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Prosecutors' Ethical Duty of Disclosure in Memory of Fred Zacharias

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Prosecutors' Ethical Duty of Disclosure

In Memory of Fred Zacharias

BRUCE A. GREEN*

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I. INTRODUCTION

In the spring of 2009, I sent Fred Zacharias an e-mail to let him know that the American Bar Association's (ABA) Standing Committee on Ethics and Professional Responsibility, on which I was serving, was working on an opinion on prosecutorial ethics and to suggest that once it was published, the opinion might be fodder for our next article. Over the preceding decade, Fred and I had coauthored five articles on the regulation of prosecutors,¹ and various others on the regulation of lawyers in general,²

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1. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837; Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002) [hereinafter Green & Zacharias, *Regulating*

but at that time, we had no work in progress and had been out of touch for a while. It was time to pick up a summer project.

The subject of the ABA committee's inquiry in what later became Opinion 09-454 was the model ethics rule on prosecutors' disclosure obligations.³ The rule calls upon 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."⁴ The rule goes back four decades. The ABA first adopted it in 1969 as Disciplinary Rule (DR) 7-103(B) of the *Model Code of Professional Responsibility*, and then carried it over into Rule 3.8(d) of the *ABA Model Rules of Professional Conduct (ABA Model Rules)*.⁵ But this would be the committee's first opinion addressing this rule and it would help fill a void. Although most state courts have incorporated the rule or a variation of it into their ethics codes, few state bar association ethics committees or courts had previously interpreted the rule's state counterparts.⁶

Around the same time that the opinion was underway, prosecutors and their disclosure obligations were in the news largely because of several high profile cases in which prosecutors had been embarrassed by

Federal Prosecutors' Ethics]; Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187 (2008); Fred C. Zacharias & Bruce A. Green, *The Duty To Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009) [hereinafter Zacharias & Green, *The Duty To Avoid Wrongful Convictions*]; Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000) [hereinafter Zacharias & Green, *The Uniqueness of Federal Prosecutors*].

2. See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006); Fred C. Zacharias & Bruce A. Green, *Federal Court Authority To Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003) [hereinafter Zacharias & Green, *Federal Court Authority To Regulate Lawyers*]; Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73 (2009) [hereinafter Zacharias & Green, *Rationalizing Judicial Regulation*]; Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005) [hereinafter Zacharias & Green, *Reconceptualizing Advocacy Ethics*].

3. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) [hereinafter ABA Opinion 09-454], available at http://www.abanet.org/media/youraba/200909/opinion_09-454.pdf.

4. MODEL RULES OF PROF'L CONDUCT R 3.8(d) (2010), available at http://www.abanet.org/cpr/mrpc/rule_3_8.html.

5. ABA Model Rule 3.8(d) provides in full:

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

Id.

6. ABA Opinion 09-454, *supra* note 3, at 1 & nn.4-5 (citing authorities).

discovery failures.⁷ Various segments of the legal profession were studying these obligations, whether prosecutors adequately complied with them, and whether the law should be changed. Much attention was directed to prosecutors' constitutional duty under *Brady v. Maryland*⁸ and the decisions that followed it, and there was also discussion about expanding federal and state statutes governing prosecutors' disclosure of evidence and information to the defense.⁹ However, participants in the discussion largely ignored rule 3.8(d). They may have been unaware of the rule, assumed that it added little if anything to constitutional and statutory obligations, or believed that any necessary reforms should be achieved other than by amending or enforcing the rule.

It was in response to my e-mail about the forthcoming opinion that I first learned from Fred that he had begun medical treatment, having received, in his words, a "pretty grim" prognosis. But he was hopeful.

7. See Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2161–62 (2010) (describing "a series of federal criminal cases in which [the Department of Justice] was embarrassed by its lawyers' discovery failures"). Most notably, the federal prosecution of U.S. Senator Ted Stevens concluded with Attorney General Holder's agreement that the district court vacate the jury's guilty verdict and dismiss the indictment after a team of Department of Justice lawyers were found to have withheld information that tended to exculpate the Senator and contradict their main witness. See *id.* The U.S. Department of Justice responded by revamping its internal policies on disclosure, see *id.* at 2163, and a committee of the Federal Judicial Conference, at the urging of the district judge who had presided over Senator Stevens's trial, considered whether to propose changes to the relevant rule of criminal procedure. See Letter from Hon. Emmet G. Sullivan to Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure (Apr. 28, 2009), available at http://legaltimes.typepad.com/files/sullivan_letter.pdf; Letter from Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure, to Hon. Emmet G. Sullivan (July 2, 2009), available at http://legaltimes.typepad.com/files/tallman_letter.pdf. Several groups, including the ABA Criminal Justice Section, cosponsored a two-day conference at Cardozo Law School to consider what institutional measures should be taken in prosecutors' offices and elsewhere to improve prosecutors' disclosure practices. See Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

8. 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); see also *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant . . . is of course most prominently associated with this Court's decision in *Brady v. Maryland*.").

9. See, e.g., Stephen R. Spivack et al., *Troubling the Heavens: Production of Evidence Favorable to Defendants by the United States*, CHAMPION, Jan.–Feb. 2010, at 24–25; see also *supra* note 7.

Two weeks later, he sent an e-mail proposing that after the ABA published its opinion, we should coauthor not one but *three* writings in response to it. The first would be a short essay that would “look at the new ABA opinion,” which Fred had yet to see, “and come to the conclusion that while it’s right, . . . each jurisdiction should really look at the rule to decide if that’s what the jurisdictions want to accomplish.”¹⁰

Fred anticipated that the relationship between rule 3.8(d) and external law would be a fundamental question that an opinion interpreting the rule would have to confront at the start. Does rule 3.8(d) impose an obligation that is independent of, and potentially more demanding than, the disclosure obligations that the Constitution and other law impose on prosecutors? Or does this rule merely authorize state courts to discipline prosecutors for knowing violations of their disclosure duties under the Constitution and under other law external to the ethics code? As the ABA opinion would note, most of the relevant writings at the time, including dicta in two Supreme Court opinions¹¹ and academic commentary,¹² assumed that prosecutors had an independent ethical duty under the rule. In particular, the writings assumed that unlike Supreme Court decisions requiring prosecutors to disclose only evidence and information that is “material”—meaning significant enough to potentially lead to an acquittal¹³—the ethics rule requires disclosure of favorable evidence regardless of its relative importance.¹⁴ In contrast, several state courts

10. E-mail from Fred C. Zacharias, Professor of Law, University of San Diego, to Bruce A. Green, Professor of Law, Fordham University (Apr. 13, 2009) (on file with author).

11. See ABA Opinion 09-454, *supra* note 3, at 4 & n.16 (citing *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009), and *Kyles*, 514 U.S. at 436). “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.” *Id.* (quoting *Bell*, 129 S. Ct. at 1783 n.15). As the court in *Kyles* pointed out, *Brady* “requires less of the prosecution than” ABA Model Rule 3.8(d). 514 U.S. at 437.

12. ABA Opinion 09-454, *supra* note 3, at 4 n.16 (citing ANNOTATED MODEL RULES OF PROF’L CONDUCT 375 (6th ed. 2007); 2 GEOFFREY C. HAZARD, JR. ET AL, THE LAW OF LAWYERING § 34.6 (3d ed. 2001 & Supp. 2009) (“This 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 (2009)); see also ABA Opinion 09-454, *supra* note 3, at 4 n.12 (citing ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (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.”)).

13. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 289–90 (1999) (“[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 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.’” (quoting *Kyles*, 514 U.S. at 435)).

14. See *supra* note 12 and sources cited therein.

had found otherwise,¹⁵ disciplinary agencies did not seek to enforce the rule based on a liberal interpretation of it, if at all,¹⁶ and prosecutors seemed to treat the ethics rule as an irrelevancy.¹⁷

Fred envisioned that our initial essay on the ABA opinion would draw on his recent article, *Integrity Ethics*,¹⁸ which explored the nature of ethics rules, one of the recurring themes of his extraordinary body of

15. See D.C. RULES OF PROF'L CONDUCT R 3.8 cmt. 1 (2007) ("[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."); ABA Opinion 09-454, *supra* note 3, at 4 n.18 ("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." (citing *In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (en banc) (deferring to the disciplinary board's finding that the prosecutor did not intentionally withhold evidence))); see also ABA Opinion 09-454, *supra* note 3, at 1 n.2 (citing *State v. York*, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J., concurring) (stating that the predecessor to Rule 3.8(d) "merely codifies *Brady v. Maryland*")).

16. See ABA Opinion 09-454, *supra* note 3, at 2; see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) ("[D]espite the universal adoption by the states of Disciplinary Rules prohibiting prosecutorial suppression of exculpatory evidence and falsification of evidence, and despite numerous reported cases showing violations of these rules, disciplinary charges have been brought infrequently and meaningful sanctions [are] rarely applied." (footnotes omitted)). Disciplinary proceedings against prosecutors are generally infrequent, and commentators have assumed that disciplinary authorities are often reluctant to seek sanctions against prosecutors even when there is a basis for doing so. See Ellen Yaroshefsky, *Wrongful Convictions: It Is Time To Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 276-77 (2004); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 755 (2001). In a 2009 article, Professor Zacharias and I focused on potential proceedings based on the competence rule to show, in part, why disciplinary agencies might have this reluctance. See Zacharias & Green, *The Duty To Avoid Wrongful Convictions*, *supra* note 1, at 35-57.

