate RPC 3.8(d) for "knowing" behavior. The prosecutor may have had a reasonable belief that the witness statement was not subject to Brady. Nevertheless, "[T]he actions, or inactions in this case, of the prosecutor are paramount to a fair administration of justice; and the people of this state must have confidence in a prosecutor's integrity in performing his duty to disclose exculpatory evidence in order for the system to be just." *Id.* at 781.

In 2012, the Supreme Court of North Dakota held that a prosecutor's negligent failure to disclose an exculpatory memorandum to the defense in an underlying criminal prosecution prior to trial violated RPC 3.8(d). *In re Disciplinary Action Against Feland*, 820 N.W.2d 672 (N.D. 2012) The Court reviewed the same Colorado case used by Respondent in this motion, as well as the Louisiana case cited by the Board above:

> The only case cited by the parties that provides significant analysis of the issue is *In re Attorney C*, 47 P.3d 1167 (Colo. 2002). In Attorney C, disciplinary proceedings were commenced against a prosecutor who had on two occasions withheld exculpatory evidence from the defense until after the preliminary hearings were completed. A hearing board concluded the first violation had been committed negligently and the second violation had been committed knowingly. *Id.* at 1173. The Colorado Supreme Court, after first concluding the exculpatory evidence should have been disclosed before the preliminary hearings had been held, addressed whether Rule 3.8(d) applies only when a prosecutor intentionally fails to disclose evidence. The court noted that discovery violations in criminal cases are routinely handled by trial courts through appropriate orders and sanctions, and the court did not "wish to upset that process nor to interject regulatory counsel into it." *Attorney C*, at 1174.
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> .....
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> By contrast, the court in *In re Jordan*, 913 So.2d 775, 783 (La. 2005), concluded Rule 3.8(d) does not incorporate a mental element and could be violated by conduct that was not intentional. Noting that its rule outlining proper factors to consider in imposing discipline allowed the court to consider whether the conduct had been committed intentionally, knowingly, or negligently, the court found the prosecutor had "knowingly" withheld exculpatory evidence in violation of Rule 3.8(d), which warranted a deferred three-month suspension. *Jordan*, at 784; see also *Lawyer Disciplinary Bd. v. Hatcher*, 199 W.Va. 227, 483 S.E.2d 810, 818 (1997) (although not directly addressing whether there is an intent requirement under Rule 3.8(d), the court noted that a prosecutor who "knowingly" fails to disclose all exculpatory evidence "runs the risk of violating ... Rule 3.8"); Hans P. Sinha, *The Discipline of Prosecutors: Should Intent Be a Requirement?*, 10 Engage: J. Federalist Soc'y Prac. Groups 102, 103–04 (2009) (noting the lack of an intent requirement in Rule 3.8(d) and discussing the conflicting results in *Attorney C* and *Jordan*).

Id. The Supreme Court of North Dakota also recognized that not all rules of professional conduct contain a mental state:

> Rule 3.8(d) is not ambiguous. It clearly provides a prosecutor 'shall ... disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.' The drafters did not limit its application only to intentional violations. Furthermore, the drafters of the Rules of Professional Conduct demonstrated they knew how to include a specific mens rea if one was intended. See N.D.R. Prof. Conduct 3.3(a) and 3.4(c). Rule 3.8(d) creates an affirmative duty upon a prosecutor to disclose all known exculpatory materials, and the plain language of the rule does not create an exception for unintentional violations.

