

## COMMENT

### Discovery Audits: Model Rule 3.8(d) and the Prosecutor's Duty To Disclose

As a society, we have entrusted our prosecutors with discretion. Discussions of prosecutorial discretion often surround charging decisions, plea bargaining, and the general ability to “control the terms of [a defendant’s] confinement.”<sup>1</sup> However, a prosecutor also exercises discretion in determining what information to share with his adversary.

In the discovery context, prosecutors have a two-fold ethical duty. They must not abuse their discretion by deciding whether to withhold or disclose evidence in ways that are generally “unfair or unwise.”<sup>2</sup> In addition, both the Supreme Court, in *Brady v. Maryland*,<sup>3</sup> and Model Rule of Professional Conduct 3.8(d)<sup>4</sup> have imposed positive limits on the prosecutor’s disclosure discretion. The prosecutor’s ethical exercise of discretion is also complicated by his duty, on the one hand, to “zealously assert[] the client’s position under the rules of the adversary system,”<sup>5</sup> and on the other, to seek justice.<sup>6</sup> The ethical complexities involved suggest that prosecutors require clear guidance regarding their professional responsibilities. A well-functioning criminal justice

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1. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009); see also Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136-41 (1998) (discussing prosecutorial discretion).

2. Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 619 (1999).

3. 373 U.S. 83, 87 (1963).

4. MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2009).

5. *Id.* pmb1.

6. *Berger v. United States*, 295 U.S. 78, 88 (1935).

system also demands adequate structures to monitor compliance with the guidelines provided.

However, commentators and policymakers alike have recognized that the current system is inadequate to these tasks.<sup>7</sup> After the Ted Stevens case was dismissed for discovery-related misconduct,<sup>8</sup> the Department of Justice (DOJ) implemented a working group to review the Department's discovery policies and practices.<sup>9</sup> Two recently issued DOJ memoranda, one providing "Guidance for Prosecutors Regarding Criminal Discovery"<sup>10</sup> and another "Requir[ing] . . . Office Discovery Policies in Criminal Matters,"<sup>11</sup> are the fruits of this effort. The contents of these memos are a testament to the DOJ's commitment to (and willingness to expend resources on) structural and policy changes to federal discovery practices. The challenge now is to continue this effort to draw brighter lines regarding the criteria, timing, and procedures for disclosing material to the defense, and to design more reliable structures for policing the boundaries of permissible discovery discretion.

This Comment proposes audits as a solution. Part I discusses the current approaches to regulating criminal discovery under the Constitution and the Model Rules. Part II discusses two audit-type regulatory models from which a prosecutorial audit system might borrow. Part III then outlines the contours of a hybrid audit system, which aims to provide substantive guidance through a

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7. See Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 483 (2009) ("After forty-five years of jurisprudence under *Brady*, the judiciary has failed to provide coherent guidelines to prosecutors who remain uncertain of the scope of their disclosure obligations."); Amir Efrati, *It's Rare for Prosecutors To Get the Book Thrown Back at Them*, WALL ST. J., Apr. 16, 2009, at A11.
  8. Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009, at A1.
  9. Memorandum from David W. Ogden, Deputy Att'y Gen., on Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group for Department Prosecutors (Jan. 4, 2010) [hereinafter Summary of Actions Memorandum], available at <http://www.justice.gov/dag/dag-memo.pdf>; Press Release, Dep't of Justice, Department Asks Alaska Corruption Cases Be Remanded to District Court, Former State Representatives Be Released 2 (June 4, 2009), available at <http://www.justice.gov/opa/pr/2009/June/09-ag-550.html>.
  10. Memorandum from David W. Ogden, Deputy Att'y Gen., on Guidance for Prosecutors Regarding Criminal Discovery for Department Prosecutors (Jan. 4, 2010) [hereinafter Guidance Memorandum], available at <http://www.justice.gov/dag/discovery-guidance.pdf>.
  11. Memorandum from David W. Ogden, Deputy Att'y Gen., on Requirement for Office Discovery Policies in Criminal Matters for Heads of Department Litigating Components Handling Criminal Matters (Jan. 4, 2010) [hereinafter Memorandum on Discovery Policies], available at <http://www.justice.gov/dag/dag-to-usas-component-heads.pdf>.

quality assurance approach, and to improve internal compliance by leveraging the principles of managerial regulation.