17. For example, an ethics guide published several years ago by the National College of District Attorneys, which calls itself "America's School for Prosecutors," contains a chapter on prosecutors' discovery obligations that includes approximately 100 footnotes citing constitutional case law but makes no mention of the ethics rule. See L. Douglas Pipes, *Discovery Danger Zone: The Brady Rule, in DOING JUSTICE: A PROSECUTOR'S GUIDE TO ETHICS AND CIVIL LIABILITY* 27, 27-40 (Ronald H. Clark ed., 2002). The chapter acknowledges prosecutors' susceptibility to professional discipline for a Brady violation but not for violating the ethics rule per se. See *id.*; see also Theresa A. Newman & James E. Coleman Jr., *The Prosecutor's Duty of Disclosure Under ABA Model Rule 3.8(d)*, CHAMPION, Mar. 2010, at 20, 20 (stating that "for years" prior to ABA Formal Opinion 09-454, the question whether rule 3.8(d) went beyond external law "had created some confusion and uncertainty among courts, state Bar Associations, and even prosecutors").

18. Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541 (2009).

writing on the regulation of the bar.¹⁹ The article distinguished between two types of legal ethics rules—“rules of role” and “rules of integrity” ethics.²⁰ The former were “professional rules prescrib[ing] functions that lawyers must fulfill in order to help the legal system achieve its goals,” including functions lawyers serve in their roles “as clients’ agents or champions, officers of the court, and fair players who ensure that the adversary game functions as intended.”²¹ The latter rules “serve as reminders to lawyers about limits to their roles” and “build upon constraints external to the ethics codes,” such as ordinary societal standards of morality or criminal or civil law.²² The article gave examples of rules that fit into each category,²³ as well as examples of where it was unclear how to categorize the rule,²⁴ but the article did not address rule 3.8.

Fred correctly anticipated that the ABA’s forthcoming opinion would conclude that the rule was independent of *Brady* and other external law, and would give guidance about its requirements.²⁵ He wrote that our essay would “probably” conclude that the ABA was correct. This would mean, in Fred’s classification scheme, that rule 3.8(d) was meant to be a rule of role. It did not simply remind prosecutors of existing disclosure obligations and subject prosecutors to discipline for violating the external law. Rather, the rule reinforced prosecutors’ justice-seeking role,²⁶ thereby helping the legal system achieve its goals of achieving fair and accurate outcomes and of affording the accused a fair process in criminal

19. In her contribution to this collection of articles paying tribute to Professor Zacharias, Nancy Moore discusses the significance of his writings on the nature of ethics rules, including his article on integrity ethics. See generally Nancy J. Moore, *The Complexities of Lawyer Ethics Code Drafting: The Contributions of Professor Fred Zacharias*, 48 SAN DIEGO L. REV. 335 (2011).

20. Zacharias, *supra* note 18, at 546.

21. *Id.* at 554.

22. *Id.* at 559–60.

23. See *id.* at 554–55 & tbl.1 (discussing rules of role); *id.* at 559–60 & tbl.2 (discussing integrity rules).

24. See *id.* at 563–65 (discussing the confidentiality rule); *id.* at 581 (discussing the aggregate settlement rule).

25. See ABA Opinion 09-454, *supra* note 3, at 4 (“Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d) establishes an independent one.”) (footnote omitted).

26. Both Fred and I wrote about prosecutors’ general duty to “seek justice” and took different views on the justification for the duty. He thought the duty was justified primarily by prosecutors’ power, see Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58–60 (1991), while I envisioned it as principally deriving from prosecutors’ role as lawyers for a sovereignty, see Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 625, 633–37 (1999). As David Luban notes in his contribution to this tribute issue, these views are not irreconcilable, and a robust understanding of the prosecutor’s unique professional status and obligations may build on both perspectives and more. See David Luban, *Fred Zacharias’s Skeptical Moralism*, 48 SAN DIEGO L. REV. 303, 313–19 (2011).

cases. This conclusion would prevent my having to disavow an ethics opinion I had a hand in writing; however, we would not be entirely uncritical. The essay would consider whether there was still sufficient justification for an ethics rule that imposed additional disclosure obligations on prosecutors, assuming that adequate justifications existed forty years earlier. Fred noted: "If the situation has changed since the rule's adoption, then there is all the more reason for states to reconsider what they really mean to do."²⁷

A short while later, Fred sent me a three-paragraph abstract of the first piece, as he envisioned it. He still had not yet seen the ABA opinion, and I had not disclosed its details, but true to form, he knew in advance that he would take issue with it. He wrote, referring to the as yet-unnumbered opinion:

This essay stems from a conversation between two long-time collaborators on professional responsibility issues after the ABA's recent issuance of Formal Op. _____. Both of the authors have written extensively in the fields of prosecutorial ethics and professional code-drafting. One author participated in the drafting of Formal Op. The other strongly disagreed with significant aspects of it.

Upon reflection, the authors in this essay conclude that the opinion is technically correct. It accurately states the ethics rule in question and its originally-intended purpose. It also correctly asserts that states that have adopted the rule can, and perhaps even should, enforce it. Yet the authors also conclude that the opinion illustrates problems with the rule underlying the opinion and highlights the importance of code-drafters properly conceptualizing proposed rules when they frame and adopt them.

In the short term, this essay should prompt jurisdictions that have adopted Model Rule 3.8(d) to reconsider how the rule fits other law in the jurisdiction and whether they wish to maintain the rule. The essay is designed for a broader purpose, however. It encourages code drafters to focus on the precise character of particular ethics rules before implementing them. In the long run, that should

27. E-mail from Fred Zacharias, Professor of Law, University of San Diego, to Bruce Green, Professor of Law, Fordham University (Apr. 13, 2009) (on file with author). Fred envisioned the two succeeding articles as more ambitious: The second in the series would be "an inquiry into whether 'ethics codes should go beyond the law,'" looking not only at rule 3.8—the special rule for prosecutors—but also at such other provisions as the no-contact rule and the confidentiality rule. And the last would examine the question, "If it is legal, is it ethical?" This question, Fred observed, "goes beyond what code drafters should do. In particular, it raises the question of how ethics should be arrived at or enforced when neither the substantive law nor professional codes confront a moral question." E-mail from Fred Zacharias, Professor of Law, University of San Diego, to Bruce Green, Professor of Law, Fordham University (Apr. 13, 2009) (on file with author).

help the drafters determine both the wisdom of adopting the rules and the appropriate methodology for framing them.²⁸

Fred followed with a page of thoughts about issues and questions he expected us to address along the way.

Fred's correspondence, looking ahead to our next few years of collaboration at the same time that he was undergoing debilitating medical treatment, speaks to many things, including his bravery and optimism in the face of his illness, his commitment to a life of the mind, and the fertility of his scholarly imagination. It also speaks to his generosity as a friend. As Fred undoubtedly knew, I cherished our collaboration and conversation. If, as it turned out, I would not get the chance to work with Fred personally on the contemplated articles, Fred made sure I would still have a chance to continue engaging with his ideas, as I do in writing this essay, and that was a true gift.²⁹

Fred's questions about rule 3.8(d) also speak to his acumen, if not prescience. His skepticism about whether state courts should use ethics rules to augment prosecutors' constitutional and statutory disclosure duties anticipated an opinion issued by the Ohio Supreme Court in February 2010. In *Disciplinary Counsel v. Kellogg-Martin*,³⁰ that court rejected a grievance board's recommended punishment of a state prosecutor for failing to meet her ethical, if not legal, disclosure obligation.³¹ A dissenting justice took the view, consistent with the ABA opinion, that Ohio's counterpart to rule 3.8(d) "differs from the related rule of criminal procedure in plain language and purpose" and requires more of prosecutors.³² In other words, the state's counterpart to rule 3.8(d)³³ was

28. E-mail from Fred Zacharias, Professor of Law, University of San Diego, to Bruce Green, Professor of Law, Fordham University (May 29, 2009) (on file with author).

29. So was Fred's request that I edit one of his last publications. See Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333, 333 n.* (2009). Indeed, Fred invited me to include myself as a coauthor, but the article was too near to completion to justify doing so.

30. 124 Ohio St. 3d 415, 2010-Ohio-282, 923 N.E.2d 125.

31. See *id.* ¶¶ 2, 16–33.

32. *Id.* ¶ 60 (Moyer, C.J., dissenting).

33. Ohio's DR 7-103(B) was somewhat differently worded from the ABA model. It provided:

A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

OHIO CODE OF PROF'L RESPONSIBILITY DR 7-103 (1970), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/professional/professional.pdf>, superseded by OHIO RULES OF PROF'L CONDUCT R. 3.8 (2007), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>. However, the

a rule of role. But the majority rejected this interpretation, finding that prosecutors' disciplinary obligation was no more extensive than their legal obligation.³⁴ In Fred's terminology, this meant that the ethics rule was an integrity rule. Fred's analysis equally anticipated a similar debate within the California bar, which has divided over whether a proposed state rule on prosecutorial disclosure should be "circumscribed by the constitution, as defined and applied in relevant case law," or should reflect "the broader scope of duty provided in" ABA Model Rule 3.8(d), as interpreted in Opinion 09-454.³⁵

Fred and I never had the opportunity to have the further conversations and collaborations he anticipated. Although I can imagine some of those conversations, I have not set out to write either the essay that Fred had in mind when he wrote his abstract or the one that we would actually have coauthored with the outline as a starting point. Doing the first would not be true to our history of collaboration, and doing the second would be impossible because of my own limitations. Had we been able to continue our work together, the essay would have evolved over the course of our conversations, exchange of e-mails, and, eventually, exchange of drafts. We would have incorporated new developments and further ideas. We would have argued and, as always, found common ground, much as Fred might have despaired at some moments of our doing so. With the benefit of Fred's deep knowledge of professional regulation and penetrating and nuanced approach to it, whatever we ultimately produced would have been more interesting and complex than whatever I could write alone. The best I can do is to build in my own way on Fred's outline and in doing so, return to, and draw upon, some of the themes of his and our work.

differences cannot account for the differences in interpretation between the Ohio Supreme Court's opinion and the ABA Opinion.

