

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 467

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Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3

*Model Rules 5.1 and 5.3 require lawyers with managerial authority and supervisory lawyers, including prosecutors, to make “reasonable efforts to ensure” that all lawyers and nonlawyers in their offices conform to the Model Rules. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to ensure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations. The particular measures that managerial and supervisory prosecutors must implement to comply with these rules will depend on a variety of factors, including the size and structure of their offices.*

## A. Introduction

Prosecutors have special duties under the Model Rules of Professional Conduct. They have “the responsibility of a minister of justice and not simply that of an advocate.”<sup>1</sup> They must “refrain from prosecuting a charge that [they know] is not supported by probable cause.”<sup>2</sup> They must “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.”<sup>3</sup> They must “make timely disclosure to the defense” of exculpatory and mitigating evidence.<sup>4</sup> In short, and in words long ago written by the Supreme Court in *Berger v. U.S.*,<sup>5</sup> a prosecutor’s duties are “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.”<sup>6</sup>

We believe that most prosecutors know and follow the rules of professional conduct. Indeed, the laudable efforts of such prosecutors have provided good examples, cited throughout this opinion. But there are prosecutors who do violate the rules, and for all prosecutors there are special challenges and obligations. This opinion provides

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1. ABA MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [1].

2. ABA MODEL RULES OF PROF’L CONDUCT R. 3.8(a).

3. ABA MODEL RULES OF PROF’L CONDUCT R. 3.8(b).

4. ABA MODEL RULES OF PROF’L CONDUCT R. 3.8(d). For additional special duties of prosecutors, see also ABA MODEL RULES OF PROF’L CONDUCT R. 3.8(c)-(h) and cmts. [3]-[9].

5. *Berger v. United States*, 295 U.S. 78 (1935).

6. *Id.* at 88. See also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454 at fn. 9 (“References in U.S. judicial decisions to the prosecutor’s obligation to seek justice date back more than 150 years.”) (citations omitted). A “prosecutor” for purposes of this opinion is a lawyer employed by a government agency whose primary responsibility involves the investigation and prosecution of criminal cases and related matters. Where a prosecutor’s duties also embrace civil authority, this opinion also applies to that sphere of their work. Federal prosecutors are covered by state ethics rules under the McDade Amendment, 28 U.S.C. §530B.

guidance on the special challenges and obligations of prosecutors with managerial and supervisory responsibility.<sup>7</sup>

## B. ABA Model Rules of Professional Conduct 5.1 and 5.3 Apply to Prosecutors

Rules 5.1 and 5.3 address obligations of lawyers with managerial authority (hereinafter sometimes referred to as “managers”) and supervisory lawyers within a “firm” or a “law firm.” Rule 1.0(c) defines “firm” or “law firm” to include “lawyers employed in a legal services organization or the legal department of a corporation or other organization.” Comment [3] makes clear that government organizations are included.<sup>8</sup> The comments to Rule 5.1 also specifically reference government agencies.<sup>9</sup> Prosecutors’ offices are *government* organizations.

Rule 3.8, which specifies the “Special Responsibilities of Prosecutors,” also makes clear that prosecutors have supervisory obligations under Rules 5.1 and 5.3. Comment [6] to Rule 3.8 reads, “Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office.”<sup>10</sup> Finally, ABA Formal Opinion 09-454 emphasizes that these obligations apply to prosecutors: “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.”<sup>11</sup> Formal Opinion 09-454 adds, “[S]upervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.”<sup>12</sup>

## C. Who Has Responsibility Under ABA Model Rules 5.1 and 5.3 in a Prosecutor’s Office?

Rules 5.1 and 5.3 set forth three types of responsibility for the conduct of lawyers and nonlawyers “employed or retained by or associated with a lawyer.”<sup>13</sup> Paragraph (a)

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7. Of course all lawyers--e.g., lawyers in private practice, in public defender offices, and in other state and federal agencies--have supervisory obligations under Rules 5.1 and 5.3. We leave for another day a specific discussion of how Rules 5.1 and 5.3 must be implemented by them. The general obligations described in this opinion with respect to prosecutors, however, apply to lawyers in those offices as well.

8. ABA MODEL RULES OF PROF’L CONDUCT R. 1.0 cmt. [3] (“[w]ith respect to the law department of an organization, *including the government*, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules”) (emphasis added).

9. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [1] (“[p]aragraph (a) [of Rule 5.1] applies to lawyers who have managerial authority over the professional work of a firm. . . . This includes . . . lawyers having comparable managerial authority in a . . . government agency. . .”).

10. Comment [6] to Rule 3.8 gives examples: “Paragraph (f) [of 3.8] reminds the prosecutor of the importance of these [supervisory] obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case.” Paragraph 3.8(f) also “requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor.”

11. Formal Op. 09-454, *supra* note 6, at 8 (citing Rules 5.1(a) and (b)). See also the opening summary of Formal Op. 09-454: “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.”

12. Formal Op. 09-454, *supra* note 6, at 8 (citing Rules 5.1(b) and (c)).

13. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (over lawyers) & R. 5.3(a) (over nonlawyers). With respect to nonlawyers, the obligation is to make sure that the nonlawyer’s “conduct is compatible with the professional obligations of the lawyer.”

addresses lawyers “with managerial authority.”<sup>14</sup> Paragraph (b) pertains to lawyers “having direct supervisory authority over another lawyer” or “having direct supervisory authority over the nonlawyer”.<sup>15</sup> Paragraph (c) applies to lawyers who either (i) order or ratify the conduct of another, or (ii) have managerial authority or direct supervisory authority, know of the conduct at a time when its consequences can be mitigated, and fail to take reasonable remedial action.<sup>16</sup> We address each below.

