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### Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?

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# POLICING FEDERAL PROSECUTORS: DO TOO MANY REGULATORS PRODUCE TOO LITTLE ENFORCEMENT?\*

BRUCE A. GREEN\*\*

## I. INTRODUCTION

Because this symposium is dedicated to examining issues of professionalism partly from the perspective of power and the public interest, it seems appropriate to look at the professional conduct of criminal prosecutors. In discussions of prosecutorial conduct, issues of power and the public interest inevitably converge. That is because prosecutors wield "immense power to strike at citizens"<sup>1</sup> and do so not in pursuit of private gain, but charged with the responsibility to "seek justice."<sup>2</sup>

In light of prosecutors' immense power and public-interested role, they assume professional obligations that are, in the very least, different from those assumed by other lawyers, if not, as some have described them, "special"<sup>3</sup> and "extraordinary."<sup>4</sup> At the same time, public confidence in criminal law enforcement demands that prosecutors live up to these high standards. As Chief Justice Warren observed in a decision dealing with unconstitutional investigative measures, "the police must obey the law while enforcing the law."<sup>5</sup> The same is certainly true of prosecutors.

Commentators have often observed, however, that many prosecutors fail to meet the professional standards that govern their conduct,<sup>6</sup>

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1. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981). "The responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." *Id.* See generally Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 (1991).

3. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983) (entitled "Special Responsibilities of a Prosecutor").

4. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.2, at 760 (1986).

5. *Spano v. New York*, 360 U.S. 315, 320 (1959).

6. See, e.g., Monroe H. Freedman, *The Professional Responsibility of Prosecuting Attorneys*, 88 GEO. L.J. 1030, 1034-42 (1967); Joseph F. Lawless & Kenneth E. North, *Prosecutorial Misconduct*, TRIAL, Oct. 1984, at 26; Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 708-16 (1987). For

and that the mechanism for policing the ethical conduct of prosecutors deals with this problem ineffectively.<sup>7</sup> The inadequacy of formal disciplinary processes, they argue, is illustrated by the dearth of publicly reported instances in which prosecutors, and especially federal prosecutors, have been disciplined.<sup>8</sup> This perceived failure of disciplinary authorities has been explained in various ways. For example, commentators have suggested that some members of the judiciary who are former prosecutors may be inordinately hostile to claims of prosecutorial misconduct;<sup>9</sup> that evidence of prosecutorial misconduct, particularly in federal cases, may be difficult to obtain;<sup>10</sup> and that members of disciplinary bodies generally lack experience in criminal cases and may therefore be reluctant to judge the conduct of prosecutors.<sup>11</sup>

Elsewhere, I have argued that critics exaggerate the prevalence and seriousness of prosecutorial misconduct.<sup>12</sup> I would now argue further that the criticism of formal disciplinary mechanisms overlooks the importance of informal judicial controls, if not informal professional controls,<sup>13</sup> to ensure compliance with standards of prosecutorial con-

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articles focusing particularly on the prevalence of misconduct by prosecutors in the courtroom, such as the use of inadmissible or false evidence, or the use of improper arguments on summation, see Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 633-42 (1972); Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131, 135-138 (1986) (discussing courtroom misconduct by prosecutors that is designed to divert the jury from properly deciding a criminal case on the basis of legally admitted evidence); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 971-72 (1984); Note, *The Nature and Function of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946, 950, 956-57 (1954).

Courts have also occasionally noted the prevalence of prosecutorial misconduct. See, e.g., *United States v. Peveto*, 881 F.2d 844, 862 (10th Cir.) ("There has over a substantial period of time, nearly since I have been here, but at least with the present administration of the United States Attorney's office [been] a pattern of conduct or misconduct of not presenting evidence until very late, many times during the trial."), *cert. denied*, 493 U.S. 943 (1989).

7. See, e.g., Alschuler, *supra* note 6, at 670-73; Gershman, *supra* note 6, at 141-42; Rosen, *supra* note 6, at 703 & n.56; Steele, *supra* note 6, at 976-79; Zacharias, *supra* note 2, at 49. But see Richard L. Braun, *Ethics in Criminal Cases: A Response*, 55 GEO. L.J. 1048, 1056 (1967) (arguing that scrutiny by trial courts, appellate courts and defense attorneys is effective to police prosecutors).

8. Disciplinary decisions cited in commentary on prosecutorial misconduct almost invariably involve state and local prosecutors rather than federal prosecutors. See, e.g., Rosen, *supra* note 6; Steele, *supra* note 6; Romualdo P. Eclavea, Annotation, *Disciplinary Action Against Attorney for Misconduct Related to Official Duties as Prosecuting Attorney*, 10 A.L.R. 4th 605 (1981).

9. Lawless & North, *supra* note 6, at 27-28.

10. *Id.* at 28 (evidence of misconduct contained in federal grand jury transcripts may not be disclosed to the defense absent a threshold factual showing of misconduct).

11. Steele, *supra* note 6, at 982.

12. See Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126 (1988).

13. Criticism by members of the private bar is unlikely to affect prosecutors' conduct. Nor

duct. The power of a court to "discipline" a prosecutor for misconduct that comes to its attention by issuing unfavorable scheduling and discovery orders and evidentiary rulings is not to be underestimated. Indeed, some might argue that, in deference to judicial authority, prosecutors are more apt to be underzealous than overzealous. Of equal importance is the judge's ability to call misconduct to the attention of a prosecutor's supervisors and to seek assurances from them that appropriate measures will be taken. Because a prosecutor's office, as an institution, appears repeatedly before the court, it has a greater incentive than other law offices to respond appropriately to such requests.

Nevertheless, it is important that formal disciplinary mechanisms be available to respond effectively to prosecutorial misconduct. To be effective, a disciplinary mechanism must establish a standard of proper conduct, then identify and sanction those individuals whose conduct deviates from that standard. When it comes to regulating and disciplining attorneys, there is invariably some tension between how disciplinary authorities and the lawyers they govern construe the limits on proper conduct. This is true even though lawyers, through the American Bar Association and state and local bar associations, play the leading role in fashioning the rules courts apply to lawyers' professional conduct. To the public it may appear that those who are being regulated and those who are doing the regulating are the same—namely, lawyers. But in truth the legal profession is comprised of various groups with divergent interests; a differing view of what is ethical conduct may be taken by the civil plaintiffs' bar as opposed to the civil defense bar, by practitioners in large law firms as opposed to sole practitioners, by trial lawyers as opposed to corporate lawyers, or by state litigators as opposed to federal litigators.<sup>14</sup> The interests and experiences of prosecutors are in many respects unique and, as a consequence, prosecutors frequently view the propriety of their own behavior differently from others within the organized bar including, but not limited to, criminal defense attorneys. Therefore, it is important that authoritative rulings be

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is the marketplace likely to be effective in discouraging the types of misconduct with which commentators are typically concerned—e.g., overzealousness in jury arguments or the failure to disclose discoverable information. It is true that many, if not most, prosecutors plan eventually to leave the government. But concern about offending future employers or colleagues is unlikely to discourage prosecutorial excesses. As likely as not, future employers will view some measure of excess as evidence of zealotry or aggressiveness that is valued in the private bar.

14. See generally David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

issued regarding the scope of proper prosecutorial conduct and that improper conduct be sanctioned.

This Article focuses on how standards of prosecutorial conduct are enforced. As will be discussed, the process for sanctioning wrongful conduct of federal prosecutors is structurally inadequate. Federal prosecutors are subject to discipline by as many as four different authorities. Yet, each of the available disciplinary mechanisms is itself deficient. Furthermore, the diffusion of responsibility among different mechanisms compounds the problem.

## II. OVERVIEW OF THE STANDARDS GOVERNING PROSECUTORIAL CONDUCT

Prosecutorial conduct is governed in large part by statutory and constitutional law. For example, the Federal Rules of Criminal Procedure,<sup>15</sup> federal statutes,<sup>16</sup> and the Due Process Clause of the United States Constitution<sup>17</sup> each impose discovery obligations on federal prosecutors. Similarly, a federal regulation,<sup>18</sup> federal statutes,<sup>19</sup> and various constitutional provisions<sup>20</sup> regulate prosecutors and their agents in seeking statements from witnesses, suspects and defendants.

Broadly speaking, there are three additional sources of law governing the conduct of federal prosecutors. These are: (1) codes of professional responsibility and other rules adopted by federal district courts pursuant to their rule-making authority, (2) rules promulgated by federal courts on an ad hoc, case-by-case basis, and (3) internal guidelines adopted by the Department of Justice. An overview of these additional sources of law is undertaken here as background to this Article's examination of the regulatory bodies responsible for overseeing federal prosecutors' conduct.

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15. FED. R. CRIM. P. 16.

16. 18 U.S.C. § 3500 (1994).