Id. at 680. The Court concluded that negligent conduct would also be violative of RPC 3.8(d): "Rather, we believe adequate protection of the public, particularly those persons accused of a crime, requires that prosecutors not only refrain from intentionally withholding exculpatory evidence but that they conform their conduct so they do not knowingly or negligently withhold such evidence." *Id.*

If the hearing panel determines that Mr. Jones violated RPC 3.8(d), they must turn to the ABA Standards for Imposing Lawyer Sanctions to apply the discipline, which requires an analysis of the following: (1) What ethical duty did the lawyer violate? (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?) (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? and, (4) Are there any aggravating or mitigating circumstances? *ABA Standards, Theoretical Framework*

This is the appropriate point at which to consider "mental state." The Board submits that the facts support a finding that Mr. Jones acted in a "knowing" manner. The ABA Standards define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *ABA Standards, Definitions* Mr. Jones incorrectly argues that there are no facts demonstrating that he was consciously aware of "creating the circumstances that would result in an untimely disclosure." (Memorandum of Law in Support of Motion for Summary Judgment, p. 9) The

correct analysis is whether he had the conscious awareness of the nature and attendant circumstances of the conduct but without the conscious purpose to accomplish the result. Simply put, he did. He was aware of the statement. He was aware that he made a decision not to produce it to the defense. He was aware of putting it in the trial notebook. The Board does not have to show that his purpose was to withhold the statement from the defense until after the trial.

For these reasons, Mr. Jones has failed to demonstrate that he is entitled to summary judgment with respect to RPC 3.8(d). He cannot negate an essential element of the Board's claim or demonstrate that the Board's evidence at the summary judgment stage is insufficient to establish its claim.

2. The Facts Demonstrate That Mr. Jones Violated RPC 3.4(c).

In the Board's Response to the Statement of Undisputed Material Facts, there are several facts the hearing panel should consider in relation to this allegation of misconduct. First, Mr. Jones obviously does not dispute that the third statement should have been produced at trial because he filed a "State's Notice of Omitted Jencks Statement in Relation to the Testimony of Andrew Hammack" alerting the defense and Court that the statement had been improperly omitted. Tenn. R. Crim. P. 26 is the "Jencks" rule. "The language of Rule 26.2 is similar to the language in Rule 26.2 of the Federal Rules of Criminal Procedure." Tenn. R. Crim. P. 26.2 "S. 1437, 95th Cong., 1st Sess. (1977), would place in the criminal rules the substance of what is now 18 U.S.C. § 3500 (the Jencks Act)." Fed. R. Crim. P. 26.2

Second, before the trial began, Mr. Jones informed the trial court that all Jencks statement had been provided to the defense. In the State's Notice of Omitted Jencks Statement in Relation to the Testimony of Andrew Hammack filed by Mr. Jones, he acknowledges that the prosecution voluntarily produced all Jencks statements "then in its possession" before trial, which

demonstrates that the prosecution was not relying on formal motions. Finally, defense counsel and the prosecution engaged in an informal process for requesting Jencks material as each witness testified.

Mr. Jones knowingly disobeyed this obligation when he decided not to treat the third statement as he had every other piece of Jencks material. He had already assured the trial court that the prosecution met its obligation to turn over witness statements as required by Rule 26 and Jencks, but he failed to ensure that the prosecution continued to meet its obligation.

For these reasons, Mr. Jones has failed to demonstrate that he is entitled to summary judgment with respect to RPC 3.4(c). He cannot negate an essential element of the Board's claim or demonstrate that the Board's evidence at the summary judgment stage is insufficient to establish its claim.

3. The Facts Demonstrate That Mr. Jones Violated RPC 8.4(a) and (d).

With respect to RPCs 8.4(a) and 8.4(d), the Board relies on all of the same factual allegations addressed throughout this response. Further, Mr. Jones has admitted in his memorandum that RPC 8.4(d) is intended to apply to conduct directly related to judicial proceedings. (Memorandum in Support of Motion for Summary Judgment, p. 16) The Board agrees. It will be incumbent upon the hearing panel to determine whether Mr. Jones' action, or inaction, adversely affected the administration of justice. The Board submits that the factual allegations discussed herein provide a sufficient basis for the hearing panel to conclude that Mr. Jones' actions, committed in the context of a judicial proceeding, adversely affected the administration of justice. Mr. Jones incorrectly argues that the Board must prove a certain mental state with respect to RPC 8.4. If the facts show that Mr. Jones' conduct was prejudicial to the administration of justice, it is a violation. Mr. Jones' mental state is a factor only when the

hearing panel is applying the ABA Standards for Imposing Lawyer Sanctions. Further, there is no requirement that RPC 8.4(d) be coupled with another violation, although it often is.