## 1. Managerial Responsibility

Under paragraph (a), “managerial” lawyers “shall make reasonable efforts to ensure that [their organization] has in effect measures giving reasonable assurance that all lawyers in the [organization] conform to the Rules of Professional Conduct.” Managerial lawyers include “members of a partnership, the shareholders in a law firm organized as a professional corporation and [other lawyers] having comparable managerial authority.”<sup>17</sup> This group also includes “lawyers who have intermediate managerial responsibilities.”<sup>18</sup> Rule 5.3(a) imposes a corresponding obligation with respect to nonlawyers “employed or retained or associated” with the office.

In a prosecutor’s office, managerial lawyers are the top prosecutors and all other prosecutors with managerial or executive functions in the office. This group would include, for example, the District or County or U.S. Attorney him or herself, as well as executive staff, bureau or unit heads, and similarly positioned others who, among other duties, make policies and set procedures for the office as a whole or for individual units. As part of their functions, these individuals may also be direct supervisors under 5.1(b) and 5.3(b) discussed below--depending on the facts and circumstances--but they have overarching special duties under Rules 5.1(a) and 5.3(a).<sup>19</sup>

Managers must make “reasonable efforts” to ensure compliance with the Model Rules of Professional Conduct by all lawyers in the office, including other lawyers with comparable managerial authority. As discussed further in this opinion, “these efforts can take many forms, so long as they are reasonably calculated to eliminate or inhibit violations [of the Rules].”<sup>20</sup>

## 2. Supervisory Responsibility

Under Rule 5.1(b) “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” Under Rule 5.3(b) “[a] lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” This

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14. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1(a) & 5.3(a).

15. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1(b) & 5.3(b).

16. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1(c) & 5.3(c).

17. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [1].

18. *Id.*

19. See GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* §42.4 (3<sup>rd</sup> Ed., Supp. 2010) [hereinafter HAZARD & HODES] (partners and other managers are “‘supervisory’ lawyers *per se*”); *RESTATEMENT OF THE LAW GOVERNING LAWYERS* (3<sup>rd</sup> Ed.) §11, at 112 (managerial lawyers have “general supervisory” duties over lawyers and nonlawyers).

20. HAZARD & HODES, *supra* note 19, §42.4.

category “applies to lawyers who have supervisory authority over the work of other lawyers [and nonlawyers] in the [office]” regardless of their status in the organization.

In a prosecutor’s office, a “supervisor” is a lawyer who--regardless of his or her position or title in the office hierarchy--directly supervises the work of another prosecutor in a particular matter, proceeding, inquiry or other event or series of events involving a case. “Even if a lawyer is not a partner or other general manager, he or she may have direct supervisory authority over another lawyer.”<sup>21</sup>

Further, a manager within the meaning of paragraph (a) can also be a supervisor within the meaning of paragraph (b). For example, a unit or bureau chief whose job description consists mainly or principally of executive or managerial functions may also directly supervise individual prosecutors in any proceeding, application, inquiry, investigation, trial, appeal, or other matter. When managers function as direct supervisors, they have obligations under paragraph (b) as well.

The key to responsibility under paragraph (b) is the relationship between the two lawyers in the matter. The supervisory authority “need not be over the entirety of the second lawyer’s practice. . . [5.1(b)] would apply to direct supervision in a particular case, to a senior or mid-level [lawyer] with supervisory authority over a junior [lawyer’s] work in that or a series of cases, or to one partner [or manager] who has been given supervisory authority over another partner [or manager’s] work in a case or practice area.”<sup>22</sup>

Finally paragraphs (a) and (b) impose some overlapping duties. For, example, a direct supervisor “has the same responsibility as a partner or manager to assure compliance with the ethical rules by those lawyers under her direct supervisory authority.”<sup>23</sup> In fact, as noted in G. Hazard, W. Hodes & P. Jarvis, *The Law of Lawyering* (3<sup>rd</sup> Ed., 2010 Supplement), Rule 5.1(b) “is essentially identical to Rule 5.1(a), except that it applies to all lawyers who have ‘direct supervisory authority over another lawyer,’ whether or not they are partners or managers or other partner-equivalents” and whatever their practice setting.<sup>24</sup> And, “Rule 5.1(b), like Rule 5.1(a), can require proactive, as distinct from merely reactive or passive, measures.”<sup>25</sup>

### **3. Responsibility for Another’s Conduct Under ABA Model Rules 5.1(c) and 5.3(c)**

Rules 5.1(c) and 5.3(c) make a lawyer responsible for another lawyer’s or a nonlawyer’s conduct if the lawyer “orders or, with knowledge of the specific conduct, ratifies the conduct involved” or if “the lawyer is a partner or has comparable managerial

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21. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 5.1-2(b), at 1009 (2014) [hereinafter ROTUNDA & DZIENKOWSKI] (citing Rule 5.1(b)).

22. HAZARD & HODES, *supra* note 19, §42.5. See also ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [5] (“Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter.”).