## **I. CURRENT METHODS OF REGULATING PROSECUTORS' DISCLOSURE**

### *A. The Brady Rule*

In a landmark criminal discovery case, *Brady v. Maryland*, the Supreme Court held that due process requires prosecutors to disclose exculpatory material and information to the defense.<sup>12</sup> Accordingly, the prosecution's suppression of "favorable" evidence "where the evidence is material to either guilt or to punishment" requires reversal of a conviction on the grounds that the trial was fundamentally unfair.<sup>13</sup>

Over time, a body of *Brady* jurisprudence developed that defined the doctrine's reach. Significantly, the Court devised a "materiality" standard in *United States v. Bagley*.<sup>14</sup> Under the materiality standard, suppression of putatively favorable information will not give rise to a constitutional violation unless that piece of information or evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."<sup>15</sup> This means that individual suppressions are not considered piecemeal—rather, the withheld evidence is considered in context, against all other evidence adduced in the case.<sup>16</sup> While the materiality touchstone might provide a good metric for assessing due process violations, as an ethical standard, it sets a low bar. To this effect, critics have pointed out that "under the Supreme Court's current disclosure rules, the prosecutor's decision to suppress favorable evidence would be a perfectly rational, albeit unethical, act."<sup>17</sup>

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12. 373 U.S. 83, 87 (1963).

13. *Id.*; see Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 696 (1987).

14. 473 U.S. 667, 678-82 (1985).

15. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

16. *Id.* at 436-37.

17. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 438 (1992) (footnote omitted).

*B. Model Rule of Professional Conduct 3.8(d)*

The Model Rules of Professional Conduct, in theory and intent, compensate for *Brady's* shortfalls. In particular, Rule 3.8(d) states that:

The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor . . .<sup>18</sup>

In a July 2009 formal opinion, the American Bar Association (ABA) tried to dispel the misconception “that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure.”<sup>19</sup>

To the contrary, the Rule’s requirements exceed those of the Constitution in several key respects. First, disclosure of favorable information and evidence is required irrespective of its materiality, that is, “without regard to the anticipated impact of the evidence or information on a trial’s outcome.”<sup>20</sup> The Rule intends for the defense, not the prosecution, to “decide on [the] utility”<sup>21</sup> of the information, “thereby requir[ing] prosecutors to steer clear of the constitutional line, erring on the side of caution.”<sup>22</sup> Second, the Rule imposes a procedural responsibility on managers in prosecution offices to implement internal systems for ensuring compliance.<sup>23</sup> This also arguably exceeds constitutional expectations, considering that the Supreme Court held in *Van de Kamp v. Goldstein* that prosecutorial supervisors enjoy immunity from suits

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18. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009). Rule 3.8(d) enjoys the endorsement of most states. In fact, although some states “tweak” its language, no state “has completely abandoned the concepts.” Hans P. Sinha, *Prosecutorial Ethics: The Duty To Disclose Exculpatory Material*, PROSECUTOR, Jan.-Mar. 2008, at 20, 21. Thirty-six states adopted the ABA’s language verbatim; twelve jurisdictions “made minor edits”; two jurisdictions included an intent element (Alabama and the District of Columbia); and only California has elected to “go it alone.” *Id.* Colorado has added intent by judicial decision. *Id.* at 24.

19. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454, at 1 (2009) [hereinafter ABA Opinion] (discussing prosecutors’ duty to disclose favorable information and evidence to the defense).

20. *Id.* at 4.

21. *Id.* at 2.

22. *Id.* at 4.

23. *Id.* at 8.

complaining of failures to create internal data systems to ensure all *Giglio* material<sup>24</sup> is discovered.<sup>25</sup>

Notwithstanding the clarification, the Model Rule remains vague on several scores. Indeed, the ABA has bemoaned that neither courts nor local disciplinary authorities have adequately considered the “separate obligations” regarding discovery that the Model Rule imposes.<sup>26</sup> For one, interpretive guidance on what is considered “favorable” is scant. Moreover, there is no settled understanding of the level of care required to satisfy the Rule’s instruction to disclose favorable evidence “known to the prosecutor.”<sup>27</sup> The Rule, on its face, does not require prosecutors to ferret out favorable information; they simply cannot “ignore the obvious.”<sup>28</sup> This stance suggests that the Rule requires no affirmative duty. Yet in some jurisdictions, courts have gestured toward a stricter test, under which knowledge is constructive and judged by an objective standard.<sup>29</sup>

This vagueness inhibits the implementation of the Model Rule, a process that is demonstrably incomplete. Research indicates that local disciplinary authorities are generally reluctant to find and sanction 3.8(d) violations.<sup>30</sup> Moreover, even where a disciplinary authority does find a violation, some courts appear equally unwilling to censure on 3.8(d) grounds, or to depart