34. *Kellogg-Martin*, 124 Ohio St. 3d 415, ¶¶ 21–22, 923 N.E.2d at 130.

35. STATE BAR OF CAL., COMM'N FOR THE REVISION OF THE RULES OF PROF'L CONDUCT, PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA 78–79 (2010), available at <http://calbar.ca.gov/LinkClick.aspx?fileticket=WBiabhKgb9s%3d&tabid=2653>.

II. DIFFERING VISIONS OF PROSECUTORIAL DISCLOSURE RULES

Professor Zacharias's writings often gave advice to ethics rule drafters.³⁶ One of the points of his article on integrity ethics is that it matters whether ethics rules are meant to be rules of role or integrity rules, and that ethics rule drafters should decide in advance which kind of rule they mean to write. After a rule is adopted, one's characterization of a rule may also influence how one interprets or evaluates it. The point can be illustrated by comparing the ABA ethics opinion and the Ohio Supreme Court decision. They reached essentially opposite conclusions about the scope of similar rules on prosecutorial disclosure, driven implicitly by differing visions of whether the rule was a rule of role or a rule of integrity ethics.

The ABA opinion's analysis started with the question of whether the disclosure rule was bounded by external law³⁷ but did not find this question particularly thorny. It noted that the Supreme Court in *Brady* and in the cases that followed "established[ed] a constitutional minimum"³⁸ but did not purport to foreclose courts from "adopting more demanding disclosure obligations by . . . rule of professional conduct,"³⁹ and that, in fact, Supreme Court decisions assumed that the ethics rule was more demanding.⁴⁰ It stated that "[t]he drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law."⁴¹ Although not adopting Professor Zacharias's terminology, the opinion envisioned the ethics obligation as deriving from the prosecutor's role in the adversary process. The committee cited a comment accompanying rule 3.8 that indicated that the obligations in that rule generally derived from the prosecutor's "responsibility of a minister of justice . . . 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."⁴² The committee

36. See, e.g., Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 281–85 (1993); Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1016–19 (2002).

37. ABA Opinion 09-454, *supra* note 3, at 2 ("A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure.").

38. *Id.* at 3.

39. *Id.*

40. See *id.* at 4 & n.16.

41. *Id.* at 3.

42. *Id.* at 3 (quoting MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010)).

identified the disclosure rule in particular as originating out of the prosecutor's role.⁴³ It reasoned:

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.⁴⁴

Having established that rule 3.8(d) was not tethered to external law, the rest of the opinion was given over to interpreting the rule's provisions and applying them to a hypothetical situation. The committee relied on a combination of the rule's language and its perceived purposes. The most significant difference between the ethics rules and the constitutional case law, the committee found, is that the case law requires disclosure only if evidence or information favorable to the accused is "material," whereas the ethics rule "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."⁴⁵ In this respect, the committee noted, the rule "requires prosecutors to steer clear of the constitutional line, erring on the side of caution," as the U.S. Supreme Court has urged prosecutors to do.⁴⁶ The opinion also addressed when the necessary disclosures had to be made. Constitutional decisions suggest that prosecutors can wait until trial to disclose material information that is not exculpatory but that can be used to impeach prosecution witnesses, and therefore prosecutors need not disclose such information to defendants who plead guilty.⁴⁷ In contrast, the committee found that the requirement of "timely disclosure" in rule 3.8(d) meant that favorable evidence or information had to be disclosed "as soon as reasonably practical" so that defense counsel could make effective use of it in advising the defendant, investigating, and preparing for trial.⁴⁸ Further,

43. *See id.*

44. *Id.* at 3–4.

45. *Id.* at 2, 4 (footnote omitted).

46. *Id.* at 4 & n.21.

47. *See United States v. Ruiz*, 536 U.S. 622, 628–32 (2002), cited in ABA Opinion 09-454, *supra* note 3, at 7 n.33.

48. *See* ABA Opinion 09-454, *supra* note 3, at 6.

it concluded that “[a] defendant’s consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d),” as it might absolve a prosecutor of the constitutional disclosure duty.⁴⁹

Over the dissent of the court’s chief justice, the Ohio Supreme Court reached the opposite conclusion about the import of the prosecutorial disclosure rule in its state ethics code.⁵⁰ In *Kellogg-Martin*, the court reviewed the state disciplinary authority’s recommendation that it sanction a prosecutor, in part, for withholding investigative reports from a defendant charged with raping a young girl. The alleged victim’s age at the time of the rape was critical to whether the defendant committed the charged offense of raping a girl younger than thirteen years old or the less serious one of raping an older child, and the girl’s testimony about when the rapes occurred was critical to establishing the timing. The prosecutor failed to disclose two reports of interviews in which the girl said that the rapes occurred at times when she was age thirteen, not twelve. In the court’s view, neither the Constitution nor the relevant Ohio rule of criminal procedure required the prosecutor to give the reports to the defense unless the defendant elected to go to trial because the reports could be used to impeach the prosecution’s witness but were not exculpatory.⁵¹ It

49. *Id.* at 7. The opinion found that the rule was less demanding than *Brady* in one significant respect: prosecutors had no duty to “undertake an investigation in search of exculpatory evidence” because the rule by its terms holds a prosecutor accountable only when the prosecutor fails to disclose favorable evidence and evidence known to the prosecutor. *Id.* at 5–6.

50. See *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St. 3d 415, 2010-Ohio-282, 923 N.E.2d 125, at ¶¶ 21–22. The prosecution took place in 2002, and therefore the prosecutor’s conduct was governed by the *Ohio Code of Professional Responsibility*, which was superseded by the *Ohio Rules of Professional Conduct*, effective February 1, 2007. See OHIO CODE OF PROF’L RESPONSIBILITY DR 7-103 (1970), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/professional/professional.pdf>, superseded by OHIO RULES OF PROF’L CONDUCT R. 3.8 (2007), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>. DR 7-103(B) of the *Ohio Code of Professional Responsibility*, provided:

A public prosecutor . . . in criminal litigation shall make timely disclosure to counsel for the defendant . . . 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.

Id. The now applicable provision of the *Ohio Rules of Professional Conduct*, rule 3.8(d), provides:

The prosecutor in a criminal case shall not . . . fail 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, fail to disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the tribunal.

OHIO RULES OF PROF’L CONDUCT R. 3.8(d) (2010) (emphasis omitted), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>.

51. *Kellogg-Martin*, 124 Ohio St. 3d 415, ¶¶ 22–33, 923 N.E.2d at 130.

found that the defendant's guilty plea obviated the disclosure obligation. The question, then, was whether DR 7-103(B) required more than the Constitution and state procedural rules. The court held that it did not. Its reasoning was brief and seemingly tautological: "[B]road interpretation of DR 7-103(B) would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does *not* require disclosure. This holding would in effect expand the scope of discovery currently required of prosecutors in criminal cases."⁵²

One might suppose that the ABA's ethics committee and the Ohio Supreme Court employed similar tools of interpretation but reached different results because interpreting the law is an art, not a science; the tools used for interpreting ambiguous rules and statutes may generate different results in the hands of different judges and lawyers. This might lead one to ask which body, the ABA committee or the Ohio Supreme Court, better employed the conventional tools for interpreting rules and statutes—which one better apprehended the language of the rule, better extracted meaning from its drafting history, and better effectuated the rule's purpose. Certainly, the ABA's approach was better elaborated. But interpreting ethics rules is a tricky business. Little attention has been given either to how the ABA ethics committee should interpret model ethics rules⁵³ or to how state courts and state and local bar associations' ethics committees should interpret state ethics rules.⁵⁴ There is no broadly accepted answer to these questions, and it is not necessarily the case that ethics committees and courts should employ the same interpretive tools in the same manner.

52. *Id.* ¶ 21, 923 N.E.2d at 130.

53. Is the ABA committee supposed to focus on what the original ABA drafters intended? Should it set forth the interpretation that it believes leads to the best results in light of contemporaneous legal practices? Should it seek to predict how a court would interpret the rule and, if so, which court? For commentary on the role of bar association ethics committees, see Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 731 n.2 (2002), which cites authorities; and David G. Trager, *Do Bar Association Ethics Committees Serve the Public or the Profession? An Argument for Process Change*, 34 HOFSTRA L. REV. 1129 (2006).

54. For discussion of this question, see Bruce A. Green, *Doe v. Federal Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485 (1989) [hereinafter Green, *Ethical Rules*]. See also Bruce A. Green, Reply, *The Market for Bad Legal Scholarship: William H. Simon's Experiment in Professional Regulation*, 60 STAN. L. REV. 1605, 1668 (2008) ("[C]ourts of different jurisdictions can employ different interpretive approaches; indeed, the court of a single jurisdiction can take different approaches . . .").

There is another way to understand the division between the ABA committee and the Ohio Supreme Court, one that does not turn on the different uses of conventional interpretive tools. It is that the two bodies had fundamentally opposing visions of the essential nature of the rule. In Professor Zacharias's terms, the ABA committee thought rule 3.8(d) is meant to be, or should be, a rule of role, whereas the Ohio Supreme Court thought its equivalent prosecutorial disclosure rule is an integrity rule whose function is to codify the law and no more. If the Ohio rule's wording is broader than the external law, that is presumably because it was too broadly written originally or because the external law became less demanding after the rule was first written, and the court failed to revise the rule to correspond with the evolving external law.