23. ROTUNDA & DZIENKOWSKI, *supra* note 21, §5.1-2(b), at 1009.

24. HAZARD & HODES, *supra* note 19, §42.5 (emphasis added).

25. *Id.*

authority in the [office] where the other lawyer practices [or the nonlawyer is employed], or has direct supervisory authority of the other lawyer [or nonlawyer], and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”<sup>26</sup>

These obligations supplement the obligations of managers and supervisors under paragraphs (a) and (b), even though they are not directed at supervisors and managers alone. Indeed, the obligations set forth in Rules 5.1(c)(1) and 5.3(c)(1) apply regardless of whether the ordering or ratifying lawyer is a manager or a direct supervisor. But it is important to make clear--as we do here--that a lawyer who is a manager or supervisor may be responsible under Rules 5.1(c) and 5.3(c) even though he or she has no formal or structural relationship to the misbehaving lawyer or nonlawyer.<sup>27</sup>

Rules 5.1(c)(2) and 5.3(c)(2) also impose a duty to avoid or mitigate the consequences of improper conduct if there is an opportunity to do so.<sup>28</sup> A lawyer who is “a partner or has comparable managerial authority . . . or has direct supervisory authority over the other lawyer [or non-lawyer] and knows of [misconduct] at a time when its consequences can be avoided or mitigated” must take “reasonable remedial action.”<sup>29</sup>

What constitutes “reasonable remedial action” will depend on the circumstances, but in any event requires “prevention of avoidable consequences” of the misconduct if the manager or supervisor learns of the misconduct when that can be achieved.<sup>30</sup> Steps to avoid future similar acts may be important for other reasons, but Rules 5.1(c)(2) and 5.3(c)(2) require steps that look back -- that will “remedy or mitigate the consequences of [a] violation” that has already occurred. In the case of prosecutors, the immediate turnover of material to the defense might be required.<sup>31</sup> In other instances, reporting the conduct to disciplinary authorities might be required.<sup>32</sup> But the obligation to take reasonable remedial steps “extends to all known violations”--not only those covered by

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26. ABA MODEL RULES OF PROF'L CONDUCT R. 5.1(c) & R. 5.3(c).

27. RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 19, §11, at 110 (the obligation of a partner or managerial lawyer to take remedial action as described in 5.1(c) “attaches even if [the partner or managerial lawyer] has no direct supervisory authority over the other lawyer”). *See also* HAZARD & HODES *supra* note 19 §42.6 (“[P]artners and those with comparable managerial authority cannot rely upon the fact that they have, or had, no direct responsibility for or supervisory authority over the lawyer engaged in wrongdoing. Partner status, equivalent managerial status, and direct supervisory authority all equally trigger a responsibility to take remedial action under Rule 5.1(c)(2)”). Further, “most violations of [(c)(1) will] also constitute violations of Rule 8.4(a)”. HAZARD & HODES, *supra* note 19, §42.6. Model Rule 8.4(a) provides that it is “professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”

28. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(1)-(2) & 5.3(c)(1)-(2). *See also* HAZARD & HODES, *supra* note 19, §42.6.

29. *Id.*

30. *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [5] (“[a]ppropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer’s involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension”). *See also*, HAZARD & HODES, *supra* note 19, §42.6.

31. *In re Myers*, 584 S.E.2d 357, 362 (S.C. 2003) (Solicitor (a supervising or managerial prosecutor) violated Rule 5.1(c)’s obligation to remediate when he failed to notify the defense lawyer about improper eavesdropping by his subordinates immediately upon learning of the misconduct).

32. RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 19, §11 cmt. e.

an applicable reporting obligation<sup>33</sup>--and should, in some recognizable measure, remedy or mitigate the consequences of misconduct that has occurred.

#### D. Background: The Need for Guidance

In recent years, reports, court opinions, and other authorities have drawn attention to prosecutorial misconduct--notwithstanding the many excellent prosecutors who scrupulously follow or exceed the mandates of the Rules of Professional Conduct. These reports, opinions and authorities suggest a need for more guidance.<sup>34</sup> For example, in *Connick v. Thompson*,<sup>35</sup> the Supreme Court reversed a \$14 million judgment awarded against the New Orleans Parish District Attorney's Office in favor of John Thompson, an innocent man who spent 18 years in prison--14 of them on death row--because prosecutors withheld exculpatory evidence. The majority opinion rejected Mr. Thompson's theory of liability based on 42 U.S.C. §1983,<sup>36</sup> and did not address the Rules. But the opinions in *Connick*--both majority and dissenting--document events that demonstrate the need for guidance on the managerial and supervisory obligations of prosecutors under the Rules of Professional Conduct. And, only one year later in *Smith v. Cain*,<sup>37</sup> the Supreme Court reversed a conviction for *Brady* violations by the same office.<sup>38</sup>

In 2013 the Supreme Court of Oklahoma disciplined a former Assistant District Attorney for the Oklahoma County District Attorney's Office and criticized the District Attorney's office for a lack of managerial and supervisory effectiveness.<sup>39</sup> The Court said:

We must recognize that the [Assistant District Attorney] was acting under the direction, supervision, and policies of the then elected District Attorney. Responsibility for the respondent's conduct and

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33. *Id.*

34. See, e.g., Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA TODAY (September 23, 2010), [http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform\\_N.htm](http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm); Joaquin Sapien, *Out of Order: When Prosecutors Cross The Line*, PROPUBLICA, <http://www.propublica.org/series/out-of-order> (last visited July 6, 2014); KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 (2010), available at [http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct\\_Exec\\_Sum.pdf](http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct_Exec_Sum.pdf). See also *United States v. Olsen*, 737 F.3d 625 (9<sup>th</sup> Cir. 2013) (denying petition for rehearing en banc, Kozinski, Pregerson, Reinhardt, Thomas, and Watford dissenting, writing, "There is an epidemic of *Brady* violations abroad in the land.").

35. *Connick v. Thompson*, 131 S.Ct. 1350 (2011).

36. "Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused [the District Attorney's Office to fail to disclose certain evidence to Thompson]." *Id.* at 1355. See 42 U.S.C. §1983 (1996) provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

37. *Smith v. Cain*, 132 S.Ct. 627 (2012) (reversing a murder conviction for *Brady* violation by the New Orleans Parish District Attorney's Office).