17. See, e.g., *Kyles v. Whitley*, 115 S. Ct. 1555, 1565 (1995) (prosecutor's failure to disclose evidence favorable to the defense in a capital murder case violated due process); *United States v. Agurs*, 427 U.S. 97, 107 (1976); *Brady v. Maryland*, 373 U.S. 83, 89-90 (1963) (establishing prosecution's duty to disclose evidence favorable to the accused); *United States v. Alzate*, 47 F.3d 1103, 1109-10 (11th Cir. 1995); see generally Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984).

18. 28 C.F.R. § 77 (1995) (regulating communications with represented persons).

19. 18 U.S.C. §§ 2510-22 (1994) (regulating wiretapping).

20. *Arizona v. Fulminane*, 499 U.S. 279, 311 (1991) (Due Process Clause); *Miranda v. Arizona*, 384 U.S. 436 (1966) (Fifth Amendment right against compelled self-incrimination); *Massiah v. United States*, 377 U.S. 201 (1964) (Sixth Amendment right to counsel).

## A. CODES OF PROFESSIONAL RESPONSIBILITY

Lawyers customarily look to the codified standards of professional responsibility applicable in the relevant jurisdiction to determine their ethical obligations. In almost every state, the highest court has adopted standards governing lawyers' conduct. In most instances, these courts have relied on rules drafted by the American Bar Association (ABA)—either the Model Code of Professional Responsibility (Model Code), which was initially adopted by the ABA in 1969, or the Model Rules of Professional Conduct (Model Rules), which was adopted by the ABA in 1983.<sup>21</sup> Once adopted by the state court, the rules generally govern lawyers who are admitted to practice in the particular state or who appear before a court of that state.<sup>22</sup>

Like the state courts, federal courts, pursuant to their rule-making authority, have adopted rules governing the conduct of attorneys who appear before them.<sup>23</sup> In some cases, district courts have promulgated individual rules.<sup>24</sup> But, for the most part, they have simply adopted local rules that incorporate by reference either the ABA Model Code, the ABA Model Rules, or the standards adopted by the high court of the state.<sup>25</sup> Federal prosecutors, like other lawyers practicing before a

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21. See generally Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 REC. ASS'N B. CITY N.Y. 77 (1981); WOLFRAM, *supra* note 4, at 48-65; Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 FORD. URB. L.J. 283 (1991).

22. A problem might arise, however, if there were a conflict between the ethical rules of the state before which the lawyer is appearing and the state in which he is licensed to practice. See generally Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

23. The federal courts' authority to adopt ethical rules governing federal prosecutors has a variety of sources. To begin with, federal courts have broad common law authority to supervise and discipline lawyers who appear before them that derives primarily from their authority to admit, suspend and disbar attorneys who practice within the jurisdiction. Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 530-31 & nn.161-62 (1989). In addition, federal courts have general supervisory authority over the conduct of criminal proceedings. See, e.g., *McNabb v. United States*, 318 U.S. 332 (1943). See generally Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992). The extent of the federal courts' supervisory authority over federal prosecutors has increasingly been called into question, however, particularly with respect to conduct outside the courtroom. See, e.g., *United States v. Lau Tung Lam*, 714 F.2d 209, 210 (2d Cir. 1983) ("[T]he federal judiciary's supervisory powers over prosecutorial activities that take place outside the courthouse is extremely limited, if it exists at all."). See generally Gershman, *supra*, at 433-43.

24. For example, some district courts have adopted restraints on extrajudicial speech in criminal cases. See, e.g., DIST. CONN. LOC. CRIM. R. 7; E. & S. DIST. N.Y. LOC. CRIM. R. 13.

25. See, e.g., *Stamp v. Brown*, No. 81-C1475, 1990 U.S. Dist. LEXIS 2086, at \*3 (N.D.

federal district court, are subject to professional standards incorporated in district court rules, as interpreted by federal courts of the district.<sup>26</sup> When interpreting the ethical rules in the context of decisions in disciplinary proceedings, rulings on disqualification motions, or other determinations, the federal courts are not bound by state judicial interpretations. That is because, as federal courts often note, the ethical rules applicable in federal judicial proceedings are a matter of federal law and state ethical rules cannot, of their own force, be the basis for judicial rulings in federal proceedings.<sup>27</sup>

In some cases, rules have been promulgated by bar associations but not generally adopted by any judicial authority. The only important example, as far as federal prosecutors are concerned, is the ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function.<sup>28</sup> Although portions of these standards have been adopted by at least one jurisdiction to provide an additional basis of attorney discipline,<sup>29</sup> in most jurisdictions they have not been adopted on a wholesale basis. They have, however, often been invoked by the courts when interpreting other law or when formulating rulings on an ad hoc basis.<sup>30</sup>

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Ill. Feb. 27, 1990) (citing N.D. ILL. LOC. CT. R. 3.54(b) stating that attorneys may be disciplined for violating the Model Code of Professional Responsibility). See also *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 624 (S.D.N.Y. 1990) (noting that an attorney may be disciplined for "conduct violative of the Codes of Professional Responsibility of the American Bar Association or the New York Bar Association from time to time in force.").

26. See, e.g., *Whitehouse v. United States Dist. Court for the Dist. of R.I.*, 53 F.3d 1349, 1355 (1st Cir. 1995).

27. See, e.g., *In re Snyder*, 472 U.S. 634, 645 n.6 (1985); *Grievance Comm. for S. Dist. N.Y. v. Simels*, 48 F.3d 640 (2d Cir. 1995).

28. See Robert G. Morvillo, *Forfeiture of Legal Fees*, N.Y. L.J., Apr. 2, 1991, at 6.

The Prosecution Function Standards comprise one chapter of a four-volume book, *ABA Standards of Criminal Justice*. The standards are not limited to ethical matters but include recommendations and guidelines on, for instance, the training of prosecutors and office administration and organization. The ABA describes the Prosecution Standards as "hortatory standards," and unlike the Model Rules, not meant to be binding, but intended to serve rather as standards worthy of aspiration. While the standards may, of course, be adopted as ethical rules, local rules or statutes, they are adopted with the intent that they serve as guidelines. It is unclear as to how many of the standards have actually been adopted in a binding fashion. However, the standards are referred to in court decisions involving disciplinary and ethical problems as persuasive.

*Id.*

Another independent body of ethics rules with potential application to federal prosecutors is the Federal Ethical Considerations promulgated by the Federal Bar Association in 1973. See C. Normand Poirer, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A. J. 1541 (1974). However, these ethical rules have rarely been invoked in judicial decisions and add little to the lawyers' codes that have been adopted by the courts.

29. See MASS. SUP. JUD. CT. R. 3:08.

30. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 191 (1986) (Blackmun, J., dissenting);

## B. AD HOC JUDICIAL RULES

Federal prosecutors are also subject to ethical rules announced by federal courts on an ad hoc, case-by-case basis pursuant to each court's supervisory authority.<sup>31</sup> Typically, the conduct is not clearly proscribed by constitutional or statutory law or by prevailing professional standards, but is nonetheless deemed wrongful given the prosecutor's duty to "seek justice." For example, courts have directed prosecutors to make disclosure to the court or take other remedial steps when prosecutors are aware that the defendant's counsel has a conflict of interest.<sup>32</sup> Federal court opinions have set limits on the issuance of subpoenas to defense attorneys.<sup>33</sup> Other opinions requiring federal prosecutors to uphold a higher level of candor have forbidden prosecutors from misleading grand jury witnesses and others about their status as the subject or target of a criminal investigation,<sup>34</sup> recognized a prosecutorial responsibility to correct errors in a pre-sentence investigation report,<sup>35</sup> and enjoined prosecutors from making erroneous legal arguments to justify the admission of evidence.<sup>36</sup>

In virtually all cases, the federal courts' ad hoc rules have been announced in the context of opinions criticizing the prosecutor's conduct in a given case; in many instances, the expected standard of conduct is left somewhat vague. While the court may make plain that the

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Floyd v. Meachum, 907 F.2d 347, 354 (2d Cir. 1990); United States v. Pinto, 850 F.2d 927, 934 n.1 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); United States v. Dukes, 727 F.2d 34, 43 (2d Cir. 1984); cf. Jeffries v. Blodgett, 988 F.2d 923, 940 (9th Cir. 1993) ("the ABA Standards serve only as a 'guide' . . .").

31. See, e.g., United States v. Gurney, 393 F. Supp. 683 (M.D. Fla. 1974); United States v. Thomas, 320 F. Supp. 527 (D.D.C. 1970).

32. See, e.g., Mannhalt v. Reed, 847 F.2d 576, 583-84 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988); United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986). See generally Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323 (1989).

33. United States v. Perry, 857 F.2d 1346, 1348-50 (9th Cir. 1988) (holding that while a defendant awaits trial, it is wrongful for a prosecutor to issue a grand jury subpoena to the indicted defendant's attorney to obtain evidence relating to the defendant for use against others).

