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Fred C. Zacharias

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THE PROFESSIONAL DISCIPLINE OF PROSECUTORS

FRED C. ZACHARIAS*

Numerous commentators have noted a lack of cases in which disciplinary authorities have sanctioned prosecutors. Some argue that the limited professional discipline of prosecutors, by definition, has been inadequate. This Article analyzes that claim dispassionately, by providing an empirical and theoretical look at the reality of prosecutor discipline.

The Article first identifies the range of actions for which, realistically, discipline might be imposed. It then considers whether prosecutors are less likely than private lawyers to face disciplinary action and, if so, the possible reasons for the discrepancy. With this background, the Article attempts to identify if, when, and why more discipline of prosecutors would benefit society.

The final portion of the Article assumes the validity of existing resource constraints. It suggests lines disciplinary authorities might draw for when disciplinary action against prosecutors should be instituted. The Article offers alternatives to discipline that might represent more effective mechanisms for addressing the concerns of those who lament the lack of bar action.

INTRODUCTION	722
I. THE INAPPLICABILITY OF MANY PROFESSIONAL RULES TO PROSECUTORS	725
II. THE LIMITED DISCIPLINE OF PROSECUTORS	743
A. <i>The Actual Discipline of Prosecutors</i>	744
B. <i>The Discipline of Prosecutors Relative to Private Attorneys</i>	750

* Professor of Law, University of San Diego School of Law. The author appreciates the contributions of Laura Berend, Michael English, Bruce Green, Rory Little and Shaun Martin and the yeoman service of research assistants Victoria Shank, Jessica Farino, Heidi Firouzi, and Galit Kalma. The author also thanks the University of San Diego School of Law for its generous financial and research support.

C.	<i>Explanations for the Discrepancy in Discipline</i>	755
1.	Practical, Legal, and Theoretical Explanations	756
2.	The Availability of Alternative Remedies	762
III.	SHOULD PROSECUTORS BE DISCIPLINED MORE OFTEN?.....	765
A.	<i>When Is Discipline Most Useful?</i>	765
B.	<i>The Costs of Failing to Enforce the Codes</i>	771
IV.	RECOMMENDATIONS.....	773
CONCLUSION	777

INTRODUCTION

In a frequently cited passage,¹ the United States Supreme Court has justified immunizing prosecutors from civil lawsuits based, in part, on the availability of professional discipline as an alternative remedy for prosecutorial misconduct:

[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.²

Numerous commentators have reacted by noting the dearth of cases in which disciplinary authorities have sanctioned prosecutors.³

1. For examples of the many federal cases citing *Imbler's* famous passage, see *Town of Newton v. Rumery*, 480 U.S. 386, 413–14 (1987) (Stevens, J., dissenting); *Malley v. Briggs*, 475 U.S. 335, 343 n.5 (1986); *Schrob v. Catterson*, 948 F.2d 1402, 1410 (3d Cir. 1991); *Ehrlich v. Giuliani*, 910 F.2d 1220, 1222 (4th Cir. 1990); *Schloss v. Bouse*, 876 F.2d 287, 292 (2d Cir. 1989); *In re Doe*, 801 F. Supp. 478, 487–88 (D.N.M. 1992). State courts too often have referred to discipline as a significant alternative means for controlling prosecutorial misconduct. See, e.g., Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 40 n.5 (1987) (citing authorities).

2. *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (citing as support MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1969)).

3. See, e.g., Genson & Martin, *supra* note 1, at 47 (noting that “[d]isciplinary sanctions are rarely imposed against prosecutors” and proposing responses to that fact); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697–98 (1987) (advocating new remedies for prosecutorial misconduct because of the limited number of cases in which prosecutors have been disciplined for withholding exculpatory information); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 898 (1997) (arguing that “the disciplinary process has been almost totally ineffective in sanctioning even egregious *Brady* violations”); Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3464–77 (1999) (recounting examples of the limited discipline of prosecutors); cf. Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 69–70 & nn.6–8 (1995) [hereinafter Green, *Policing Federal Prosecutors*] (discussing the “perceived failure of disciplinary authorities” cited in the literature); Brian P. Barrow, Note, *Buckley v. Fitzsimmons: Tradition Pays a Price for the Reduction of Prosecutorial Misconduct*, 16

Most of their observations are tinged with an element of hand-wringing. They bemoan the absence of discipline and suggest that discipliners should correct a failure to do their jobs.⁴

This Article approaches the issue of discipline of prosecutors from an impartial perspective. It starts from two baseline propositions. First, there probably is a reason—maybe even a good reason—for the rarity of discipline. Second, however, in light of the frequent references to prosecutorial misconduct in the case law,⁵ the lack of ensuing discipline is surprising. This Article attempts to assess these propositions realistically.

Rather than presupposing institutional deficiencies on the part of disciplinary authorities, Part I of the Article starts by analyzing the range of actions for which discipline might be imposed. It concentrates on full-time prosecutors, rather than on prosecutors who must juggle the demands of a part-time civil practice⁶ and who may

WHITTIER L. REV. 301, 328 (1995) (arguing that professional discipline “has not been applied to prosecutors with the force necessary to prevent egregious instances of misconduct”).

4. See, e.g., BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 1.8(d), at 1-40, § 13.6, at 13-16 to 13-18 (1985) (arguing that discipline “is so rare as to make its use virtually a nullity”); JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 11:3, at 390 (2d ed. 1996) (noting the illusory nature of effective discipline); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) (“[W]hile the prosecutor is theoretically subject to disciplinary codes [for misconduct], there is a notable absence of disciplinary sanctions against prosecutors, even in the most egregious cases.”); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 966-67 (1984) (arguing the existence of an increasing number of cases involving flagrant prosecutorial misconduct); Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1086 (1994) (“[P]rosecutors are boldly crossing ethical boundaries, unchecked because there are few remedial solutions available which effectively counter the misconduct.”).

5. For an excellent resource cataloguing cases involving alleged prosecutorial misconduct, see GERSHMAN, *supra* note 4, *passim*.

6. Many of the cases in which prosecutors actually have been disciplined involve part-time prosecutors. Part-time practice was common in the days before full-time prosecution offices developed in most jurisdictions. Thus, many of the relevant cases are of the older variety.

Beyond the conflict-of-interest cases described *infra* note 7, the most common misconduct of part-time prosecutors was using the threat of prosecution to gain an advantage for a civilian client. See, e.g., *People ex rel. Gallagher v. Hertz*, 608 P.2d 335, 339 (Colo. 1979) (en banc) (special prosecutor-securities receiver suspended for six months); *People v. Attorneys Respondent*, 427 P.2d 330, 331 (Colo. 1967) (prosecutor-lawyer reprimanded); *People ex rel. Colo. Bar Ass'n v. Attorney at Law*, 9 P.2d 611, 612 (Colo. 1932) (prosecutor-lawyer reprimanded); *In re LaPinska*, 381 N.E.2d 700, 705 (Ill. 1978) (city attorney-lawyer suspended for one year); *In re Lantz*, 420 N.E.2d 1236, 1237 (Ind. 1981) (per curiam) (prosecutor-lawyer reprimanded); *In re Joyce*, 234 N.W. 9, 10

find the interests of private clients conflicting with the interests of the state.⁷ Using the Model Rules of Professional Conduct⁸ as a guide, Part I identifies professional code sections that apply to prosecutors and that one might reasonably expect some prosecutors to violate. It also attempts to separate direct code violations—those that would best support discipline—from more generalized conduct that some commentators may view to be “misconduct” but that may not constitute a violation of the rules. In this way, Part I attempts to

(Minn. 1930) (county attorney-lawyer suspended for six months); *In re Bunston*, 155 P. 1109, 1111 (Mont. 1916) (county attorney-lawyer disbarred); *In re Waggoner*, 206 N.W. 427, 432 (S.D. 1925) (state’s attorney-lawyer suspended for three months).

7. See generally Richard H. Underwood, *Part-time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1 (1993) (surveying conflicts and proposing new guidelines for prosecutors). Numerous cases exist in which part-time prosecutors have been disciplined for:

(1) representing conflicting interests as a prosecutor and defense attorney in the same or similar proceeding, see, e.g., *In re Patterson*, 176 F.2d 966, 968 (9th Cir. 1949) (Assistant United States Attorney reprimanded); *State ex rel. Neb. State Bar Ass’n v Hollstein*, 274 N.W.2d 508, 518 (Neb. 1979) (city attorney censured); *In re Becker*, 203 N.Y.S. 437, 442 (App. Div. 1924) (Deputy Attorney General suspended for three months); *In re Voss*, 90 N.W. 15, 22 (N.D. 1902) (state’s attorney suspended for nine months); *Maginnis’ Case*, 112 A. 555, 559 (Pa. 1921) (assistant district attorney suspended indefinitely); *In re Wakefield*, 177 A. 319, 324 (Vt. 1935) (state’s attorney suspended for three months);

(2) participating in criminal and civil actions arising from the same facts, see, e.g., *Ky. Bar Ass’n v. Lovelace*, 778 S.W.2d 651, 654 (Ky. 1989) (commonwealth attorney suspended for forty-five days); *In re Truder*, 17 P.2d 951, 952 (N.M. 1932) (district attorney reprimanded); Application of *In re Seneca County Bar Ass’n In re Koch*, 93 N.Y.S.2d 141, 142 (App. Div. 1949) (district attorney held not subject to censure because he made full disclosure to the grand jury before an indictment was handed down); *In re Williams*, 50 P.2d 729, 732 (Okla. 1935) (county attorneys reprimanded); *In re Jolly*, 239 S.E.2d 490, 491 (S.C. 1977) (per curiam) (circuit solicitor publicly reprimanded); *In re Wilmarth*, 172 N.W. 921, 926 (S.D. 1919) (state’s attorney censured); *In re Schull*, 127 N.W. 541, 542–43, modified on rehearing on other grounds, 128 N.W. 321, 322 (S.D. 1910) (district attorney suspended for four-and-one-half months); cf. *People ex rel. Hutchison v. Hickman*, 128 N.E. 484, 488 (Ill. 1920) (state’s attorney not disciplined); *In re Johnson*, 131 N.W. 453, 457 (S.D. 1911) (state’s attorney not disciplined because of insufficient evidence of improper motive); and

(3) violating statutes specifically prohibiting the concurrent private practice of law, see, e.g., *In re Snyder*, 559 P.2d 1273, 1275 (Or. 1976) (district attorney placed on one-year probation).

8. MODEL RULES OF PROF’L CONDUCT (1999). As of 1999, forty states have adopted some form of the Model Rules. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS xxiv-xxv (2000) (summarizing state adoptions of the American Bar Association’s (ABA) two model codes). The Model Rules are particularly useful for analyzing prosecutorial misconduct because they, unlike the predecessor MODEL CODE OF PROF’L RESPONSIBILITY (1969), contain a rule that directly addresses some specific prosecutorial conduct. See MODEL RULES OF PROF’L CONDUCT R. 3.8 (1999).

identify and focus upon sanctionable violations that prosecutors in the real world are likely to commit on a regular basis.

Part II then compares disciplinary cases involving prosecutorial conduct to cases involving similar conduct of private attorneys. It considers whether prosecutors are less likely than private lawyers to face disciplinary action and, if so, the possible reasons for the disparate treatment. In part, this analysis is empirical. Part II.A looks at the range of actual reported cases in which disciplinary proceedings have been brought against prosecutors. Part II.B compares prosecutor discipline with the discipline of private lawyers. Part II.C evaluates the possible justifications for the limited discipline of prosecutors, including substantive reasons why prosecutors should not be disciplined for particular code violations, practical impediments to discipline, and the availability of alternative remedies for prosecutorial misconduct.

With this background, Part III attempts to identify whether, when, and why more discipline of prosecutors would benefit society. It analyzes when deterrence of prosecutorial misconduct through professional discipline is particularly important and when alternative remedies are inadequate to provide deterrence. Part III also considers the societal costs of failing to enforce the codes fully.

Finally, Part IV makes recommendations. It assumes the validity of existing resource constraints and suggests lines that disciplinary authorities might draw. Part IV offers alternatives to discipline that might more effectively address the concerns of those who lament the lack of bar action.

I. THE INAPPLICABILITY OF MANY PROFESSIONAL RULES TO PROSECUTORS

Allegations of prosecutorial misconduct abound in the cases and academic literature. Not surprisingly, commentators have concluded that professional discipline should serve as a frequently administered check on prosecutorial wrongdoing.⁹ Many of the rules of professional conduct, however, are blunt instruments—altogether inapplicable, or barely applicable, to full-time prosecutors.¹⁰ This, combined with the special characteristics of prosecutors and the activities they engage in, helps explain the rarity of discipline.

9. *See supra* notes 3–4.

10. Bruce Green and I note this phenomenon in Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 225–35 (2000).

Many professional rules do not pertain equally to prosecutors because of the nature of prosecutors' clientele, prosecutors' salaried status, or specific government rules that control prosecutors' conduct.¹¹ For example, one feature distinguishing prosecutors from private lawyers is their lack of dominant individual clients or multiple clients of any type. Prosecutors represent only "the state" or "the people."¹² Prosecutors have significant, often controlling, discretion to determine which constituency of the state should be considered dominant in any particular case.¹³ As a result, rules governing conflicts among clients¹⁴ and rules designed to protect the autonomy and decision-making authority¹⁵ of clients rarely apply to them.

Moreover, because prosecutors work on a salaried basis and do not tailor financial arrangements with clients on a case-by-case basis, client-protective rules governing fees and retainer agreements never come into play.¹⁶ Rules governing other business aspects of private

11. Specific statutes or administrative rules often limit the extent to which prosecutors (and other government attorneys) may engage in pro bono legal activities or private representation. See, e.g., 18 U.S.C.A. § 205 (West 2000) (regulating participation in matters affecting the government); Exec. Order No. 12988, 61 Fed. Reg. 4729 (Feb. 5, 1996), reprinted in 28 U.S.C.A. § 519 (West 2000) (mandating that "all federal agencies" develop programs governing pro bono activity).

12. Government attorneys sometimes do have to address the question of who the client is when an agency or its representatives are involved in the litigation. See *infra* note 28. Criminal prosecutors, however, face this conflict less frequently than other government attorneys because, in the ordinary criminal case, the prosecutors are the sole representatives of the state's interests.

13. As the representative of "the state" in criminal cases, the prosecutor, in theory, must consider the interests of the victims of crimes; society's interests in retribution, punishment, deterrence, and rehabilitation of criminals; and the preservation of crime-fighting, prosecutorial, and correctional resources, as well as the defendants' rights and interests in a fair trial. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 57 (1991) [hereinafter Zacharias, *Can Prosecutors Do Justice?*] (discussing prosecutors' various constituencies); see also Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 930-34 (1996) [hereinafter Flowers, *Updating the Ethics Codes*] (discussing the role of the prosecutor as "an advocate without a singular client" and "without a singular purpose"); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 626 n.84 (1999) [hereinafter Green, *Seek Justice*] (arguing that a prosecutor's singular client is the state, rather than the victims, police, or any other constituency).

14. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7-1.10 (1999). For prosecutors who previously engaged in private practice, the rules protecting against conflicts involving former clients may come into play. See *supra* note 3 and accompanying text.

15. See generally Fred C. Zacharias, *Limits on Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 198 (2001) (discussing a range of code provisions that protect or remove from clients the power to make decisions).

16. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5 (1999) (governing fees); *id.* R. 1.8(a), (c)-(e), (j) (governing specific types of fee arrangements).

practice, including advertising, solicitation,¹⁷ and other law firm practices,¹⁸ also have little meaning for prosecutors. Table I lists some of the important provisions in the Model Rules that, for practical purposes, simply lack relevance to the work life of prosecutors.

17. See, e.g., *id.* R. 7.1–7.3 (regulating solicitations and advertising).

18. See, e.g., *id.* R. 5.3–5.4, 5.7 (regarding associations with nonlawyers).

TABLE I	
Client and Practice-Oriented Rules	
Not Equally Applicable to Prosecutors	
1.2	Limiting objectives, advising law violations
1.4	Communicating with clients
1.5	Fees
1.7	Conflicts among clients
1.8	Specific conflicts ¹⁹
1.9	Successive conflicts among clients ²⁰
1.14	Clients with a disability
1.15	Safekeeping property
1.17	Selling a law practice
2.2	Acting as an intermediary among clients
2.3	Evaluating matters for third persons
3.7	Serving as a witness ²¹
3.9	Appearing in nonadjudicative proceeding
5.3	Controlling nonlawyers ²²
5.4	Fee sharing and joint enterprises
5.5	Engaging in unauthorized practice of law
5.6	Accepting restrictions on the right to practice
5.7	Providing law related services
6.1	Pro bono service
6.2	Seeking/accepting appointments
7.1-5	Advertising and solicitation

19. Some of the provisions in Model Rule 1.8 might apply, such as Rule 1.8(i)'s prohibition on litigating against a relative and Rule 1.8(j)'s prohibition against acquisition of a proprietary interest in the subject of a case. However, Rule 1.8 envisions mainly financial and other conflicts of interest that arise with respect to lawyers who have financial incentives to engage in particular types of private representation.

20. Although Model Rule 1.9 does apply to prosecutors, the separate guidelines in Model Rule 1.11 address successive conflicts of prosecutors more specifically.

21. Prosecutors occasionally must testify about alleged pretrial misconduct in the present or previous cases. In these instances, Model Rule 3.7 may be applicable. Courts are loath, however, to order prosecutors to testify because defense attorneys may subpoena prosecutors for tactical reasons, to gain access to otherwise unavailable discovery.

22. Like private attorneys, prosecutors are responsible for supervising the behavior of paralegals, externs, and secretaries who work for them. However, the requirements of Model Rule 5.3 do not make prosecutors responsible for the conduct of police officers or other investigative agents. Those officials typically act under independent authority and are not fully subject to prosecutorial control.

In addition to those professional rules that are inapplicable to prosecutors, there are rules which might apply but which, in practice, prosecutors are unlikely to violate. For example, prosecutors have constitutional²³ and statutory²⁴ incentives not to delay trials, and so are less likely than private attorneys to violate rules requiring lawyers to expedite litigation.²⁵ Prosecutors who must appear repeatedly before the same judges are less likely than private lawyers to engage in conduct disruptive to a tribunal²⁶ (though prosecutors occasionally also transgress²⁷). Because prosecutors typically control decisions made by the government in a particular case, many provisions regulating lawyers for organizational clients are less likely to be implicated.²⁸ Table II lists some of those provisions for which prosecutors could be, but are unlikely to be, disciplined for violating.

23. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”); see also *Barker v. Wingo*, 407 U.S. 514, 530–31 (1972) (adopting a balancing test for determining when the right to a speedy trial has been violated, including the factor of whether the government deliberately attempted to delay trial).

24. See, e.g., Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3162, 3164 (1994) (setting firm time limits for bringing defendants to trial in federal cases). Similarly, all states have some constitutional or statutory provisions guaranteeing speedy trials to criminal defendants. See YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 1114 (9th ed. 1999).

25. See MODEL RULES OF PROF’L CONDUCT R. 3.2 (1999) (requiring lawyers to “make reasonable efforts to expedite litigation”). To put the point more accurately, prosecutors’ tactical incentives to delay trial typically are counterbalanced by the serious risk of dismissal if the prosecutors implement the tactical incentives.

Bennett Gershman has collected some cases in which prosecutors have sought to delay trial for tactical reasons. See GERSHMAN, *supra* note 4, § 8.2(b)(2), at 8–7. The limited number of such cases is explicable on the basis that all of the cases Gershman cites involve allegations of constitutional violations of due process and the right to a speedy trial. Delay will always be obvious to defense counsel. Prosecutors thus have special reason to avoid it.

26. See MODEL RULES OF PROF’L CONDUCT R. 3.5(c) (1999) (forbidding lawyers to “engage in conduct intended to disrupt a tribunal”).

27. See *infra* note 36.

28. Thus, for example, while Model Rule 1.13 requires lawyers for organizations, including government attorneys, to “go up the ladder” with respect to certain organizational decisions with which they disagree, individual criminal prosecutors typically get to make most decisions regarding their prosecutions on their own. Fewer situations calling for a climb “up the ladder” present themselves. *But cf.* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 952 (1991) (discussing obligations of a government lawyer when an agency official’s wishes contradict the lawyer’s judgment); Jack B. Weinstein & Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 *TOURO L. REV.* 1, 2–3 (1985) (discussing obligations of government lawyers when commitment to “the law” conflicts with the interests of the government client); James R. Harvey, III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 *WM. & MARY L. REV.* 1569,

TABLE II
Provisions Prosecutors are Unlikely to Violate

1.6	Confidentiality ²⁹
1.7(b)	Conflicts with own interests or professional judgment ³⁰
1.13	Lawyer for organizational client ³¹
3.2	Expediting litigation
3.5(a)	Seeking to influence judge improperly ³²
3.5(c)	Engaging in conduct disruptive to tribunal
6.3, 6.4	Membership in legal services organizations ³³
8.1	Falsifying information regarding bar applications ³⁴

1569 (1996) (considering what lawyers for the United States Department of Justice should "do when an agency asks it to litigate a matter that the Department does not consider to be in the best interests of the government"). However, at least one commentator has observed that the ability of prosecutors to engage in unconstrained decision-making has diminished over time and has urged an express duty to "seek ethical supervision." Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 *FORDHAM L. REV.* 723, 763-67 (1999).

29. Prosecutors have a duty of confidentiality. But, because they have a single client (i.e., the state) and no need to garner business, prosecutors have fewer incentives than private lawyers to violate confidentiality rules. In a few cases involving acceptance of bribes, prosecutors have been disciplined for breaching their duty of confidentiality. *See, e.g., In re Cowdery*, 10 P. 47, 65-66 (Cal. 1886) (outgoing county attorney who accepted a bribe for not passing information to his successor violated confidentiality in discussions with the briber); *In re Robinson*, 420 N.Y.S.2d 430, 432 (App. Div. 1979) (finding that Assistant United States Attorney who divulged information to suspected organized crime members breached his duty of confidentiality); *In re McNerthney*, 621 P.2d 731, 733 (Wash. 1980) (prosecutor admonished for revealing the existence of search warrant). Other confidentiality situations might arise when a prosecutor is tempted to reveal to the public information that superiors or agency representatives wish to hide. Such situations probably are relatively rare.

30. One might expect prosecutors to confront the same conflicts as private attorneys. But, because prosecutors are part of a large organization of lawyers who perform similar functions, district attorneys can more easily transfer cases in-house than law firm managers. Personal or financial incentives to please clients do not encourage individual prosecutors to keep cases they should transfer to another. Only "cultural limitations" within an office—which may be substantial in some agencies—militate against internal transfer of cases.

Practical considerations may prevent full enforcement of the conflict rules against prosecutors even when the rules apply. For example, regulators differentiate between prosecutors' offices and private firms in determining whether one prosecutor's conflict of interest must be imputed to other prosecutors. *See Zacharias & Green, supra* note 10, at 222 & n.92. The regulators clearly hesitate to disqualify the whole agency from doing its job.

31. Because prosecutors control the legal decisions in a case, they need to consider Model Rule 1.13(b)'s requirement that they seek the permission of higher authorities to reverse a client's instructions only in exceptional or highly publicized cases in which high-level agency personnel become involved in the handling of the matter. *Cf. DEBORAH RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 483-88

We will return to the remaining provisions of the professional codes presently. But first, let us consider the range and nature of “prosecutorial misconduct” that has prompted commentators to complain of the lack of oversight. Allegations of prosecutorial misconduct typically concern five broad areas of activity: (1) abuse of office in the charging stage; (2) abuses in investigating crimes, including misuse of grand juries; (3) pretrial misconduct, including discovery abuses; (4) trial misconduct; and (5) miscellaneous other activities. Table III subdivides these areas into the main causes of complaint.

(2d ed. 1998) (discussing the internal office dispute over the handling of the Japanese-American internment cases before the United States Supreme Court). Similarly, because the government typically handles civil and criminal matters separately, prosecutors rarely find themselves representing both the state and an individual official of the state in the way envisioned by Rule 1.13(e).

32. Realistically, prosecutors rarely have the incentives, financial means, or client connections that would drive them to bribe a judge.

33. State and federal laws regulate prosecutors’ participation in outside legal activities. *See, e.g.*, 5 C.F.R. §§ 735.203, 2635.703(a) (1999) (forbidding government attorneys to engage in outside activities, maintain a financial interest inconsistent with obligations to the government, or misuse confidential information).

34. Prosecutors are unlikely to falsify bar applications because they know they will have to undergo government security checks that would reveal mistruths.

TABLE III
Stages of Prosecutorial Misconduct

Investigation Stage³⁵

- Misusing the grand jury process³⁶
- Examining suspects improperly
- Authorizing improper contacts with represented persons³⁷
- Making misrepresentations to witnesses or defendants³⁸
- Representing interests that conflict with the prosecutor's own (political?) interests

Screening Stage

- Charging without sufficient evidence³⁹
- Overcharging for bargaining purposes⁴⁰

Pretrial Stage

- Failing to disclose exculpatory evidence⁴¹
- Interfering with defendants' access to witnesses⁴²

Trial Stage

- Using false evidence/examining of witnesses improperly⁴³
- Making improper argument⁴⁴
- Vouching⁴⁵

Miscellaneous

- Making improper public statements⁴⁶
- Failing to report misconduct/ineffectiveness of other lawyers⁴⁷

35. Misconduct in the investigation context may involve prosecutors' participation in interrogations of suspects and witnesses or participation in police searches and seizures. Potentially pertinent rules include Model Rules 4.1 (forbidding misrepresentations), 4.2 (forbidding contacts with represented parties), and 4.3 (regulating communications with unrepresented parties). See generally Flowers, *Updating the Ethics Codes*, *supra* note 13, at 927 (advocating special professional rules governing prosecutors' involvement in the investigative process).

36. See, e.g., GERSHMAN, *supra* note 4, § 2.1, at 2-5 (listing seven varieties of alleged prosecutorial misconduct before grand juries); *id.* § 2.2, at 2-7 n.22 (citing cases in which courts have recommended that disciplinary proceedings be brought against prosecutors for misconduct before the grand jury); Jeffrey S. Edwards, *Prosecutorial Misconduct*, 30 AM. CRIM. L. REV. 1221, 1224, 1225-30 (1993) ("The reported cases describe numerous instances and kinds of prosecutorial misconduct," including "interference with the defendant's attorney-client relationship[s]," evidentiary misconduct, and "procedural

violations.”); Douglas P. Currier, Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077, 1077 (1984) (arguing for increased exercise of the power to dismiss indictments as a means of curbing prosecutorial grand jury misconduct); cf. Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of “Ethical Rules” Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 669 (1996) (challenging the use of ethics rules to control prosecutorial conduct in the grand jury and investigative stages).

37. See authorities cited *infra* note 65.

38. See, e.g., *United States v. Martino*, 825 F.2d 754, 757 (3d Cir. 1987) (use of sham grand jury subpoenas to trick targets of sting operation); *People v. Auld*, 815 P.2d 956, 957 (Colo. Ct. App. 1991) (prosecutor participated in sting operation by drafting fictitious complaint and soliciting perjury by undercover agent); *Nigrone v. Murtagh*, 362 N.Y.S.2d 513, 517 (N.Y. App. Div. 1974) (prosecutor presented false case to grand jury in order to further a sting operation).

39. See, e.g., *Perez v. Ledesma*, 401 U.S. 82, 85 (1971) (noting the possible availability of injunctive relief against “prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction”); David W. Simon, *Fighting Back: Remedies for the Wrongfully Prosecuted?*, 71 WIS. LAW. 10, 12–13, 56–57 (1998) (supporting the Hyde Amendment’s attempt to remedy the perceived problem of wrongful charging through fee-shifting).

40. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 853 (1995) (proposing financial remedy for prosecutorial “overcharging”). In light of the broad range of prosecutorial discretion courts recognize at the charging stage, most allegations of prosecutorial misconduct at this stage focus on “vindictive” prosecutions. See GERSHMAN, *supra* note 4, § 4.4(a)(2)(A), at 4–31 (discussing *Blackledge v. Perry*, 417 U.S. 21 (1974) and its progeny).

41. See, e.g., *Rosen*, *supra* note 3, at 697 (“[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 rarely applied.”) (footnotes omitted); *Weeks*, *supra* note 3, at 835 (arguing that prosecutors routinely are tempted to, and probably do, withhold exculpatory evidence from the defense); Edward L. Wilkinson, *Brady and Ethics: A Prosecutor’s Evidentiary Duties to the Defense Under the Due Process Clause and their Relation to the State Bar Rules*, 61 TEX. B.J. 435, 440–41 (1998) (discussing instances of failure to disclose evidence that violate the professional rules); Edwin H. Auler, Comment, *Actions Against Prosecutors Who Suppress or Falsify Evidence*, 47 TEX. L. REV. 642, 642 (1969) (urging a broad array of remedies for prosecutors’ “disregard [for] their professional responsibilities by suppressing evidence”).

42. See *Zacharias*, *Can Prosecutors Do Justice?*, *supra* note 13, at 81–83 & nn.159–69 (discussing the legal rules against interfering with access to witnesses).

43. See *Rosen*, *supra* note 3, at 702 (arguing the existence of prosecutorial misconduct in the use of false evidence); *Auler*, *supra* note 41, at 643 (arguing the need for remedies to deter prosecutors from falsifying evidence).

44. See, e.g., Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 648, 651 (1972) (discussing prosecutorial misconduct in closing argument); J. Thomas Sullivan, *Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials*, 20 U. ARK. LITTLE ROCK L. REV. 213, 220–22 (1998) (describing alleged prosecutorial misconduct in summations); *Zacharias*, *Can Prosecutors Do Justice?*, *supra* note 13, at 95–102 & n.219 (discussing the ethical boundaries of argument by prosecutors).

45. See, e.g., *United States v. DiLoreto*, 888 F.2d 996, 999 (3d Cir. 1989) (finding it per

In each of these areas of prosecutorial activity, commentators tend to refer vaguely to “prosecutorial misconduct.”⁴⁸ But “misconduct” alone, even when it exists, does not always rise to the level of a disciplinable offense. Disciplinary authorities, for the most part, limit themselves to enforcing only direct violations of specific requirements or prohibitions in the professional codes.⁴⁹ The codes do not address much of the prosecutorial misconduct alleged in the cases and commentary. The codes, for example, do not deal directly with important aspects of prosecutorial participation in improper police conduct⁵⁰—including entrapment,⁵¹ improper investigations,

se reversible error for a prosecutor to state “[w]e don’t put liars on the stand”); *United States v. Modica*, 663 F.2d 1173, 1178 (2d Cir. 1981) (finding error resulting from prosecutors’ vouching for witnesses); cf. Thomas L. Shaffer, *The Legal Profession’s Rule Against Vouching for Clients: Advocacy and “The Manner that is the Man Himself,”* 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 145, 146 (1993) (discussing the justifications for vouching rules).

46. See, e.g., GERSHMAN, *supra* note 4, § 6.1, at 6–2 (asserting that “[p]rosecutors violate these rules either deliberately or inadvertently”); Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1630–37 (1996) (discussing the bounds of and justifications for limiting extra-judicial speech by attorneys on both sides and identifying potentially improper speech by prosecutors and defense attorneys in the O.J. Simpson case); Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 FORDHAM L. REV. 865, 869 n.16, 871–78 (1990) (analyzing professional restrictions on prosecutorial statements to the press).

47. I have argued previously that prosecutors have a special obligation to bring lax performance or improper conduct by defense counsel to the attention of the authorities. Zacharias, *Can Prosecutors Do Justice?*, *supra* note 13, at 66–74. In general, of course, the professional rules only require lawyers to report other lawyers when they violate significant aspects of the professional rules. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (1999) (requiring reporting by “a lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer”). Yet, the reporting requirement is honored largely in the breach.

48. The phrase “prosecutorial misconduct” is bandied about relatively indiscriminately. A Westlaw search for the phrase in the law reviews alone resulted in 1541 articles that employ it.

49. See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 249–57 (1993) [hereinafter Zacharias, *Specificity in Professional Responsibility Codes*] (explaining the relationship between specificity in the professional codes and the enforceability of the norms the codes establish).

50. See, e.g., Little, *supra* note 28, at 751–63 (discussing the ramifications of increased participation by prosecutors in police investigations). Obviously, a prosecutor who is found to have acted *illegally* (e.g., in conjunction with a police officer) will be subject to discipline. But professional codes and professional discipline are concerned mostly with prosecutors’ improper conduct in their capacity as lawyers. The codes do include a few provisions that seem to encompass some pretrial investigative conduct. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (1999) (prohibiting advising a violation of the law, which may implicate prosecutorial participation in improper police activity); *id.* R. 4.2 (forbidding some prosecutorial supervision of undercover operations, at least as

and searches or interrogations that result in the exclusion of evidence.⁵² Even lawyerly activities such as misusing a grand jury to fish for evidence,⁵³ threatening potential witnesses, charging witnesses or defendants with crimes for tactical reasons,⁵⁴ and abusing the plea bargaining⁵⁵ and sentencing⁵⁶ processes are activities that the codes refer to only obliquely, if at all.⁵⁷

interpreted by some jurisdictions).

51. See GERSHMAN, *supra* note 4, § 1.2, at 1-3 to 1-4 (discussing prosecutorial misconduct that can arise when prosecutors become involved in police entrapment) and authorities cited therein.

52. See *id.* §§ 1.3, 1.7 (discussing misconduct arising from prosecutorial involvement in “staged arrests, scams, and stings” and in “illegal eavesdropping”) and authorities cited therein.

53. See *id.* §§ 2.3–2.9 (discussing prosecutorial misconduct in the use of the grand jury) and authorities cited therein.

54. See, e.g., *United States v. Under Seal*, 714 F.2d 347, 350 (4th Cir. 1983) (questioning the authority of prosecutors to use grand jury proceedings and the threat of charges to coerce witnesses to cooperate with the government); see also Bruce A. Green, “Package” Plea Bargaining and the Prosecutor’s Duty of Good Faith, 25 CRIM. L. BULL. 507, 514–16 (1989) [hereinafter Green, *Package Plea Bargaining*] (discussing the obligations of prosecutors in threatening to charge family members of the actual targets of their investigations). *But cf.* *Ostrer v. Aronwald*, 434 F. Supp. 396, 401 (S.D.N.Y. 1977) (rejecting a claim of coercive subpoena).

55. See generally GERSHMAN, *supra* note 4, §§ 7.2–7.5 (citing a variety of conduct that the author believes rises to the level of prosecutorial misconduct) and authorities cited therein. Indeed, because plea bargaining typically is viewed as a quintessential aspect of prosecutorial discretion, the codes leave prosecutors at sea on the question of what “just” and ethical plea bargaining encompasses. See also Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 1026 (1989) (arguing for increased responsibility of prosecutors for making disclosures during the plea bargaining process); David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor’s Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3007 (1999) (acknowledging that the professional codes do not explicitly require prosecutors to disclose important nonevidentiary information during plea bargaining, but urging the adoption of a new ethical standard). See generally Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998) [hereinafter Zacharias, *Plea Bargaining*] (discussing what constitutes just behavior by prosecutors in the plea bargaining process).

56. See, e.g., *Tucker v. Zant*, 724 F.2d 882, 889–90 (11th Cir. 1984) (finding that a prosecutor’s conduct at sentencing rendered the sentencing “fundamentally unfair”); *Hance v. Zant*, 696 F.2d 940, 951 (11th Cir. 1983) (reversing a death penalty imposed after a “prosecutor’s fervent appeal to the fears and emotions” of the sentencing jury); *United States v. Alverson*, 666 F.2d 341, 349 (9th Cir. 1982) (remanding for resentencing because of prosecutor’s ex parte communications with the original sentencing judge); *cf.* GERSHMAN, *supra* note 4, § 12.1, at 12-4 (“By its very nature the sentencing process lends itself to prosecutorial abuse.”); Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1282, 1286 (1997) (noting the limited guidance that the professional rules provide for prosecutors exercising sentencing discretion and proposing a new rule).