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

39. *State ex rel. Oklahoma Bar Ass'n v. Miller*, 309 P.3d 108 (Okla. 2013) (assistant prosecutor suspended for 180 days for violations of, *inter alia*, Rules 8.4, 3.8 & 3.4). The Tenth Circuit has also expressed concern about prosecutorial misconduct in the Oklahoma County District Attorney's office. See *Le v. Mullin*, 311 F.3d 1002, 1029 (2002) ("While it is true that any prosecutor will have his share of trial-outcome challenges, over the last fifteen years, the Oklahoma County District Attorney's office has been cited for actions deemed improper, 'egregiously improper,' deceitful and impermissible in striking foul blows, deplorable, 'perhaps inappropriate,' worthy of condemnation, and, in this very case, 'condemned' and 'certainly error.'"; "The prosecution's actions in this case suggest defiance of Oklahoma courts and disregard for Oklahoma law.") (footnotes omitted).

trial tactics falls partially to the District Attorney as the chief administrator of the office.<sup>40</sup>

The New Orleans and Oklahoma examples alone would justify examination of the obligations of managerial and supervising prosecutors under Rules 5.1 and 5.3. But the frequency of prosecutorial misconduct nationwide documented by, *inter alia*, opinions in criminal cases and disciplinary proceedings reported in the last fifteen years, also underscores this need. These decisions reveal numerous violations of *Brady* in criminal cases<sup>41</sup> (which are also violations of Rule 3.8), and show other examples of misconduct, e.g., prosecutors using false evidence or failing to correct false statements to the court;<sup>42</sup> prosecutors engaging in other improper courtroom conduct;<sup>43</sup> and prosecutors engaging in conduct that would violate, *inter alia*, Rule 4.2,<sup>44</sup> Rule 3.6,<sup>45</sup> Rule 8.4(a), and Rule 8.3(a).<sup>46</sup>

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40. State ex rel. Oklahoma Bar Ass'n v. Miller, 309 P.3d at 119.

41. See, e.g., *Monroe v. Angelone*, 323 F.3d 286, 314 (4th Cir. 2003) (failure to reveal leniency agreements with key witness and then stressing absence of such deals in closing statement[s]); *Tassin v. Cain*, 517 F.3d 770, 781 (5th Cir. 2008) (failure to disclose a "beneficial sentencing agreement that hinged directly on [a government witness's] testimony"; failure to correct misleading statements by the witness regarding the agreement; and, arguing to the jury, on the basis of the misleading testimony, that the witness had no reason to lie) (footnote omitted); *Silva v. Brown*, 416 F.3d 980, 986 (9th Cir. 2005) (failure to disclose an arrangement where the prosecutor agreed to drop murder charges against the chief prosecution witness in exchange for the witness's agreement to refrain from undergoing a psychiatric evaluation before testifying; "The existence of this deal evidencing the prosecution's concern as to the mental state of [the witness] was obviously impeachment evidence favorable to the defense."); *Douglas v. Workman*, 560 F.3d 1156, 1174-76 (10th Cir. 2009) (failure to disclose plea deal with witness linking defendant to murder; the witness was "indispensable" to the state's case). See also Brad Heath & Kevin McCoy, *supra* note 34 (finding *Brady* violations in many federal cases). Indeed, the failure to turn over exculpatory evidence has been described as the "most common form of [prosecutorial] misconduct cited by courts in overturning convictions." See Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, And The System That Protects Them*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana\\_n\\_3529891.html](http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html) (last visited July 7, 2014). See also *Rampant Prosecutorial Misconduct*, NY TIMES (Jan. 4, 2014), [http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html?\\_r=0](http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html?_r=0); Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Ramey, 512 N.W.2d 569 (Iowa 1994) (indefinitely suspending an experienced prosecutor for making false statements regarding a chain of custody and for failing to disclose exculpatory evidence); Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195 (Ohio 2003) (six month stayed suspension for failing to disclose DNA test results in a child sex abuse case); *In re Jordan*, 913 So. 2d 775, 784 (La. 2005) (deferred three month suspension for failing to disclose *Brady* material in violation of 3.8(d) and 8.4(a); deferral "subject to the condition that any misconduct . . . during a one-year period following [the date of the suspension] may be grounds for making the deferred suspension executory, or imposing additional discipline. . .") (rehearing denied).

42. See, e.g., *Napue v. Illinois*, 360 U.S. 264, 265, 269-270 (1959) (failure to correct witness testimony the prosecutor knew to be false); *Drake v. Portuondo*, 553 F.3d 230, 233, 241-243 (2d Cir. 2009) (knowingly presenting false expert-witness testimony); *Hobbs v. Cappelluti*, 899 F. Supp. 2d 738 (N.D. Ill. 2012) (helping detective coerce a false video confession and pursuing conviction with the false confession); *Dow v. Virga*, 729 F.3d 1041 (9th Cir. 2013) (knowingly eliciting and failing to correct a detective's false testimony; "textbook prosecutorial misconduct"); *In re Jordan*, 91 P.3d 1168, 1173-1175 (Kan. 2004) (public censure for prosecutor's, *inter alia*, false statements to the court and failure to disclose evidence in violation of Rules 3.3, 3.4, 3.8, and 8.4.)

43. See, e.g., *United States v. Perlaza*, 439 F.3d 1149, 1172-1173 (9th Cir. 2006) (improper comment that presumption of innocence disappears when jury starts to deliberate); *Marshall v. Hendricks*, 307 F.3d 36, 65 (3d Cir. 2002), *cert. den.*, 538 U.S. 911 (2003) (improper mischaracterization of defense witness's testimony); *State v. Rogan*, 984 P.2d 1231, 1249-1250 (Haw. 1999) (forbidding re-prosecution on double jeopardy grounds after mistrial based on prosecutor's impermissible appeals to racial prejudice during summation; discussing Rule 3.8 and ABA PROSECUTION FUNCTION STANDARDS 3-5.8 (3d ed. 1993)).