The following case from Mississippi provides an instructive analysis of 8.4(a) and 8.4(d):

> Rule 8.4 (a), provides that it is professional misconduct for an attorney to "violate or attempt to violate the rules of professional conduct ..." Attorneys in Mississippi have a professional obligation to obey the Rules of Professional Conduct of the State. Guidance as to how an attorney is to go about meeting this obligation can be found in scope of the Miss. R. Prof. Conduct, which states that [s]ome of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Although Rule 8.4 does not contain the "shall not" language, it is prohibitory nonetheless. Rule 8.4 indicates that certain actions constitute professional misconduct regardless of the fact that they do not lend themselves to greater specificity. Rule 8.4(a), in particular, prohibits the violation or the attempted violation of any of the Miss. R. Prof. Conduct. It is clear that Rogers would violate Rule 8.4(a) by failing to carry out those actions which the Rules under which he was charged denote as "shalls" or by undertaking to do those things which the Rules designate as "shall not's" or constituting professional misconduct. Therefore, upon finding that Rogers violated or attempted to violate Rules 8.4(c) or (d), as charged, it must also be found that he violated 8.4(a).

Rogers v. Mississippi Bar, 731 So. 2d 1158, 1166 (Miss. 1999) Tennessee has similar guidance in its Scope to the Rules of Professional Conduct:

> The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add

> obligations to the Rules but provide guidance for practicing in compliance with the Rules.

TN R S CT Rule 8, Preamble & Scope

The Board objects to any consideration of the defendant's Alford plea as a material fact in this case. As reflected in her attorney's affidavit, the defendant was facing years of trials, appeals, and incarceration if she continued to fight for her innocence. The myriad of reasons for her decision to enter a plea are not relevant to deliberation of Mr. Jones' misconduct. Likewise, Judge Craft's declaration and opinion on whether or not Mr. Jones committed a violation of the Rules of Professional Conduct is irrelevant. It is the duty and power of this hearing panel to adjudicate violations of the Rules of Professional Conduct. Respectfully, Judge Craft's duty was to rule on matters of criminal procedure and apply applicable doctrines of criminal law.

For these reasons, Mr. Jones has failed to demonstrate that he is entitled to summary judgment with respect to RPC 8.4(a) and (d). He cannot negate an essential element of the Board's claim or demonstrate that the Board's evidence at the summary judgment stage is insufficient to establish its claim.

4. <u>The Hearing Panel Is Not Precluded From Concluding That Mr. Jones Violated The Rules Of Professional Conduct.</u>

Mr. Jones has provided no authority for the inexplicable theory that the hearing panel is precluded from making its own determination, as provided in Tenn. Sup. Ct. R. 9, of disciplinary misconduct.[1] He cannot assert res judicata, because the doctrine of res judicata "bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit." *Cohn v. Bd. of Prof'l Responsibility*, 151 S.W.3d 473, 486 (Tenn. 2004), quoting *Richardson v. Tennessee Bd. of*

[1] The fact that Mr. Jones continues to equate a constitutional violation with the Board's clerical error is also inexplicable, although it is indicative of his repeated efforts to minimize his own misconduct.

Dentistry, 913 S.W.2d 446, 459 (Tenn. 1995) and *Goeke v. Woods*, 777 S.W.2d 347, 349 (Tenn. 1989)). The doctrine does not apply here because the Board was not a party.

Mr. Jones has implied on more than one occasion that "nine judges" found nothing unethical in his conduct. Actually, every court reviewing this case admonished the prosecution, and therefore Mr. Jones, by finding that the third statement should have been provided to the defense.