The Ohio Supreme Court made no reference to the ABA opinion and was certainly free to ignore it. The ABA ethics committee is a nonauthoritative body interpreting a model rule drafted by another nonauthoritative committee of the same organization. Only state courts, not the ABA, have legal ability to adopt, authoritatively interpret, and enforce ethics rules for lawyers. A state court can reject an ABA model altogether. Equally, the state high court can adopt the wording of an ABA model but interpret its rule differently from how the ABA interprets the identically worded model.

The Ohio Supreme Court might have rejected the ABA interpretation for various reasons. It may have had a different understanding when it initially adopted the rule. However, it is unlikely that when state courts adopted prosecutorial disclosure rules, they initially gave much thought to the nature or meaning of the rules. They did not draft the rules themselves but generally adopted them as part of a package of provisions recommended by a bar association.⁵⁵ Years later, a state court probably could not say with confidence whether its original understanding was that the rule was independent of *Brady* or a mere codification. But a court would not be bound by its original understanding in any case. If at the time of adoption the state high court thought the prosecutorial disclosure rule was a rule of role that was more demanding than *Brady*, nothing would prevent the court from reconceptualizing the rule if, upon further reflection, it came to a different view. A state high court need not carry out the "intent" of the bar association drafters or its own intent in adopting an ethics rule as it would be obliged based on separation of powers principles to effect the legislative intent when interpreting a

55. State courts generally do not take an active role in rulemaking. They typically adopt rules based on bar association recommendations without giving much thought to them, and first think hard about a rule when it is time to interpret or apply it. See Zacharias & Green, *Rationalizing Judicial Regulation*, *supra* note 2, at 94–95.

statute.⁵⁶ The court could interpret its rule dynamically, in light of what it now considered to be the best approach to lawyer regulation. In doing so, as a matter of fair notice, it might choose to apply its interpretation prospectively if it would otherwise be punishing lawyers who could not fairly anticipate what direction the court would take.⁵⁷ But that was not a problem in *Kellogg-Martin*, where the court adopted a narrow view of the prosecutorial disclosure rule.

This might lead one to ask which body better apprehended the nature of the prosecutorial disclosure rule. The next two parts of this essay explore that question and reach an unexpected conclusion: although the ABA ethics committee and the Ohio Supreme Court had opposite visions of equivalent rules, they may both be right. Even so, there is something obviously jarring about the divide, which reveals deficiencies in the rule adoption process. The ABA has an interest in persuading courts to adopt not only its *Model Rules* but also its interpretations of those rules, so the result seems to reflect a failure on its part. The state court has an interest in having ethics rules say what they mean so that lawyers in the state do not have to worry whether the court ascribes meanings to ethics rules that contradict the rules' wording. Moreover, it is confusing for lawyers when ethics opinions say one thing and court opinions say another. The last part of this Article identifies some of the implications of this situation for rulemakers and courts in drafting and adopting professional conduct rules.

III. THE ABA'S VISION OF ABA MODEL RULE 3.8(D)

Professor Zacharias's article on integrity ethics distinguished rules of role from two different types of integrity rules—those that codified ordinary morality and those that incorporated or codified external law.⁵⁸ Rule drafters might plausibly draft a rule governing prosecutorial disclosure that fits into any of these three categories. The ABA opinion obviously did not employ Professor Zacharias's terminology or refer to his concept of the different functions that ethics rules serve. But the opinion certainly takes an implicit stance on the nature of rule 3.8(d) and

56. See Green, *Ethical Rules*, *supra* note 54, at 557–58.

57. See Zacharias & Green, *Rationalizing Judicial Regulation*, *supra* note 2, at 117 & n.107 (citing *In re Disciplinary Proceeding Against Haley*, 126 P.3d 1262, 1271–72 (Wash. 2006)).

58. See Zacharias, *supra* note 18, at 553–54, 559–61.

its predecessor, DR 7-103(B). It rejects the idea that rule 3.8(d) codifies disclosure law generally or the *Brady* case's materiality limitation in particular. It expresses the view that the rule explicates prosecutors' role in the adversary process and that the rule's independent disclosure obligation derives from that role. As discussed below, the committee's view of the rule was predictable and probably correct given the committee's task, but it is not inevitable that a rule on prosecutorial disclosure would be conceived of as a rule of role, rather than an integrity rule.

A. Prosecutorial Disclosure as an Expression of Common Morality

Conventional moral principles might place limits on prosecutors' zealotry as advocates, and integrity rules might codify such principles. Professor Zacharias identified rules requiring honesty of all lawyers, including prosecutors, as an example.⁵⁹ Leaving aside expectations of candor and integrity flowing from the lawyer's role as a fiduciary of clients and an officer of the court, an ethics code might forbid prosecutors and other trial lawyers from lying, and subject them to sanction for doing so, as an ordinary moral constraint on their impulse to do whatever is necessary to win cases for their chosen clients or causes.

The ordinary societal expectation of honesty has implications for whether prosecutors keep significant evidence or information under wraps or disclose it to the defense. It would be deceptive for a prosecutor to present an appearance, whether to a jury or to the defense, that there is a strong case for the defendant's guilt, when the prosecutor knows or believes that the defendant is innocent based on evidence unknown to the defense and jury. One might equally criticize a prosecutor who secretly possesses exculpatory evidence that casts the case in a significantly different light, even if the prosecutor does not personally regard the evidence as persuasive or credible. In that event, the deception is not about the prosecutor's state of mind so much as about the objective state of the evidence. Maintaining that the defendant is guilty seems deceptive when the prosecutor secretly possesses—or, one might say, hides, buries, conceals, or suppresses—evidence that might establish a defendant's innocence. The prosecutor's position falsely implies that the prosecutor is personally unaware of any significant contrary evidence that has not been made available.

Other moral principles may also be relevant. For example, it may be argued that people should not inflict undeserved harm on others. When a prosecutor seeks a conviction against someone known to be innocent,

59. *See id.* at 569–70.

the conduct most clearly offends this principle. The same may be true when the prosecutor does not know the defendant is innocent but knows evidence that strongly suggests that the defendant is innocent.

Rule drafters may or may not believe these ordinary moral principles should limit lawyers' conduct as advocates. Certainly, when it comes to criminal defense lawyers, the prevailing view is that, to some extent, the adversary ethic trumps the duty of honesty. Criminal defense lawyers conventionally make arguments to the jury in support of an acquittal that they personally disbelieve based on undisclosed conversations with the client or others.⁶⁰ To some degree, the deceptiveness of this practice is tempered by the public's conventional awareness that criminal defense lawyers do not always believe what they say and by instructions that jury summations are arguments, not statements of personal belief. However, the rationale for allowing criminal defense lawyers to engage in deception by taking a position that is contradicted by undisclosed evidence and information would not apply with equal force, if at all, to prosecutors. Rule drafters might want to remind prosecutors that the ordinary moral expectations still apply to them, if not to the other side.

The earliest precursor to rule 3.8(d) might have been characterized as an integrity rule founded on ordinary morality. The 1908 *ABA Canons of Professional Ethics* recognized "the prosecutor's . . . obligation not to suppress facts capable of establishing the innocence of the accused."⁶¹ One might argue that it is morally repugnant for anyone, lawyer or not, to suppress facts that would exonerate an innocent person, unless secrecy was justified by something particular about the individual's role, for example, as close family member or as someone who learned the information in a privileged relationship. The canon might only have been a reminder to prosecutors that their advocacy role does not justify a departure from the ordinary principle. The drafters of the *Model Code*

60. See John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 GEO. J. LEGAL ETHICS 339, 345 (1987); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" To Present a False Case,* 1 GEO. J. LEGAL ETHICS 125, 126 (1987); see also *United States v. Wade*, 388 U.S. 218, 256–59 (1967) (White, J., concurring) ("But defense counsel has no comparable obligation to ascertain or present the truth.").

61. ABA Opinion 09-454, *supra* note 3, at 3 & n.11 (citing CANONS OF PROF'L 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.")).

almost certainly had this provision in mind because their task was to improve upon the *Canons*. Arguably, the drafters of DR 7-103(B) were simply improving on the canon while trying to effectuate a similar purpose.

But however one views the moral principle at stake, it becomes less apt as a prosecutor moves away from concealing significant exculpatory evidence to withholding evidence that is merely helpful or favorable to the defense. For example, information may not establish that the defendant is innocent in fact but simply that there is a reasonable doubt about the defendant's guilt. In that event, the evidence is material under *Brady*, but withholding it may not violate everyday moral principles against dishonesty or inflicting undeserved harm because the defendant may still be guilty in fact. Common morality may not pose much restraint on a prosecutor who plays by existing laws and procedural rules that distinguish between material exculpatory information that must be produced and immaterial information that may be withheld, at least if the prosecutor does not falsely pretend to be more generous than the law requires.

Rule 3.8(d) demands even more than *Brady* in significant respects and therefore is even less easily explained as a special application of an everyday moral principle. The rule requires disclosure of any evidence that would tend to establish the innocence of the accused. Suppose the prosecutor is personally convinced of the defendant's guilt and has sufficiently strong evidence to prove the defendant's guilt beyond a reasonable doubt, even taking undisclosed evidence into account. Withholding favorable evidence or information, as the law permits, might undermine public confidence in the fairness of the process, but it cannot easily be regarded as immoral.