57. The Model Rules do forbid a prosecutor from instituting charges that are not

Regulators sometimes can construe otherwise unspecified prosecutorial misconduct as falling under the rubric of “dishonest” behavior,⁵⁸ conduct “prejudicial to the administration of justice,”⁵⁹ or conduct reflecting “[un]fitness as a lawyer.”⁶⁰ But it is difficult and expensive to establish general misconduct that does not involve direct rule violations as grounds for professional sanctions.⁶¹ Both inside and outside the prosecutorial realm, disciplinary authorities are loath to pursue such cases.⁶²

Another reason why the perceived misconduct listed in Table III rarely gives rise to discipline is that much of the behavior in question involves traditional areas of prosecutorial discretion. Almost by definition, reasonable observers differ on what conduct is appropriate in these areas. Thus, for example, so long as *some* evidence supports a criminal charge, observers typically disagree over the propriety of a prosecutor’s decision to support a police arrest pending further investigation. Similarly, some consider aggressive charging within constitutional limits to be a valid exercise of discretion, while others consider it to be “overcharging.” For the most part, even aggressive prosecutors will limit themselves to this range of disputable conduct; they are unlikely to exceed constitutional limits intentionally⁶³ for fear of losing a conviction on appeal.⁶⁴

supported by probable cause but, in the view of many, that is a low threshold. *See* MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (1999) (setting a threshold for charging). The Model Rules also offer vague assurances that prosecutors will generally respect defendants’ rights but, for the most part, do not impose specific limits on use of the interrogation, grand jury, or plea bargaining processes. *See, e.g., id.* R. 3.8(b)-(c) (requiring prosecutors to make reasonable efforts to make sure that an accused can obtain counsel and avoid waivers of pretrial rights); *id.* R. 3.8(f) (limiting the authority of prosecutors to subpoena lawyers to the grand jury).

58. *See, e.g.,* MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (1999) (forbidding lawyers to “engage in conduct involving dishonesty”).

59. *Id.* R. 8.4(d).

60. *Id.* R. 8.4(b) (forbidding lawyers to commit criminal acts that reflect “adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”).

61. *See* Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 49, at 253–54 (discussing the variables governing the decision to institute disciplinary proceedings).

62. *See supra* text accompanying note 50 (discussing discipline for prosecutors’ participation in illegal activities). Discretionary acts or acts that arguably are constitutionally permitted are unlikely to be viewed as the type of intentional misconduct that justifies bar sanction. Nor, in the absence of clearly proscribed conduct, are disciplinary authorities likely to enter the debate over when lawyers have acted too aggressively, or not aggressively enough, in prosecuting crimes. *See* Zacharias, *Can Prosecutors Do Justice?*, *supra* note 13, at 48 (noting that vague standards governing prosecutorial conduct can be used to justify virtually any stance prosecutors may choose to adopt).

63. Although an intent to violate the professional code is rarely a prerequisite to

In other areas listed in Table III, the substantive question of what constitutes misconduct is itself legally controversial. For example, prosecutors steadfastly have maintained a right to contact represented persons before their indictment, even when professional codes seem to forbid that conduct.⁶⁵ The extent to which prosecutors, like the police, may mislead witnesses and defendants into making confessions or cooperating with an investigation has always been difficult to define—even for the courts.⁶⁶ How far prosecutors may go in suggesting that prosecution witnesses not cooperate with the defense is another subject of legal dispute.⁶⁷ In these areas, disciplinary authorities correctly assume that any attempt to impose discipline for conduct that prosecutors insist is legitimate will embroil the disciplinary agency in litigation and aggressive claims by prosecutorial agencies that professional discipline violates the separation of powers.⁶⁸ One might expect the regulators to avoid

discipline, disciplinary agencies are more likely to prosecute knowing violations of the rules than well-intended, zealous representation that includes inadvertent misconduct. See *infra* note 120 and accompanying text.

64. See, e.g., *Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974) (barring a felony charge filed in retaliation for defendant's exercise of his right to trial leading to a misdemeanor conviction); see also WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 13.5, at 638–41 (2d ed. 1992) (discussing vindictive prosecution cases).

65. See, e.g., Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 *FORDHAM L. REV.* 355, 423–27 (1996) (arguing in support of the Department of Justice's position that states' adoptions of Model Rule 4.2 do not bind attorneys representing the federal government). For a history of the controversy surrounding the rule against communications with represented persons and a review of the authorities on the subject, see Zacharias & Green, *supra* note 10, at 212 n.21; Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, Or, Who Should Regulate the Regulators?*, 65 *FORDHAM L. REV.* 429, 429–30 nn.1–2 & 7 (1996) [hereinafter Zacharias, *Who Can Best Regulate*]; see also authorities cited in Corinna Barrett Lain, *Prosecutorial Ethics Under the Reno Rule: Authorized by Law?*, 14 *CRIM. JUST. ETHICS* 17, 22–24 (Summer/Fall No.2 1995) (questioning the legal authority of federal prosecutors to resist rules against communications with represented persons); Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 *GEO. J. LEG. ETHICS* 473, 494 (1995) (arguing that “the DOJ's [challenge to Model Rule 4.2] takes the concept of attorney self-regulation to the most extreme manifestation imaginable”); Neals-Erik William Delker, Comment, *Ethics and the Federal Prosecutor: The Continuing Conflict over the Application of Model Rule 4.2 to Federal Attorneys*, 44 *AM. U. L. REV.* 855, 858–59 nn.16–19 (1995) (discussing the controversy over Model Rule 4.2).

66. For a collection of authorities and an empirical review of the interaction between prosecutors and potential cooperating witnesses, see Ellen Yaroshesky, *Cooperation with Federal Prosecutors: Experiences of Truth-telling and Embellishment*, 68 *FORDHAM L. REV.* 917 (1999).

67. See Zacharias, *Can Prosecutors Do Justice?*, *supra* note 13, at 81–85 (discussing the obligations of prosecutors in controlling defense counsels' access to witnesses).

68. See, e.g., *Massameno v. Statewide Grievance Comm.*, 663 A.2d 317, 325–26 (Conn. 1995) (rejecting prosecutor's separation of powers challenge to the application of

such controversies and to concentrate their resources elsewhere until the legal issues have been adjudicated.⁶⁹

The above analysis suggests that there is a fairly narrow range of areas in which one realistically would expect prosecutors to engage in misconduct and in which disciplinary authorities are likely to have both the wherewithal and the inclination to proceed. These areas include primarily: (1) pretrial and trial conduct that is specifically forbidden in the codes; (2) engaging in pretrial publicity; and (3) the implementation of prosecutors' obligations to report other lawyers. The remainder of this Article focuses on those clear, sustainable rule violations within these areas that most reasonable observers would expect disciplinary authorities to prosecute—at least occasionally.

Table IV lists all of the code provisions that some prosecutors probably do violate and that might come to the attention of regulators.

professional rules to him); see also Melissa K. Atwood, Comment, *Who Has the Last Word?: An Examination of the Authority of State Bar Grievance Committees to Investigate and Discipline Prosecutors for Breaches of Ethics*, 22 J. LEGAL PROF. 201, 204-06 & nn.23-27 (1998) (noting "a possible 'separation of powers' problem when it comes to the judiciary enforcing its rules of professional conduct on attorneys who are officers of the executive branch").

69. See Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 49, at 280 (discussing allocation of resources by the bar).

TABLE IV	
Code Provisions Some Prosecutors Probably Violate	
1.1, 1.3	Competence, Diligence
1.11	Successive conflicts for government lawyers
3.1	Making nonmeritorious claims
3.3(a)(1)	Making false statements to a tribunal
3.3(a)(3)	Failing to disclose controlling authority to a tribunal
3.3(a)(4)	Offering false evidence
3.4(a)	Obstructing access to or unlawfully concealing evidence
3.4(b)	Falsifying evidence, counseling a witness to testify falsely, offering a witness prohibited inducements
3.4(c)	Knowingly disobeying a legal obligation (e.g., disclosure)
3.4(d)	Failing diligently to comply with discovery
3.4(e)	Alluding to irrelevant matter/personal opinion at trial
3.4(f)	Requesting a witness not to cooperate with the adversary
3.5(b)	Participating in ex parte communications
3.6	Trial publicity
3.8(a)	Charging without probable cause
3.8(b)	Protecting defendants' right to counsel
3.8(c)	Seeking waiver of rights from unrepresented clients
3.8(d)	Disclosing evidence
3.8(e)	Preventing publicity by other personnel
3.8(f)	Issuing attorney-subpoenas
3.8(g)	Making extrajudicial statements
4.1(a)	Making false statements to third persons
4.2	Contacting represented persons
4.3	Misleading unrepresented persons
4.4	Respecting the rights of third persons
5.1(a)	Assuring that subordinates conform to the codes
8.2	Making false and reckless statements about judges or candidates
8.3	Reporting misconduct of other lawyers
8.4	Catch-all

Table V narrows Table IV's provisions to those which one would expect prosecutors to violate more frequently, based on conduct that the case law and common experience suggest occurs on a regular basis.⁷⁰ Thus, for example, one would not expect prosecutors to try to act incompetently and one would expect those who do to be fired.⁷¹ The context in which prosecutors practice, including the availability of internal supervision, help prevent incompetent performance.⁷² Likewise, because the rules for subsequent employment of government lawyers are fairly clear,⁷³ one would expect both prosecutors leaving government and firms hiring them to accept the guidance the rules provide. In neither of these areas does it seem likely that many code violations will occur nor that, even if violations are attempted, the intervention of disciplinary authorities will be needed to correct them.

Prosecutors also are fairly unlikely to violate some of the other provisions in Table IV because of their need to maintain an ongoing professional relationship with judges before whom they appear routinely. For example, prosecutors are less apt to hide controlling authority than lawyers who appear only occasionally in court. Such conduct will, if it becomes known, irreparably damage a prosecutor's relationship with the court. Perhaps more significantly, if the conduct becomes known to disciplinary agencies, it will also have become known to the pertinent judge. One can be reasonably certain that the judge will take strong remedial measures on his or her own.⁷⁴

70. Providing a catalogue of constitutional cases involving the variety of recurring prosecutorial misconduct cases is beyond the scope of this Article. A thorough collection is found in GERSHMAN, *supra* note 4, *passim*.

71. There are a few cases in which prosecutors have been disciplined for incompetence. But these are mostly older cases that predated the professionalization of prosecution offices and arose at a time when courts were more willing to intervene in the management of prosecutorial affairs. *See* authorities cited *infra* note 95.

72. *See infra* note 119 and accompanying text.

73. *See, e.g.*, 18 U.S.C. § 207 (1994) (imposing restrictions on post-government practice by government attorneys); MODEL RULES OF PROF'L CONDUCT R. 1.11 (1999) (governing conflicts of interest on the part of government attorneys). I do not mean to suggest that lawyers and third parties will always adhere to clear rules. In this context, however, government lawyers and potential lawyers have little incentive to violate the employment rules, given the availability of alternative jobs and employees. They therefore will violate the rules only when they do not understand what the rules require.

74. One could, of course, make the same argument with respect to the offering of false evidence, obstructing access to evidence, failing to make required disclosures, and the like. For these actions, however, the prosecutor's incentives are somewhat different. The conduct is less likely to be discovered, may be more important to victory, and, because there is often an argument that the prohibition is not being violated, the prosecutor typically can rationalize the conduct more easily.

Once one accounts for the category of regulation that prosecutors are unlikely to violate frequently and for those controversial provisions that are subject to litigation,⁷⁵ Table V becomes consistent with the analysis of Table III. That analysis suggested that the most likely candidates for discipline include specifically proscribed pretrial and trial conduct, violations of pretrial publicity rules, and prosecutors' failure to implement their obligations to report other lawyers.⁷⁶ Table V similarly suggests that the best candidates for discipline involve pretrial and trial misconduct that is directly prohibited by the rules.

75. See *supra* note 65 and accompanying text (discussing litigation concerning prosecutorial defiance of Model Rule 4.2). Among the most controversial prohibitions that the professional codes arguably incorporate are rules against prosecutorial communication with represented persons, engaging in misrepresentations in the interrogation process, and misleading unrepresented witnesses and third parties into cooperating. See MODEL RULES OF PROF'L CONDUCT R. 4.1-4.3 (1999).

76. See *supra* text accompanying notes 68-69.

TABLE V
Likely Candidates for Discipline

Rules Mainly Applicable to the Investigative Stage

- | | |
|-----|--|
| 4.3 | Misleading unrepresented persons |
| 4.4 | Respecting the rights of third persons |

Rules Mainly Applicable to the Pretrial Stage

- | | |
|--------|--|
| 3.4(c) | Knowingly disobeying a legal obligation (e.g., disclosure) |
| 3.4(d) | Failing diligently to comply with discovery |
| 3.4(f) | Requesting a witness not to cooperate with the adversary |
| 3.8(c) | Not seeking a waiver of rights |
| 3.8(d) | Disclosing evidence |

Rules Mainly Applicable to the Trial Stage

- | | |
|-----------|---|
| 3.1 | Making nonmeritorious claims |
| 3.3(a)(1) | Making false statements to tribunal |
| 3.3(a)(4) | Offering false evidence |
| 3.4(a) | Obstructing access to or unlawfully concealing evidence |
| 3.4(b) | Falsifying evidence, counseling a witness to testify falsely, offering a witness prohibited inducements |
| 3.4(e) | Alluding to irrelevant matter/personal opinion at trial |

Miscellaneous Provisions

- | | |
|------------------|---|
| 3.6, 3.8(e), (g) | Encouraging publicity during litigation |
|------------------|---|

II. THE LIMITED DISCIPLINE OF PROSECUTORS

There are several ways one might evaluate the professional discipline of prosecutors empirically. Ideally, one could simply interpret statistics collected by the various disciplinary agencies. Surprisingly, however, not a single statistical compilation has ever been published that collects information governing the discipline of prosecutors or that compares the discipline of prosecutors to the discipline of private practitioners.

Another option would be to conduct a rigorous independent study of prosecutors' offices and disciplinary agencies. With adequate resources, one could observe prosecutors and interview participants in criminal cases in an effort to identify misconduct prosecutors actually engage in and the resulting consequences. Similarly, one might interview disciplinary counsel to ascertain what kinds of prosecutorial misconduct they learn about (and how), to identify how they decide to pursue or decline to pursue cases, and to evaluate the results of cases that they have pursued. Again, probably because of the resource intensiveness of these methodologies, neither approach has ever been implemented.⁷⁷

This Article employs a third methodology, using resources that are readily available in an effort to provide at least some of the missing pieces of information. It examines the reported cases in which prosecutors actually have been disciplined. As a scientific matter, this methodology has shortcomings. The data are limited by what is in the public record.⁷⁸ Any inferences we might draw from the raw results are subject to alternative interpretations, particularly because the cases tell us nothing directly about the regulators' mental processes in deciding whether or not to act. Still, the legal realist would suggest that these are the data that count. They provide useful insights into whether and when the regulators have seen fit to act.⁷⁹

77. Such studies also run the risk of subjectivity. Data produced by interviews sometimes are skewed and observations depend on the skill of the observer.

78. This excludes cases that have been instituted but dismissed, instances of private discipline, and cases that otherwise do not enter the national reports. By definition, the cases are limited to those in which regulatory agencies have learned of at least arguable prosecutorial misconduct. Furthermore, they involve instances in which the regulators have, in fact, taken action.

79. Even here, it is important to note one caveat. Because the reported cases do not include dismissals and cases resulting in private discipline, the picture they present is not complete.

A. *The Actual Discipline of Prosecutors*

The study pulls together all reported cases in which prosecutors have been disciplined for violations of professional rules by courts or state disciplinary authorities.⁸⁰ It includes all forms of professional discipline, setting aside the subjective question of whether particular sanctions in particular cases may have constituted merely a “slap on the wrist.”⁸¹

The study, though not all-encompassing,⁸² revealed over 100 cases in which prosecutors have been disciplined.⁸³ This result dispels at least one myth: that prosecutors are *never* disciplined. Nevertheless, many of the cases are old, making the number of reported cases far from staggering in light of the many prosecutors

80. The research for all parts of the study was conducted by research assistants. I instructed them to search Westlaw and Lexis for all reported cases in which prosecutors have been disciplined. I also instructed them to identify only cases involving professional discipline of lawyers, eliminating cases that may have alluded to alleged prosecutorial misconduct in the context of constitutional issues, sanction proceedings, contempt proceedings, or the like. This limitation was consistent with this Article's goal of exploring the viability of professional discipline as a (or the) primary vehicle for controlling prosecutorial misconduct.

81. Some commentators who have criticized the lack of prosecutorial discipline have rested their conclusions, in part, on the claim that private reprimands, and even public censure, are inadequate sanctions for misconduct. *See, e.g.*, Green, *supra* note 3, at 88–89 (arguing that private sanctions fail to deter prosecutorial misconduct). As with the discipline of private lawyers, the remedy upon a finding of misconduct depends on a variety of factors. The reaction of lawyers to censures that do not suspend their licenses to practice will vary, depending on the lawyer and the context in which the censure is imposed. For purposes of this Article's analysis, I choose not to enter this thicket, addressing instead the question of whether the instances of prosecutorial discipline—whatever the ultimate sanction—are too rare.

82. The comprehensiveness of this computerized search was, of course, limited both by the search methods and commands employed by the research assistants and by the limitations of the databases. Moreover, some professional discipline occurs through unpublished opinions and through tribunals that are not reported through the “ALL STATES” databases. For example, opinions of California's “bar courts” are separately catalogued. Most jurisdictions report instances of discipline that do not produce judicial opinions mainly through local periodicals, rather than the national reporters. Thus, I do not pretend to claim that the empirical research upon which this Article relies is comprehensive. Nevertheless, it does provide a useful starting point for discussion.

83. The results were presented to me in the form of a thirty-five page memorandum encompassing over 100 cases. *See* Memorandum from Victoria Shank, to Fred Zacharias (July 22, 1999) (on file with the North Carolina Law Review). As I identified additional cases that the author of the memorandum had not located, I added them to the list. For earlier published collections of prosecutorial discipline cases, see Steele, *supra* note 4, at 970–79; Romualdo P. Eclavea, Annotation, *Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney*, 10 A.L.R. 4th 605 *passim* (1981). Of course, more instances of prosecutorial discipline probably exist, but did not give rise to judicial opinions published in the national reporters.

and criminal cases that exist. Still, the body of cases is not entirely negligible.⁸⁴ The research suggests at least that, in appropriate cases, courts and disciplinary organizations sometimes have been willing to address prosecutorial misconduct.

After categorizing the cases,⁸⁵ patterns emerge. Two categories of conduct dominate the list. The first category involves plainly illegal activity such as bribery,⁸⁶ extortion,⁸⁷ conversion,⁸⁸ and

84. I do not wish to quibble here. A reasonable observer could conclude that the number of reported cases is "negligible" in light of the large number of criminal cases that involve prosecutors. Moreover, the search covered a long period. No one could reasonably dispute that, viewed over time, the occurrence of discipline is rare. *See infra* note 116 and accompanying text.