Judge Craft made the following statements in the hearing on Motion for New Trial: "**I find it wasn't proper for the state to forget it. It was not proper for the state not to turn it over**, but it was unintentional." (Appendix – Part 12, July 17, 2009 transcript of hearing on Motion for New Trial, p. 108)

The Court of Criminal Appeals, like the trial court, held that "...**it is clear that the defendant's requests for discovery included the third statement of Hammack, and the trial court found that, at the least, the statement should have been provided following his testimony**. Additionally, the court found that the State's failure to timely provide the statement was an inadvertent mistake. **Certainly, the statement should have been provided.**" (*State v. Jackson*, 2012 Tenn. Crim. App. LEXIS 1003 (Tenn. Crim. App., Dec. 10, 2012) (emphasis added))

The Tennessee Supreme Court reversed and remanded the case as a result of Mr. Jones' misconduct. The Tennessee Supreme Court explained its conclusion as to *Brady* violations on the basis that there were a number of ways that counsel for Ms. Jackson could have used the contents of Mr. Hammack's third statement to challenge the State's case during trial. In a footnote, the Court declined to disturb the trial court's initial finding that the prosecution did not intentionally withhold the statement:

> By our holding we do not disturb the trial court's finding that the prosecutor did not intentionally withhold Mr. Hammack's third statement. We observe, however, that this is not the first time prosecutors in the Thirtieth Judicial District have withheld evidence that should have been disclosed. See, e.g., *State v. Coleman*, No. W2001–01021–CCA–R3–CD, 2002 WL 31625009, at 9 (Tenn.Crim.App. Nov. 7, 2002) (stating that the prosecution offered an "untimely revelation" of an oral statement defendant made to the police, resulting in a thirty-day continuance); *Roe v. State*, No. W2000–02788–CCA–R3–PC, 2002 WL 31624850, at 11 (Tenn.Crim.App. Nov. 20, 2002) (stating that the prosecution improperly withheld information favorable to the defendant, although no Brady violation resulted as the information was not material).

State v. Jackson, 444 S.W.3d 554, 597 (Tenn. 2014)

Notwithstanding that footnote, the Board submits that the unanimous opinion serves as confirmation that the prosecution, meaning Mr. Jones, is responsible for the error:

> The record in this appeal demonstrates that Defendant satisfied the first requirement of a Brady claim **by requesting, on March 9 and March 23, 2007, any statements Mr. Hammack had provided to the State.** Defendant identified Mr. Hammack as the suspect from whom the police had taken fingerprints and a DNA sample. **In two pre-trial hearings, the defense sought to compel the prosecution to produce evidence related to Mr. Hammack, including statements to the police, which were specifically referenced.** At least four pre-trial hearings were held on defense motions to compel production of Brady materials in general. The defense renewed its request for Brady materials at trial. Thus, the record clearly demonstrates that the defense requested Brady materials and specifically requested any statements Mr. Hammack had given to the police.

Id. at 594. (emphasis added) The Court also makes it clear that the third Hammack statement was in the possession of the prosecution:

> Second, the record also shows that Mr. Hammack's third statement was in the prosecution's possession. Mr. Hammack gave the statement to the police on June 13, 2005, long before Defendant's trial. Although the prosecution apparently did not obtain a copy of the statement from the police until midway through Defendant's trial, the Brady duty of disclosure applies even to evidence in police possession which is not turned over to the prosecution. *Kyles*, 514 U.S. at 438, 115 S.Ct. 1555; *Johnson*, 38 S.W.3d at 56. The record is thus undisputed that, for purposes of Brady, **the prosecution had Mr. Hammack's third statement in its**

> **possession from June 13, 2005, and actually had the statement in its physical possession before Mr. Hammack testified, but did not provide the statement to the defense.** Defendant has therefore established the second element of her Brady claim.