34. United States v. Babb, 807 F.2d 272, 276-77 (1st Cir. 1986) (holding that a prosecutor may not affirmatively deceive a grand jury witness about his or her status as a target or subject of the investigation); United States v. Fields, 592 F.2d 638, 647-48 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979) (ruling that a prosecutor acted improperly in failing to disclose that a criminal investigation had been initiated against the lawyer's client); United States v. Jacobs, 547 F.2d 772, 773-75 (2d Cir. 1976) (stating that a prosecutor must disclose that a grand jury witness is a target).

35. United States v. Jones, 983 F.2d 1425, 1429 (7th Cir. 1993).

36. United States v. Eason, 920 F.2d 731, 735-37 (11th Cir. 1990).



prosecutor transgressed a norm, it may not spell out that norm precisely in its opinion, nor is it likely to codify the norm thereafter. Thus, to a large degree, federal prosecutors are expected to be familiar with the decisional law relevant to their conduct and to extract applicable standards of conduct from critical opinions.

### C. INTERNAL GUIDELINES

Like other prosecuting authorities, the United States Department of Justice (Department) may promulgate specific regulations governing the conduct of prosecutors.<sup>37</sup> The Department has done so in two ways. First, like some federal courts, the Department has incorporated the ABA Model Code by reference in its guidelines.<sup>38</sup> Second, the Department has developed its own guidelines to assist federal prosecutors in the performance of their duties and to set uniform policy on certain matters.

Some of the guidelines are designed to supplement provisions of the professional codes that address the same issue. For example, the Department has issued a guideline governing prosecutors' communications with the media in connection with pending cases.<sup>39</sup> This guideline augments restrictions of DR 7-107 of the ABA Model Code, Rule 3.6 of the ABA Model Rules, as well as some local rules of the federal district courts.<sup>40</sup>

Other guidelines have been adopted in part to discourage the adoption or enforcement of competing provisions of the professional codes. For example, the Department has promulgated guidelines for the issuance of grand jury subpoenas to defense attorneys.<sup>41</sup> It did so as part of an effort to discourage courts from adopting a recent amendment to the Model Rules dealing with this subject. The Department can now point to this guideline to support its argument that judicial regulation in this area is unnecessary.

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37. Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 517-24 (1976); see also James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562-66 (1981). See generally KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

38. 28 C.F.R. § 45.735-1(b) (1995) ("[A]ttorneys employed by the Department should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association."). The provision was not updated following the ABA's adoption of the Model Rules in 1983.

39. 28 C.F.R. § 50.2 (1995).

40. *Stamp*, 1990 U.S. Dist. LEXIS 2086 at \*3; *Polycast*, 129 F.R.D. at 624.

41. DEPARTMENT OF JUSTICE MANUAL § 9-2.161(a) (Supp. 1993) [hereinafter DOJ MANUAL].

For the most part, however, the Department's guidelines deal with issues that are not meaningfully addressed by the professional codes. This is true, for example, of guidelines dealing with the issuance of subpoenas to members of the media,<sup>42</sup> the consensual monitoring of oral and wire communications,<sup>43</sup> the non-consensual interception of wire or oral communications through eavesdropping or wiretapping,<sup>44</sup> dual and successive prosecutions when the defendant has been or is already being prosecuted in a state court,<sup>45</sup> and warnings to grand jury witnesses.<sup>46</sup>

The Department's guidelines generally do not create substantive rights for the defendant.<sup>47</sup> In fact, many of the Justice Department regulations expressly state that they are intended only for internal guidance and should not be used to create any enforceable rights for defendants.<sup>48</sup> Thus, a violation of a Justice Department guideline would not entitle a defendant to dismissal of an indictment or quashing of a subpoena.<sup>49</sup> Violation of these policies could, however, serve as a basis for disciplining a federal prosecutor.<sup>50</sup>

### III. THE MECHANISMS FOR DISCIPLINING FEDERAL PROSECUTORS

Criminal defense lawyers often accuse prosecutors of wrongful behavior. Whether or not there is any basis to it, such an accusation may be useful as part of a criminal defense.<sup>51</sup> Or, it may help the defendant obtain some procedural advantage. For example, accusations of

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42. 28 C.F.R. § 50.10 (1995).

43. DOJ MANUAL, *supra* note 41, § 9-7.302.

44. *Id.* §§ 9-7.110 to -7.180.

45. *Id.* § 9-2.142.

46. *Id.* § 9-11.153.

47. See *United States v. Caceres*, 440 U.S. 741, 755-57 (1979); *United States v. Piervinanzi*, 23 F.3d 670, 682-83 (2d Cir. 1994); *In re Klein*, 776 F.2d 628, 635 (7th Cir. 1985).

48. DOJ MANUAL, *supra* note 41, § 9-2.161(a) (outlining attorney subpoena guidelines); 28 C.F.R. § 50.10 (1995) (providing guidelines for subpoenas to the press).

49. *Klein*, 776 F.2d at 635. But see *United States v. Giordano*, 416 U.S. 505, 528 (1974) (holding that suppression of evidence obtained through a wiretap that was not properly authorized by a deputy attorney general was proper where "re-application approval was intended to play a central role in the statutory scheme").

50. 28 C.F.R. § 50.10(n) (1995); *United States v. Pacheco-Ortiz*, 889 F.2d 301, 311 (1st Cir. 1989) (referring prosecutor's violation of target warning guideline to DOJ Office of Professional Responsibility).

51. ALAN M. DERSHOWITZ, *THE BEST DEFENSE* at xiv (1982) ("In representing criminal defendants—especially guilty ones—it is often necessary to take the offensive against the government: to put the government on trial for *its* misconduct.") (emphasis added).

wrongdoing may discredit prosecutors in the court's eyes, distract prosecutors, cause prosecutors to expend resources to defend themselves, or cast the defendant's evidentiary claim or other legal claim in a more sympathetic light.

Formal accusations of prosecutorial misconduct are far more rare. When filing a formal accusation, the defense lawyer's purpose is generally not to punish the prosecutor personally, but to obtain some relief for the defendant. For example, defense counsel may move to dismiss an indictment based on alleged improprieties in the grand jury, to suppress evidence thought to have been obtained by unethical means, or to overturn a conviction that purportedly was secured through improper behavior at trial.

While providing procedural relief to the defendant as a remedy for prosecutorial misconduct might be viewed as a personal rebuke to the prosecutor and might discourage similar misconduct in the future,<sup>52</sup> it is unusual for federal courts to provide such relief.<sup>53</sup> Nor, as a general

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52. Several appellate courts have expressed frustration that the harmless error rule has caused their warnings about prosecutorial misconduct to go unheeded because the convictions were ultimately affirmed. *See, e.g.,* *United States v. Modica*, 663 F.2d 1173, 1182-83 (2d Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 989 (1982).

53. *See Zacharias, supra* note 2, at 48 n.13. Because of the availability of disciplinary sanctions against prosecutors, courts generally recognize that dismissing an indictment or overturning a conviction—remedies which punish society more than the prosecutor—are inappropriate simply as a device for deterring future misconduct. *See, e.g.,* *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988); *United States v. Hasting*, 461 U.S. 499, 506 (1983); *Peveto*, 881 F.2d at 844, 862-63; *United States v. Beckett*, 706 F.2d 519 (Former 5th Cir. 1983); *Modica*, 663 F.2d at 1173; *Gershman, supra* note 6. To overturn a conviction, a defendant must generally demonstrate that the prosecutor's actions violated a constitutional provision, a statute, or a rule of criminal procedure, and not just an ethical rule. In the past, federal courts occasionally overturned convictions on the basis of prosecutorial conduct that was unethical, but violated no particular provision of federal law. *See, e.g.,* *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976). *See generally* Beale, *supra* note 23, at 1433. *But see* *United States v. Hammad*, 858 F.2d 834, 841 (2d Cir. 1988) (explaining that the court's authority to overturn decisions based on prosecutorial misconduct has increasingly come into question, and federal courts in recent years have been hesitant to test their authority).