85. As discussed below, research assistants reviewed selected prosecutorial discipline cases in a different manner for different parts of the study. *See infra* note 107 and accompanying text. The work of all the research assistants was excellent; their parallel work confirmed that each student found most of the pertinent cases. However, on occasion, one student found a few cases that others did not. In an effort to be as comprehensive as possible, this section of the Article incorporates cases not in the first research assistant's memorandum that subsequent students found. Likewise, Table VII includes cases from this student's memorandum that fit within the categories in the Table.

86. *See, e.g., In re Wilson*, 258 P.2d 433, 436-37 (Ariz. 1953) (per curiam) (county attorney disbarred for accepting money not to prosecute a prostitute); *In re Cowdery*, 10 P. 47, 65-66 (Cal. 1886) (en banc) (outgoing city attorney suspended for accepting bribe to refrain from informing the new city attorney of precedent adverse to the adversary); *In re Norris*, 57 P. 528, 531 (Kan. 1899) (prosecutor disbarred for accepting bribes for dismissing and commencing prosecutions); *Commonwealth ex rel. Pike County Bar Ass'n v. Stump*, 57 S.W.2d 524, 527-28 (Ky. 1933) (prosecutor disbarred for accepting bribe to discontinue investigation of a theft); *In re Robinson*, 420 N.Y.S.2d 430, 432 (App. Div. 1979) (per curiam) (Assistant United States Attorney disbarred for providing confidential information on pending cases to supposed members of organized crime for \$700); *In re Crum*, 215 N.W. 682, 687-89 (N.D. 1927) (Assistant Attorney General suspended for accepting campaign contributions from persons under investigation); *In re Simpson*, 192 P. 1097, 1098-99 (Okla. 1920) (county attorney disbarred for accepting bribes to forgo prosecution of gambling houses); *In re McMahan*, 513 P.2d 796, 798 (Or. 1973) (en banc, per curiam) (city attorney suspended for accepting money and gifts from a bail bondsman); *State v. Hays*, 61 S.E. 355, 357-58 (W. Va. 1908) (county attorney disbarred for receiving periodic payments from the owner of a "speak-easy" to avoid prosecution for violation of prohibition).

87. *See, e.g., In re Bloom*, 561 P.2d 258, 259-61 (Cal. 1977) (county counsel disbarred for offering to make "problems disappear" in land development matter in exchange for money); *People ex rel. Colo. Bar Ass'n v. Anglim*, 78 P. 687, 687-88 (Colo. 1904) (district attorney disbarred for demanding payments to forgo prosecuting saloon and gambling shop proprietors).

88. *See, e.g., People ex rel. Colo. Bar Ass'n v. Anonymous, Attorney at Law*, 9 P.2d 611, 612 (Colo. 1932) (en banc) (district attorney reprimanded for billing city for unincurred expenses and keeping the funds); *In re Redding*, 501 S.E.2d 499, 500-01 (Ga. 1998) (per curiam) (assistant solicitor general disbarred for converting funds tendered by defendants for pleas in absentia); *In re Forbes*, 257 N.W. 329, 330 (Minn. 1934) (per curiam) (county attorney disbarred for submitting falsified receipts for expenditures); *In re Jelliff*, 271 N.W.2d 588, 589-91 (N.D. 1978) (prosecutor suspended for sixty days for failing to account for funds he received while acting in his official capacity); *In re Sitton*, 177 P.

embezzlement⁸⁹ of state funds.⁹⁰ The second category involves procedural and evidentiary misconduct, such as withholding evidence,⁹¹ presenting false evidence,⁹² and misleading or deceiving

555, 556-57 (Okla. 1918) (county attorney reprimanded for converting county funds as payment of moneys the county owed him independently); *State ex rel. McCourt v. Garland*, 150 P. 289, 290 (Or. 1915) (en banc) (special prosecutor disbarred for converting \$702 collected on behalf of the state); *In re Jacquith*, 270 N.W. 649, 650-51 (S.D. 1936) (per curiam) (state's attorney suspended for six months for seeking excessive reimbursement for mileage); *In re Waggoner*, 206 N.W. 427, 428-30 (S.D. 1925) (state's attorney disbarred for conspiring with the sheriff to claim a reward for the return of stolen property).

89. *See, e.g., People v. Tucker*, 676 P.2d 680, 681 (Colo. 1983) (en banc) (district attorney suspended for one-year and a day for embezzling public funds); *cf. In re Riddle*, 700 N.E.2d 788, 792-96 (Ind. 1998) (per curiam) (prosecutor disbarred for hiring a "sham" prosecutor, for purposes of staffing his private law office).

90. Cases involving miscellaneous other criminal conduct also exist. *See, e.g., In re Crisel*, 461 N.E.2d 994, 995-96, 999 (Ill. 1984) (state's attorney suspended for three years for filing a false police report); *In re Armentrout*, 457 N.E.2d 1262, 1268-69 (Ill. 1983) (state's attorney suspended for two years for using his position to participate and induce others to participate in creating forged petition signatures); *In re Farr*, 557 A.2d 1373, 1377 (N.J. 1989) (per curiam) (prosecutor's suspension continued for six months for theft of evidence and other prosecutorial misconduct); *D'Arcy v. N.Y. State Bar Ass'n*, 374 N.Y.S.2d 222, 223-24 (N.Y. App. Div. 1975) (per curiam) (district attorney disbarred after pleading guilty to unlawful imprisonment in the course of his official duties); *State ex rel. Okla. Bar Ass'n v. Scanland*, 475 P.2d 373, 374-75 (Okla. 1970) (district attorney disbarred for bribing a police officer); *see also In re Chancey*, No. 91 CH 348, Ill. S. Ct. MR No. 10266 (1994) (prosecutor reprimanded for creating fake court order to protect a child from kidnapping), in *Mary Robinson, Discipline Cases Involving Conduct by Criminal Defense Attorneys and Prosecutors 4* (23rd National Conference on Professional Responsibility, May 29-31, 1997) (on file with the author); *In re Peek*, No. 94 SH 0369, Ill. S. Ct. MR No. 9461 (1996) (prosecutor disbarred for conspiracy to purchase drugs), reported in *Robinson, supra*, at 5.

91. *See, e.g., Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Ramey*, 512 N.W.2d 569, 572 (Iowa 1994) (en banc) (prosecutor suspended for three months for, inter alia, failing to disclose interview with informant); *In re Carpenter*, 808 P.2d 1341, 1346 (Kan. 1991) (per curiam) (assistant district attorney censured for failure to disclose exculpatory evidence); *In re Morris*, 419 N.W.2d 70, 70 (Minn. 1987) (prosecutor censured for failure to disclose evidence); *In re Brophy*, 442 N.Y.S.2d 818, 819 (N.Y. App. Div. 1981) (mem.) (prosecutor censured for inadvertent *Brady* violation); *Office of Disciplinary Counsel v. Jones*, 613 N.E.2d 178, 179-80 (Ohio 1993) (per curiam) (prosecutor suspended for six months for failing to disclose evidence); *Cuyahoga County Bar Ass'n v. Gerstenslager*, 543 N.E.2d 491, 491 (Ohio 1989) (per curiam) (prosecutor publicly reprimanded for *Brady* violation); *In re Illuzzi*, 632 A.2d 346, 347 (Vt. 1993) (per curiam) (prosecutor privately reprimanded for failing to disclose exculpatory evidence); *cf. Read v. Va. State Bar*, 357 S.E.2d 544, 546-47 (Va. 1987) (commonwealth attorney not disciplined for alleged *Brady* violation).

92. *See, e.g., Price v. State Bar*, 638 P.2d 1311, 1316, 1318 (Cal. 1982) (in banc) (assistant district attorney suspended for five years for altering evidence); *In re Dreiband*, 77 N.Y.S.2d 585, 585 (N.Y. App. Div. 1948) (per curiam) (attorney suspended for arguing false evidence); *cf. In re Friedman*, 392 N.E.2d 1333, 1338 (Ill. 1979) (prosecutor not disciplined for creating and introducing false evidence in the process of developing a bribery investigation); *Grievance Committee's Findings re Prosecution of the Miller*

the tribunal.⁹³ A third relatively large category involves allegedly abusive behavior toward tribunals, usually consisting of criticism of judges.⁹⁴ Several other categories contain a significant, but smaller

Murder Case, 56 ILL. B.J. 955, 956 (1968) (describing committee's decision not to proceed with disciplinary action against a prosecutor alleged to have used false evidence on grounds that the court alleging the misconduct had "misapprehended the fact").

93. See, e.g., *In re Hansen*, 877 P.2d 802, 804, 806 (Ariz. 1994) (city prosecutor censured for lying to the court about the reasons for a witness's absence); *Ramey*, 512 N.W.2d at 572 (prosecutor suspended for three months for, inter alia, making false representations to a court); *In re Joyce*, 234 N.W. 9, 10 (Minn. 1930) (per curiam) (county attorney suspended for six months for misrepresenting to the court the status of another proceeding); *In re Maestretti*, 93 P. 1004, 1005 (Nev. 1908) (per curiam) (district attorney suspended for thirty days for misleading the trial court about a recent opinion of the state supreme court); *In re Norton & Kress*, 608 A.2d 328, 338-39 (N.J. 1992) (per curiam) (prosecutor suspended for three months for withholding information from the court); *Mitchell v. Ass'n of the Bar of N.Y.*, 351 N.E.2d 743, 744-46 (N.Y. 1976) (United States Attorney disbarred for perjury and obstruction of justice in connection with the Watergate break-in); *In re Drieband*, 77 N.Y.S.2d 585, 585 (N.Y. App. Div. 1948) (assistant district attorney censured for using testimony in summation that he had learned was false subsequent to the testimony); *In re Barnes*, 574 P.2d 657, 659 (Or. 1978) (en banc) (district attorney reprimanded for failing to inform a court issuing a warrant of a pending case on a pertinent legal issue); *In re Bridge*, 724 A.2d 462, 463 (Vt. 1998) (Assistant Attorney General reprimanded for misleading the court about government's consent to his representation of a private client); *In re Jones*, 39 A. 1087, 1090 (Vt. 1898) (state's attorney disbarred for misleading presiding judge about the faithful performance of his duties, which was a prerequisite to the payment of his salary); *In re Sanders*, 494 N.W.2d 430, 431-32 (Wis. 1993) (prosecutor suspended for sixty days for misrepresenting to scheduling clerk that case had settled and misrepresenting facts to defense counsel and to court concerning jail policy on work release); cf. *United States v. Kelly*, 550 F. Supp. 901, 902 (D. Mass. 1982) (mem.) (Assistant United States Attorney not disciplined for introducing false testimony because prosecutor did not know the evidence was false).

94. See, e.g., *In re Riley*, 691 P.2d 695, 703-04, 707 (Ariz. 1984) (en banc) (deputy county attorney censured for making derogatory public statements about a judge); *In re McCowan*, 170 P. 1101, 1104 (Cal. 1917) (per curiam, en banc) (district attorney suspended for stating to the grand jury that a judge was "nothing but a crook"); *In re Raggio*, 487 P.2d 499, 500-01 (Nev. 1971) (per curiam) (district attorney reprimanded for criticizing a decision of the state supreme court in a television interview); *In re Holtzman*, 577 N.E.2d 30, 33 (N.Y. 1991) (per curiam) (district attorney reprimanded for repeating unsubstantiated rumor about a judge); *In re Becker*, 203 N.Y.S. 437, 441-42 (N.Y. App. Div. 1924) (assistant district attorney suspended for three months for, inter alia, making inconsistent statements to the court about the existence of material in his file); *In re Markewich*, 182 N.Y.S. 653, 656-57 (N.Y. App. Div. 1920) (assistant district attorney censured for calling federal district judge's decision dishonest); cf. *In re Westfall*, 808 S.W.2d 829, 838-39 (Mo. 1991) (en banc) (prosecutor not disciplined for criticizing a decision).

Many of these decisions are of the older variety, probably in part because modern First Amendment decisions might render discipline in some of these cases unconstitutional. See Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 628-30 & nn.138-45 (1990) (discussing the vulnerability of some professional regulation, including regulation of lawyer criticism of judges, to First Amendment attack).

number, of cases—including neglect of duty (incompetence),⁹⁵ abuse of authority for personal gain,⁹⁶ conflicts of interest in private practice,⁹⁷ and engaging in ex parte communications.⁹⁸ Other ethical violations have been prosecuted on a haphazard basis.⁹⁹

95. See, e.g., *Wilbur v. Howard*, 70 F. Supp. 930, 936–37 (E.D. Ky. 1947) (commonwealth attorney disbarred for systematically failing to enforce laws against illegal gaming), *rev'd*, 166 F.2d 884 (6th Cir. 1948); *In re Miller*, 677 N.E.2d 505, 509 (Ind. 1997) (prosecutor admonished for failing repeatedly to comply with discovery requirements, resulting in dismissal of the criminal case); *In re Graves*, 146 S.W.2d 555, 556 (Mo. 1941) (en banc) (county attorney reprimanded for “failure to enforce the laws against gambling, prostitution, illegal sale of intoxicating liquor . . . and failure to prosecute persons violating election laws”); *In re Segal*, 617 A.2d 238, 245 (N.J. 1992) (per curiam) (prosecutor reprimanded for failure to prepare a case); *In re Voss*, 90 N.W. 15, 15 (N.D. 1902) (state’s attorney suspended for nine months for intentionally failing to enforce prohibition and gambling laws); *In re Simpson*, 83 N.W. 541, 552–53 (N.D. 1900) (state’s attorney disbarred for willfully failing to prosecute liquor laws); *In re Burton*, 246 P. 188, 200–01 (Utah 1926) (per curiam) (county attorney reprimanded for failing to prosecute a series of cases); *In re Wakefield*, 177 A. 319, 323 (Vt. 1935) (state’s attorney suspended for three months for refusing to proceed against a private client); *In re Lindberg*, 494 N.W.2d 421, 424 (Wis. 1993) (per curiam) (district attorney suspended for six months for “continued pattern of neglect” in his handling of cases).

96. See, e.g., *People v. Brown*, 726 P.2d 638, 641 (Colo. 1986) (en banc) (district attorney disbarred for seeking to tamper with own motor vehicle record); *In re Serstock*, 432 N.W.2d 179, 185 (Minn. 1988) (en banc, per curiam) (prosecutor suspended indefinitely, but for at least two years, for fixing traffic tickets of people to whom he was indebted); *Office of Disciplinary Counsel v. Greene*, 655 N.E.2d 1299, 1301–02 (Ohio 1995) (prosecutor reprimanded for lying to the court to induce dismissal of traffic ticket given to state trooper’s wife); see also authorities cited *supra* notes 86–89.

97. See authorities cited *supra* notes 6–7.

98. See, e.g., *United States v. Ferrara*, 54 F.3d 825, 828 (D.C. Cir. 1995) (challenge to disciplinary proceedings in *In re Howes*, N. Mex. S. Ct. No. 23414, dismissed on procedural grounds); *In re Burrows*, 629 P.2d 820, 826 (Or. 1981) (district attorney and assistant district attorney reprimanded for consenting to meet directly with represented defendant); *In re Dumke*, 489 N.W.2d 919, 922 (Wis. 1992) (city prosecutor suspended for six months for discussing plea and possible cooperation directly with a represented party); *In re Brey*, 490 N.W.2d 15, 17 (Wis. 1992) (district attorney suspended for sixty days for discussing plea and conduct of defense counsel with defendant); *In re Zapf*, 375 N.W.2d 654, 656 (Wis. 1985) (district attorney reprimanded for sending a letter directly to the defendant without counsel’s consent).

99. See, e.g., *Noland v. State Bar*, 405 P.2d 129, 132 (Cal. 1965) (assistant district attorney suspended for thirty days for tampering with a jury list); *People v. Buckley*, 848 P.2d 353, 355 (Colo. 1993) (deputy district attorney censured for shoplifting); *Fla. Bar v. Schaub*, 618 So. 2d 202, 204 (Fla. 1993) (prosecutor suspended for thirty days for eliciting irrelevant testimony from defense experts); *People ex rel. Stead v. Phipps*, 104 N.E. 144, 146 (Ill. 1914) (state’s attorney suspended for one year for inducing three young boys to plead guilty despite their assertions of innocence); *In re Davis*, 471 N.E.2d 280, 281 (Ind. 1984) (prosecutor reprimanded for failing to seek appointment of special prosecutor to investigate criminal conduct of a colleague and his son); *In re Berning*, 468 N.E.2d 843, 845 (Ind. 1984) (prosecutor reprimanded for sending critical letters to jurors); *State v. Socolofsky*, 666 P.2d 725, 727 (Kan. 1983) (county attorney censured for sending jurors a newspaper article about defendant’s previous misconduct); *Commonwealth ex rel. Ward v. Harrington*, 98 S.W.2d 53, 59 (Ky. 1936) (commonwealth attorney censured for presenting

The breakdown of the cases—and in particular the nature of the large categories of cases—is not surprising. One of the difficulties of instituting investigations into potential ethical violations is that disciplinary authorities typically depend on third parties to bring violations to their attention. Prosecutors have no clients who are likely to complain. Criminal defendants rarely have incentives or resources to pursue complaints to the bar.¹⁰⁰ Defense lawyers hesitate to antagonize adversaries with whom they must deal on a regular basis.¹⁰¹ As a result, one would expect most disciplinary proceedings

incomplete information to the grand jury); Attorney Grievance Comm'n of Md. v. Green, 365 A.2d 39, 41 (Md. 1976) (state's attorney disbarred for his participation in obstruction of justice, conspiracy, and attempted subornation of perjury); *In re Shafir*, 455 A.2d 1114, 1116 (N.J. 1983) (prosecutor reprimanded for forging supervisor's signature and giving false information to another prosecutor's office); *In re Weishoff*, 382 A.2d 632, 636 (N.J. 1978) (prosecutor suspended for one year for creating charade in courtroom in order to dispose of a case in the absence of the defendant or the complaining police officer); *In re Rook*, 556 P.2d 1351, 1357 (Or. 1976) (district attorney reprimanded for refusing to plea bargain with fifteen defendants on the same terms as with another defendant so long as they were represented by either of two specific attorneys); *In re Jacquith*, 270 N.W. 649, 651 (S.D. 1937) (state's attorney suspended for six months for threatening a potential witness to prevent his appearance); *Zimmerman v. Bd. of Prof'l Responsibility*, 764 S.W.2d 757, 760 (Tenn. 1989) (prosecutor reprimanded for making extrajudicial statements in violation of the professional rules); *In re McNerthney*, 621 P.2d 731, 733 (Wash. 1980) (letter of admonition issued to prosecutor for inadvertently revealing the existence of a search warrant to his roommate); see also *In re Bretz*, No. 96 CH 0117, Ill. S. Ct. MR No. 12243, (district attorney suspended for filing charges without probable cause), in *Robinson*, supra note 90, at 3; *In re Garza*, No. 86 CH 0021, Ill. S. Ct. MR No. 4206 (prosecutor censured for improper cross-examination and argument), reported in *Robinson*, supra note 90, at 3; *In re Bloon*, Mass. Supreme Judicial Ct., No. 93-78 BD (Dec. 16, 1993) (prosecutor censured for signing fraudulent confession to induce confession by co-defendant), reported in *Robinson*, supra note 90, at 4; cf. *Burkett v. Chandler*, 505 F.2d 217, 225 (10th Cir. 1974) (reversing disbarment of a United States Attorney and several assistants based on an alleged conspiracy to violate the civil rights of politician defendants and alleged hiding of a material exculpatory witness); *People ex rel. Hutchison v. Hickman*, 128 N.E. 484, 488 (Ill. 1920) (district attorney not disciplined for obtaining perjury indictment).