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24. *Giglio* material refers to information that tends to impeach or undermine the credibility of a government witness. See *Giglio v. United States*, 405 U.S. 150 (1972).
  25. *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 864-65 (2009).
  26. ABA Opinion, *supra* note 19, at 1.
  27. MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2009); see *Sinha*, *supra* note 18, at 27-30.
  28. ABA Opinion, *supra* note 19, at 5 (internal quotation marks omitted).
  29. See, e.g., *Mastracchio v. Vose*, No. CA 98-372T, 2000 WL 303307, at \*4, \*13 (D.R.I. Nov. 2, 2000), *aff’d*, 274 F.3d 590 (1st Cir. 2001) (finding that the prosecutor “[came] exceedingly close to violating Rhode Island Rule of Professional Conduct 3.8” for not obtaining impeachment evidence from police files presumably available to him); cf. *United States v. Agurs*, 427 U.S. 97, 110 (1976) (finding, in a *Brady* context, that “[i]f evidence highly probative of innocence is in [the prosecutor’s] file, he should be presumed to recognize its significance even if he has actually overlooked it”). Compare *In re Attorney C*, 47 P.3d 1167, 1174 (Colo. 2002) (imposing an intent element), with *In re Jordan*, 913 So. 2d 775, 780 (La. 2005) (reversing the disciplinary board’s finding that there was no violation because of the prosecutor’s “good faith and lack of intent”). As *Sinha* notes, “Theoretically, in 48 of the 51 jurisdictions, . . . a prosecutor could face disciplinary proceedings” for “unintentionally mak[ing] a good faith mistake in failing to turn over exculpatory material.” *Sinha*, *supra* note 18, at 23.
  30. See *Rosen*, *supra* note 13; Lisa M. Kurcias, Note, *Prosecutor’s Duty To Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1217-20, 1218 n.116 (2000); see also Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001) (providing empirical data on the professional discipline of prosecutors).

from a *Brady*-type analysis.<sup>31</sup> This all suggests that reliance on the bar and the courts to effectuate the Model Rule may be misplaced. These institutions have not wholly resolved the broader question of what does, in fact, constitute “model” disclosure practices. A well-designed audit system, however, could further this end.<sup>32</sup>

## II. ADMINISTRATIVE LAW AND ADAPTING AN AUDIT DESIGN

Administrative agencies routinely use audits as a method of oversight and accountability, and their methods translate readily to the prosecution context. Indeed, although prosecution offices are often excluded from the study of administrative agencies, scholars and practitioners have questioned why this is the case.<sup>33</sup> As Gerard Lynch has pointed out, “[t]hinking of the prosecutor as an administrative official” is useful and “may also affect our understanding of prosecutorial discretion.”<sup>34</sup> U.S. Attorneys’ Offices (USAOs) are, after all, the local branches of the executive agency charged with law enforcement, the DOJ. Thus, looking toward administrative solutions “acknowledge[s], at least in part, that our system has taken on an administrative law tinge, and then insist[s] that it at least live up to the standards of administrative law.”<sup>35</sup>

In practice, an agency “audit” can serve a variety of goals, employ a range of methods, and take on several different design forms. The classical conception of an audit model involves externally imposed obligations and an independent

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31. See, e.g., *In re Attorney C*, 47 P.3d at 1170, 1174 (declining to adopt a materiality standard and concluding that “because the rule was unclear, respondent could not have had an intent to withhold the evidence prior to the preliminary hearing in contravention of ethical mandate”); cf. *Read v. Va. State Bar*, 357 S.E.2d 544 (Va. 1987) (reversing the disciplinary board’s finding of a violation). Sometimes the *Brady* and 3.8(d) analyses are not sufficiently distinct. In *People v. Bryan*, for instance, the court found that there was no *Brady* violation in failing to disclose a victim’s comments that the police report was inaccurate because the discrepancies were exposed on cross-examination, and hence, immaterial. The court immediately proceeded to find that Rule 3.8(d) was not violated for this reason either, because the “defendant was provided the police report containing the inconsistencies for use to impeach the victim at trial.” *People v. Bryan*, No. 227578, 2002 WL 1575095, at \*2 (Mich. Ct. App. July 16, 2002).

32. See Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. (forthcoming 2010) (manuscript at 18) (suggesting that prosecutors should look to solutions employed in the corporate context, such as audits).