In addition, to overturn a conviction a criminal defendant must generally show that the prosecutor's misconduct was not harmless. *See* FED. R. CRIM. P. 52(a); *Bank of Nova Scotia*, 487 U.S. at 254-56 (holding that a district court generally exceeds its supervisory authority in dismissing an indictment for prosecutorial misconduct that does not prejudice the defendant). The application of the "harmless error rule" results in many cases where convictions are affirmed even though the prosecutor has acted wrongfully. *See* *United States v. Mechanik*, 475 U.S. 66, 72 (1986) (holding that a defendant may not appeal from a conviction based on claims of misconduct in the grand jury, since a conviction by a petit jury demonstrates that any error in the grand jury was harmless); *Modica*, 663 F.2d at 1173 (vouching for witness's credibility during summation); *People v. Green*, 274 N.W.2d 448, 454 (Mich. 1979) (questioning defendant without notifying defense counsel); *State v. York*, 632 P.2d 1261, 1263 (Or. 1981) (instructing prospective witnesses not to talk to defense counsel); *State v. Hohman*, 420 A.2d 852, 854 (Vt. 1980) (improper pretrial publicity); Erica M. Landsburg, Note, *Policing*

rule, is there a civil remedy for prosecutorial misconduct.<sup>54</sup> Except on the rare occasions when a remedy for the defendant is available under the law, defense lawyers will have little incentive to formally challenge the propriety of the prosecutor's conduct.<sup>55</sup>

Although of little benefit to aggrieved defendants, personal sanctions may be imposed on federal prosecutors who engage in misconduct. Indeed, federal courts view personal sanctions as the most appropriate response. Thus, in determining that it was improper to reverse a criminal conviction in order to deter prosecutorial misconduct, the Supreme Court in *United States v. Hastings*<sup>56</sup> cited the availability of personal sanctions which were "more narrowly tailored."<sup>57</sup> Courts have also relied on the possibility of personal sanctions to justify the general unavailability of a civil remedy for prosecutorial misconduct,<sup>58</sup> as well as to support the unavailability of monetary sanctions against the prosecutor's office.<sup>59</sup>

Four bodies have some authority to sanction a prosecutor for misconduct in a federal criminal proceeding: the federal district court presiding over the proceeding, a disciplinary committee of the federal court, the Justice Department's Office of Professional Responsibility, and a disciplinary committee established in the state in which the prosecutor is licensed. This next section discusses the limitations of each of

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*Attorneys: Exclusion of Unethically Obtained Evidence*, 53 U. CHI. L. REV. 1399 (1986).

54. A criminal defendant generally may not pursue an independent civil suit against a prosecutor for violating his civil rights by unethical behavior because prosecutors have absolute immunity for misconduct related to their prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), *aff'g* 500 F.2d 1301 (9th Cir. 1974); *see also* Susan M. Coyne, Note, *Immunitizing the Investigating Prosecutor: Should the Dishonest Go Free or the Honest Defend*, 48 FORDHAM L. REV. 1110, 1112-14 (1980); John L. Filosa, Note, *Prosecutorial Immunity: No Place for Absolutes*, 4 U. ILL. L. REV. 977 (1983); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992) (holding prosecutor has only qualified immunity for conduct in investigative capacity).

55. *Green*, 274 N.W.2d at 468; *Rosen*, *supra* note 6, at 734-35; *Steele*, *supra* note 6, at 980. Perhaps the most extreme reaction to an accusation of prosecutorial misconduct is the libel suit recently filed by a federal prosecutor against a criminal defense lawyer who filed a complaint with the Department of Justice. *See* Gary Taylor, *Prosecutor's Lawsuit Rules Defense Bar*, NAT'L L.J., May 15, 1995, at A5; *Lawyer's Complaint to DOJ Draws Libel Suit from AUSA*, Crim. Prac. Man. (BNA) No. 9, at 202 (Apr. 26, 1995). However, the principal disincentive to filing a formal complaint with a court or disciplinary body is the cost to future clients who may seek leniency from the prosecutor's office.

56. 461 U.S. 499 (1983).

57. *Id.* at 506 & n.5.

58. *Imbler*, 424 U.S. at 429.

59. *See United States v. Woodley*, 9 F.3d 774, 782 (9th Cir. 1993); *see also United States v. Horn*, 29 F.3d 754, 766-67 (1st Cir. 1994); *United States v. Prince*, CR 93-1073(RR), 1994 U.S. Dist. LEXIS 2962, at \*3 (E.D.N.Y. Mar. 9, 1994) (publicly reprimanding United States Attorney's Office for discovery violations, but withdrawing assessment of jury costs).

these disciplinary mechanisms in enforcing standards of prosecutorial conduct.

#### A. DISTRICT COURT REVIEW OF PROSECUTORIAL CONDUCT

Federal prosecutors appear regularly before the judges of the districts in which they practice. As a result, the propriety of their conduct comes under judicial scrutiny more often than that of other attorneys.<sup>60</sup> Such close judicial observation may itself discourage prosecutors from engaging in certain types of misconduct.<sup>61</sup> When it does not, district judges have authority to discipline federal prosecutors in a number of ways.

In cases involving certain types of serious, willful misconduct by a lawyer practicing before the federal court, the court may impose a criminal sanction: it may punish the lawyer for contempt of court.<sup>62</sup> The imposition of contempt sanctions is limited, however, to certain types of misconduct—generally, willful disobedience of a court order or contemptuous or contumacious conduct in court that threatens the administration of justice.<sup>63</sup> The contempt sanction may be imposed summarily when the misconduct occurs in the judge's presence; otherwise, a hearing must be conducted.<sup>64</sup> In actual practice judges rarely, if ever, invoke this drastic remedy against federal prosecutors,<sup>65</sup> although

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60. Lee A. Adlerstein, *Ethics, Federal Prosecutors and Federal Courts: Some Recent Problems*, 6 HOFSTRA L. REV. 755, 756-57 (1978).

No aspect of the job of a federal prosecutor has escaped judicial attention: The interviewing of witnesses, conduct of proceedings before the grand jury, application for arrest and search warrants, statements made in court and during trial, statements made to the press, giving of information to or withholding of information from the defendants attorney, the wording of indictments, as well as the making of agreements with witnesses and defendants.

*Id.* at 755-56 (footnotes omitted).

61. Braun, *supra* note 7, at 1055-57. For discussions of prosecutorial misconduct that may escape judicial scrutiny, see Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550 (1987) and Green, *supra* note 12.

62. *See, e.g.*, United States v. Giovanelli, 897 F.2d 1227, 1230 (2d Cir.) (upholding summary contempt conviction of criminal defense attorney who addressed judge defiantly in jury's presence), *cert. denied*, 498 U.S. 822 (1990).

63. *Giovanelli*, 897 F.2d at 1229.

64. *Id.* at 1230.

65. Alschuler, *supra* note 6, at 673-74 (no cases found in which a prosecutor has been held in contempt for courtroom misconduct); Gershman, *supra* note 6, at 141; Lawless & North, *supra* note 6, at 26; Steele, *supra* note 6, at 703 n.56 (no cases found in which a prosecutor has been held in contempt for violating his discovery obligations); WOLFRAM, *supra* note 4, at 761 & n.44.

The contempt sanction has been applied, however, to state prosecutors. *See, e.g.*, Brostoff v. Berkman, 591 N.E.2d 1175 (N.Y.) (upholding summary contempt sanction imposed on prosecutor who disobeyed judge's order to leave the well area of her courtroom), *cert.*

they may threaten to do so from time to time.<sup>66</sup> That is, in part, because contempt is unavailable for much of the behavior of prosecutors that is considered to be wrongful—particularly conduct occurring during the course of investigation or otherwise occurring outside the court's presence. Yet, even in cases where the contempt sanction would seem clearly to be appropriate, such as cases in which prosecutors directly defy a court order, courts have declined to invoke this sanction, undoubtedly because it is unduly harsh.<sup>67</sup>

When the prosecutor's wrongdoing is considered to be inadvertent or too insignificant to warrant a harsher response, the court can reprimand the prosecutor, either privately or publicly.<sup>68</sup> The impact of a public reprimand on the record at trial or, more significantly, in a published opinion, should not be underestimated. Prosecutors are jealous of their reputations, including their reputations for probity.<sup>69</sup> At the same time, however, there is a serious risk of unfairness in the practice of sanctioning a prosecutor by criticizing him in a public opinion. In many instances the prosecutor may not have been afforded an opportunity to present evidence and arguments to demonstrate the propriety of his conduct.<sup>70</sup> Even when the prosecutor has had a fair op-

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*denied*, 113 S. Ct. 180 (1992).

It is applied more frequently to defense attorneys. *See, e.g., Giovannelli*, 897 F.2d at 1228; *United States v. Thoreen*, 653 F.2d 1332, 1342 (9th Cir. 1981); *United States v. Cutler*, 58 F.3d 825, 837-38 (2d Cir. 1995); *People v. Simac*, 641 N.E.2d 416 (Ill. 1994).

66. *Woodley*, 9 F.3d at 782 (noting availability of contempt sanction to redress prosecutorial misconduct); *Modica*, 663 F.2d at 1185.

67. *Horn*, 29 F.3d at 754, 770.

68. *See, e.g., United States v. Gillespie*, 974 F.2d 796, 802 (7th Cir. 1992) ("Because . . . there is no indication that the government acted in bad faith in failing to provide the target warnings, or that it proffered an affirmative misrepresentation [to the grand jury witness] regarding his target status, we limit ourselves to verbal admonitions.").