100. See *Steele*, supra note 4, at 980 (“[R]eporting the prosecutor to a grievance committee does not serve the defendant’s self-interests.”). Typically, disciplinary agencies will not entertain complaints against prosecutors until a criminal case is complete, on the theory that, without this precaution, defendants will file complaints in order to obtain discovery or otherwise benefit their positions in the underlying case. See *infra* note 130 and authorities cited therein.

As an empirical matter, defendants’ lack of tactical incentives and resources may not prevent embittered, incarcerated defendants from filing complaints continually, hoping that the bar will investigate the prosecutor. However, as in the case of courts evaluating the numerous prisoner filings challenging convictions, one would expect the bar to view such complaints with suspicion. Absent an independent reason to believe the complaint has merit, the disciplinary authorities are likely to give the complaints short shrift.

101. Defense attorneys commonly allege prosecutorial misconduct in motions, but that

to involve conduct that the regulators learn about through persons other than the direct participants in the underlying case.

The category encompassing proven illegal conduct by prosecutors consists of precisely the kind of cases that typically come to the attention of disciplinary authorities without effort, through media attention directed at the prosecutorial conduct.¹⁰² Similarly, cases in which the presentation of false evidence is discovered and cases involving abusive litigation behavior—though rare in absolute terms—at least come to the attention of a court. Judges are in a good position to refer violations to the bar. Even when they are not inclined to refer cases directly, judges may prompt bar action by highlighting the misconduct in published opinions.

B. The Discipline of Prosecutors Relative to Private Attorneys

In order to evaluate whether the discipline of prosecutors is too rare, it makes sense to compare its frequency against the frequency of discipline of nonprosecutors. Table VI facilitates this analysis by categorizing the code provisions listed in Table V into (1) those applicable to all lawyers and (2) those that only prosecutors are likely to violate or that prosecutors have more reason to violate than private attorneys.¹⁰³

is different than taking the more personal step of filing a bar grievance that has no connection with the defense attorney's responsibilities in the litigation. *See, e.g., Rosen, supra* note 3, at 735 ("Sensible defense attorneys will . . . understandably hesitate to jeopardize a practice by filing complaints that will have little chance of resulting in the meaningful discipline, might harm their clients, and might well adversely affect their practices . . ."); *Steele, supra* note 4, at 980 (noting the disincentives of defense counsel to report prosecutors). Indeed, even private lawyers hesitate to report code violations of other private lawyers.

102. For some crimes by prosecutors, there may be victims who will want satisfaction greater than merely seeing an offending prosecutor fired from his position. Especially when no criminal charge is forthcoming, these victims may be willing to undertake the burden of bringing the offense to the bar's attention by filing a bar complaint.

103. Thus, for example, the provisions of Model Rule 3.8 specifically target prosecutorial conduct. In contrast, the provisions of Model Rule 3.4 impose discovery and other procedural obligations that apply to all lawyers but which have special significance for prosecutors because of prosecutors' constitutionally-based disclosure obligations. Similarly, the provisions of Model Rules 4.3 and 4.4, which require all lawyers to respect the right of third parties, seem especially significant for prosecutors because of the frequency with which prosecutors confront constitutional rights of defendants and witnesses.

TABLE VI	
Applicability of Table V's Provisions	
<u>A. Provisions Applicable to All Lawyers</u>	
3.1	Making nonmeritorious claims
3.3(a)(1)	Making false statements
3.3(a)(4)	Offering false evidence
3.4(a)	Obstructing access to or unlawfully concealing evidence
3.4(b)	Falsifying evidence, counseling a witness to testify falsely, offering a witness prohibited inducements
3.4(e)	Alluding to irrelevant matter/personal opinion at trial
3.4(f)	Requesting a witness not to cooperate with the adversary
3.6, 3.8(e), (g)	Encouraging publicity during litigation
<u>B. Provisions Uniquely or Specially Applicable to Prosecutors</u>	
3.4(c), (d)	Knowingly disobeying a legal obligation (e.g., disclosure) and failing to comply with discovery ¹⁰⁴
3.8(c)	Not seeking a waiver of rights
3.8(d)	Disclosing of evidence
4.3, 4.4	Misleading unrepresented persons and respecting the rights of third persons ¹⁰⁵

104. Model Rule 3.4 applies to private attorneys. However, the nature of prosecutors' special constitutional responsibilities—especially the responsibility to disclose exculpatory evidence—makes the requirements of Rule 3.4(c) and (d) particularly germane to prosecutorial activity.

105. Prosecutors are more likely than private attorneys to require the cooperation of unrepresented defendants or third-party witnesses and to be in a position to threaten a clearly defined right those persons may possess.

In an attempt to get a realistic handle on the facts concerning discipline of prosecutors, I collected the reported cases in which states had disciplined lawyers for violations of the rules listed in Table VI, or their analogues.¹⁰⁶ Although the research cannot be classified as scientific or comprehensive,¹⁰⁷ the results nonetheless are instructive.

Table VII classifies the results.¹⁰⁸ For each provision, Table VII notes the number of cases in which discipline has been imposed *in toto* and then subdivides these into cases involving prosecutors, criminal defense attorneys, and civil lawyers. Because many of the instances of discipline involve lawyers' violations of multiple rules, Table VII first identifies cases involving only violations of the pertinent provisions and then lists separately the cases in which multiple violations contributed to the disciplinary authorities' findings. Again, Table VII does not distinguish among cases according to the sanctions imposed.¹⁰⁹

106. To be more precise, I asked several research assistants to conduct computerized searches for these cases. In the interest of completeness, I supplemented their research with cases found by research assistants working on other aspects of this study. *See supra* note 85.

107. *See supra* notes 79–82. The Model Rules themselves do not govern in any state. The research assistants, through the use of pointed computerized searches, attempted to identify violations of state versions of rules that corresponded to each Model Rule in question. Some instances of discipline predated the Rules but implemented the same principles.

The task was complicated by the fact that individual states use their own terminology and numbering for the concepts the rules embrace. For time reasons, the research assistants could not identify each state's rules and then conduct searches using those. Instead, the research assistants attempted more global searches using combined state databases and key words to identify, as well as possible, all cases in which disciplinary authorities attempted to or in fact meted out discipline to lawyers for violations of the rules.

108. The cases listed in Table VII are simply too numerous to cite individually. The research assistants' memoranda are on file with the author and the *North Carolina Law Review*. The cases involving prosecutors are included in the summaries of prosecutor discipline cases in Part II.A of this Article.

109. *See supra* note 81.

TABLE VII				
Discipline Cases Involving Table VI's Provisions				
A. Provisions Applicable to All Lawyers	Total # of Discipline Cases	Prosecutor	Criminal Defense Lawyer	Civil Lawyer
3.1	5	0	0	5
3.1 + other violations	52	1	2	49
3.3(a)(1)	12	5	1	6
3.3(a)(1) + other violations	143	2	10	131
3.3(a)(4)	4	2	0	2
3.3(a)(4) + other violations	80	0	0	80
3.4(a)	3	0	2	1
3.4(a) + other violations	33	0	0	33
3.4(b)	1	0	1	0
3.4(b) + other violations	30	0	2	28
3.4(e)	1	1	0	0
3.4(e) + other violations	10	1	1	8
3.4(f)	5	1	1	3
3.4(f) + other violations	0	0	0	0
3.6/3.8(e), (g)	0	0	0	0
3.6/3.8(e), (g) + other violations	9	1	3	5
B. Provisions Uniquely or Specially Applicable to Prosecutors¹¹⁰				
3.4(c)	0	0	0	0
3.4(c) + other violations ¹¹¹	20	0	0	20
3.4(d)/3.8(d) ¹¹²	8	8	0	0
3.4(d)/3.8(d) + other violations	18	2	0	16
3.8(c)	0	0	0	0
4.3	3	0	1	2
4.3 + other violations	26	0	2	24
4.4	8	2	0	6
4.4 + other violations	49	1	4	44

110. These categories are explained *supra* note 102.

111. The listed cases involve violations of court rules. In seventeen other cases, lawyers were sanctioned for violating obligations imposed by disciplinary tribunals. Of these, none involved a prosecutor and one involved criminal defense counsel.

112. In states with rules like Model Rule 3.8(d), which provides specific disclosure obligations, prosecutors are more likely to be disciplined for violating ethical discovery obligations than under the parallel provision of Model Rule 3.4(d). Table VII combines the two rules.

When one reviews the reported cases involving the provisions equally applicable to prosecutors and private attorneys (i.e., the provisions listed in Table VI Part A), a few surprising facts appear. First, most discipline occurs in cases involving the private civil bar. Discipline for lawyering in criminal cases—whether for violations by prosecutors *or* defense attorneys—is quite rare.¹¹³ Apparently because of the heightened sense of combat that occurs in the criminal arena, disciplinary authorities are readier to adopt an “anything goes” attitude.

Such leniency, of course, is consistent with the sense of many commentators that criminal defense lawyers have a higher than normal duty to press ethical boundaries to the limits when that is in the interests of their clients.¹¹⁴ If disciplinary agencies are extending the same reasoning to prosecutors, they probably are concluding either that aggressive defense lawyer conduct justifies reciprocation by prosecutors or that alternative remedies, such as judicial supervision, are adequate to discourage prosecutorial misconduct.

There is another possible explanation. Quite apart from any belief that alternative judicial remedies are adequate to control misconduct in criminal cases, the disciplinary authorities may be leery of interfering with, or having an undue effect upon, the judicial process. If courts come to suspect that judicial decrees of constitutional violations arising from prosecutorial misconduct or defense counsel ineffectiveness automatically give rise to discipline—even disbarment—the courts may become less willing to make findings regarding misconduct.¹¹⁵ Disciplinary authorities may be recognizing this possibility and may be reacting by deferring to judicial remedies in order to preserve their integrity.

113. Professor Albert W. Alschuler reached the same conclusion in 1972. Alschuler, *supra* note 44, at 670 (referring to an earlier study showing “only a handful of cases” in which disciplinary proceedings had been instituted against defense counsel for courtroom behavior).

114. See generally Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 169–70 (1996) (discussing the general acceptance of super-aggressive representation in criminal defense cases). Whether the deference of discipliners is appropriate in this context is an issue beyond the scope of this empirical analysis.

115. The hesitation to equate constitutional violations with grounds for other remedies helps explain the judicial limits on malpractice suits by criminal defendants and immunity rules barring civil suits against prosecutors. See, e.g., RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 75 cmt. d (Proposed Final Draft No. 2, Apr. 6, 1998) (noting limits on malpractice suits against criminal defense counsel); see also *infra* notes 196–98 and accompanying text (discussing case law defining prosecutorial immunity).

The second conclusion that one can reasonably draw from Table VII is that discipline rarely occurs unless a lawyer has committed multiple violations of the professional codes. Violation of a single rule rarely suffices to produce bar action.

On the one hand, this conclusion should have little bearing on the distinction between prosecutors and private lawyers for purposes of discipline; prosecutors who commit multiple code violations should theoretically be subject to the same likelihood of discipline as private lawyers. On the other hand, prosecutors may, as a practical matter, be less likely to commit multiple violations. When critics of prosecutorial discipline complain of the failure of discipline, they frequently are relying on the failure of the authorities to discipline prosecutors who have committed single violations pointed out in the judicial opinions. If, in fact, disciplinary authorities are reluctant to prosecute any lawyer for single violations, the claim that disciplinary authorities apply a double standard may be misplaced.

Nevertheless, on the whole, Table VII does support the claim that prosecutors are disciplined rarely, both in the abstract and relative to private lawyers.¹¹⁶ Part A of Table VII concerns rules that apply equally to prosecutors and private lawyers (though some do not apply to private criminal defense attorneys) and which prosecutors, like private attorneys, have incentives to violate. The Table suggests that, even with respect to these limited provisions, the discrepancy between discipline of prosecutors and private attorneys is enormous.

Part B addresses several rules that apply specially, or more frequently, to prosecutors than to private attorneys. Still, the Table reveals that prosecutors are disciplined no more often than are private attorneys, and in some cases less. The study uncovered only one category within either part of the Table—violations of the discovery provisions in Rule 3.4(d)—in which a significant number of prosecutorial violations resulted in discipline.

C. Explanations for the Discrepancy in Discipline

Several kinds of explanations might justify the discrepancy between prosecutor discipline and private lawyer discipline. There may be practical impediments to disciplining prosecutors or practical reasons why disciplinary authorities prefer to pursue private

116. *Accord* Alschuler, *supra* note 44, at 670–71 (noting his inability to find more than “a single case” in which prosecutors had been disciplined for courtroom misconduct); *see also* JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT § 13.28, at 921–22 (1999) (noting that discipline of prosecutors is rare); *supra* note 3 and accompanying text.

misconduct. There may be theoretical or legal justifications for avoiding the prosecution of prosecutors. Finally, alternative remedies for prosecutorial misconduct may obviate the need for disciplinary authorities to expend precious resources in pursuing the prosecution corps.¹¹⁷

1. Practical, Legal, and Theoretical Explanations

Disciplinary authorities have limited resources to prosecute violations of the professional rules. They must determine how to allocate those resources so as to punish misconduct most effectively, deter future misconduct by the miscreant lawyer, protect the lawyer's clients, deter misconduct by other lawyers, maintain the image of the bar, and preserve the trust of potential clients.¹¹⁸

The context in which prosecutors practice helps insulate them from discipline. Like practitioners in large law firms, prosecutors typically are supervised and trained, have a peer support system (including mentors and colleagues) through which ethical issues can be discussed, and are blessed with the resources necessary to research and come to a reasoned conclusion regarding appropriate conduct. Historically, regulatory authorities have imposed discipline primarily on solo or small-firm practitioners who are uncontrolled by such internal constraints and are likelier to make "ethical decisions" without measured and informed consideration.¹¹⁹

117. See Green, *Policing Federal Prosecutors*, *supra* note 3, at 70-71 ("I would [argue] that the criticism of formal disciplinary mechanisms overlooks the importance of informal judicial controls, if not informal professional controls, to ensure compliance with standards of prosecutorial conduct.").

118. See, e.g., Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 17-18 & nn.77-81 (1998) ("Three reasons are typically cited for imposing discipline on lawyers: first and foremost, protection of the public, second, protection of the administration of justice and third, preservation of confidence in the legal profession."). The purposes of discipline may, in the case of prosecutors, conflict. Discipline of prosecutors may, for example, instill more confidence in the bar's willingness to regulate without a double standard but, by bringing prosecutorial misconduct to light, may also engender doubts about the fairness of the criminal justice system.

119. See, e.g., ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 41 (Prelim. Draft, Jan. 15, 1970) ("The majority of complaints submitted to disciplinary agencies concern the single or small-firm, low-income practitioner."); JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 52* (1966) (noting that low status lawyers are more likely to accept just the minimum standards of conduct set by the bar, while high status lawyers are more likely to accept higher standards); SHARON TISHER ET AL., *BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 103* (1977) ("[T]he vast majority of lawyers investigated and punished . . . practice alone or in two or three person firms . . ."); James Evans, *Lawyers at Risk*,

Similarly, disciplinary authorities tend to focus on intentional misconduct by lawyers whose actions are self-serving or governed by greed.¹²⁰ Intentional misconduct is most harmful to the reputation of the bar. When publicized, it heightens the public's inclination to distrust, and to avoid the use of, lawyers as a whole. Such misconduct also often reflects a lawyer who is likely to commit additional violations, because the lawyer probably will continue to be influenced by personal incentives unless taught a lesson.

When prosecutors have been influenced by venal incentives, the record suggests that the bar has proceeded against them.¹²¹ In practice, however, prosecutors rarely have financial reasons to commit misconduct.¹²² More typically, prosecutors who engage in the misconduct decried in the cases and literature—particularly pretrial and trial misconduct—are driven by an excess of zeal in pursuing the public good.¹²³ Prosecutors' actions based on such adversarial motivations are unlikely to cause future private clients to avoid or distrust their own lawyers. Indeed, excessive prosecutorial zeal highlights for clients the importance of being well-represented.¹²⁴ Rightly or wrongly, the bar thus may feel less of a need to proceed against the prosecutors.¹²⁵

CALIF. LAW., Oct. 1989, at 45, 46–47 (noting that half of lawyers disciplined in California are solo practitioners); OFFICE OF THE STATE BAR OF CALIFORNIA CHIEF TRIAL COUNSEL, CORRELATION OF FIRM SIZE AND PRACTICE AREA WITH COMPLAINTS RECEIVED AND ACTION TAKEN (July 1, 1994), in DEMOGRAPHIC AND PROFESSIONAL CHARACTERISTICS OF CALIFORNIA ATTORNEYS 15, 23rd Nat'l Conf. on Prof. Responsibility (May 29–31, 1997) (noting bar statistics to the effect that most complaints focus on solo and small-firm practitioners). There is, of course another possible, but highly controversial and unprovable explanation for the discrepancy in discipline. Arguably, elite prosecutors' offices, like elite law firms, are able to hire the "best" lawyers who may be either "more ethical" or more able to avoid ethical violations.

120. Cf. Levin, *supra* note 118, at 33 (noting the emphasis in ABA standards governing lawyer discipline on lawyers' "dishonest or selfish motive").

121. See *supra* notes 86–89, 96 and accompanying text.

122. Cf. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 724 (1999) (discussing generally the problem of ascertaining prosecutors' intentions).

123. In other words, the offending prosecutors typically engage in misconduct not for reasons of personal gain, but because they are seeking to convict defendants they honestly believe should be convicted. Although such misconduct may be improper in light of the prosecutor's broad obligation to do overall justice, the misconduct occurs because of the prosecutor's misunderstanding of the nature of that role. However wrongful the conduct itself may be, the motivation seems less blameworthy than the motivation of private attorneys who misbehave in order to feather their own nests.