Id. (emphasis added)

Finally, Mr. Jones' contempt for the complainant and for the Board's recommendation to impose a disciplinary sanction is misplaced. He is surely aware that the Tennessee Supreme Court has invested the Board with the authority to investigate complaints of disciplinary misconduct, whatever the source or on the Board's own initiative. Tenn. Sup. Ct. R. 9, §§ 4.5 and 15.1. Complainants may have personal motivations for filing a complaint. They may have little knowledge of the disciplinary process or the Rules of Professional Conduct. The process, however, is designed for independent review by Disciplinary Counsel, the Board, District Committee Members, Hearing Panels, and the Court itself. As explained in the *Flowers v. Bd of Professional Responsibility* case, neither the filing of a complaint nor the motivation of the person making the complaint undermines the Board's authority to investigate and conclude that a violation of the Rules of Professional Conduct has occurred:

> In other words, the filing of a complaint does not, as suggested by Mr. Flowers, equate with a finding that an attorney has committed misconduct. Rather, upon receiving a complaint, Disciplinary Counsel conducts an investigation and determines the appropriate course of action. If, as in this case, Disciplinary Counsel determines that a formal hearing is appropriate and that recommendation is accepted by the Board of Professional Responsibility, the matter is then heard by a hearing panel. The hearing panel makes its own independent determination as to whether the attorney engaged in misconduct. The hearing panel's decision is then appealable to the courts.
>
> The motivations of Mr. Flowers's clients, whatever they may have been, to file disciplinary complaints against him does not render these complaints frivolous and certainly does not nullify or undermine the findings of the hearing panel and the trial court.

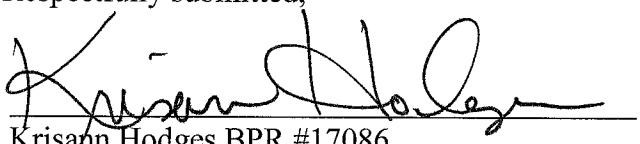
Flowers v. Bd. of Prof'l Responsibility, 314 S.W.3d 882, 893 (Tenn. 2010)

In summary, if the filing of a complaint does not equate with a finding that the attorney has committed misconduct, the lack of a complaint by any particular individual or court does not equate with a finding that there has been no misconduct. In either situation, it is incumbent upon the Board and/or a Hearing Panel to make the determination of ethical misconduct.

CONCLUSION

The Board's response demonstrates that a dispute exists with respect to the facts and to the proper interpretation of those facts. For the reasons stated above, the Motion for Summary Judgment should be denied in its entirety.

Respectfully submitted,



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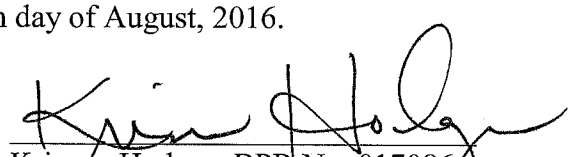
CERTIFICATE OF SERVICE

I certify that a copy of the Board's Response and Memorandum in Opposition to Summary Judgment has been served upon counsel for Respondent, Brian S. Faughnan, Esq., by regular U.S. Mail at Lewis, Thomason, King, Krieg & Waldrop, One Commerce Square, 40 South Main Street, 29th Floor, Memphis, TN 38103, and by e-mail to faughnanb@thomasonlaw.com , on this the 19th day of August, 2016.



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Bloomberg BNA ABA/BNA Lawyers' Manual on Professional Conduct™

Formal Opinion 09-454
July 8, 2009

Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

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

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution. [1] Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

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

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

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*, [2] which held that criminal defendants have a due process right to receive favorable information from the prosecution. [3] This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule. [4] Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule. [5] Finally, although courts sometimes sanction prosecutors for violating disclosure obligations, [6] disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

[2] 373 U.S. 83 (1963). *See* State v. York, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J.,

Exhibit A

concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), "merely codifies" *Brady*).

[3] *Brady*, 373 U.S. at 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Kyles v. Whitley, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*.")

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

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

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

The Committee undertakes its exploration by examining the following hypothetical.

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

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

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal. [7] In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law. [8] The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

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

[8] "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the

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

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." [9] Similarly, Comment [1] to Model Rule 3.8 states that: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

[9] Berger v. United States, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor's obligation to seek justice date back more than 150 years. *See, e.g.*, Rush v. Cavanaugh, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor "is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.")