44. See, e.g., *United States v. Koerber*, 966 F. Supp. 2d 1207 (D. Utah 2013), *app. dismissed*, (10th Cir. 2014) (granting defendant's motion to suppress evidence gained by the prosecutor during interviews that violated Rule 4.2).

45. See, e.g., *United States v. Bowen*, 269 F.Supp. 2d 546, 568, 574 (E.D. La. 2013) (granting defendants' motion for a new trial based on anonymous comments by prosecutors on a website that was viewed by jurors; noting, *inter alia*, the special duties of prosecutors under Rule 3.8; "[T]he government's actions, and initial lack of candor and credibility thereafter, is like scar tissue that will long evidence infidelity to the principles of ethics, professionalism, and

## E. Basic Requirements

### 1. Establishing Office-Wide Policies

To accomplish the goals set forth in Rules 5.1 and 5.3, managers must “establish internal policies and procedures.”<sup>47</sup> Generally, these policies and procedures should address confidentiality obligations, how to detect and resolve conflicts of interest,<sup>48</sup> “dates by which actions must be taken in pending matters,”<sup>49</sup> and ways to “ensure that inexperienced lawyers are properly supervised.”<sup>50</sup> In the prosecutorial context, these policies and procedures should specifically facilitate compliance with ABA Model Rule 3.8. As we wrote in ABA Formal Opinion 09-454, “Supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations. 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.*”<sup>51</sup> Further, in light of the “intensely difficult ethics issues” that arise for prosecutors, more elaborate procedures may be necessary to ensure compliance.<sup>52</sup>

With respect to nonlawyers, managers must establish policies and procedures that provide for “appropriate instruction and supervision concerning the ethical aspects of their employment . . . [that] . . . take account of the fact that [nonlawyers] do not have legal training and are not subject to professional discipline.”<sup>53</sup> These policies and procedures for nonlawyers must, among other things, specifically facilitate compliance with Rule 3.8.

For lawyers and nonlawyers the policies and procedures set by managers should include substantive provisions that reasonably ensure compliance, as mandated by paragraph (a), and procedural provisions identifying specific measures that direct supervisors and other responsible individuals should implement to ensure that the policies

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basic fairness and common sense necessary to every criminal prosecution, wherever it should occur in this country.”); Lawyer Disciplinary Bd. v. Sims, 574 S.E.2d 795 (W. Va. 2002) (public reprimand for violating Rules 3.6, 3.8, and 8.4(a) by, *inter alia*, making improper statements to the press); Att’y Grievance Comm’n. of Md. v. Gansler, 835 A.2d 548 (Md. 2003) (public reprimand for violating Rules 3.6 and 8.4(a) by making improper extrajudicial statements).

46. *See, e.g., In re Riehlmann*, 891 So. 2d 1239, 1247-1249 (La. 2005) (public reprimand for violating Rule 8.3(a) by failing to report a colleague’s suppression of exculpatory evidence).

47. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [2].

48. *Id.* Situations that may give rise to conflicts for prosecutors include, for example, (i) former-client and revolving-door issues under Rule 1.11, (ii) negotiations for private employment, and (iii) relationships with defense counsel and other lawyers. *See also In re McKinney*, 948 N.E.2d 1154 (Ind. 2011) (prosecutor suspended for 120 days because he prosecuted criminal matters as a part-time prosecutor while, at the same time, pursuing related civil forfeiture cases as a private attorney, where he would earn 25% of the amounts collected in the civil forfeiture cases).

49. R. 5.1 cmt. [2], *supra* note 46. For example, prosecutors should know the timing requirements applicable to investigations and prosecutions so as not to prejudice a matter.

50. *Id.*

51. Formal Op. 09-454, *supra* note 6, at 8 (emphasis added) (footnotes omitted).

52. *See, e.g., In re Myers*, 584 S.E.2d 357, 360-361 (S.C. 2003) (public reprimand of the Solicitor for the Eleventh Judicial District for violation of Rule 5.1(b) by failing to ensure that a deputy prosecutor disclosed, *inter alia*, eavesdropping by investigators on a confidential conversation between the defendant and his lawyer; “We hold that . . . the Solicitor’s Office is a law office where complex ethical questions arise, which necessitate a more elaborate system to ensure that the attorneys in the Solicitor’s Office comply with the Rules [of Professional Conduct]”).

53. ABA MODEL RULES OF PROF’L CONDUCT R. 5.3 cmt. [2].



and procedures established by the managers will be effectively executed. What those specific measures are will vary, depending on the size and structure of the office; no one size fits all. But some measures must be adopted and implemented. Recommendations for such measures are set forth below.

## 2. Guidance on Specific Measures

The ABA Standards for Criminal Justice Prosecution Function and Defense Function Standards (the “ABA Standards”), the National District Attorneys Association, National Prosecution Standards published by the National District Attorneys Association (the “District Attorneys Standards”), substantial literature on prosecutorial conduct,<sup>54</sup> and compliance programs implemented by law firms and corporate legal departments in response to the requirements of the Sarbanes-Oxley Act<sup>55</sup> all provide examples of the types of measures that might be adopted. We set forth our recommendations below, based on these and other sources.