Unlike some state court disciplinary bodies, district judges do not appear to issue formal reprimands outside the context of judicial opinions. However, the authority to criticize the conduct of litigants is implicit in the authority of a judge to issue rulings and publish opinions. It is common practice for courts to avail themselves of this forum. *See Fields*, 592 F.2d at 638 (holding that admonishment is a less drastic alternative than dismissing indictment because of wrongdoing by SEC lawyers). Errant prosecutors may be criticized either anonymously, *see, e.g., United States v. Dwyer*, 843 F.2d 60, 64 (1st Cir. 1988), or by name, *see, e.g., United States v. Isgro*, 751 F. Supp. 846 (C.D. Cal. 1990), *rev'd on other grounds*, 974 F.2d 1091 (9th Cir.), *cert. denied*, 113 S. Ct. 1581 (1993), *appeal after remand*, 43 F.3d 1480 (1994).

69. *See Modica*, 663 F.2d at 1185 (2d Cir. 1981) (noting that reprimanding a named prosecutor in a published opinion may have a deterrent effect upon prosecutorial misconduct).

Apparently recognizing the concern of prosecutors for their professional reputations, federal courts have also, on occasion, gone out of their way in written opinions to acknowledge that they are not suggesting that the Assistant United States Attorney acted wrongfully. *See, e.g., United States v. Hamilton*, 730 F. Supp. 1272, 1278 (S.D.N.Y. 1990).

70. This potential for unfairness is not limited to instances in which prosecutors are reproached, but exists in all cases involving ad hoc criticism of lawyers by district judges. *See*,

portunity to defend his conduct before the district court, a public rebuke may be unfair in that, unlike a case in which a contempt sanction is imposed, the prosecutor will generally be unable to obtain review of the district court's finding.<sup>71</sup>

In most cases when the propriety of the prosecutor's conduct is called into question, but no remedy for the alleged wrongdoing is available to the defendant, district judges decline to act as disciplinarians, but instead leave it to others to address the question.<sup>72</sup> When a Department of Justice Guideline has allegedly been violated, most district courts will rely exclusively on self-policing. As the Seventh Circuit has observed:

The Department of Justice may give such weight as it chooses to its internal rules. In all but the most exceptional cases, he who writes the rules may choose the sanctions for noncompliance. . . . An effort to foist on the Executive Branch a sanction it does not wish could lead the Executive Branch to abandon [its] policy rather than suffer unwarranted reversals.<sup>73</sup>

When federal prosecutors appear to have violated professional standards such as those incorporated by reference in local rules of the court, district courts may rely equally on state or federal disciplinary bodies.

This is not to say that district courts simply ignore prosecutorial misconduct. In some instances, courts themselves refer errant prosecu-

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e.g., *United States v. Garcia*, 924 F.2d 925, 927-28 (9th Cir.) (criticizing the district judge's expulsion of the defense lawyer from ongoing proceedings in response to the defense lawyer's objection), *cert. denied*, 501 U.S. 1210 (1991).

71. See H. Richard Uviller, *Presumed Guilty: The Court of Appeals Versus Scott Turow*, 136 U. PA. L. REV. 1879, 1901 (1988).

72. This is consistent with the general view of courts that it is not their role to oversee the ethics of the lawyers who practice before them, except insofar as the purportedly unethical conduct affects the rights of the parties appearing before the court. See generally Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS, 473, 550-51 & n.293 (1995); Committee on Professional Responsibility, *Suppressing Evidence Obtained in Violation of DR 7-104: If Hammad is Right, Is the Civil Law Wrong?*, 48 RECORD 431, 433 (1992).

73. *United States v. Schwartz*, 787 F.2d 257, 267 (7th Cir. 1986); accord *Gillespie*, 974 F.2d at 802 ("In a case such as this, even if we were at liberty to exercise our supervisory powers, we would hesitate to do so, lest the government be reluctant to establish internal rules designed to safeguard defendants in the first instance.").

tors to the relevant disciplinary authorities.<sup>74</sup> In the view of some commentators, however, courts do so too infrequently.<sup>75</sup>

#### B. DISTRICT COURT DISCIPLINARY COMMITTEES

Some district courts have, by local rule, created grievance or disciplinary committees to conduct hearings into allegations of unethical conduct by attorneys practicing before federal courts in the district.<sup>76</sup> The committees are typically comprised of former judges or lawyers practicing in the district who have been appointed to serve by the court.<sup>77</sup> They generally conduct their investigations, hearings and deliberations in secret. As a consequence, except when a public sanction is ultimately issued or when the committee's decision later becomes the subject of a published opinion by a reviewing court, there may be no public record that an inquiry was conducted. It is, therefore, impossible to determine with certainty the extent to which district court grievance committees are called upon to determine the propriety of a federal prosecutor's conduct.

The public record suggests, however, that federal prosecutors are rarely, if ever, referred to federal grievance committees.<sup>78</sup> Indeed, fed-

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74. See, e.g., *Mabry v. Johnson*, 467 U.S. 504, 510-11 (1984); *Beckett*, 706 F.2d at 522; *United States v. Kelly*, 543 F. Supp. 1303 (D. Mass.), *opinion modified by* 550 F. Supp. 901 (D. Mass. 1982); cf. *Modica*, 663 F.2d at 1173-74 (approving referrals to disciplinary authorities in appropriate cases); John M. Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95, 97 (1982); Steele, *supra* note 6, at 981; ABA Standing Committee on Professional Discipline, *Judicial Response to Lawyer Misconduct* I.12 (1984). ("Once a reviewing court has found a prosecutor's actions to be misconduct in the form of a disciplinary rule violation, whether or not reversal or dismissal is warranted, the court should report the conduct to the appropriate disciplinary authorities.").

Courts may also refer prosecutors to the Justice Department's Office of Professional Responsibility. See, e.g., *Pacheco-Ortiz*, 889 F.2d at 311 (indicating intent to refer to the Department of Justice's Office of Professional Responsibility for investigation and possible discipline future failures by federal prosecutors to provide "target warnings" to grand jury witnesses in accordance with the Justice Department's internal guidelines). However, it is apparently rare for courts to do so.

75. Rosen, *supra* note 6, at 735 & n.251.; Steele, *supra* note 6, at 981.

76. See R. U.S. DIST. CT. DIST. OF CONN., LOC. R. 3; GEN. R. U.S. DIST. CTS. S. & E. DIST. N.Y., R. 4.

77. See, e.g., *Jacobs*, 44 F.3d at 91 (describing and upholding the disciplinary process of the federal grievance committee for the Eastern District of New York).

78. There are stunningly few reported decisions concerning the conduct of federal court disciplinary committees. None of the reported decisions involve federal prosecutors. See Mashburn, *supra* note 72, at 537 ("federal judges use the formal federal disciplinary or grievance processes infrequently"). For a discussion of one of the few published Second Circuit opinions reviewing a decision of a federal grievance committee, see Green, *supra* note 23, at 485-86.



eral district judges who are concerned about possible wrongdoing by a federal prosecutor seem to be more inclined to refer the prosecutor to a state disciplinary committee than to a disciplinary committee of the district court.<sup>79</sup> There are various possible explanations for this. First, federal courts have traditionally deferred to state licensing authorities to oversee the professional conduct of lawyers.<sup>80</sup> Second, the district court disciplinary mechanisms tend to be ad hoc and unfunded, whereas the state court disciplinary mechanisms are professionally staffed and funded by the state. Additionally, district court discipline adds to the federal court's workload. For all these reasons, district courts would tend to invoke the federal disciplinary processes only in exceptional cases and would view the state processes as the ordinary mechanism for dealing with wrongdoing by federal litigators, including federal prosecutors.<sup>81</sup>

### C. OFFICE OF PROFESSIONAL RESPONSIBILITY

In addition to discipline by the courts, federal prosecutors are subject to discipline by the Department of Justice.<sup>82</sup> Its Office of Professional Responsibility (OPR) is entrusted with the task of investigating allegations of unethical conduct as well as criminal wrongdoing by federal prosecutors.<sup>83</sup> The OPR looks primarily to government employees, private citizens or private attorneys for referrals, although it occasionally receives complaints from federal judges as well.<sup>84</sup> Although the OPR has exclusive authority to review allegations of some claims

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79. *See Houston v. Partee*, 978 F.2d 362, 369 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1647 (1993).

80. *Matter of Cook*, 49 F.3d 263, 265 (7th Cir. 1995).

81. That federal prosecutors need not be admitted to practice before the federal district court may provide an additional reason for deferring to state disciplinary authorities.

82. Although United States Attorneys are appointed by the President and may be removed only by the President, Assistant United States Attorneys are subject to removal by the Attorney General. 28 U.S.C. §§ 541, 542(b) (1988). *See, e.g., Kenna v. Department of Justice*, 727 F. Supp. 64 (D.N.H. 1989) (rejecting Assistant United States Attorney's argument that his dismissal violated the First Amendment).