33. See, e.g., Barkow, *supra* note 1; Lynch, *supra* note 1.

34. Lynch, *supra* note 1, at 2136.

35. *Id.* at 2143.

reviewing body.<sup>36</sup> In the prosecution context, however, two additional regulatory models prove instructive.

The first centers on quality assurance. Broadly speaking, such programs assure the quality of agency action through “the development of standards, the evaluation of performance against those standards, and action to upgrade sub-standard performance.”<sup>37</sup> In a prominent article, Jerry Mashaw studies these systems in the social benefits context.<sup>38</sup> The quality assurance program run by the Department of Veterans Affairs (VA) is of particular interest. The VA system described by Mashaw employs an audit-type method. A regionally affiliated reviewer evaluates a random sample of each adjudication station’s daily work product, and then documents and categorizes the number and type of errors made—substantive, judgment-based, and/or procedural.<sup>39</sup> These findings are then passed to the national office, which looks for trends and undertakes additional random sampling of a station’s work product.<sup>40</sup>

A second category of audits is implemented through “management-based” strategies.<sup>41</sup> Managerial regulation, as distinct from traditional audit systems, has an *ex ante* flavor: it generally focuses on planning, compliance with a plan,

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36. The General Accountability Office (GAO) is an example of such a system. About GAO, <http://www.gao.gov/about/index.html> (last visited Mar. 3, 2010). Internal audit structures, such as Inspector General offices, operate in much the same way, except the independent auditing body is situated internal, rather than external, to the agency or firm under review. See, e.g., Office of Inspector General, <http://oig.hhs.gov> (last visited Mar. 3, 2010) (Health and Human Services); Office of Inspector General, <http://oig.state.gov> (last visited Mar. 3, 2010) (State Department).
  37. Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 791 (1974). My thanks to Professor Mashaw for his extremely helpful comments and guidance.
  38. *Id.*; see JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 149-55 (1983). Although this description is from the 1970s, the value of Mashaw’s research is that it “provides a basic model for a quality control or quality assurance program.” Mashaw, *supra* note 37, at 791-92.
  39. Mashaw, *supra* note 37, at 794-95.
  40. *Id.* Notably, the Veterans Benefits Administration (VBA), a division of the VA, has retained the core elements of this quality assurance system. See DEP’T OF VETERANS AFFAIRS, FISCAL YEAR 2009 PERFORMANCE AND ACCOUNTABILITY REPORT pt. 2, at 127, 127-29 (2009), available at <http://www4.va.gov/budget/report> (providing a current synopsis of the multitiered quality assurance program that the VBA administers).
  41. See generally Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management To Achieve Public Goals*, 37 LAW & SOC’Y REV. 691, 692 (2003) (“[A] management-based approach requires firms to engage in their own planning and internal rulemaking efforts that are supposed to aim toward the achievement of specific public goals.”).

and ultimately, convergence of an individual entity's private goals and socially beneficial public goals.<sup>42</sup> Nonetheless, the principles of managerial regulation can inform an audit's design. The Environmental Protection Agency (EPA) audit program has, for example, adopted a managerial-based audit policy. The EPA's system offers regulated firms and agencies incentives to self-impose internal audit compliance systems.<sup>43</sup> A regulated entity that uncovers, discloses, and prevents recurrence of violations through some form of "systematic discovery"—be it a self-audit or some other analogous "compliance management system"—is eligible for penalty mitigation and criminal safe harbor benefits.<sup>44</sup>

### III.A HYBRID TAILORED TO THE PROSECUTION-DISCOVERY CONTEXT

An audit design tailored to the particular need to flesh out Rule 3.8(d) borrows elements from each of the models detailed above and adapts them to the prosecution-discovery context. In so doing, the audit structure accounts for the unique external/internal feature of the prosecution system. That is, entertaining the ways in which the Department of Justice is "external" to the "internal" workings of each U.S. Attorney's Office allows us to conceive of a more tailored audit system—one that admits consideration of independent review, on the one hand, and office autonomy, on the other. Such a system furthers the overarching goal of ethical quality assurance, yet appreciates the press of resource constraints. Then, when one considers how the two components might work in tandem, the possible synergies of a two-tiered audit system come into sharper relief.

#### *A. Audits and External Review*

The quality-related concerns presented in the benefits adjudication setting resemble those in the prosecution-disclosure context. In the benefits context, of the numerous classes of claims adjudicated, only a small number are ever

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42. *Id.* at 692, 725-26.

43. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000); *see also* Cary Coglianese, *The Managerial Turn in Environmental Policy*, 17 N.Y.U. ENVTL. L.J. 54, 55 (2008) ("Governmental strategies to shape firms' internal management may well achieve environmental goals at lower costs.").