As Professor Zacharias and I suggested in *Reconceptualizing Advocacy Ethics*, ethics rules governing lawyers' conduct as advocates are more likely to codify professional morality than common societal morality.⁶² That article drew on the 1845 decision in *Rush v. Cavanaugh*, in which Chief Justice Gibson of the Pennsylvania Supreme Court said that a lawyer prosecuting a criminal case for a private client had a duty as a matter of "professional conscience" to dismiss the case if he came to believe the defendant was innocent.⁶³ We did not read the opinion as drawing on common societal morality or giving deference to the lawyer's personal sense of morality but instead argued that the court was recognizing a "duty to refrain from seeking unjust convictions" that was an "aspect[] of lawyers' duty to the court" and that was "implicit in

62. See Zacharias & Green, *Reconceptualizing Advocacy Ethics*, *supra* note 2, at 4, 37.

63. 2 Pa. 187, 189 (1845).

lawyers' professional role."⁶⁴ Further, we saw the opinion as a precursor to the later ethics codes, whose provisions on advocacy ethics were not invariably acts of legislation but were in some cases articulations of "preexisting professional duties implicit in the lawyer's role."⁶⁵

One can make a plausible argument that there is an honesty principle at the core of the prosecutorial disclosure rule, just as there is at the core of *Brady*, which built upon earlier decisions condemning prosecutors' misrepresentations.⁶⁶ But it would be hard to characterize the rule as nothing more than a codification of conventional morality. The rule is not written that way. It makes no express reference to honesty or other moral principles, it is not drafted at the level of generality that one associates with ordinary moral principles, and it makes demands well in excess of those suggested by ordinary moral expectations.

B. Prosecutorial Disclosure as a Codification of External Law

Alternatively, one might envision the prosecutor's ethical disclosure duty exclusively as a matter of integrity ethics in the sense that the law-abiding prosecutor must comply with the applicable law, period. In that event, one might draft a disclosure rule as an integrity rule that either expressly incorporated external law or codified it.

Code drafters might adopt a prosecutorial disclosure rule that merely recapitulates or reinforces external law for a host of reasons. First, they may have substantive reasons to do so. In particular, they may believe that the existing law already demands as much or more disclosure from prosecutors than necessary to ensure the fair workings of the adversary process. They may also have procedural reasons. The drafters may doubt their competence to draft the ideal disclosure standards because they lack adequate experience in the criminal justice field or adequate time to collect the information needed to develop a good rule, given the complexities of the criminal process. They may equally doubt the competence or disinterestedness of the bar association that drafted the model offered for the court's consideration. Rulemakers may also have concerns rooted in the nature of ethics codes and code drafting. For

64. Zacharias & Green, *Reconceptualizing Advocacy Ethics*, *supra* note 2, at 37.

65. *Id.*

66. See *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 . . .").

example, the optimal rule may be extremely lengthy and complicated, ultimately looking less like an “ethics” rule than a rule of criminal procedure. In general—but not invariably—code drafters have preferred rules that are relatively short and uncomplicated in order to preserve the appearance that the rules are about “ethics” and not just regulation.⁶⁷

Although the ABA opinion dispatched the possibility that, for one reason or another, rule 3.8(d) was bounded by the external law, there were contrary arguments to be made. It is true that rule 3.8(d) does not expressly refer to external law, in contrast to rules forbidding “unlawfully” interfering with the opposing party’s access to evidence or offering witnesses inducements “prohibited by law.”⁶⁸ And it is also true, as the dissenting justice in *Kellogg-Martin* noted, that the rule makes no reference to materiality, a key limitation in the *Brady* line of cases.⁶⁹ But as Professor Zacharias observed, an integrity rule might essentially paraphrase external law without intending to go significantly beyond it.⁷⁰ The drafters may have meant to do just that.

The drafting history supports this possibility. As the ABA opinion acknowledges, “[t]he ABA adopted the rule against the background of the Supreme Court’s 1963 decision in *Brady v. Maryland*.”⁷¹ Over time, the Supreme Court would build on its *Brady* decision, making the materiality requirement an increasingly significant limitation on the scope of prosecutors’ constitutional obligations.⁷² The drafters of DR 7-103(B) may have regarded their rule as a pretty fair paraphrase of the *Brady* obligation.

67. Cf. *Stern v. United States Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 20 (1st Cir. 2000) (“[The Massachusetts rule based on ABA Model Rule 3.8(e) restricting prosecutors from subpoenaing lawyers for information about their clients,] though doubtless motivated by ethical concerns, has outgrown those humble beginnings. . . . As written, [the rule] is more than an ethical standard. It adds a novel procedural step—the opportunity for a pre-service adversarial hearing—and to compound the matter, ordains that the hearing be conducted with new substantive standards in mind.”).

68. See ABA Opinion 09-454, *supra* note 3, at 4 & n.15 (citing MODEL RULES OF PROF’L CONDUCT R. 3.4(a)–(b) (2010)).

69. See *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St. 3d 415, 2010-Ohio-282, 923 N.E.2d 125, at ¶ 60 (Moyer, C.J., dissenting) (“The plain language of DR 7-103(B) requires disclosure of the reports in this case because the reports are evidence ‘that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.’” (emphasis omitted) (quoting OHIO CODE OF PROF’L RESPONSIBILITY DR 7-103 (1970), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/professional/professional.pdf>, superseded by OHIO RULES OF PROF’L CONDUCT R. 3.8 (2007), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/ProfConductRules.pdf>)).

70. Zacharias, *supra* note 18, at 559–60.

71. ABA Opinion 09-454, *supra* note 3, at 3.

72. When the Supreme Court decided *Brady* in 1963, it was not a foregone conclusion that assessing whether favorable information was material would eventually call for an after-the-fact evaluation of the information, in the light of all the trial evidence, to assess whether use of the information might have changed the outcome.

This possibility is reinforced by the fact that DR 7-103(A), the other original provision of the special rule for prosecutors, was certainly bounded by external law. DR 7-103(A),⁷³ which was carried over into Model Rule 3.8(a),⁷⁴ proscribed a prosecutor's institution of criminal charges when the prosecutor knows or it is obvious that there is no "probable cause."⁷⁵ The rule certainly went no further than external law requiring probable cause as a precondition of a prosecutor's charging decision. In fact, it allowed prosecutors leeway to charge in close cases because it allowed for discipline only when the prosecutor knew, or it was obvious, that probable cause was lacking. It is plausible that both provisions were meant to subject prosecutors to discipline for knowingly violating existing legal obligations but that the drafters either misunderstood the disclosure law at the time or, as is more likely, misapprehended the direction the law would take. Over the next decades, as the constitutional obligation was narrowed, the ethics rule increasingly diverged from it because the drafters made no allowances for changes in the law.

This account is inconsistent with the purpose of the rule, if one assumes the purpose is to do more than to remind prosecutors to abide by their legal obligations and allow non-law-abiding prosecutors to be punished. Certainly, broader purposes are both conceivable and laudatory. The ABA opinion implies that the rule is meant, at minimum, to require prosecutors to err on the side of disclosure, as the Supreme Court has urged them to do when dealing with potential *Brady* material.⁷⁶ The result would be to reduce litigation, constitutional error,

Rather, the understanding of materiality changed over time. See *United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001) (discussing progression in idea of materiality). Indeed, to some extent, it remains contested, as some judges take the view that materiality is essentially an appellate standard and that prosecutors are constitutionally required to disclose favorable information regardless of whether it might later be deemed immaterial. See, e.g., *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005).

73. DR 7-103(A) of the *ABA Model Code* provided: "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (1980).

74. Rule 3.8(a) of the *ABA Model Rules* provides: "The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2010). It does not preserve the possibility of discipline where the absence of probable cause is "obvious" but not known to the prosecutor.

75. See *supra* notes 73-74.

76. See ABA Opinion 09-454, *supra* note 3, at 4 & n.21.

and the number of retrials.⁷⁷ Moreover, the ABA's ethics committee ascribed a broader purpose to the rule, namely, to make the criminal process fairer and more accurate. In its view, as previously noted, the rule "promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions."⁷⁸ In identifying these broad purposes, however, the committee was drawing an inference from the language of the rule and other evidence, not relying on direct evidence of the drafters' conception. As Professor Zacharias's work demonstrates, it would have been perfectly plausible for the ABA drafters to have had the more limited ambition merely to attempt to codify existing legal obligations.

C. Prosecutorial Disclosure as an Expression of Role Morality

Finally, one might think about prosecutorial disclosure as a requirement that grows out of the prosecutor's role in criminal adjudications in order to fulfill the prosecutor's function of assuring fair processes and fair outcomes. This is, in effect, how the Supreme Court envisions prosecutorial disclosure as a constitutional matter. The *Brady* line of cases is less about honesty than about the preservation of minimally fair process. In effect, constitutional case law identifies the minimal amount of information that prosecutors must share to guarantee the minimally necessary adversary testing of the prosecution's proof.

Similarly, criminal procedure rules and statutes on prosecutorial disclosure are essentially rules of role. They go beyond the constitutional minimum because they are not ordinarily codifications of a legislature's vision of a minimally fair process. Ideally, they reflect something closer to lawmakers' view, as a matter of public policy, of how best to promote

77. The dissenting justice in *Kellogg-Martin* put it slightly differently when he noted that the propriety of the lawyer's conduct for ethics purposes should not turn on whether, by happenstance, otherwise proscribed conduct turns out to be harmless. See *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St. 3d 415, 2010-Ohio-282, 923 N.E.2d 125, at ¶ 74 (Moyer, C.J., dissenting) ("The professional conduct of an attorney should not be based upon the quantum of evidence produced at a criminal trial, or whether a defendant pleads guilty, regardless of the attorney's conduct. Rather, the conduct of an attorney should be evaluated on the basis of her own actions."). That is, the rule is meant to allow for punishment of prosecutors whose conduct was professionally wrongful as viewed *ex ante*, even if not unconstitutional in hindsight. For example, in *Muhammad v. Kelly*, 575 F.3d 359, 370 (4th Cir. 2009), the prosecution was found to have withheld favorable evidence but not to have violated the Constitution because the evidence was not material or was cumulative of other evidence the defense possessed. The court found that the prosecution's conduct was "not admirable," and said that it "by no means condone[s] the [prosecution's] actions." *Id.* Rule 3.8(d) might be understood, in part, as allowing for personal sanctions in cases such as this, on the theory that the prosecutor's conduct, though not unconstitutional, was professionally improper.