83. 28 C.F.R. § 0.39a(a) (1995). In the case of allegations that a former prosecutor violated the conflict-of-interest provisions established in 18 U.S.C. § 207, disciplinary proceedings are provided for by 28 C.F.R. § 45.735-7a, which may result in a prohibition on appearances before the Department of Justice. *Id.*

84. For example, in 1988, the Office of Professional Responsibility received 424 complaints against Department of Justice employees. Of that number, nineteen were attributed to "miscellaneous sources" that included not only judges, but also bar associations and anonymous complainants. In comparison, more than 75% of the cases that year originated with complaints from Department components and employees, private citizens or private attorneys. *See OFFICE OF PROF. RESP.*, 1988 ANN. REP. TO THE ATT'Y GEN. at 4.

of unethical conduct,<sup>85</sup> for the most part its authority overlaps with that of other disciplinary bodies.<sup>86</sup> One substantial limitation, however, is that the OPR has authority only over present Department of Justice employees. Thus, a federal prosecutor may avoid scrutiny by leaving government employ.<sup>87</sup>

Even under the best of circumstances, defense attorneys might doubt the efficacy of internal disciplinary mechanisms to curb prosecutorial misconduct.<sup>88</sup> One might reasonably anticipate, in the absence of evidence to the contrary, that attorneys in the Office of Professional Responsibility lack neutrality and detachment when judging the conduct of fellow members of the Department of Justice, both because they identify and sympathize with their colleagues and because they want the Department to appear to be relatively free of wrongdoing.

Until recently, the OPR conducted its investigations, made findings and imposed sanctions almost entirely in secret.<sup>89</sup> This compounded the perception that most prosecutorial wrongdoing went unpunished.<sup>90</sup> Because the OPR did not publicize its determinations, even within the Department of Justice itself, but limited itself to identifying and privately sanctioning wrongdoers within the Department, the OPR was also ineffective in guiding federal prosecutors as to the bounds of appropriate conduct and deterring prosecutorial misconduct.<sup>91</sup>

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85. In August 1994, the Department of Justice promulgated a regulation exempting its lawyers from some provisions of the professional codes. See *Comm. With Represented Persons*, 28 C.F.R. § 77 (1995). Section 77.12 explains that the regulation is designed to supersede DR 7-104(A)(1) of the Model Code, and equivalent rules of professional ethics that restrict lawyers in making direct contact with individuals who are represented by counsel. *Id.* § 77.12.

86. A federal prosecutor would generally be subject to federal disciplinary sanctions for violating standards of conduct that have been adopted by the district court either by local rule or in ad hoc rulings. Insofar as those standards are consistent with the standards of the state where the prosecutor is licensed, the prosecutor would also be subject to state disciplinary sanctions.

87. See, e.g., *United States v. Lee*, 46 F.3d 674, 679-80 (7th Cir. 1995) ("The Office of Professional Responsibility's only obligation is to determine whether individuals ought to remain in the Department of Justice. . . . So all of this criminal conduct that's been exposed that personnel engaged in will never be prosecuted or even fully investigated.").

88. See *United States v. Hasting*, 461 U.S. 499 (1983), in which the government, in opposing the reversal of a criminal conviction as a remedy for misconduct in the prosecutor's summation, relied in part on the availability of internal discipline. It advised the Court that in 1980, the OPR "investigated 28 complaints of unethical conduct and that one Assistant United States Attorney resigned in the face of an investigation." *Id.* at 506. However, to criminal defense lawyers and perhaps others, this statistic would hardly inspire confidence in the aggressiveness of the OPR's investigations.

89. *Beck v. Department of Justice*, 997 F.2d 1489, 1491 (D.C. Cir. 1993) (noting that OPR files were unavailable under the Freedom of Information Act).

90. Greg Rushford, *Watching the Watchdog*, LEGAL TIMES, Feb. 5, 1990, at 19-20.

91. The OPR eschewed even such modest possibilities as issuing opinions describing the

In response to criticisms of the Office of Professional Responsibility, the Department, under Attorney General Janet Reno, has adopted the policy of making the OPR's findings public in either of two circumstances: when misconduct has been found or when the lawyer under investigation, presumably after being exonerated, requests that the findings be released.<sup>92</sup> However, this change of policy can be expected to do little to improve the perception of the OPR's inadequacy. This is true, in part, because no public findings will be issued in the overwhelming majority of cases where prosecutors are exonerated, and in part because in the rare case where findings are released, the underlying facts developed in the investigation will still be kept secret.

The first public report issued by the OPR,<sup>93</sup> a report on the investigation of conduct alleged in *United States v. Isgro*,<sup>94</sup> illustrates the problem. The district court in *Isgro* dismissed an indictment based on two related findings of prosecutorial misconduct:<sup>95</sup> first, that the prosecutor had deliberately failed to produce exculpatory material, consisting of a transcript of the main government witness's sworn trial testimony denying that he had ever engaged in criminal conduct with the defendant;<sup>96</sup> and, second, that the prosecutor had made active misrepresentations about this material.<sup>97</sup> On appeal, although finding that it was improper to dismiss the indictment, the court of appeals agreed that the prosecutor's misconduct "rose to an intolerable level."<sup>98</sup> Not only did the court of appeals publicly chastise the prosecutor by name and indicate that the district court would be justified in pursuing other alternative remedies, it also directed the Attorney General to consider whether departmental discipline was appropriate.<sup>99</sup>

The Department's public report of its investigation in *Isgro* was hardly calculated to dispel skepticism of its internal disciplinary process. The report found that the prosecutor sincerely believed he was

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prosecutor's misconduct and the sanction imposed, without naming the attorney, or issuing opinions that simply described the ethical rule that was violated and how the OPR interpreted the rule while keeping the prosecutor's identity secret.

92. Jim McGee, *Justice Department Sets Changes on Discipline; Prosecutor's Conduct Had Led to Complaints*, WASH. POST, Dec. 14, 1993, at A1.

93. OFFICE OF PROF. RESP., PUBLIC REPORT ON INVESTIGATION OF MISCONDUCT ALLEGATIONS IN *United States v. Isgro* (1994) [hereinafter ISGRO REPORT].

94. 751 F. Supp. 846 (C.D. Cal. 1990), *rev'd*, 974 F.2d 1091 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993), *appeal after remand*, 43 F.3d 1480 (9th Cir. 1994).

95. *Isgro*, 751 F. Supp. at 851.

96. *Id.*

97. *Id.*

98. *Isgro*, 974 F.2d at 1099.

99. *Id.*

not obligated to produce the witness's exculpatory testimony because it was publicly available, and that the law was sufficiently unclear on this point to make his belief reasonable.<sup>100</sup> Further, the report credited the prosecutor's representation that he had not intentionally misled the district judge about the transcript.<sup>101</sup> Thus, the Department essentially cleared the prosecutor of the wrongdoing found by the federal courts. His only wrong, according to the report, was a lack of diligence in preparing the case for trial.<sup>102</sup> A more diligent prosecutor, the report found, would have thoroughly reviewed the main witness's trial testimony and recognized its significance.<sup>103</sup> The sanction for this lapse was a public reprimand that drew attention to the prosecutor's "outstanding career with the Department."<sup>104</sup>

From the Department's conclusory findings in the *Isgro* case, it cannot possibly be gauged whether the Department was correct and the federal courts in error about the nature and seriousness of the prosecutor's wrongdoing. Read against the background of the federal court opinions, however, the report might seem to be more of a whitewash than a serious exercise in internal discipline. Moreover, the absence of public reports chastising other prosecutors for similar lapses of diligence, which seem to recur within some prosecutors' offices,<sup>105</sup> adds to the appearance that the report in *Isgro* was intended principally to exonerate the prosecutor.<sup>106</sup> Not surprisingly, therefore, the OPR has retained its reputation as unduly protective and has continued to draw criticism.<sup>107</sup>

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100. ISGRO REPORT, *supra* note 93, at 2.

101. *Id.* at 3.

102. *Id.*

103. *Id.*

104. *Id.*

105. See, e.g., *United States v. Osorio*, 929 F.2d 753, 760-61 (1st Cir. 1991) (government's negligence in meeting disclosure obligations fits a "pattern of practice" for which it had been criticized in the past).

106. On the opposite side of the coin, government lawyers would undoubtedly perceive the *Isgro* prosecutor to have been scapegoated. The Department found that the prosecutor's only failing had been a lack of diligence—the failure to review an 800-page transcript of a witness's prior testimony that resulted in the failure to identify and disclose a single passage favorable to the accused. ISGRO REPORT, *supra* note 93, at 3. If one accepts this finding, a public admonition might seem exceedingly harsh, given that similar lapses routinely go unnoticed or unpunished, that the wrongdoing was not willful, and that a public sanction had never previously been issued by the Department for this or any other wrongdoing.