124. In other words, the most obvious method for clients to counteract prosecutorial zeal that manifests itself in misconduct is to retain and trust in aggressive defense counsel who will monitor prosecutorial conduct closely.

125. Cf. *In re* Conduct of Lasswell, 673 P.2d 855, 860 (Or. 1983) (exonerating

The absence of individual clients also reduces the likelihood of professional discipline. When prosecutors stray, the regulators no doubt perceive a lesser need to institute discipline in order to protect individuals.¹²⁶ So long as alternative remedies, such as exclusionary rules and appellate reversal of convictions, are sufficient to make clear that the prosecutorial conduct is wrong and to discourage this prosecutor and other prosecutors from committing future misconduct, the disciplinary authorities may perceive little marginal benefit of instituting their own proceedings.¹²⁷ The disciplinary process cannot help compensate or rectify the injuries of individual harmed defendants.¹²⁸

More importantly, the absence of clients makes it far more difficult for the authorities to learn of and prosecute violations. The bar cannot rely on aggrieved defendants as the instigators of complaints, because almost all defendants have antipathy toward their prosecutors. If the bar routinely responds to complaints by defendants, defense attorneys will be able to manipulate bar proceedings for tactical purposes.¹²⁹ Yet, to the extent the bar successfully separates disciplinary proceedings from the underlying prosecutions,¹³⁰ defendants and their attorneys lose much of their

prosecutor of violating rule against extra-judicial statements on grounds that the prosecutor lacked the requisite intent); *In re McNerthney*, 621 P.2d 731, 733 (Wash. 1980) (reducing punishment to a letter of admonition where prosecutor's code violations were well-intentioned and inadvertent).

126. Green, *Policing Federal Prosecutors*, *supra* note 3, at 89 (noting that disciplinary authorities "generally seek to reserve resources for cases of the most egregious wrongdoing. These are usually cases where lawyers harm individual clients . . .").

127. Of course, when disciplinary authorities perceive that the alternative remedies are inadequate to deter, the implementation of discipline may provide marginal deterrence.

128. Disciplinary authorities typically have no authority to order any form of compensation to victims or to intervene in the criminal process through which a prosecutor may have injured a defendant.

129. Among the potential benefits are obtaining discovery, disqualifying the prosecutor, and casting public (and jury) doubt about the prosecutor's credibility. Moreover, at a minimum, disciplinary authorities have reason to fear that claims by criminal defendants may be motivated by resentment for their prosecution, a desire for vengeance, or a design to discredit the prosecutor's office. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 13.10.2, at 761 (1986) (discussing hesitation of disciplinary agencies to prosecute prosecutors).

130. Anecdotal evidence suggests that states respond in varying ways to complaints filed in the middle of ongoing proceedings. In a recent discussion on a legal ethics internet discussion group, participants familiar with the disciplinary process in particular jurisdictions revealed the following information. See Responses to Subject "Disciplinary Counsel Question" (Sept. 7, 1999), at <http://www.washlaw.edu/legalethics/archives/990801/msg00125.html> (on file with the North Carolina Law Review). In Missouri and Ohio, "it is common to defer investigation into a complaint when a complaint is filed against a lawyer by opposing counsel or an opposing party in a pending case." Response by Peter Joy

incentive to file and bear the burden of prosecuting complaints.¹³¹ The practical consequence is that the bar must identify and prosecute most violations on its own. Even relying on suggestions of prosecutorial misconduct in judicial opinions can prove unrewarding, for these suggestions sometimes have proven to be literary exaggerations.¹³²

(Sept. 7, 1999), at <http://www.washlaw.edu/legalethics/archives/990801/msg00125.html> (on file with the North Carolina Law Review). In California, “the Bar will ‘turn their heads’ away from a complaint that looks like a petty dispute between opposing counsel. Usually after the case settles, the complainant declines to follow-up.” Response by Carol Langford (Sept. 8, 1999), at <http://www.washlaw.edu/legalethics/archives/990801/msg00125.html> (on file with the North Carolina Law Review). In Virginia, the discipliners “may, for exceptional circumstances, stay . . . [a] hearing or investigation because the issues are . . . similar to those raised in a pending criminal . . . proceeding. Normally, however, the pendency of . . . criminal proceedings is not a basis to defer the investigation or hearing on a bar complaint.” Response by James M. McCauley, Ethics Counsel, Virginia State Bar (Sept. 8, 1999), at <http://www.washlaw.edu/legalethics/archives/990801/msg00125.html> (on file with the North Carolina Law Review). In South Carolina, there is no “rule or practice” of deferring complaints, but the Grievance Board appears to “discount these types of complaints.” Response by Steedley Bogan, former member of Grievance Board (Sept. 7, 1999), at <http://www.washlaw.edu/legalethics/archives/990801/msg00125.html> (on file with the North Carolina Law Review).

131. As a factual matter, regardless of incentives, criminal defendants may still routinely file complaints. They may feel particularly aggrieved and have a jaundiced view of prosecutors’ motives. Incarcerated complainants have plenty of time to pursue complaints. They may view pursuing the process as a distracting amusement.

If true, these considerations cut in conflicting directions. The presence of the complaints arguably bring instances of prosecutorial misconduct to bar attention. On the other hand, if such complaints are routine, the bar may feel compelled to give them short shrift. Cf. Bogan, *supra* note 130 (noting that the South Carolina Grievance Board “discounts” complaints filed in the course of litigation). The bar’s investigative resources are limited. Moreover, pursuing meritless complaints, even if only to the stage of determining that they are meritless, imposes a psychological and financial burden on the falsely-accused prosecutors.

132. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1993) (amending a lower court’s finding of misconduct on the basis that “the magistrate judge apparently did not have a full understanding of the facts”). The limited available empirical evidence concerning the quality of judicial findings is ambiguous. Professor Richard Rosen reviewed nine disciplinary cases that stemmed from judicial decisions finding outrageous prosecutorial misconduct. See Rosen, *supra* note 3, at 730. Three resulted in no discipline, four resulted in minor sanctions stemming largely from the discipliners’ disagreement with the court about the severity of the misconduct, and two resulted in a finding of substantial wrongdoing justifying a major sanction. See *id.* These figures can be used to support the contradictory conclusions that courts which note misconduct exaggerate the existence of disciplinable behavior, that accurate judicial findings of misconduct often are ignored by disciplinary agencies, and that judicial findings of misconduct—when considered by disciplinary agencies—often do translate into discipline.

Certainly, however, Professor Rosen is correct in his main observation. There are many reported cases in which courts cite prosecutorial misconduct, but few reported cases of discipline for the cited misconduct. Even assuming that some of the judicial findings are exaggerated or refer to types of misconduct that would not justify professional discipline,

Doubts about the substantive basis for imposing discipline also may cause disciplinary authorities to hesitate to institute proceedings—for practical and theoretical reasons. The authorities must deal with the reality that many instances of questionable prosecutorial zeal reflect a conscious effort by prosecutors to push the legal envelope. Prosecutors rarely want to commit direct violations of the law, because that may result in the loss of a conviction through the exclusionary rule or on appeal. Prosecutors may, however, attempt to salvage potentially losing cases by stretching their authority or rationalizing police conduct. The result often is a new legal argument regarding untested statutory or constitutional principles,¹³³ which prosecutors' offices stand ready to litigate.¹³⁴ Disciplinary authorities who seek to base professional discipline on such conduct must expect extensive litigation in which the legal issues are fully vetted. As a practical matter, faced with no shortage of other cases involving professional misconduct, the authorities may prefer to use their limited resources to dispose of a greater number of easier cases.¹³⁵ As a substantive matter, the authorities may genuinely

one suspects that many others do identify disciplinable behavior. The paucity of ensuing disciplinary cases suggests either that disciplinary agencies are not learning of the judicial findings or are making a conscious decision not to follow up on them.

133. 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, 387–88 (1992) (noting that the bar's vision of appropriate or justifiable conduct may differ from that of prosecutors, the public, and the courts); Green, *Policing Federal Prosecutors*, *supra* note 3, at 71–72 (noting that prosecutors often have a different conception of their role than others in the organized bar and arguing that it is therefore “important that authoritative rulings be issued regarding the scope of proper prosecutorial conduct and that improper conduct be sanctioned”).

134. See, e.g., *United States v. Colo. Supreme Court*, 189 F.3d 1281, 1283–89 (10th Cir. 1999) (rejecting federal challenge to state rule governing subpoenas to attorneys); *Whitehouse v. United States Dist. Court for the Dist. of R.I.*, 53 F.3d 1349, 1365–66 (1st Cir. 1995) (upholding federal local court rule applying state ethics provision against challenge by federal prosecutors); *Baylson v. Disciplinary Bd.*, 975 F.2d 102, 106–07 (3d Cir. 1992) (rejecting district court's authority to adopt a state rule limiting grand jury subpoenas); *United States v. Klubock*, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (per curiam) (upholding federal local court rule applying state ethics provision against federal prosecutors); *Stern v. Supreme Judicial Court*, 16 F. Supp. 2d 88, 89 (D. Mass. 1998), *rev'd*, 214 F.3d 4, 13–15 (1st Cir. 2000) (considering a challenge by a United States Attorney to a state ethics rule regarding subpoenas to attorneys); *In re Doe*, 801 F. Supp. 478, 484–85 (D.N.M. 1992) (rejecting Supremacy Clause argument raised by government in challenge to application of state ethics rule).

135. See, e.g., Cramton & Udell, *supra* note 133, at 305 (noting that “[f]ederal prosecutors acting in good faith in accordance with plausible interpretations of ethics rules are exceedingly unlikely to be disciplined”); Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 49, at 280 (“[B]ecoming embroiled in disputes concerning regulatory jurisdiction inevitably diverts the bar from other important and valuable tasks.”).

believe that the professional rules in question, though technically applicable to prosecutors, should be enforced less vigorously.¹³⁶

Moreover, the authorities may sense a real separation of powers issue. Ultimately, bar authorities in most jurisdictions operate under the rubric of the courts.¹³⁷ Prosecutors are members of the executive branch. To the extent discipline requires an investigation of the workings of a prosecutor's office, disciplinary agencies may consider it invasive of the authority of a coordinate branch of government.¹³⁸ On occasion, prosecutors have directly raised the claim that the application of particular professional rules to them violates the principle of separation of powers.¹³⁹

Even if the bar does not feel legally constrained, it may feel politically constrained. State prosecutors, after all, are elected officials. The conduct and zeal shown by their subordinates is subject to political oversight. Prosecutorial misconduct can become a campaign issue.¹⁴⁰ Disciplinary authorities may hesitate to institute proceedings for fear of being accused of engaging in politics. They may hesitate to call into question the quality of justice in the judicial system.¹⁴¹ At the same time, the authorities may have some

136. This possibility is discussed fully in Zacharias & Green, *supra* note 10, at 224–35 (discussing why prosecutors may be viewed differently than other attorneys for purposes of professional discipline).

137. In most, but not all, states, the state supreme court is charged with promulgating the professional rules and, ultimately, with hearing appeals in cases involving discipline.

138. See, e.g., Atwood, *supra* note 68, at 204–06 (discussing the separation of powers argument); Zacharias & Green, *supra* note 10, at 240–42 (“Courts hesitate to supervise prosecutorial conduct for fear of encroaching on the authority of another branch of government.”).

139. See, e.g., *Whitehouse*, 53 F.3d at 1365–66 (upholding a federal district court rule applying state ethics provision despite a claim by federal prosecutors that the federal district court rule would “alter the traditional relationships between prosecutor, court, and grand jury”); *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) (requiring prosecutorial compliance with California’s no-contacts rule and affirming the district court’s rejection of the separation of powers argument at 765 F. Supp. 1433, 1445 (N.D. Cal. 1991)); *Klubock*, 832 F.2d at 667 (upholding federal district court rule applying state ethics provision despite separation of powers claim by federal prosecutors); *Simpson v. Ala. State Bar*, 311 So. 2d 307, 310–11 (Ala. 1975) (holding that prosecutor could not be disciplined where state constitution provided the method for prosecutor’s removal); *Watson v. Ala. State Bar*, 311 So. 2d 311, 311–12 (Ala. 1975) (same); see also *Eclavea*, *supra* note 83, § 2(a) (“[T]here is authority supporting the view that misconduct committed by a prosecuting attorney . . . cannot serve as the basis for professional disciplin[e] . . .”).

140. See Zacharias, *Plea Bargaining*, *supra* note 55, at 1185–86 (discussing the benefit of published prosecutorial standards on plea bargaining as exposing the standards to political debate).

141. See *Auler*, *supra* note 41, at 646 (“Grievance committees . . . are understandably hesitant to take action against other state officials which will reveal injustice in the judicial

confidence that excessive zeal is subject to rectification because of the potential for media attention and public review.

Finally, there are timing issues related to parallel criminal proceedings involving the alleged professional misconduct. Disciplinary authorities may be loath to review a prosecutor's conduct while appellate proceedings are pending, for fear of interfering, or being perceived as interfering, in the appellate process. Yet if disciplinary proceedings are held in abeyance until the completion of the criminal proceedings, many years may pass.¹⁴²

Moreover, career prosecutors are in the minority.¹⁴³ Individual prosecutors who commit misconduct may no longer be prosecutors by the time the appeals of their cases are complete. In such cases, the need for specific deterrence of the individual prosecutor's zeal will have dissipated. Again, the bar has less incentive to proceed.

2. The Availability of Alternative Remedies

There are four categories of alternative remedies for prosecutorial misconduct, the availability of which may encourage disciplinary agencies to save their resources for other cases: administrative supervision of prosecutors, trial court controls, appellate court intervention, and public oversight. Not all of these alternatives will be effective in every situation. Their drawbacks are discussed in Part III. For purposes of this Part of the Article, however, let us identify these remedies and how they operate.

Perhaps the most frequently implemented alternative mechanism for controlling prosecutorial misconduct is internal office supervision. This supervision takes three general forms: training and preparation of prosecutors to avoid misconduct; routine supervisory control and performance evaluation; and specific review of alleged misconduct.

In addition to the initial training of new prosecutors, many agencies maintain manuals or guidelines governing recurring prosecutorial conduct.¹⁴⁴ Prosecutors tend to adhere to these

system.”).

142. In contrast, civil cases involving the poorly-financed private lawyers who typically are subjected to discipline may be less likely to be appealed, reducing the likelihood of delay. See *supra* note 119 and accompanying text (discussing which lawyers are most frequently disciplined).

143. This phenomenon may be changing somewhat. See Harvey Berkman, *The Green Cadre of U.S. Attorneys is Sporting Gray as Prosecutors Stay on the Job*, NAT'L L.J., Aug. 15, 1994, at 1 (describing the increasing tendency of Assistant United States Attorneys to remain on the job for longer terms).

144. See Zacharias, *Plea Bargaining*, *supra* note 55, at 1184 n.196 (discussing administrative guidelines maintained by some prosecutors' offices); see also Green,

regulations, not only because they provide needed guidance in resolving ethical dilemmas, but because violations may serve as a basis for internal discipline or poor performance evaluations.

Routine supervisory control includes the availability of supervisors who offer advice to individual prosecutors in particular potential misconduct situations. Probably more significant, however, is the performance evaluation process. Allegations of misconduct against individual prosecutors will be considered.¹⁴⁵ Their potential effect on salaries and job retention is certain to be of importance to prosecutors.

Investigation or review of specific alleged misconduct may take two forms. It sometimes is undertaken internally or informally by the prosecutor's superiors. Alternatively, in many offices and in the federal government, specific units are responsible for the investigation of misconduct.¹⁴⁶

Outside prosecutors' offices, the primary source of oversight is the judicial process. Trial courts exercise control in a variety of ways. Despite prosecutors' broad discretion in guiding grand juries, complaints sometimes can make their way to the supervising judge. Once a case is instituted, trial judges exercise control over prosecutorial behavior through prosecutors' need to maintain a working relationship with the court and through the courts' powers to exclude evidence, to dismiss prosecutions, to hold prosecutors in contempt, and—at least with respect to in-court conduct—to issue orders in the exercise of the court's supervisory authority.¹⁴⁷ In some

Policing Federal Prosecutors, *supra* note 3, at 76–77 (discussing internal guidelines governing federal prosecutors); Little, *supra* note 28, at 744–45 (discussing the United States Attorney's Manual and training program and the National District Attorneys Association Ethics Manual).

145. See Cramton & Udell, *supra* note 133, at 305 n.41 (“Although it is stated that [internal federal procedures for reviewing misconduct] rarely result in dismissal for the offending lawyer, see H.R. Rep. No. 986, 101st Cong., 2d Sess. 31–36 (1990), there are a much larger number of instances in which internal criticism and admonishment serve to set future standards of behavior.”).

146. In the federal government, for example, the Department of Justice maintains an independent Office of Professional Responsibility, which is charged with investigating allegations of misconduct by federal prosecutors. See 28 C.F.R. § 0.39(a) (1999); see also Auler, *supra* note 41, at 647 (discussing the potential for criminal prosecution of prosecutors for prosecutorial misconduct); Green, *Policing Federal Prosecutors*, *supra* note 3, at 84–87 (discussing the Office of Professional Responsibility, its authority, and its weaknesses).

147. In *United States v. Williams*, 504 U.S. 36 (1992), the Supreme Court limited judicial authority to exercise supervisory control over prosecutors to “in-court” conduct. *Id.* at 46–47. *Williams* acknowledges, however, that courts have some authority over even out-of-court conduct that affects judicial proceedings. *Id.* at 46 (citing *Bank of Nova*

isolated contexts, a court also may have authority to fine individual prosecutors when it determines that a fine is necessary to deter similar egregious conduct in the future.¹⁴⁸

Appellate court authority over prosecutors is similar, though not identical, to that of the trial courts. Appellate courts may reverse and, in some rare instances, dismiss cases for prosecutorial misconduct.¹⁴⁹ Their primary authority, however, lies in their written opinions—the ability to embarrass prosecutors by name when the misconduct warrants this remedy.¹⁵⁰

Scotia v. United States, 487 U.S. 250 (1988), a case upholding judicial power to dismiss an indictment because of misconduct occurring before the grand jury). *Williams* left standing a long line of cases in which courts have exercised supervisory authority over lawyers, federal agents, and their own proceedings. See, e.g., *United States v. Hasting*, 461 U.S. 499, 505–06 (1983) (resting limited supervisory authority, inter alia, on power to preserve the integrity of the judicial process); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (imposing prophylactic rule of conduct for police officers); *Jencks v. United States*, 353 U.S. 657, 667–68 (1957) (finding inherent judicial power to control court procedures).