### a. Training

The ABA Standards recommend that supervising prosecutors train incoming lawyers regardless of their previous experience.<sup>56</sup> We recommend that the training cover the ethical and legal obligations imposed by the Rules of Professional Conduct, including what disclosures and other obligations Rule 3.8 imposes, what public statements may be made under Rules 3.6 and 3.8 (including statements on social media, websites, and blogs), what must be revealed to a tribunal under Rule 3.3, what contacts may be made with represented and unrepresented persons under Rules 4.2 and 4.3, what statements may be made in closing argument, and what conduct by other prosecutors must be reported under Rule 8.3(a). We also recommend that training cover what constitutes *Brady* material. Others have suggested that the initial training also address office policies and procedures, technical skills, other relevant substantive law, and court rules.<sup>57</sup> In

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54. See, e.g., Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089 (2010) (advocating an entity-based compliance approach in prosecutor's offices).

55. Responding to the regulations promulgated by the Securities and Exchange Commission (the “SEC”) under Section 307 of the Sarbanes-Oxley Act --- which sets forth minimum standards of professional conduct for attorneys --- law firms and corporate legal departments adopted internal policies which include but are not limited to distributing written policies describing the up-the-ladder reporting requirements, creating compliance committees and setting up training programs. See James L. Sonne, *Sarbanes-Oxley Section 307: A Progress Report on How Law Firms and Corporate Legal Departments Are Implementing SEC Attorney Conduct Rules*, 23 GEO. J. LEGAL ETHICS 859, 864-65, 868-69 (2010).

56. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARDS § 3-2.6 & Commentary (3d ed. 1993) (the “ABA Standards”) (“[t]raining programs should be established within the prosecutor’s office for new personnel and for continuing education of the staff”; “[e]ven lawyers with extensive experience in the trial of civil cases must undergo new training ... before they can function effectively in the trial of a criminal case”). See also National District Attorneys Association, NATIONAL PROSECUTION STANDARDS §§ 1-5.3, 1-5.4 (2009) (the “District Attorneys Standards”) (“At the time they commence their duties and at regular intervals thereafter, prosecutors should participate in formal training and education programs. Prosecutors should seek out continuing legal education opportunities that focus specifically on the prosecution function . . . . Each prosecutor’s office should develop written and/or electronically retrievable statements of policies and procedures that guide the exercise of prosecutorial discretion and that assist in the performance of those who work in the prosecutor’s office.”). Both the ABA Standards and the District Attorneys Standards state that they are intended only as guides to professional conduct, but the ABA Standards constitute ABA policy. The District Attorneys Standards do not constitute ABA policy. For additional guidance see, e.g., Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2244-46 (describing benefits of “Clear Office-Wide Definitions of What Is or Is Not Brady Material”).

57. See NATIONAL PROSECUTION STANDARDS § 5, Commentary (2009) (“A basic orientation package for assistants could include familiarization with office structure, procedures, and policies; the local court system; the operation of local police agencies; and training in ethics, professional conduct, courtroom decorum, and relations with the court and the defense bar.”); CTR ON THE ADMINISTRATION OF CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTOR’S OFFICES: A REPORT OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW’S CONVICTION INTEGRITY PROJECT, at 17 (2012), available at

addition, making office policies and procedures available to all lawyers in hard copy or electronically retrievable format may help ensure compliance. Updating those policies and procedures regularly is advisable.

Supervising lawyers should also provide initial training for nonlawyers who are “employed, retained or associated with” the office. This group would ordinarily include detectives and investigators, forensic experts in the office, paralegals and clerical staff. The training should include education on the ethical and legal obligations of prosecutors and related office procedures, e.g., proper handling, filing, and retention of forms and documents, and the preservation of evidence.<sup>58</sup> The training should be adequate to insure that the conduct of nonlawyers is compatible with the professional obligations of prosecutors.

Training sessions should be offered as frequently as needed to update lawyers and nonlawyers on relevant subjects, for example, when an important decision is rendered that directly bears on a prosecutor’s professional obligations. Policies, procedures, and training manuals should also be updated regularly, as events require, and key court decisions on prosecutorial conduct should be circulated with explanatory memos.<sup>59</sup> When a court criticizes the conduct of a lawyer or nonlawyer in the office, supervising prosecutors should consider holding special training or educational sessions as appropriate to avoid any repetition.

### b. Supervision

Effective supervision would require that supervisors keep themselves informed of the status of and developments in pending cases by, for example, requiring periodic written or oral reports on pending cases.<sup>60</sup> Other examples of appropriate measures include: (i) requiring that supervising prosecutors participate in major decisions, e.g., granting immunity, deciding charges, identifying *Brady* material, and, where feasible, documenting the basis for these decisions in writing;<sup>61</sup> (ii) establishing a system of individual oversight of line prosecutors, including during the preparation for and the conduct of trials; (iii) pairing untrained or newly-trained prosecutors with more experienced prosecutors; (iv) holding prosecutors with Rule 5.1(b) and 5.3(b) obligations accountable for the conduct of their subordinates; and (v) designating a specific attorney to oversee the review of files for *Brady* material.

## F. Other Recommendations

### 1. Creating a Culture of Compliance

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[http://www.law.nyu.edu/sites/default/files/upload\\_documents/Establishing\\_Conviction\\_Integrity\\_Programs\\_FinalReport\\_ecm\\_pro\\_073583.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf) [hereinafter CONVICTION INTEGRITY PROJECT REPORT] (“Both new and experienced prosecutors must be trained and educated about their ethical and professional obligations. Ongoing training programs are not an admission that an office has a problem with attorney misconduct; they are a necessary component of reminding prosecutors about their unique job responsibilities.”).

58. See NATIONAL PROSECUTION STANDARDS § 5, Commentary.

59. For a sample manual, see, e.g., DIST. ATT’YS ASS’N OF THE STATE OF N.Y., “THE RIGHT THING:” ETHICAL GUIDELINES FOR PROSECUTORS, available at <http://www.daasny.org/Ethics%20Handbook%209.28.2012%20FINAL.pdf> (last visited July 3, 2014).

60. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [3] notes managerial lawyers “may not assume that all lawyers associated with the firm will inevitably conform to the Rules.” Keeping abreast of the developments in the matters under supervision and requiring such periodic reports are reasonable measures to check any such assumptions. See *In re Anonymous Member of S. Carolina Bar*, 552 S.E.2d 10, 14-15 (S.C. 2001) (“[u]ndoubtedly, the supervision of attorneys by other attorneys in their firm is one of the most effective methods of preventing attorney misconduct”; “[w]hen an attorney has allegedly violated Rule 5.1, it is not a complete defense to prove that the attorney did not know about the underlying misconduct. . . . In fact, a complete lack of knowledge can lead to a finding of poor supervision if the subordinate’s violation is such that reasonable supervision would have discovered it.”).

61. See generally Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1005-06 (2009).

“[T]he ethical atmosphere of [an organization] can influence the conduct of all its members . . . .”<sup>62</sup> Managers and supervisors in prosecutors’ offices should create a “culture of compliance.”<sup>63</sup> This can be done by, e.g., (i) emphasizing ethical values and imperatives during the hiring process;<sup>64</sup> (ii) providing incentives for ethical behavior, such as positive reviews, promotions, and raises; (iii) protecting and rewarding lawyers who fulfill their up-the-ladder duties;<sup>65</sup> (iv) promoting initiatives that make compliance with ethical obligations less demanding for line prosecutors<sup>66</sup> such as “open-file” discovery policies;<sup>67</sup> (v) publicizing ethical compliance reforms and internal policies both within the office and to the public;<sup>68</sup> and (vi) internally disciplining lawyers and reporting lawyers who violate the Rules of Professional Conduct.<sup>69</sup>

## 2. Enforcing “Up-the-Ladder” Obligations

Prosecutors, like lawyers in other government offices, have obligations under Rule 1.13 to report conduct by an employee or other constituent that is a violation of law that might be imputed to the office.<sup>70</sup> This raises especially complex issues for prosecutors and other lawyers who work in government offices about the identity of their clients and the nature of their obligations.<sup>71</sup> We do not address these Rule 1.13 issues in this opinion. We focus here on how prosecutors might implement their supervisory and managerial obligations under Rules 5.1 and 5.3 by developing an internal system for “up-the-ladder” reporting of violations of the Rules of Professional Conduct whether or not such violations would also trigger the up-the-ladder reporting obligations of Rule 1.13.

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62. ABA MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. [3].

63. See Barkow, *supra* note 53, at 2116 (“Whether or not an office is responding to a history of misconduct, creating a culture of compliance and ethical behavior is in the interests of prosecutors who head the office.”).

64. See CONVICTION INTEGRITY PROJECT REPORT, *supra* note 56, at 16 (recommending posing ethical hypotheticals and asking “potential hires to discuss key ethical rules or obligations”).

65. See discussion of a prosecutor’s up-the-ladder duties, *infra* at Part F2.

66. See, e.g., Formal Op. 09-454, *supra* note 6, at 4 (Rule 3.8 “requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial’s outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.”) (footnotes omitted).

67. An “open-file” discovery policy includes, for example, the office disclosing all exculpatory evidence of which they are aware, without evaluating materiality, in an effort to avoid both intentional and unintentional withholding of *Brady* evidence. See Barkow, *supra* note 53, at 2111 (“Another way of improving transparency and monitoring without imposing substantial costs would be for prosecutors’ offices to adopt an ‘open-file’ discovery process. Many offices already follow open-file policies, and several scholars have touted these policies as a protection against *Brady* violations.”) (footnote omitted); See also CONVICTION INTEGRITY PROJECT REPORT, *supra* note 56.

68. This provides interested “stakeholders” the opportunity to comment on these policies. See Barkow, *supra* note 53, at 2111; CONVICTION INTEGRITY PROJECT REPORT, *supra* note 56, at 33-34 (discussing the benefits to prosecutors of publicizing their efforts to curb prosecutorial misconduct).

69. ABA MODEL RULES OF PROF’L CONDUCT R. 8.3(a) provides: “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”

70. See ABA MODEL RULES OF PROF’L CONDUCT R. 1.13(b). R. 1.13 cmt. [9] reads, “The duty defined in the Rule [1.13] applies to governmental organizations.” “Up the ladder” obligations are also imposed by the Sarbanes-Oxley rule for lawyers appearing and practicing before the SEC. See 17 C.F.R. §§ 205.3(b), 205.4 & 205.5 (2013) (establishing responsibilities for supervisory and subordinate lawyers to report material violations of the Sarbanes-Oxley Act). For a model up-the-ladder policy, see ASSOC. OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE TASK FORCE ON THE LAWYER’S ROLE IN CORPORATE GOVERNANCE, App. F (2006), which establishes specific procedures, provides for an appropriate level of confidentiality, prohibits retaliation, requires training on reporting requirements, and provides for annual written certification by all lawyers that they are aware of their obligations and will comply.

71. For example, actions by constituents in a prosecutor’s office could lead to liability under 42 U.S.C. §1983, as alleged in *Connick v. Thompson*, 131 S.Ct. 1350 (2011), and might require up-the-ladder reporting under Rule 1.13. So too might the apparent failure to supervise and train in the Oklahoma County District Attorney’s office noted by the Tenth Circuit in *Le v. Mullin*, 311 F.3d 1002 (2002), where the Court said that the prosecutor’s actions “suggest defiance of Oklahoma courts and disregard for Oklahoma law.” In such instances there could be violations of Rule 1.13 separate from any violations of Rules 5.1 and 5.3.