107. See, e.g., Harvey Berkman, *GAO: DOJ Ethics Probers Lax*, NAT'L L.J., Apr. 17, 1995, at A16, (citing GENERAL ACCOUNTING OFFICE, DEPARTMENT OF JUSTICE—OFFICE OF PROFESSIONAL RESPONSIBILITY'S CASE HANDLING PROCEDURES (GAO/OSI 95-8) (Mar. 31, 1995)).

#### D. STATE DISCIPLINARY AUTHORITIES

Finally, federal prosecutors who engage in misconduct may be sanctioned by state disciplinary authorities. As a general matter, the state appellate courts, which have authority over the lawyers who are admitted to practice in the state, have delegated to grievance or disciplinary committees the task of investigating, prosecuting and adjudging claims of attorney wrongdoing.<sup>108</sup> A disciplinary committee's determinations are then subject to judicial review.

Despite recent calls for increased accountability, most state disciplinary authorities continue to conduct their investigations and hearings in secret, with no public record made of the filing of a complaint and, in many instances, no public disclosure of the committee's ultimate determination.<sup>109</sup> Many disciplinary committees make liberal use of private sanctions when minor wrongdoing is found.<sup>110</sup> Only when the committee imposes either a public reprimand or a more serious sanction, such as suspension or disbarment, will the public learn of its proceedings. As a consequence, it is impossible to know how often federal prosecutors have come under investigation by state disciplinary committees or even how often federal prosecutors have been sanctioned for misconduct.<sup>111</sup>

The secrecy of disciplinary investigations and proceedings has been both defended and challenged on various grounds. Whatever else may be said, it is clear that the secrecy of disciplinary proceedings makes the disciplinary process almost entirely ineffective in defining and deterring prosecutorial misconduct. In cases where it is unclear how the ethical rules apply to the prosecutor's alleged behavior, a disciplinary body will have to make its own interpretation of the ethical rules. If it determines that the alleged conduct is proper, no charges will be brought. No one will ever know, however, how the disciplinary body interpreted the relevant ethical rules or what justified its inter-

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108. WOLFRAM, *supra* note 4, at 82-84 & n.33; see also ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1983) (setting forth model procedures for lawyer discipline).

109. See WOLFRAM, *supra* note 4, at 107.

110. For a discussion of the imposition of private sanctions in New York, see Hal R. Lieberman, *Informal Discipline: Tool to Upgrade Ethics Part I: Admonitions*, N.Y. L.J., Mar. 22, 1991, at 1.

111. The few well publicized cases involving state disciplinary efforts directed at federal prosecutors in recent years have involved prosecutorial communications with represented parties. *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995); *In re John Doe*, 801 F. Supp. 478 (D.N.M. 1992); *Kolibash v. Committee on Legal Ethics*, 872 F.2d 571 (4th Cir. 1989).

pretation. If it is determined that the prosecutor's alleged conduct would be improper under the relevant rules, a hearing may be held with regard to the allegations. Even assuming, however, that those conducting the hearing reach a similar conclusion about the scope of the ethical rules and determine as a factual matter that the prosecutor behaved as alleged, the bar and the public are unlikely ever to learn of that. In most instances where the reach of the ethical rules is unclear, the appropriate sanction, if any, will be a private one. The private sanction will have the effect of depriving future prosecutors of guidance as to what the disciplinary committee believes to be improper conduct. It will also ensure that the disciplinary process provides little deterrence of subtle forms of prosecutorial misconduct.<sup>112</sup>

Without a doubt, the dearth of reported disciplinary proceedings brought by state authorities against federal prosecutors reflects that not only are they rarely reported, but such proceedings are also rarely initiated. There are at least four reasons why this should be so.

First, state authorities never learn of most cases in which federal prosecutorial misconduct is thought to have occurred. For the most part, state authorities initiate investigations based on complaints from disgruntled clients, rather than from opposing counsel or judges. Prosecutors do not have a corporeal client to report their alleged wrongdoing. Neither defense lawyers nor federal judges are diligent about reporting such allegations; reports from fellow prosecutors are undoubtedly rarer still. Pro-active disciplinary counsel may initiate investigations based on criticisms leveled at federal prosecutors in judicial opinions, but such opinions are written in only a fraction of the cases in which a district judge, opposing lawyer, or fellow prosecutor suspects that prosecutorial misconduct has occurred.

Second, state disciplinary authorities generally seek to reserve resources for cases of the most egregious wrongdoing. These are usually cases where lawyers harm individual clients, mishandle client funds or commit crimes.<sup>113</sup> Few cases of prosecutorial misconduct fit these

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112. An exceptional case was *Kelly*, 550 F. Supp. at 901, in which the federal district court published a report of the state disciplinary board that found that the Assistant United States Attorney had not deliberately violated the disciplinary rules. The court's decision to publish the report came at the request of the United States Attorney's Office. *Id.* at 902. That request might not have been made if the district judge had not previously published an opinion referring the federal prosecutor's conduct to the state disciplinary board. *Id.* Although the United States Attorney asked that the report be published to give guidance to future prosecutors, it is not unlikely that he also sought to establish a public record of the Assistant's vindication.

113. See COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 34 (1991).

categories.<sup>114</sup> The types of misconduct state or federal prosecutors are typically accused of committing would not ordinarily give rise to disciplinary action when committed by civil lawyers.<sup>115</sup> For example, discovery violations by civil litigators are typically redressed by courts through the imposition of judicial sanctions, not personal discipline.<sup>116</sup> Although the need for public confidence in the integrity of criminal prosecutions may argue for more aggressive enforcement against prosecutors, state authorities may be reluctant to adopt what would appear to be a double standard. Indeed, aggressive enforcement of prosecutorial standards might appear especially unfair given a historic perception that criminal defense lawyers are among the least ethical practitioners. Thus, even when state authorities learn of accusations of prosecutorial wrongdoing, they are likely to decline to investigate as a matter of discretion.

Third, many state disciplinary bodies may have an ongoing relationship with federal and state prosecutors' offices. Disciplinary bodies may both refer cases for criminal prosecution and obtain evidence from prosecutors' offices for use in disciplinary proceedings. Disciplinary counsel would think twice about jeopardizing this relationship by proceeding aggressively against individual prosecutors.

Finally, state disciplinary authorities may be reluctant to proceed against federal prosecutors in particular for at least two reasons. First, they recognize that the Department of Justice is likely to bring its extraordinary resources to bear in defense of the prosecutor. Thus, a disciplinary proceeding will be unusually costly and time-consuming. Second, the state agency's authority to discipline a federal prosecutor may raise a difficult constitutional question under the Supremacy Clause.<sup>117</sup> It is generally, although not universally, accepted that state disciplinary agencies may sanction state prosecutors for professional

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114. *Id.*

115. *See id.* at 11.

116. *Id.* at 36.

117. Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and State Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 354-57, 369-84 (1992). Likewise, federal courts' authority to discipline federal prosecutors may raise questions about separation of powers and about the scope of the federal courts' supervisory powers. *Id.* at 384-86. *See also* William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 490-91, 503 (1979).

misconduct.<sup>118</sup> It is far less certain, however, that they may sanction federal prosecutors.<sup>119</sup>

For all these reasons, except in the most extraordinary circumstances, state disciplinary agencies would be reluctant to seek sanctions against federal prosecutors for conduct occurring in the context of criminal proceedings. State disciplinary proceedings might be brought if a case were referred by the Department of Justice itself, or if a formal finding of serious wrongdoing was already entered in a federal court proceeding. Proceedings might also be brought in response to a referral by a federal court. Otherwise, for understandable institutional reasons wholly apart from the sympathies or inexperience of those who oversee them, state disciplinary bodies can be expected to turn their attention elsewhere.