148. See, e.g., *Greene v. State*, 931 P.2d 54, 62 (Nev. 1997) (applying Superior Court Rule 39, which gives courts the power to fine prosecutors for making improper remarks in opening statement); *McGuire v. State*, 677 P.2d 1060, 1065 (Nev. 1984) (\$500 fine imposed on a prosecutor by the Nevada Supreme Court in a combined appeal of two defendants' convictions). Generally, courts have no fining authority, except in contempt proceedings, with respect to Rule 11 violations, or when specific statutory provisions providing for fines exist. Cf. *Candolfi v. N.Y. City Transit Auth.*, 595 N.Y.S.2d 656, 660 (Civ. Ct. 1992) (upholding \$1,800 fine of civil attorney for "abusive behavior"); see also Levin, *supra* note 118, at 77–80 & nn.346–48 (discussing the use of fines in this and other countries and advocating the creation of fining authority as part of disciplinary sanctions); Barrow, *supra* note 3, at 328 (urging expanded judicial imposition of monetary sanctions for inappropriate prosecutorial conduct).

149. A finding of prosecutorial misconduct typically will not dispel the possibility of defendant's guilt, so appellate courts are unlikely to bar retrial of the defendant. Under some limited circumstances, however, courts may rule that intentional egregious misconduct at trial so subverted the integrity of the trial process that double jeopardy considerations require dismissal with prejudice. See *Oregon v. Kennedy*, 456 U.S. 667, 675–76 (1982); see also Rick A. Bierschbach, *One Bite at the Apple: Reversals of Convictions Tainted by Prosecutorial Misconduct and the Ban on Double Jeopardy*, 94 MICH. L. REV. 1346, 1348–51, 1363–69 & nn.117–18 (1996) (discussing double jeopardy principles applicable to prosecutorial misconduct reversals); Rosenthal, *supra* note 4, at 910–26 (analyzing the application of double jeopardy principles to cases involving prosecutorial misconduct).

150. See, e.g., *McGuire v. State*, 677 P.2d 1060, 1062 (Nev. 1984) (mentioning by name a prosecutor who had committed similar misconduct in two other cases). *But cf.* GERSHMAN, *supra* note 4, § 13.4, at 13–14 (noting that "[c]uriously, appellate courts have been reluctant to identify the . . . offending prosecutor by name," but citing cases in which courts have done so).

Some prosecutors may not care if an appellate court mentions them by name as having committed misconduct so long as the court does not impose any direct sanction. Other prosecutors take great offense at any suggestion that they have acted improperly. See, e.g., *People v. Hill*, 952 P.2d 673, 682–83 & n.9 (Cal. 1998) (mentioning prosecutor by name and, over prosecutor's strenuous objection, alluding to unpublished previous

The other main remedy for prosecutorial misconduct is public oversight. State district attorneys typically are elected officials. Misconduct within their offices—even by lawyers whom they have not directly supervised—can become an issue during elections. Accordingly, media attention and political review by the voters may provide a deterrent or, at least, a reason for district attorneys to take corrective steps when misconduct is brought to their attention.

III. SHOULD PROSECUTORS BE DISCIPLINED MORE OFTEN?

Thus far, we have examined the reality of prosecutor discipline, identified areas in which there appears to be a discrepancy between discipline of prosecutors and private attorneys, suggested possible explanations for why disciplinary authorities sometimes hesitate to bring cases against prosecutors, and noted the existence of alternative remedies for prosecutorial misconduct. It behooves us to mesh some of these analyses. In particular, let us consider when the discrepancy in prosecutions seems appropriate and when the case for increased discipline is at its strongest.

A. *When Is Discipline Most Useful?*

When disciplinary resources are limited, prosecutorial activity is more hidden and less blameworthy than private misconduct, and alternative remedies are available for prosecutors' violations of the codes, it makes considerable sense for disciplinary authorities to forebear. On the other hand, even conceding limitations on disciplinary resources, these factors do not excuse complete abdication of disciplinary authority. There are at least five varieties of cases in which discipline seems especially important.

The first two varieties are defined by the nature of the prosecutorial misconduct itself. When violations are particularly serious and the prosecutors involved are unlikely to be punished by other means, the bar's intervention may be required to maintain society's confidence in the disciplinary system. The most obvious

opinions in which prosecutor's conduct also was chastised). Thus, for example, when a district court in *United States v. Lopez*, 765 F. Supp. 1433 (N.D. Cal. 1991), mentioned a specific Assistant United States Attorney as having improperly contacted a represented party and as having materially misled the magistrate, the United States Attorney's office immediately filed a brief demanding not only that the decision be reversed, but that the description of the Assistant's alleged misconduct be removed from the public record. See *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1993) (referring to the prosecutor's contention that "the district court erred in its finding that Lyons materially misled the magistrate judge" and noting "conflicts in the testimony" about this subject).

examples are prosecutorial involvement in illegal conduct¹⁵¹ and intentional efforts by prosecutors to manufacture inculpatory evidence or to hide exculpatory evidence.¹⁵² When offending prosecutors are criminally prosecuted for such misconduct, society's sense of justice is vindicated. However, when the prosecutors are merely criticized or lose their employment but continue to practice law, society may sense a double standard. It is probably for this reason that the bar exercises its disciplinary authority most (although still rarely) in these type of cases.¹⁵³

Likewise, when prosecutors engage in part-time private employment and the rights of their private clients are affected, the alternative public remedies for prosecutorial misconduct are unlikely to address the private misconduct. Again, bar action is warranted. For the most part, in this context, discipline occurs on a more regular basis.¹⁵⁴

Beyond violations involving criminal conduct and the rights of private clients, it is difficult to pinpoint violations that fit within the "particularly serious" framework. One might consider intentional misconduct, such as introducing false evidence¹⁵⁵ or knowingly withholding exculpatory information,¹⁵⁶ as exceptional. On a case-by-case analysis, however, seemingly less important violations may be equally harmful to defendants and fair process.¹⁵⁷ Moreover, intentional violations are those that prosecutors will be particularly careful to hide. These will often evade the attention of disciplinary agencies.

Perhaps, therefore, regulators should focus on a third, more transparent group of violations; namely, violations that the disciplinary agency knows or senses recur on a frequent basis. Although disciplinary agencies may not learn of many individual violations, for reasons we have already discussed,¹⁵⁸ the constitutional

151. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (1999) ("It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer . . .").

152. See *supra* notes 92–93 and accompanying text.

153. See *supra* notes 86–93 and accompanying text.

154. See *supra* note 6 and accompanying text.

155. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (1999) (forbidding lawyers to "offer evidence that the lawyer knows to be false").

156. See *id.* R. 3.8(d) (requiring prosecutors to disclose *Brady* information and more).

157. In other words, withholding particular evidence may have little actual effect on a case while other violations, such as blocking access to witnesses or misleading an unrepresented witness into cooperating, can prove to be the difference between an acquittal and a conviction.

158. See *supra* note 126–27 and accompanying text.

case law suggests that a fair number (though perhaps a small percentage) of prosecutors do introduce false evidence,¹⁵⁹ make false statements to tribunals,¹⁶⁰ withhold evidence,¹⁶¹ and obstruct access to witnesses.¹⁶² Perhaps it makes sense for the agency to treat a prosecutor's office as one lawyer for purposes of determining whether a pattern of code violations justifies discipline.¹⁶³

As already noted, one could make a case for calling the individual violations "particularly serious violations" that fit within

159. See, e.g., *Davis v. Zant*, 36 F.3d 1538, 1551 (11th Cir. 1994) (reversing conviction because of prosecutor's false statement that misled jury regarding credibility of government witness); *United States v. Kojayan*, 8 F.3d 1315, 1323-24 (9th Cir. 1993) (prosecutor's false statement regarding availability of witness constitutes reversible error); *United States v. Valentine*, 820 F.2d 565, 570 (2d Cir. 1987) (prosecutor's mischaracterization of grand jury testimony of uncalled witness violated due process); cf. *People v. Rice*, 505 N.E.2d 618, 619 (N.Y. 1987) (criticizing prosecutor's failure to advise defense counsel that witness was dead, but declining to reverse).

160. See, e.g., *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (failure of prosecutor to correct witness's false testimony constituted a due process violation); *United States v. Vozzella*, 124 F.3d 389, 391-93 (2d Cir. 1997) (reversing lower court's decision because of government's introduction of false records); *United States v. Catton*, 89 F.3d 387, 389 (7th Cir. 1996) (prosecutor's misstatement of fact and false testimony of a witness required a new trial); *United States v. Tarricone*, 11 F.3d 24 *passim* (2d Cir. 1993), *superseded by* 21 F.3d 474 (remanding to determine, *inter alia*, whether the prosecutor knew or should have known of false testimony); see also *Miller v. Pate*, 386 U.S. 1, 6-7 (1967) (reversal for prosecutor's use of physical evidence that deliberately misrepresented the truth, and gave false impression to the jury); *Genson & Martin*, *supra* note 1, at 50, n.65 (citing cases involving prosecutors' misstatements of law).

161. For a discussion of cases involving the withholding of evidence, see GERSHMAN, *supra* note 4, §§ 5.2-5.4 (discussing and citing cases involving prosecutorial suppression of evidence potentially favorable to the accused).

162. See, e.g., *United States v. Valenzuela-Bernal*, 458 U.S. 858, 860-63 (1982) (noting the possibility of a constitutional violation when defendant can show a prosecutor removed a witness from the country to deprive the defense of an opportunity to interview him); *United States v. Mendez-Rodriguez*, 450 F.2d 1, 4-5 (9th Cir. 1971) (prosecutor arranged deportation of witness); *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966) (forbidding prosecutors to directly advise witnesses not to speak with the defense); *People v. Avery*, 377 N.E.2d 1271, 1276 (Ill. App. Ct. 1978) (reversing conviction where prosecutor kept witness incommunicado); see also authorities cited in GERSHMAN, *supra* note 4, § 9.10(b)(1)-(2).

163. See *supra* notes 114-15 and accompanying text. Disciplinary authorities routinely take into account the existence, or absence of, a prior record of disciplinary offenses in deciding whether to proceed and in imposing sanctions. See Levin, *supra* note 118, at 53-54 (arguing against this practice). Because prosecutors often act in accordance with office policy or office ethos, it is fair for the discipliners to consider the whole office in assessing the track record, particularly if the reason the discipliner considers this factor at all is its relevance to the need for deterrence. This reasoning may also justify regulators in considering discipline of supervisors or in seeking the authority to impose "entity liability" on the prosecutors' office. See *infra* note 191 and accompanying text; see also Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1371, 1371-73 nn.239-40 & 243 (1995) [hereinafter Zacharias, *Reconciling Professionalism*] (discussing the benefits of entity liability).

the first set of cases in which discipline seems important.¹⁶⁴ Yet even if the violations are not particularly serious when considered alone, their recurrent nature demands a greater measure of deterrence. As with the individual lawyer who commits multiple infractions, the existence of codified professional guidelines has proven insufficient to induce the offices' compliance with the codes. Alternative remedies are ineffective because, for the most part, these intentional violations are hidden from the alternative regulators as well.

Thus, when violations in this category do come to light, cumulative remedial action may make sense even if administrative or judicial regulation does address the individual prosecutor's conduct. Here there is a good case for "making an example" of the offender—to send a message to other prosecutors that, while the likelihood of discovery and punishment is small, the sanction will be significant.¹⁶⁵ Arguably, disciplinary authorities should be less willing than in cases involving isolated misconduct to defer action on the basis that courts have already addressed the misconduct.

The fourth type of violation in which the bar's justifications for minimal discipline seem less valid involves public misconduct that comes easily to the bar's attention. The most obvious example is prosecutorial violations of the rules against speaking to the press during litigation.¹⁶⁶ Many such violations are easily identified; by intention, they appear in the newspapers and other media sources.

164. See *supra* text accompanying note 153 (discussing "serious violations").

165. There is a strong body of economics literature on deterrence and, in particular, the combination of sanction, frequency of sanction, and publicity given to a sanction that will best encourage future malefactors to avoid similar misconduct. See, e.g., DARYL A. HELLMAN & NEIL O. ALPER, *ECONOMICS OF CRIME: THEORY AND PRACTICE* (2d ed. 1990) (discussing the effect of deterrence in numerous criminal contexts); see also Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 172 (1968) (listing factors that influence deterrence); Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 44–52 (1996) (discussing a market model of crime); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1241–46 (1985) (discussing the optimal use of nonmonetary sanctions).

This literature highlights another aspect of the problem that this Article has not discussed—the possibility that disciplinary sanctions are too weak. See Levin, *supra* note 118, at 48, 68–80 (noting that the most frequently imposed discipline, admonitions, "have little sting and convey a weak message about the unacceptability of a lawyer's conduct"); Rosen, *supra* note 3, at 736 (arguing that "[b]oth the courts and the bar disciplinary bodies must start punishing *Brady*-type misconduct more harshly"). That subject is beyond the scope of this Article for two reasons. First, I am responding specifically to the claims of critics that the bar acts too infrequently in prosecuting prosecutors. Second, the magnitude of a particular sanction is not within the control, or the exclusive control, of disciplinary authorities because it typically is subject to judicial review.

166. See MODEL RULES OF PROF'L CONDUCT R. 3.6 (1999) (regulating trial publicity).

For this type of misconduct, regulators within prosecutors' offices are unlikely to take remedial action; the individual prosecutor's decision to speak publicly typically represents an office decision geared toward improving the chances of conviction or of enhancing the image of the office itself.¹⁶⁷ Courts may criticize prosecutors for speaking publicly, but they rarely take punitive action.¹⁶⁸ Courts' remedial authority also may be limited for such out-of-court misconduct, which arguably does not directly affect the evidence.¹⁶⁹ If the bar expects the prohibitions in the professional rules to have force, they must be implemented by some entity. Yet in practice, prosecutors rarely have been disciplined for their violations.¹⁷⁰

Similarly, when judicial opinions mention prosecutorial misconduct, one would expect almost automatic bar action (though not necessarily automatic discipline).¹⁷¹ The opinions bring the

One should not underestimate the constitutional obstacles to disciplining lawyers for their speech. *See, e.g.,* *Gentile v. State Bar*, 501 U.S. 1030, 1075–76 (1991) (permitting gag rules geared to prevent a “substantial likelihood of material prejudice” to a fair trial). Nevertheless, most professional codes have been modified in an effort to satisfy constitutional standards. Yet, violations of the codes continue to occur without much reaction from the bar.

167. Thus, in the O.J. Simpson case, for example, the hierarchy in the District Attorney's Office not only failed to discourage the prosecutors trying the case from public comment, but the district attorney himself made statements designed to encourage public support for the prosecution. *See* *Cole & Zacharias*, *supra* note 46, at 1630–41 (cataloguing and discussing the public statements of the lawyers in the *Simpson* case). Likewise, Independent Counsel Prosecutor Kenneth Starr's decision to appear on television news shows during the investigation of President Clinton was a transparent strategic office decision to curry public favor.

168. *See* *GERSHMAN*, *supra* note 4, §§ 6.2–6.3 (citing numerous cases in which courts have observed improper statements by prosecutors). The courts' authority may be limited. When a court rule or specific gag order forbids speaking to the press, a judge may punish a violation by exercising the contempt power. More frequently, however, a court can only refer a lawyer's conduct to the bar and warn the lawyer that further violations could lead to a mistrial, change of venue, or contempt sanctions. Stronger remedies, such as the exclusion of evidence or dismissal, typically are not available for lawyer misconduct relating to public statements. *See id.* § 6.4 (discussing sanctions and remedies for prosecutorial speech to the press).

169. *See supra* note 147.

170. *See supra* Parts II(A)–(B) (discussing when prosecutors have been disciplined). Among the few pertinent discipline cases are *Zimmermann v. Board of Professional Responsibility*, 764 S.W.2d 757, 760–61 (Tenn. 1989) (prosecutor reprimanded) and *In re Hansen*, 584 P.2d 805, 806–07 (Utah 1978) (same). *Cf. In re Conduct of Lasswell*, 673 P.2d 855, 859–60 (Or. 1983) (proceedings instituted against prosecutor for making extrajudicial statements, but allegations dismissed on grounds that the prosecutor lacked the requisite intent).

171. As discussed above, bar authorities should avoid a regime in which their conduct creates incentives for courts not to enforce constitutional protections in the underlying criminal cases. *See supra* note 115 and accompanying text.

misconduct to the bar's attention and create a basis for a substantial suspicion that a code violation has occurred. In some cases, the bar may determine that the judicial remedy (and maybe simply the court's criticism) suffices as a sanction for an individual prosecutor and as a deterrence against similar future misconduct by this prosecutor and others. Yet in many cases, the judicial remedy will be superficial—at least in terms of its direct consequences for the prosecutor.¹⁷² Because the bar can easily learn of these violations, the typical excuse for a lack of action disappears.¹⁷³

We have already touched upon the fifth, and perhaps most important, set of violations with respect to which more frequent discipline seems warranted. Whenever alternative remedies are insufficient to deter prosecutorial misconduct, it becomes more necessary for the bar to intervene. The insufficiency of alternative remedies may occur for three independent reasons: (1) the alternative remedies, by their very nature, may be inadequate to deter; (2) the alternative remedies, in practice, may be used too rarely or may lack adequate force; or (3) prosecutors may have strong incentives to violate the rules whether or not the alternative sanctions are imposed.

Violations of the trial publicity rules again provide the best example.¹⁷⁴ Other examples include violations of the rules against interfering with third party (e.g., witness) rights,¹⁷⁵ seeking a waiver of rights from defendants,¹⁷⁶ and asserting personal opinions at trial.¹⁷⁷

172. Often, appellate courts simply refer to alleged prosecutorial misconduct or constitutional violations without mentioning the prosecutor by name. Many violations are recognized but treated as harmless error. Even when courts assign error to a particular prosecutor's conduct and reverse a case, the impact on the prosecutor's reputation and career may be muted by virtue of the fact that the prosecutor has gone into private practice in the period leading up to the appellate decision.

173. Of course, the fact that a court finds prosecutorial misconduct does not necessarily mean that the disciplinary authorities would agree that discipline is appropriate. See Rosen, *supra* note 3, at 720–31 (tracing the progress in the disciplinary process of nine cases in which courts have found prosecutors to have committed misconduct).