78. See ABA Opinion 09-454, *supra* note 3, at 4.

fairness while also taking other relevant interests into account. On one side of the scale are fair process considerations favoring broad disclosure. These include the public interest in ensuring that criminal defendants make well-advised decisions regarding their trial rights and that their lawyers present a skilled defense. Disclosure assists criminal defense lawyers to fulfill their ethical obligations to give clients competent advice and advocacy.⁷⁹ But there are countervailing interests in preventing obstructions of justice or witness tampering that may sometimes occur when disclosures are too extensive or are made too soon, in limiting the administrative and financial costs of disclosure, and in limiting the cost of judicial proceedings that would result from prosecutors' noncompliance with the rule.

Professional ethics may impose disclosure obligations on prosecutors that are independent of the Constitution, rules, and statutes, if one assumes that the prosecutorial role implies or justifies disclosure obligations that are not fully elaborated by the existing law. Suppose that *Brady* had not yet been decided and that criminal procedure laws on prosecutorial disclosure laws had not yet been adopted. It might be argued that as an ethical matter, prosecutors as ministers of justice must make at least some disclosure to ensure that defendants received fair trials and the outcomes of those trials were reliable. Rules of ethics might be drafted to codify that obligation. Pursuant to their supervisory authority to regulate lawyers, courts might have power to adopt and enforce these rules. Alternatively, courts' supervisory authority might provide a legal basis for adopting ethics rules for prosecutors reflecting how courts, as a matter of public policy, would strike the right balance between the competing interests at stake with regard to prosecutorial disclosure.

In either case, if the court were writing on a blank slate, its ethics rule might not look like a codification of *Brady* because the court would not be explicating the Due Process Clause and establishing a constitutional floor. Its rule also might differ from current statutes or procedural rules addressing this subject. One reason is that the court might see things differently from the legislature. Another is that the ethics rule would serve a somewhat different function from a procedural rule. Although trial judges might compel prosecutors to comply with an ethics rule,

79. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 & 1.4 (2010).

violations of the ethics rule itself would not have a potential legal remedy in the criminal litigation.⁸⁰

Although external law is not in fact silent on the question of what prosecutors should disclose to the defense, it is also not necessarily preemptive. Certainly, as a matter of professional discretion, prosecutors can disclose more than the law requires, and many do. Some are only slightly more generous than the law demands, and others, such as those with an “open file” policy in jurisdictions where the law does not require it, are substantially more generous.⁸¹ As the ABA opinion recognized, constitutional decisions do not bar courts from adopting professional conduct rules on the same subject. Ordinarily, statutes do not bar such rules either. It may be preferable to impose more demanding disclosure obligations on prosecutors as a matter of professional obligation rather than leaving it to prosecutors’ discretion whether to be more forthcoming than the Constitution and statutes require.

One could have easily predicted—as Professor Zacharias did—that the ABA ethics committee would implicitly view rule 3.8(d) as a rule of role that was independent from external law rather than as an integrity rule that tracked, or was bounded by, external law. To conclude otherwise would be to ignore the rule’s language in several respects. First, the rule contained no explicit materiality limitation. Second, the language describing what had to be disclosed—“all evidence or information . . . that tends to negate the guilt of the accused or mitigates the offense”⁸²—is too broad to be interpreted to contain an implicit materiality limitation, especially as *materiality* is interpreted in the Supreme Court decisions. Third, as the ethics opinion noted, there is already a rule subjecting prosecutors and other lawyers to discipline for flouting discovery rules.⁸³ If the drafters meant to draft a somewhat redundant law requiring prosecutors in particular to comply with discovery obligations, they might have been expected to do so explicitly. Beyond that, a rule of professional conduct incorporating an after-the-fact materiality test is antithetical to the rules’ usual approach, which is to focus on lawyers’ conduct, not the effect of their conduct; in general, “no harm, no foul” is not a recognized ethics principle.

80. On the other hand, an ethics rule would presumably leave a fair amount to prosecutors’ office policies and individual discretion. Otherwise, risk-averse prosecutors, to avoid violating the rule, might disclose more than they arguably should. In other words, the ethical floor might be higher than the constitutional floor, but it would still not be the ideal.

81. See Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1968 (2010).

82. See MODEL RULES OF PROF’L CONDUCT R 3.8(d) (2010).

83. See ABA Opinion 09-454, *supra* note 3, at 8 & n.41.

Against this background, it is hard to imagine the ABA ethics committee concluding that rule 3.8(d) was bounded by external law without a compelling basis in the text or drafting history for this view. To do so would diminish the credibility of the *Model Rules* by suggesting that they are poorly drafted—they do not mean what they say. It would also undermine the credibility of leading authorities on the ethics rules who uniformly assumed that the rule went beyond the external law.⁸⁴ And doing so would trivialize a rule addressing an aspect of professional conduct that was significant and increasingly controversial. Although the bar's claim to be "self-regulating" is overstated—if not, as Professor Zacharias once wrote, mythic⁸⁵—the bar seeks to wield influence.⁸⁶ Conceptualizing rule 3.8(d) as a restatement of other law forty years after its adoption might undermine the ABA's authority to influence courts and speak for the profession through its ethics rules. On the other hand, interpreting rule 3.8(d) to mean what it says would promote the ABA's interest in preserving its influence, both in actuality and in appearance, at least if courts later accepted the committee's view.

As a rule of role for lawyers serving as prosecutors, rule 3.8(d) might be viewed in either of two ways—as either an articulation or an elaboration of prosecutors' duties.⁸⁷ Courts' propensity to adopt the rule or to accept the ABA's interpretation of it might turn in part on which characterization one adopted. If the rule appeared to codify a generally prevailing understanding of what a lawyer's role implied, then the rule should not be controversial. It would serve a pedagogic function and facilitate discipline for departures from accepted norms, but it would not make new or contestable demands on lawyers. A quasi-legislative rule, however, would merit closer scrutiny by a court, which might take a different view from rule drafters about what new obligations lawyers should undertake.

Other provisions of rule 3.8 illustrate the distinction. On one hand, rule 3.8(g), which requires prosecutors to disclose and investigate "new,

84. See *supra* note 12.

85. See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1153 (2009) ("Conceiving of the disciplinary codes as mere professional self-regulation rather than as one element of an expansive regulatory regime governing the bar misleads courts, code drafters, lawyers, and laypersons alike.").

86. See *id.* at 1150 ("[B]ecause lawyers participate heavily in producing the governing professional rules and the broader external law that affects the bar, lawyers in some respects are distinct among regulated professionals.").

87. See *supra* text accompanying notes 62–65.

credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,”⁸⁸ has fairly been characterized as a codification of what good prosecuting necessarily entails.⁸⁹ Indeed, it has been said to be less demanding than prevailing professional expectations.⁹⁰ Although prosecutors may disagree about whether the norms should be incorporated into disciplinary rules,⁹¹ virtually none have argued that prosecutors as ministers of justice may properly ignore or suppress significant exculpatory evidence that comes their way after obtaining a conviction. On the other hand, rule 3.8(e), which regulates prosecutors’ issuance of subpoenas to lawyers for evidence about their clients, was an innovation

88. MODEL RULES OF PROF’L CONDUCT R. 3.8(g) (2010).

89. See AM. BAR ASS’N, CRIMINAL JUSTICE SECTION, 105B: REPORT TO THE HOUSE OF DELEGATES 3 (2008), available at http://www.ojp.usdoj.gov/BJA/topics/Plenary5/Workshops/Workshop5C/B_Scheck-AmericanBarAssoc105B.pdf. The Report to the House of Delegates noted:

The United States Supreme Court recognized in *Imbler v. Pachtman* that prosecutors are “bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that cases doubt upon the correctness of the conviction.” Further, when a prosecutor concludes upon investigation of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice. These obligations have not, however, been codified in Rule 3.8 of the ABA Model Rules of Professional Conduct, which identifies the “Special Responsibilities of a Prosecutor.” Proposed Rules 3.8(g) and (h), and the accompanying Comments would rectify this omission.

Id. (footnote omitted) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 427 n.15 (1976)).

90. *Id.* at 5 (“The Rule and Comments are designed to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities, with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum.” (footnote omitted)); see also Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 481–82 (2009) (“These provisions are meant to establish the disciplinary minimum, not to fully elaborate the professional expectations for prosecutors.”); see generally Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009) (discussing the various attempts that have been made to change rule 3.8 since the Ethics 2000 Commission).