Though not addressing Rule 1.13, we recommend that managerial and supervising prosecutors establish a similar system for up-the-ladder reporting concerning possible violations of the Rules of Professional Conduct by lawyers in the office. Such internal reporting procedures would enable managers and supervisors to correct, remedy, and sometimes avoid such violations. A system for this up-the-ladder reporting could include (i) designating a specific attorney or committee to receive reports and address and resolve the issues;<sup>72</sup> (ii) permitting confidential review, as appropriate, to promote increased reporting of potential ethical issues;<sup>73</sup> and (iii) requiring the reporting of any reprimand or other criticism by a judge, as well as written complaints or allegations of ethical misconduct by any person, to a supervising prosecutor or to a prosecutor designated for this purpose.<sup>74</sup> In addition, supervising prosecutors should make clear that any lawyer who knows of a violation of the rules of professional conduct may be required to report that information to a supervising prosecutor, or pursuant to an established up-the-ladder regime instituted to comply with Rules 5.1 and 5.3.

### 3. Discipline

The training and supervision described in this opinion can be enhanced with appropriate remediation and discipline. For example: (i) imposing sanctions within the office; (ii) requiring remedial education targeted at particular types of misconduct;<sup>75</sup> (iii) intensifying, in appropriate cases, the scrutiny of prosecutors who have engaged in improper conduct or whose conduct has been criticized by a court; (iv) demotion or dismissal; and (v) where appropriate, referring the matter to an outside authority under Rule 8.3(a).<sup>76</sup> It may be effective to have responsibility for in-house review placed with a specific supervisory lawyer or a group of lawyers within the office.<sup>77</sup>

## G. Organizational and Structural Variables

Organizational and structural differences, such as the size of an office, the personnel turnover rate, the manner in which cases are prosecuted, the size of caseloads,<sup>78</sup> and the hierarchical structure may have an impact on which of the measures we recommend should be used to ensure compliance. Large offices with several layers of hierarchy may need to establish a formal committee to coordinate and direct the internal reporting of misconduct and the

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72. See ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. [3] ("Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee.").

73. *Id.*

74. See Barkow, *supra* note 53, at 2110.

75. For example, if the office is criticized for a *Brady* violation, appropriate remedial education is imperative.

76. See, e.g., *In re Brizzi*, 962 N.E.2d 1240 (Ind. 2102) (public reprimand for improper public statements); *In re McKinney*, 948 N.E.2d 1154 (Ind. 2011) (120 day suspension for conflict of interest); *In re Miller*, 677 N.E.2d 505 (Ind. 1997) (reprimand for advancing the cause of a civil litigant while serving as a prosecutor). *But see*, Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 FORDHAM L. REV. 537, 541-42 (2011); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 2 ("[D]isciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d)"); *United States v. Olsen*, 737 F.3d 625, 630 (9<sup>th</sup> Cir. 2013) (Kozinski, Pregerson, Reinhardt, Thomas & Watford dissenting) (denying petition for rehearing en banc) ("[p]rofessional discipline [for *Brady* violations] is rare").

77. See CONVICTION INTEGRITY PROJECT REPORT, *supra* note 56, at 16 (discussing creation of "Best Practices Committees"). For an analogous discussion of the benefits of having a general counsel in private firms, see ROTUNDA & DZIENKOWSKI, *supra* note 21, § 5.1-1.

78. High caseloads are a particular risk factor. Whether a caseload is manageable may depend on, *inter alia*, the type and complexity of cases being handled by each lawyer, the experience and ability of each lawyer, and the resources available to support the lawyers. See also Va. Standing Comm. on Legal Ethics, Advisory Op. 1798 (2004) (addressing whether a chief prosecutor violates Rule 5.1 when he assigns too high a caseload; "[w]here a supervising attorney assigns a caseload so large as to preclude any hope of the supervised attorney's ethically representing the client (or clients), that supervisor would be in violation of Rule 5.1").

monitoring for ethics violations. Such formalized assignments, on the other hand, are unlikely to be required for small prosecutor's offices that employ 10 to 15 prosecutors, or even fewer. Supervising prosecutors in these smaller offices may make "reasonable efforts" by simply, for example, adopting an open-door policy for reporting misconduct or assigning a specific person in the office to hear such reports.

Direct supervision and monitoring also may vary with organizational and structural differences. For example, some offices assign multiple prosecutors to handle a case and each prosecutor is responsible for only one stage of the process.<sup>79</sup> In these offices, a monitoring scheme is unlikely to be reasonable if no special attention is paid to ensure that important information, such as *Brady* material, is not lost in the transition from prosecutor to prosecutor. The handling of this transition is especially delicate in offices with high turnover rates--much can be lost with frequent transitions. By contrast, where only one prosecutor handles a case from start to finish and through all stages in the process, a different monitoring regime will be appropriate.<sup>80</sup>

## H. Conclusion

Prosecutors with managerial authority and supervisory lawyers must make "reasonable efforts to ensure" that all lawyers and nonlawyers in their offices conform to the Rules of Professional Conduct. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to insure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations. The particular measures that managerial and supervisory prosecutors must implement to comply with these rules will depend on a variety of factors, including the size and structure of their offices, as set forth in this opinion.

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79. Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships, Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 13 (2013) ("horizontal prosecution" refers to matters handled by "multiple prosecutors, each handling the case at one stage of the process").

80. *Id.* at 12 ("vertical prosecution" refers to matters handled by one prosecutor at all stages). See also Formal Op. 09-454, *supra* note 6, at 8 ("[W]hen 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. . . . 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.").

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