174. See *supra* note 166 and accompanying text.

175. For example, prosecutors have incentives to induce unrepresented witnesses and co-conspirators to cooperate with prosecutions. They often encourage these parties to make statements or cooperate when a lawyer would otherwise advise them to assert their right to remain silent. Yet the professional codes typically caution all lawyers in the position of the prosecutors to avoid misleading the third person or suggesting that she is offering disinterested advice. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 4.3 (1999).

176. The professional codes impose on prosecutors some obligation to safeguard an accused's constitutional rights even when doing so would interfere with the prosecution's ability to obtain evidence and gain a conviction. See, e.g., *id.* R. 3.8(b)–(c) (requiring prosecutors to safeguard the right to counsel and to avoid seeking a waiver of pretrial

Prosecutors are unlikely to fear internal discipline for these violations, because the prosecutors ordinarily engage in them with their superiors' tacit approval; the violations may help convict defendants who deserve punishment. Even in the more egregious cases, supervisors may avoid taking action—especially public action—for fear of encouraging an outcry or a political backlash against the office.

Unless these types of misconduct violate minimal constitutional standards, courts are unlikely to become involved.¹⁷⁸ Courts hesitate to impose remedies for misconduct that benefit potentially guilty defendants. When the conduct occurs pre-trial and out-of-court, some judges even have taken the position that courts have no supervisory power to regulate the conduct.¹⁷⁹ If the threat of bar discipline also is absent, prosecutors have every incentive, and little disincentive, to engage in violations that will help them produce convictions.

B. The Costs of Failing to Enforce the Codes

In separate works, I have suggested that professional codes serve many valid functions other than providing a basis for discipline. They can identify moral issues, promote moral introspection by lawyers about appropriate conduct, influence judicial standards, and facilitate

rights from unrepresented defendants).

177. See, e.g., *id.* R. 3.4(e) (forbidding lawyers to assert “personal knowledge” or allude to matters not supported by “admissible evidence”); cf. Alschuler, *supra* note 44, at 642 (citing numerous examples of improper, inflammatory argument by prosecutors); Zacharias, *Can Prosecutors Do Justice?*, *supra* note 13, at 95–97 & nn.219–25 (discussing the legitimate bounds of prosecutorial argument).

178. Indeed, that was the thrust of *Imbler v. Pachtman*, 424 U.S. 409 (1976), the case with which this article began. See *supra* note 1 and accompanying text. The Court upheld the notion of prosecutorial immunity and the frequent decisions by the Supreme Court to find prosecutorial misconduct as not rising to the level of a constitutional violation as justified by the availability of professional discipline as a remedy for the misconduct. See *Imbler*, 424 U.S. at 429; see also Zacharias, *Can Prosecutors Do Justice?*, *supra* note 13, at 47 n.7 (“Courts have declined to strengthen legal and constitutional controls, based in part on the belief that independent professional regulation best constrains prosecutorial behavior.”).

Appellate court supervision often is even less realistic than trial court supervision. Appellate courts rarely will impose the most meaningful sanction of dismissing a case outright. See *supra* note 149. Reversal for a new trial may be effective, but only if the prosecutor who committed the misconduct remains in the prosecutor's office and suffers the repercussions of the reversal. Direct censure of the prosecutor in appellate opinions is a remedy that can have some effect, but only in public cases in which the media and peer observers are likely to focus on the opinions.

179. See, e.g., *United States v. Williams*, 504 U.S. 36, 45–47 (1992) (apparently limiting supervisory power of lower federal courts to “in-court” conduct).

communication within the bar.¹⁸⁰ As a rule, one cannot fairly conclude that the bar's failure to seek or impose discipline in a particular case purges the prevailing code of value or meaning. Nevertheless, when disciplinary agencies fail to enforce the codes altogether, or fail to enforce them against a segment of the bar, they encourage disrespect for the codes' letter and spirit.

This disrespect can take numerous forms. At the simplest level, the affected segment of the bar—here prosecutors—may simply have less inclination to follow the governing code's mandates.¹⁸¹ More subtly, if prosecutors' adversaries (i.e., defense counsel) perceive that prosecutors are unwilling to satisfy the professional standards, the adversaries may feel a need to counteract the prosecutorial misconduct by engaging in misconduct of their own. Thus, for example, prosecutors who speak to the press about matters in litigation encourage defense attorneys to do the same, if only to level the playing field.¹⁸² To the extent that defense attorneys mimic prosecutorial misconduct and themselves are not disciplined, this in turn will reduce their own respect for the codes and for the disciplinary authorities in other areas.

As a practical matter, the absence of discipline can, in some areas of prosecutorial misconduct, create a vacuum in the remedial scheme. This Article began by noting that constitutional standards for prosecutorial conduct provide only a minimum baseline and that, in some areas, courts look to professional discipline as *the* preferred remedy. Even if disciplinary authorities are justified in preserving resources with respect to some code violations, the authorities need to acknowledge their role in the overall framework of misconduct deterrence.

180. See generally Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 49, at 231–39 (discussing the various functions of professional codes); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. W. L. REV. 169, 180 (1997) (discussing the implementation of subsidiary goals of the professional codes); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 344 (1994) (discussing the various purposes of the professional codes).

181. Cf. *United States v. Modica*, 663 F.2d 1173, 1183–84 (2d Cir. 1981) (lamenting the failure of prosecutors to “abide by [the] well-established rules limiting the types of comments permissible in summation”).

182. Indeed, the Model Rules implement the notion of leveling the playing field by allowing a lawyer to “make [an otherwise prohibited public] statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client.” MODEL RULES OF PROF’L CONDUCT R. 3.6(c) (1999).

Abdication of enforcement also contributes to a public sense that a double-standard exists.¹⁸³ As already discussed, there are good reasons why the bar might fairly choose to discipline prosecutors less frequently than private attorneys. But when this tendency is carried to the extreme, observers are more apt to overlook the valid justifications and to assume a double-standard. This may contribute to less faith in bar regulation, a greater desire or demand for outside regulation, or simply a broader dissatisfaction with the codes themselves as a valid source of professional norms.¹⁸⁴

IV. RECOMMENDATIONS

The above analysis concludes that, at least sometimes, bar authorities are remiss in their obligation to review prosecutorial violations of the professional rules. Yet, the analysis also suggests that the failure of disciplinary authorities to discipline prosecutors as frequently as private lawyers and for all instances of “prosecutorial misconduct” is not entirely due to negligence, as most commentaries have implied. There are good reasons why disciplinary authorities do not, or cannot, seek to discipline prosecutors with respect to particular aspects of the codes. And, even when discipline is possible, the authorities may sometimes forebear from prosecuting for reasonable resource allocation and other considerations.

The value of the analysis is twofold. First, and perhaps most importantly, it suggests a need for what Professor Bruce Green terms “more transparency” in the disciplinary process.¹⁸⁵ If one cost of minimal discipline is a loss of public faith in the process¹⁸⁶—even when good reasons for refraining from discipline exist—more public discussion of how disciplinary agencies handle complaints about prosecutors seems warranted. More openness about the disciplinary process on the part of the regulators, including the publication of

183. See, e.g., HALL, *supra* note 4, § 11:3, at 390 (“The relative paucity of disciplinary actions against prosecutors, and then imposition of a ‘slap on the wrist’ for even egregious misconduct demonstrates that there is a disciplinary double standard.” (citations omitted)).

184. See, e.g., Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 704–12, 732–33 (1998) [hereinafter Flowers, *Impropriety Standard*] (arguing the importance of maintaining the public perception that prosecutors are required to act with propriety); cf. Steele, *supra* note 4, at 979 (“Frequent misconduct by prosecutors is subversive to the perception that the American legal profession is capable of self-policing professional standards.”).

185. Correspondence from Bruce A. Green to Fred Zacharias (Nov. 21, 1999) (on file with the North Carolina Law Review).

186. See *supra* note 181–83 and accompanying text.

statistics, would be a welcome development. The academy, for its part, should undertake more and better empirical research into the reality of prosecutorial discipline.¹⁸⁷

The second value of this Article's analysis lies in pinpointing those areas in which the excuses for limited discipline evaporate. It often makes sense, and is easier, for bar authorities to concentrate on misconduct by private attorneys. But that does not translate into a good policy justification for ignoring the prosecution corps altogether.

The reported cases suggest that when the authorities have prosecuted prosecutors, they have targeted legitimate categories of violations.¹⁸⁸ In particular, the authorities do seem to have targeted particularly serious prosecutorial misconduct and cases in which private clients are affected and public remedies are unlikely to address the prosecutor's behavior. Yet the bar does not seem to have a coherent strategy to target other areas of prosecutorial misconduct in which professional discipline is particularly appropriate. These areas include recurring and serious violations, violations that are themselves public or are alluded to in judicial opinions, and those in which alternative remedies are especially ineffective. The authorities may have good reason not to pursue individual instances of misconduct that fit these categories—for example, the availability and effectiveness of alternative remedies. But the overall trend of infrequent prosecutions suggests neglect or sloth.

In order to address these areas in a coherent way, bar authorities need to adjust their traditional procedures for instituting investigations. Because of the absence of likely complainants, a proactive approach to discipline is required. Disciplinary agencies should assign staff to review media reports of prosecutions that refer to potentially questionable prosecutorial conduct (e.g., speaking to the press) and to review local court opinions that identify prosecutorial misconduct.¹⁸⁹

Once potential cases come to light, and before undertaking a factual investigation, the bar should subject the cases to an analysis governed by internal guidelines that provide standards for resolving resource allocation questions. These guidelines should, at a minimum, require consideration of the seriousness of the potential

187. See *supra* note 77 and accompanying text.

188. See *supra* Part II.A.

189. Cf. Rosen, *supra* note 3, at 697, 735–36 (proposing that “instead of relying solely on complaints from individuals, bar disciplinary bodies should also review reported cases and initiate disciplinary proceedings whenever the opinions suggest possible *Brady*-type misconduct”).

offense, of whether it is the type of offense that is likely to occur frequently within prosecutors' offices, of the availability of meaningful alternative remedies for deterring similar misconduct by this prosecutor and others, and of the resources that pursuing this violation will require. When the determination is made that professional discipline is necessary to maintain the integrity of the governing rules, the disciplinary authorities should be willing to embrace bar action.

It may also be necessary for the bar to adjust its theories of discipline. In many respects, the critiques of the current regime focus more on ongoing misconduct by prosecutors in general, rather than on the compelling nature of particular prosecutors' behavior. If the problem lies in the ethos of prosecutors' offices, disciplinary authorities may need to consider targeting supervisors more than line attorneys, to give supervisors incentives to produce better behavior throughout their offices.¹⁹⁰ As in the private realm, the time may be ripe to give regulatory authorities the power to impose fines or other "entity" sanctions on prosecutors' offices.¹⁹¹

Amending the regulatory regime as discussed above would lead to more frequent professional discipline of prosecutors, but certainly not to the degree desired by the commentators who envision discipline as a remedy for all (or even most) prosecutorial misconduct. As previously noted, this Article's recommendations are targeted at those kinds of violations for which the professional disciplinary scheme is well-suited. What that means, for the critics, is that the focus of their arguments should shift to alternatives that might be more effective in addressing their concerns.

If, for example, bar discipline is suitable mainly for violations that become public, how should routine but surreptitious misconduct be rectified? Greater focus on internal training, supervision, and guidelines seems to be required because, by definition, hidden conduct is known (at least in a general way) within a prosecution office, but nowhere else.

Alternatively, how can more violations be brought to public attention? One commentator already has suggested the development

190. Most professional codes already provide some authority to impose discipline on supervisory attorneys. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.1(b) (1999) (requiring supervisors to "make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct").

191. See, e.g., Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 4-5 (1991) (analyzing entity responsibility for law firms); Zacharias, *Reconciling Professionalism*, *supra* note 163, at 1371-73 (discussing the theory of entity liability).

of mechanisms designed to encourage trial courts to refer more instances of prosecutorial misconduct to the bar.¹⁹² Another, perhaps overenthusiastically, has suggested the establishment of an independent commission charged exclusively with the investigation of prosecutorial misconduct.¹⁹³ Other fruitful areas of inquiry might be the development of incentives for defendants or defense counsel to use the disciplinary process and methods for coordinating media attention and disciplinary review.

Similarly, if bar authorities justifiably avoid cases involving well-intended, harmless, or less serious prosecutorial misconduct, the remedial focus may need to shift to providing greater guidance to prosecutors through more specific ethical standards¹⁹⁴ and to enhancing institutional job performance constraints. Perhaps prosecutors' offices need to be encouraged to emphasize adherence to professional standards in pay and job evaluations. For this encouragement to be realistic, the offices would require institutional reassurances that taking limited action against staff will not be used as a predicate for judicial reversal or onerous discipline. Or, as one commentator has already suggested, prosecutors and their supervisors

192. See Williams, *supra* note 3, at 3477-78.

193. See Morton, *supra* note 4, at 1114-15; cf. Steele, *supra* note 4, at 982-88 (proposing establishment of a "Prosecutors' Grievance Council"). It is not altogether clear that the frequency of prosecutorial misconduct would justify the devotion of so many resources to the matter. Moreover, other than providing additional financial support for investigations, it is unclear what such a commission could accomplish that current disciplinary authorities could not achieve as well.

194. Such standards might be produced internally, within prosecutors' offices, or through rewriting of the codes. Compare, e.g., Zacharias, *Plea Bargaining*, *supra* note 55, at 1184 (advocating the adoption of internal standards governing plea bargaining goals), with Aaron, *supra* note 55, at 3027-28 (urging adoption of a new professional code provision governing disclosure of information that would affect plea bargaining), and Letter from Bruce Green to Nancy Moore (Nov. 8, 1999) (on file with the North Carolina Law Review) (urging more specific rules requiring heightened candor of prosecutors to courts and defendants, and imposing responsibilities upon prosecutors having to do with post-conviction evidence, the rights of witnesses and third parties, and specific evidentiary situations), and Secunda, *supra* note 56, at 1286-87 (proposing clearer professional rule governing prosecutors in the sentencing process). See also Genson & Martin, *supra* note 1, at 59 (urging better education of prosecutors and the maintenance of an "internal policy manual"); cf. Flowers, *Impropriety Standard*, *supra* note 184, at 734-35 (urging application of a broad "appearance of impropriety standard" to govern prosecutorial conduct); Flowers, *Updating the Ethics Codes*, *supra* note 13, at 927 (urging the adoption of amendments to the professional codes to regulate prosecutors' investigative functions more precisely); Green, *Policing Federal Prosecutors*, *supra* note 3, at 71-72 (advocating the need for more precise standards for prosecutors because prosecutors may have a different view of what is acceptable or appropriate than other lawyers).

might need a new kind of incentive to adhere to the professional codes.¹⁹⁵

And judges, perhaps, need some reeducation. *Imbler v. Pachtman*'s reference to the existence of professional discipline as grounds for immunizing prosecutors from legal action and constitutional review has been repeated often in subsequent cases.¹⁹⁶ Yet, as this Article suggests, *Imbler*'s premise is not realistic.¹⁹⁷ Bar authorities do not, and probably cannot, fill the void in prosecutorial oversight across the board. Just as the bar must determine what role it can reasonably play, so too must the courts.¹⁹⁸

CONCLUSION

Recent federal legislation, the Ethical Standards for Federal Prosecutors Act,¹⁹⁹ provides that federal prosecutors "shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."²⁰⁰ The federal law seems to assume and rely upon the existence of regular state discipline of prosecutors.²⁰¹ One commentator has suggested that the law's adoption itself will "increase the incidence of state bar assertions of discipline over prosecutors."²⁰² The history of the

195. See Meares, *supra* note 40, at 873–83 (suggesting the use of financial incentives as a mechanism for regulating prosecutorial conduct); cf. Simon, *supra* note 39, at 12–13, 57 (applauding a federal statute providing for attorneys fees when wrongful prosecutions are instituted).

196. See *supra* notes 1–2 and accompanying text.

197. See Douglas J. McNamara, Buckley, *Imbler* and *Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1184–88 (1996) (urging the abandonment of *Imbler*, in part, because of the "unfulfilled promise of alternative deterrence").

198. See, e.g., Auler, *supra* note 41, at 643–45 (pre-*Imbler* article urging broader availability of civil remedies for prosecutorial misconduct). To a very limited extent, the United States Supreme Court has retreated from *Imbler*'s absolute immunity doctrine. In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Court held that some prosecutorial acts in the investigative stage of the criminal process are only entitled to qualified immunity, but that once the prosecutor has probable cause and therefore adopts an "advocacy" role, absolute immunity becomes applicable. See *id.* at 267–78; see also Barrow, *supra* note 3, at 323–29 (criticizing *Buckley* and suggesting alternatives); McNamara, *supra* note 197, at 1138, 1149–54 (analyzing *Buckley* and urging that *Imbler* be overruled).

199. 28 U.S.C.A. § 530B (West Supp. 1999).

200. *Id.*

201. For a full analysis of the Ethical Standards for Federal Prosecutors Act, see Zacharias & Green, *supra* note 10, *passim*.

202. Caroline Heck Miller, *Knowing the Dancer from the Dance: When the Prosecutor is Punished for the Government's Conduct*, 29 STETSON L. REV. 69, 89 (1999) (arguing that the federal law may encourage "state bar jurisdiction" or stimulate "additional grievances

discipline of prosecutors, discussed in this Article, casts doubt on that proposition. But the new legislation does make it all the more important to understand how state disciplinary agencies view their role in supervising prosecutorial misconduct.²⁰³

This Article has attempted to consider the issues surrounding the professional discipline of prosecutors dispassionately. If one examines the available empirical data—the cases and the nature of the code provisions that might give rise to discipline—one cannot help but conclude that the traditional lamentations regarding the absence of bar discipline are somewhat overblown, but also contain a large measure of truth. The bar has not abstained entirely. Neither has it fulfilled its commitment to maintaining the letter and spirit of the codes.

These conclusions suggest that it is time for disciplinary authorities to engage in self-analysis. At a minimum, regulatory agencies should formulate concrete guidelines for when discipline of prosecutors is warranted. They should pursue discipline proactively when appropriate.

At the same time, the Article's analysis suggests that critics of the bar should reevaluate their stance as well. It is time to address the issue of prosecutorial misconduct more contextually. We should focus our attention on remedies that have a realistic chance to work.

to be filed against prosecutors”).

203. See Zacharias & Green, *supra* note 10, at 216, 235–42 (discussing various conceptions of federal and state prosecutors that may affect the attitude of professional regulators).