In 1908, more than a half-century prior to the Supreme Court's decision in *Brady v. Maryland*, [10] the ABA Canons of Professional Ethics recognized that the prosecutor's duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused. [11] This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: "A public prosecutor ... shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor ... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The ABA adopted the rule against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation. [12]

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

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

[12] *See, e.g.*, Olavi Maru, Annotated Code of Professional Responsibility 330 (American Bar Found., 1979) ("a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's duty as a matter of ethics"). For example, *Brady* required disclosure only upon request from the defense—a limitation that was not incorporated into the language of DR 7-103(B), *see* Maru, *id.* at 330—and that was eventually eliminated by the Supreme Court itself. Moreover, in United States v. Agurs, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court

finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. Maru, *id.*

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

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor's obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence," [13] and most importantly, "that special precautions are taken to prevent ... the conviction of innocent persons." [14] A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

[13] Rule 3.8, cmt. [1].

[14] *Id.*

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d) [15] establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation. [16] The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation. [17]

[15] For example, Rule 3.4(a) makes it unethical for a lawyer to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value" (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is *prohibited by law*" (emphasis added), and Rule 3.4(c) forbids knowingly disobeying "an obligation under the rules of a tribunal...." These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

[16] This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative "materiality" test. *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing inter alia*, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* "requires less of the prosecution than" Rule 3.8(d)); Annotated Model Rules of Professional Conduct 375 (ABA 2007); 2 Geoffrey C. Hazard, Jr., & W. William Hodes, The Law of Lawyering §34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* ... and its progeny"); Peter A. Joy & Kevin C. McMunigal, Do No Wrong: Ethics for Prosecutors and Defenders 145 (ABA 2009).

[17] The current version provides: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA Standards for Criminal Justice, Prosecution Function, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. The accompanying Commentary observes: "This obligation, which is virtually identical to that imposed by ABA

model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law." *Id.* at 96. The original version, approved in February 1971, drawing on DR 7-103(B) of the Model Code, provided: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity."

In particular, Rule 3.8(d) is more demanding than the constitutional case law, [18] in that it requires the disclosure of evidence or information favorable to the defense [19] without regard to the anticipated impact of the evidence or information on a trial's outcome. [20] The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution. [21]

[18] *See, e.g.*, United States v. Jones, 609 F. Supp.2d 113, 118-19 (D. Mass. 2009); United States v. Acosta, 357 F. Supp.2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the Brady line of cases. *See In re* Attorney C, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")

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

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

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

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof. [22] Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

[22] Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. National District Attorneys' Association, National Prosecution Standards §53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function (3d ed. 1992), never has included such a limitation either.

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence [23] or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

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

In the hypothetical, supra, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant's guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses' testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor." Knowledge means "actual knowledge," which "may be inferred from [the] circumstances." [24] Although "a lawyer cannot ignore the obvious," [25] Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

[24] Rule 1.0(f).

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

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law. Although the rule requires prosecutors to disclose *known* evidence and information that is favorable to the accused, [26] it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution's proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an

informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information. [27]

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[26] If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. *Cf.* Rule 3.8, cmt. [9].

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

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively. [28] Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

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[28] *Compare* D.C. Rule Prof'l Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof'l Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA Standards for Criminal Justice, Prosecution Function, *supra* note 17 (calling for disclosure "at the earliest feasible opportunity").

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty. [29] Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case, [30] timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment. [31] Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order. [32]

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

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

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

[32] Rule 3.8, Comment [3].

Defendant's Acceptance of Prosecutor's Nondisclosure

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the

disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply. [33] For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

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

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client [34] or another. [35] Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty, [36] with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed. [37]

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

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

[36] *See* Rules 1.2(a) and 1.4(b).

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

The Disclosure Obligation in Connection with Sentencing

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

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

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

Third, disclosure of information that would only mitigate a sentence need not be provided before or during

the trial but only, as the rule states, "in connection with sentencing," *i.e.*, after a guilty plea or verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing. [38]

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

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

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations. [39] Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, [40] and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations. [41] To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

[39] Rules 5.1(a) and (b).

[40] Rule 5.1(b).

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

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case. [42]

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

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