#### IV. THE INTERACTION OF DISCIPLINARY AUTHORITIES

##### A. THE IMPACT OF DIFFUSE REGULATORY RESPONSIBILITY

There is a further explanation for the inadequacy of the formal processes by which standards of prosecutorial conduct are enforced. The lack of enforcement may be traced in part to the diffusion of regulatory authority. Standards of prosecutorial conduct are underenforced precisely because each of the various disciplinary authorities can justify relying on others to carry the load.<sup>120</sup>

State disciplinary committees take the view that the district court is most familiar with the relevant circumstances surrounding the

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118. *Price v. State Bar of California*, 638 P.2d 1311, 1313 (Cal. 1982); *Massameno v. Statewide Grievance Comm.*, No. CV-92-070-35-64, 1993 Conn. Super. LEXIS 3481, at \*8 (Conn. Super. Ct. Dec. 16, 1993); *Florida Bar v. Schaul*, 618 So. 2d 202, 203 (Fla. 1993); *In re Friedman*, 392 N.E.2d 1333, 1344-45 (Ill. 1979); *In re Westfall*, 808 S.W.2d 829, 838 (Mo.), *cert. denied*, 502 U.S. 1009 (1991); *In re Holtzman*, 577 N.E.2d 30, 31 (N.Y.), *cert. denied*, 502 U.S. 1009 (1991); *In re Weishoff*, 382 A.2d 632, 633 (N.J. 1978); *In re Conduct of Burrows*, 629 P.2d 820, 823-25 (Or. 1981); *Reed v. Virginia State Bar*, 357 S.E.2d 544, 547 (Va. 1987); *In re Mauch*, 319 N.W.2d 877, 878 (Wis. 1982). *But see Simpson v. Alabama State Bar*, 311 So. 2d 307, 310 (Ala. 1975) (holding that the Alabama Bar Association lacked jurisdiction to discipline or disbar a district attorney under the state's Rules Governing the Conduct of Attorneys).

119. In *John Doe*, 801 F. Supp. at 480-81, the court held that federal prosecutors may be sanctioned by state disciplinary boards. However, the Department of Justice can be expected to continue to question the authority of state disciplinary bodies.

120. In theory, the availability of diverse enforcement mechanisms should promote compliance with ethical norms, but this presupposes that enforcement authorities coordinate their efforts. *See generally* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992). In the absence of coordination, diverse enforcement mechanisms may prove not only unproductive, but counterproductive. Supervision of federal prosecutors is a case in point.



prosecutor's conduct and is therefore in the best position to determine whether the prosecutor acted improperly. These committees may read the district court's silence as a determination that the prosecutor's conduct was acceptable and, understandably, hesitate to take a contrary view. Even when the court's silence is not read as an endorsement of the prosecutor's conduct, a state disciplinary body would have good reason to turn its attention elsewhere. Given how overworked state disciplinary committees tend to be and the amount of serious attorney misconduct they must address, they might reasonably regard it as an inappropriate allocation of resources to investigate and prosecute prosecutorial conduct that was considered unremarkable by the court before which the prosecutor appeared.<sup>121</sup>

Similarly, except in an unusual case such as *Isgro*, where a federal court specifically finds prosecutorial misconduct and refers the case for internal discipline,<sup>122</sup> the Office of Professional Responsibility may never learn of a prosecutor's questionable conduct and, even when it does, may have little incentive to pursue an investigation seriously. Like a state disciplinary committee, the OPR may consider the district court to be best situated to evaluate the prosecutor's behavior and may view the district court's silence as an expression of unconcern. Moreover, the OPR must be sensitive to the concern that zealously investigating prosecutors whose conduct seems to pass muster with the district court would undermine the morale of Assistant United States Attorneys, many of whom already consider themselves to be under siege by defense lawyers, the organized bar, and, occasionally, federal judges. Thus, the report issued in the *Isgro* case suggests that the OPR considers its function of vindicating wrongfully accused prosecutors as more important than investigating prosecutors who have escaped judicial criticism.

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121. Consider Cramton & Udell, *supra* note 117, at 304-05 (asserting that "Disciplinary authorities are accustomed to leaving most issues of lawyer conduct to other remedial settings. Where a malpractice action or a sanction during the course of judicial proceedings is available, a disciplinary committee is unlikely to take action.").

That disciplinary committees are reluctant to inquire into the propriety of conduct of which a trial court was aware, in the absence of a referral by that court, is suggested by the infrequency with which prosecutors are publicly disciplined, even when the impropriety of their conduct is commented on by the trial court. It is also suggested by the infrequency with which civil litigators and criminal defense lawyers are publicly sanctioned. There is, for example, a substantial body of reported decisions—and, no doubt, an even more substantial body of unreported decisions—that find that the attorney for an individual litigant had a conflict of interest. Yet, there are few publicly reported cases in which lawyers have been sanctioned by a disciplinary body for having a conflict of interest at trial.

122. *Isgro*, 974 F.2d at 1099; see *supra* text accompanying note 99.

Federal district courts, on the other hand, regard prosecutorial misconduct as a problem to be addressed primarily by state disciplinary committees, if not by self-policing.<sup>123</sup> The courts apparently assume that state disciplinary authorities have jurisdiction to discipline federal prosecutors—an assumption that the Department of Justice does not necessarily share. One irony of the federal courts' deference to state disciplinary authorities is that, in the event that a state authority does proceed against a federal prosecutor, the prosecutor may be entitled to remove the case to federal court.<sup>124</sup> Thus, reliance on state authorities, while substantially reducing the likelihood that a disciplinary proceeding will be initiated against a federal prosecutor, does not eliminate the federal court's involvement on the rare occasion that a proceeding is initiated.

#### B. THE NEED FOR COMMUNICATION AND COOPERATION

What is needed to ensure that fewer cases of misconduct by federal prosecutors fall through the cracks? To begin with, district courts, state disciplinary authorities and the Office of Professional Conduct should communicate openly about the question of regulating federal prosecutors. They should work to achieve some protocol concerning the enforcement of standards of prosecutorial conduct in federal cases, so that each knows what to expect of the other and serious allegations of prosecutorial wrongdoing are pursued by at least one appropriate authority.

Further, an agreement should be reached on which standards of prosecutorial conduct are more appropriately enforced by one disciplinary body rather than another. For example, the Justice Department's Office of Professional Responsibility might take principal, if not exclusive, responsibility for enforcing the Department's internal guidelines on the theory that, as rule-maker, the Department is best equipped both to interpret these guidelines and to assess appropriate sanctions for non-compliance.<sup>125</sup> For essentially the same reasons, the federal courts might take principal responsibility for enforcing both their ad hoc judicial standards and specific local rules that augment the professional codes. State disciplinary agencies might reasonably conclude that their

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123. *United States v. Bernal-Obeso*, 989 F.2d 331, 333 & n.2 (9th Cir. 1993) (noting the authority of the United States Department of Justice Office of Professional Responsibility to take appropriate action should a prosecutor fail to discharge the government's obligation to disclose exculpatory evidence).

124. *Kolibash*, 872 F.2d at 572.

125. See *supra* notes 37-50, 72-73 and accompanying text.

principal role is to enforce the state's professional code, to the extent that it applies to prosecutors in federal proceedings, and not these other bodies of law.

Insofar as different disciplinary bodies share responsibility to enforce particular standards of prosecutorial conduct, some understanding should be reached about the role each will play. For example, district courts should assume the initial role in the regulation of federal prosecutors; it is unlikely that any body will look seriously at the prosecutor's conduct unless the district court asks it to do so. Thus, in cases where genuine concerns are raised, a district court should either initiate an inquiry itself or refer the case to another appropriate body.

At the same time, other disciplinary bodies should understand that district judges look to them to carry the laboring oar in enforcing many of the professional standards for federal prosecutors. These disciplinary bodies should either accept that responsibility or give notice that they are unwilling to do so. Thus, when a district court makes a referral to a state disciplinary committee or to the Office of Professional Responsibility, the relevant disciplinary agency should undertake a serious investigation, as the district court contemplates it will, or let the district court know that it is unwilling to do so for discretionary reasons unrelated to the merits of the case. The district court can then decide whether to undertake its own investigation.

## V. CONCLUSION

There are certainly enough authorities—federal and state, external and internal—overseeing federal prosecutors. Yet, commentators have uniformly lamented the lack of effective discipline of prosecutors who violate standards of professional conduct. The infrequency with which federal prosecutors are sanctioned personally for unethical conduct may be attributed in part to inadequacies in each of the available disciplinary mechanisms. Unless a defendant's rights are at issue, a district court will be reluctant to interrupt a pending criminal proceeding and to expend limited resources to adjudicate the propriety of a prosecutor's conduct, particularly given the awareness that the available sanctions are likely to appear either unduly lenient, as in the case of public criticism, or too harsh, as in the case of a contempt sanction. Nor would the court be likely to refer alleged misconduct to the district court's grievance or disciplinary committee, since district court disciplinary proceedings, where available, are typically reserved for exceptional cases. State disciplinary authorities learn about proportionally few cases in which federal prosecutors are accused of wrongdoing and, given

their limited resources, they are reluctant to exercise discretion to pursue seriously those few cases. And, while the Justice Department's Office of Professional Responsibility does have adequate resources to investigate such allegations, it has an apparent history of inadequate enforcement.

An additional explanation for the failure of professional discipline is the diffusion of responsibility among the various authorities who oversee federal prosecutors. This is a problem that can and should be addressed by all players in the disciplinary process: federal judges, state disciplinary bodies, and the Department of Justice. Collectively, these authorities should strive to craft a disciplinary process that is, in the aggregate, more effective than each of the component parts.