91. Prosecutors in different jurisdictions have divided over whether states should adopt the ABA models. State prosecutors’ organizations have petitioned the judiciary to adopt the rule in Wisconsin, see Petition at 1, *In re Amendment of Supreme Court Rules Chapter 20, Rules of Professional Conduct for Attorneys* (No. 08-24) (Wis. Sept. 19, 2008), available at <http://www.wicourts.gov/supreme/docs/0824petition.pdf>, where it was subsequently adopted, see Order at 1–2, *In re Amendment of Supreme Court Rules Chapter 20, Rules of Professional Conduct for Attorneys* (No. 08-24) (Wis. June 17, 2009), available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=36849>, and Tennessee, where it was also adopted, see Order at 1, 130–31, *In re Petition for the Adoption of Amended Tennessee Rules of Professional Conduct* (No. M2009-00979-SC-RL1-RL) (Tenn. Sept. 29, 2010), available at http://www.tba.org/ethics/TSC_Order_Adopting_TRPC.pdf, but have opposed the rules in Washington, Letter from Thomas A. McBride, Exec. Sec’y, Wash. Ass’n of Prosecuting Attorneys, to Arthur Lachman, Chair, Rules of Prof’l Conduct Comm. (Aug. 5, 2009) (on file with author).

adopted by the ABA in response to perceived overreaching by prosecutors. Federal prosecutors argued variously that the restrictions were unwise on policy grounds, interfered with grand juries' autonomy, overstepped judicial authority, and were unnecessary in light of prosecutorial self-restraint.⁹² Few state courts were persuaded to adopt the model rule, and one federal court rejected its characterization as entirely an "ethics" rule.⁹³

Not surprisingly, the rule drafters seemed to suggest that the prosecutorial disclosure rule merely articulated an obligation implicit in prosecutors' duty to do justice. Contemporaneous with drafting DR 7-103(B), the *ABA Model Code* drafters adopted accompanying "Ethical Considerations" that served in part as interpretive guides, much like the comments now accompanying the rules in the *ABA Model Rules*. The relevant ethical consideration indicates that the provisions of the prosecutorial ethics rule were expressions of a special role that "differs from that of the usual advocate," that is, a "duty . . . to seek justice, not merely to convict."⁹⁴ The comments to rule 3.8 preserve this understanding.⁹⁵

Rule 3.8(d) is more fairly viewed, however, as the product of a quasi-legislative determination, first by the ABA in drafting it and then by the courts in adopting it. It may have been widely understood before the adoption of DR 7-103(B) that prosecutors should not suppress highly exculpatory evidence such as by hiding or intimidating defense witnesses. However, no one has identified a conventional understanding prior to the rule's adoption that prosecutors must disclose all information favorable to the defense; further, prosecutors have reasonable, if not compelling, arguments to the contrary.

In sum, it seems reasonable for the ABA's ethics committee to take the view that the ABA model rule does not merely remind prosecutors to obey constitutional law but improves the criminal justice process by augmenting prosecutors' disclosure duty under constitutional case law.

92. For discussions of rule 3.8(e) and its drafting history, see Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917 (1992); and Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429, 458-61 (1996).

93. See *supra* note 67 and accompanying text.

94. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980).

95. See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010).

As so understood, the rule does not codify a conventional understanding of prosecutorial obligations but rather embodies a policy judgment that is contestable. Rule 3.8(d), in other words, is just the sort of rule that merits the closest scrutiny from state courts when they set out to adopt and interpret legally effective ethics rules against the background of the *ABA Model Rules* and ethics opinions.

IV. THE OHIO SUPREME COURT'S VISION OF OHIO'S PROSECUTORIAL DISCLOSURE RULE

The Ohio Supreme Court might reasonably have viewed its prosecutorial disclosure rule as an integrity rule that goes no further than external law for reasons that probably would not have been considered by, or been important to, the ABA ethics committee. Although the Ohio rule was worded similarly to the ABA model interpreted by the ABA ethics committee, the Ohio Supreme Court was engaged in a different task. The ABA ethics committee essentially looked at the ABA rule in the abstract. The Ohio Supreme Court, however, was reviewing a state ethics rule that was adopted in a particular manner and that existed in the context of a particular body of state law dealing with the same subject matter. Unlike the ABA ethics opinion, the court's decision would have legal effect. The court might therefore consider the extent of its particular authority to regulate prosecutors through the application of ethics rules and the legitimacy and wisdom of exercising that authority in its state, given the court's relationship with the other government branches. Also unlike the ABA ethics committee, the court was interpreting the rule in the context of its particular state's disciplinary process. All of these differences had potential significance.

First, and perhaps most significantly, a state court might read its prosecutorial disclosure rule narrowly because of procedural concerns about the manner in which it was drafted and adopted. Suppose that a court sought to adopt the optimal prosecutorial disclosure rule—one that best promoted a fair trial while giving due respect to competing interests. Presumably, given the importance and difficulty of striking the right balance, the ideal judicial rulemaking process would be similar to administrative rulemaking or legislating. The court might gather the views of criminal defense lawyers, prosecutors, and trial judges—but not legal ethicists particularly—put a proposed rule out for public comment, and take account of different, knowledgeable perspectives.⁹⁶ The ideal

96. See generally Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460 (1996).

rule for one state would not necessarily be the same as the ideal rule for another state.

DR 7-103(B) and rule 3.8(d) were the product of processes that would not inspire confidence that the ABA got it right. No one knows what the drafters of DR 7-103(B) were thinking forty years ago when they adopted the rule, and there is nothing to suggest that ABA model rule drafters gave the rule much thought when they carried it over into rule 3.8(d). Certainly, there is no evidence that they reconsidered and ratified it in light of whatever intervening changes may have occurred in the law and criminal process. More recently, when the ABA's "Ethics 2000" Commission comprehensively reviewed the *Model Rules* and proposed amendments, the evidence is that they left rule 3.8 alone, not because they were satisfied that it was ideal, but for political reasons and out of concerns about their own limitations.⁹⁷ Further, even if these rules made sense for the average state, they may not be best for any particular state, given its particular criminal laws, processes, traditions, and institutions.

Unarticulated process considerations may well have influenced the court's decision in *Kellogg-Martin*. The process by which the court initially adopted DR 7-103(B) would have called the rule into question if the rule were intended to demand significantly more than other laws. Before adopting the rule, the Ohio Supreme Court did not give notice to the bar that the rule may demand more than the external law and did not seek input from different segments of the bench and bar about the advisability of the rule as so interpreted. Perhaps had it undertaken such a process, the court would ultimately have concluded that the rule, as interpreted by the ABA, struck just the right balance. During the course of more than a year between when *Kellogg-Martin* was submitted to the Ohio Supreme Court and when that court decided the case, a comparable process was underway and almost completed. As the dissenting judge noted, the court had recently proposed changing to the relevant state rule of criminal procedure to provide for more open discovery with the stated purpose of "provid[ing] for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice."⁹⁸ The court's recommended revisions to the criminal procedure rule suggest that the court might well have been sympathetic to a demanding rule of

97. See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573.

98. *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St. 3d 415, 2010-Ohio-282, 923 N.E.2d 125, at ¶ 69 n.2 (Moyer, C.J., dissenting).

role. But that was not a foregone conclusion. Neither the ABA nor Ohio institutions had undertaken a robust process to ensure that an ethics rule requiring prosecutors to disclose all favorable evidence was the best rule either for states in general or for Ohio in particular.

Second, unlike the ABA, a state court may be concerned about the extent to which it could or should regulate prosecutors' disclosure duties through the exercise of supervisory authority over the legal profession. In 2002 and 2003, in a pair of articles in the *Vanderbilt Law Review*, Professor Zacharias and I explored federal courts' authority to regulate lawyers in general and prosecutors in particular.⁹⁹ The articles noted questions about the legitimacy and wisdom of employing judicial supervisory power to regulate prosecutors particularly with respect to areas of conduct that were extensively regulated already by other law. One could raise similar questions for state courts, which might well be answered differently from state to state.

A state court that viewed its own authority conservatively might doubt the wisdom or legitimacy of adopting disclosure rules for prosecutors that were more demanding than statutory obligations. It might worry that its supervisory authority to establish ethics rules is too limited to justify such a rule, that an ethics rule would interfere with legislative authority to adopt procedural rules, or that an ethics rule would interfere with executive branch authority. Or the court might worry that other government bodies or the public would perceive it to be overstepping, even if it were acting within lawful authority, and that its relationship with other bodies or public respect would be eroded as a result.

Even if a court were satisfied that its legal authority to regulate prosecutors through the adoption and enforcement of ethics rules was established and well accepted, it might be reluctant to wield that power, preferring to leave prosecutorial regulation almost exclusively to other law. Many lawyers and judges are uncomfortable with ethics codes, viewing them as weaker or more ephemeral than other law or too easily susceptible to illegitimate capture by the bar,¹⁰⁰ or regarding the interpretation of ethics rules as more arbitrary and less rigorous than other legal decisionmaking.¹⁰¹ Judges interpreting and applying constitutional cases or statutes can claim to be like umpires calling balls and strikes, whereas

99. See Green & Zacharias, *Regulating Federal Prosecutors' Ethics*, *supra* note 1; Zacharias & Green, *Federal Court Authority To Regulate Lawyers*, *supra* note 2; see also Zacharias & Green, *The Uniqueness of Federal Prosecutors*, *supra* note 1, at 260.

100. See Zacharias & Green, *Rationalizing Judicial Regulation*, *supra* note 2, at 92–97.

101. Cf. *Holland v. Florida*, 130 S. Ct. 2549, 2575 (2010) (Scalia, J., dissenting) (referring to legal ethics as the “least analytically rigorous and hence most subjective of law-school subjects”).

adopting and applying ethics rules puts them at the center of the game, making them more easily susceptible to criticism.¹⁰²

It would have made sense for the Ohio Supreme Court to weigh concerns such as these, given its efforts to reform criminal discovery practices through amendments to the state's criminal procedure rules. Imposing broad discovery obligations by applying a somewhat obscure disciplinary rule just as these reform efforts were underway might have been viewed as autocratic, undemocratic, or preemptive. Prosecutors might have been offended that the court's view of the ethics rule was one-sided and unduly demanding, and that the court's interpretation did not adequately take their concerns into account. The legislature may have perceived that the court was usurping its authority over criminal procedure. The court's credibility as an honest broker between the state's prosecutors and the defense bar may have been undermined. The resulting mistrust might have jeopardized support for the proposed procedural rules, which the court might have believed struck a better and fairer balance than the prosecutorial disclosure rule as construed by the ABA.

Third, a court may be more sensitive than the ABA to problems created by multiple law—constitutional cases, procedural rules, and ethics rules—applying to a single area of prosecutorial conduct, and may seek to harmonize the law by aligning ethics rules with external law. In his writings, Professor Zacharias frequently raised concerns about the multiple and inconsistent laws governing lawyers,¹⁰³ and one of his scholarly projects was to try to understand why different bodies of the law of lawyering diverged and to propose how courts and other law

102. If, for example, constitutionally or statutorily required disclosures contributed to witness tampering or other evils, the blame might fall on the framers of the Due Process Clause, on the Supreme Court that interpreted it in the *Brady* line of cases, or on the legislature. But if the relevant disclosures were required exclusively by an ethics rule, the blame would fall on the court that adopted the rule. Likewise, the adopting court might be criticized simply in anticipation that a demanding ethics rule would lead to such evils.

103. See, e.g., Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 370 (1994) (noting problems for lawyers in national practices created by inconsistent state ethics rules); Zacharias & Green, *Rationalizing Judicial Regulation*, *supra* note 2, at 75 ("[T]here is something troubling about the ease with which courts come to different conclusions about the propriety of the same professional behavior, depending on the circumstance in which the issue is decided.").

makers might do a better job of bringing them into convergence.¹⁰⁴ Recognizing the likelihood that Ohio would soon reform its criminal discovery law in a manner enjoying broad support, the court may have seen little to gain from an ethics rule that augmented the law, and may have perceived that any benefit would be overshadowed by the complexities caused by an ethics rule establishing independent disclosure obligations.

Finally, a court may have concerns about how a rule will be employed by its particular state's disciplinary authority. In a state in which disciplinary authorities pursue lawyers overzealously based on aggressive readings of the disciplinary rules, courts may be inclined to protect lawyers by construing ethics rules narrowly; conversely, courts that are confident that disciplinary agencies exercise discretion prudently may be less inclined to do so. The prevailing professional assumption is that disciplinary authorities tend to be underzealous when it comes to criminal prosecutors; further, both the comments to rule 3.8 and Opinion 09-454 recognize the importance of cutting prosecutors some slack.¹⁰⁵ Based on the case before it, however, the Ohio Supreme Court in *Kellogg-Martin* may have had doubts about how its state's disciplinary authorities exercised discretion. It may have worried that a broadly construed rule would cause prosecutors to be excessively cautious, discourage lawyers from becoming prosecutors, lead to intrusive disciplinary inquiries, or cause similar harms.¹⁰⁶

The result is that, even though the ABA ethics committee reasonably envisioned Model Rule 3.8(d) as a rule of role that was independent of external law, the Ohio Supreme Court opinion reasonably envisioned its equivalent ethics rule as an integrity rule that was bounded by external law.

104. See, e.g., Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 95 (1999) (“[I]t may be reasonable for legislatures to take a more active role in defining the interrelationship between privilege and confidentiality, to harmonize the definitions, and to minimize the overlap of separate doctrines.”); Zacharias & Green, *Rationalizing Judicial Regulation*, *supra* note 2, at 90–92 (suggesting that in exercising supervisory authority in litigation, in decisionmaking regarding common law and equitable claims against lawyers, and in attorney discipline, courts “addressing conduct covered by the [ethics] codes . . . should take the rules as the starting point in their analyses”).

105. MODEL RULES OF PROF'L CONDUCT R. 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.”), *cited in* ABA Opinion 09-454, *supra* note 3, at 6 n.26.

106. See generally Zacharias & Green, *The Duty To Avoid Wrongful Convictions*, *supra* note 1, at 35–49.

V. CONCLUSION

The inconsistent visions of the ABA ethics committee and the Ohio Supreme Court are jarring. Even if their approaches can be reconciled—even if, as this essay suggests, each may be right in its own way—the situation is scarcely ideal from either body's perspective. If the ABA ethics committee is right, then states should regulate prosecutors by requiring them broadly to disclose information that is favorable to the defense. The Ohio Supreme Court, for one, has decided otherwise. The state court decision will likely be perceived as a tacit rejection of the ABA's view on prosecutorial ethics. Other state courts may follow suit. Of course, there is no shame in this. ABA models are just models. Courts occasionally decline to adopt ABA model rules of lawyer and judicial ethics. Sometimes the ABA knows that it is pushing courts further than they are disposed to go. Nothing about this raises general doubts about the legitimacy of the ABA's role in lawyer regulation. But the situation suggests that the ABA was ineffective in promoting its view.

For its part, the state court adopted a rule with which it was unwilling to live. On its face, its rule placed significant demands on prosecutors, and the state disciplinary authorities so understood, but when it came time to enforce the rule as written, the state court balked. The situation suggests that the state court was inattentive at the rule adoption stage and presents doubts about whether the court's ethics rules as written are a reliable guide to the court's expectations.

The competing visions expressed by the ABA ethics opinion and the Ohio Supreme Court underscore and exacerbate uncertainties about the character of other states' prosecutorial disclosure rules. Federal courts, including the Supreme Court, have assumed that the state rules demand more than the constitutional case law, and it may be that many state high courts would agree if they were to consider the question. In the absence of authoritative state court rulings, however, prosecutors may feel free to ignore state counterparts to rule 3.8(d), and the Ohio Supreme Court's decision may further embolden prosecutors. Additionally, state trial judges who are ruling on discovery disputes and state disciplinary authorities may hesitate to enforce these rules.

This essay paying tribute to Fred Zacharias's work and building on that work must naturally conclude by asking what lessons the ABA and courts can learn from this. That is undoubtedly the question with which he would have ended this essay, seeking to make a broader point. And

there are, indeed, lessons to offer both the ABA and courts regarding drafting and adopting ethics rules.

The narrow point, as Fred recognized, is that state courts should now reexamine their prosecutorial disclosure rules to decide how they want the rules to function. If a court wants its rule to be given the full effect of the rule's language, consistently with Opinion 09-454, it should put the bar on notice of that intention, so that prosecutors know that they must make liberal disclosure, and trial judges and disciplinary authorities can call prosecutors to account when they knowingly fail to do so. If a court wants the rule to be coextensive with *Brady* decisions, it should make that clear, preferably by rewriting the rule to bring its meaning in alignment with its function as an integrity rule. Additionally, as Fred further recognized, there are broader points to be made about ethics rulemaking.

There is little that the ABA could do about some of the concerns that may have influenced the Ohio Supreme Court, but it certainly could have anticipated process concerns that the court may have had. In a sense, the prosecutorial disclosure rule was a wolf in sheep's clothing. When state courts adopted it in the early 1970s as part of a package of new rules contained in the *ABA Model Code*, the ABA did not focus state courts' attention on the possibility that the rule would impose obligations that far exceeded prosecutors' legal obligations, and state courts did not focus prosecutors and others on this possibility and solicit feedback. Years later, when the court was called upon to apply the rule, it was understandably reluctant to adopt the ABA's interpretation because this was a questionable way to establish demanding disclosure obligations.

The ABA can improve its rulemaking process in several ways to make its product more credible. First, it can make its process more transparent and more broadly inclusive of varying, relevant viewpoints, as in fact it has over the years. Second, it can attempt to ensure that, substantively, its rules adequately reflect legitimate viewpoints on multiple sides of an issue. This is particularly important when the drafting process is quasi-legislative in the sense that drafters must strike a balance among competing interests. This may mean that the rules will reflect compromises rather than going as far as some, or even a substantial majority, would like them to go in one particular direction. Further, the ABA should put courts on notice when a rule imposes obligations that exceed ordinary moral or legal expectations, rather than waiting for future ethics opinions to make this clear.¹⁰⁷ In some cases, thinking about how to characterize

107. For example, as noted earlier, the California State Bar is explicit that its proposed prosecutorial disclosure rule would go beyond the external law. See STATE BAR OF CAL., COMM'N FOR THE REVISION OF THE RULES OF PROF'L CONDUCT, *supra* note

the rule should lead the ABA to refrain from advancing its view of lawyer conduct through an ethics rule at all but perhaps instead to propose legislation, a procedural rule change, or a change to standards or guidelines that are not meant to be legally enforceable.

State courts, in turn can improve their rule adoption processes. By all appearances, the Ohio Supreme Court initially rubber-stamped a bar association model rule, never revisited the rule in the context of potential legal and institutional changes over time, and later paid a price for its inattention. State courts should be more engaged in adopting rules and should periodically reexamine their rules, whether or not prompted to do so by the ABA's own revision and amendment processes. If they lack confidence in the model rule drafting process, they should establish a robust process for reviewing the ABA models and, where appropriate, developing alternatives. Whatever unarticulated concerns may have led the Ohio Supreme Court to reject the plain meaning of its rule could have been addressed sooner in a rule adoption or revision process. At that earlier stage, the court should have endorsed the rule in light of a fuller understanding of its import, refrained from adopting the rule, or written or rewritten it differently.

These thoughts owe much to Fred Zacharias's body of writing and to what I learned during our ten-year collaboration, as well as to the notes he sent in the spring of 2009. I suspect, however, that he would have identified additional, and perhaps more profound or more interesting, implications. That is the smallest part of the loss that his passing represents. I dedicate this essay to Fred's memory and express my gratitude to the *San Diego Law Review* for this opportunity to pay tribute to an exceptional scholar and friend.

35, at 78–79 (“Proposed Rule 3.8 clarifies and, in some instances, expands the scope of a prosecutor’s duties under the Model Rule . . .”).