44. 65 Fed. Reg. at 19,620.

reconsidered on appeal.<sup>45</sup> Similarly, in the discovery context, only a small number of decisions *not* to disclose a piece of information are brought to light or otherwise challenged. Accordingly, in the discovery context, as in the benefits context, appeals (or disciplinary complaints) pose neither “an effective check on the fairness and accuracy” of discovery decisions nor a “supervisory check on [the] initial decision.”<sup>46</sup> Given these similarities, the solution Professor Mashaw identifies for benefits adjudication programs, “[q]uality [a]ssurance . . . as a [m]anagement [t]echnique,” is equally compelling in the prosecution-discovery context.<sup>47</sup> Indeed, as Mashaw points out, performance and quality monitoring is ordinarily recognized as “such an obvious necessity” that in any other private enterprise “the failure to employ some method of quality control would be considered desperately poor, if not irresponsible, management.”<sup>48</sup>

A quality assurance program could bridge the substantive and structural gaps identified in the prosecution-discovery context. The DOJ Office of Professional Responsibility (OPR), as an auditor independent from and external to each office, is well-situated to spearhead such a program. In operation, OPR would select a random sample of recently completed cases to assign error types, and generally “evaluate the information supporting the decision, its origins and reliability, contradictory information, and the broader context in which the decision took place.”<sup>49</sup>

Initially, the auditor’s evaluative capacity will be limited by the murkiness of the 3.8(d) criteria itself, which brings us back full circle to the audit policy’s *raison d’être*. Still, this is not a reason to forgo the effort. As Mariano-Florentino Cuéllar notes, “Ideally the statutes or constitutional provisions implicated in the discretionary decision would provide *some* standard for the auditor to use, even when the standard is . . . vague . . . .”<sup>50</sup> Here, as a starting point, OPR could prepare its auditors to evaluate case files by having them study *Brady* decisions (to gain a sense of the distinctions between the two violations) and what little 3.8(d) disciplinary opinion and case law exists. Where holes remain, OPR lawyers should have the authority, as auditors, to “articulate a reasonable standard,” drawing on their “insights

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45. Mashaw, *supra* note 37, at 784-85.

46. *Id.* at 785.

47. *Id.* at 791.

48. *Id.*

49. Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 253 (2006).

50. *Id.* at 287.

[into] . . . constitutional interpretation, policy considerations,”<sup>51</sup> or the drafting history and local analogs of Rule 3.8(d).

The product of the external audits would be substantive analysis, which would generate a body of gradually evolving guidelines that should guide prosecutors’ decisionmaking in various situations. The January 4, 2010 memorandum on criminal discovery matters is a solid starting point: that guidance document laid out, in broad strokes, some threshold requirements related to gathering, reviewing, types, and timing of discovery.<sup>52</sup> Continuing this nascent effort, OPR, like other regulatory agencies, would issue periodic guidance documents that synthesize the auditors’ analyses and would share best practices between various prosecutorial offices. The interpretive guidance would, in turn, provide prosecution managers and supervisors with a source of concrete criteria for assessing the quality of the line prosecutors’ discovery practices and a means of holding them internally accountable for compliance with the Rule.

### *B. Audits and Internal Compliance*

The Model Rule intends for individual prosecution offices to establish internal compliance measures. The idea generally draws support from literature on the “internal law of administration,” which emphasizes its importance in ensuring bureaucratic accountability.<sup>53</sup> It was also impressed in the July 2009 ABA Opinion, and in the January 2010 DOJ Directive, which affirmatively “require[d] each office to establish a discovery policy with which prosecutors in that office must comply.”<sup>54</sup>

As a first approximation, the DOJ’s prescription for a more robust internal law, combined with the cost savings possible through a management-based approach, counsels for a system in which prosecutors check one another. In the parlance of the management-based model, prosecutors should be incentivized “to conduct their own evaluations, find their own control solutions, and document all the steps they take.”<sup>55</sup> From this premise, several different design variations are possible. In larger offices, one can envision a system in which each prosecutor is paired with a secondary “discovery prosecutor” for every case. The secondary prosecutor would periodically review the case’s

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51. *Id.* at 288.

52. Guidance Memorandum, *supra* note 10, at 2.

53. See MASHAW, *supra* note 38, at 149-55.

54. Memorandum on Discovery Policies, *supra* note 11, at 2.

55. Coglianese & Lazer, *supra* note 41, at 726.

progression, specifically monitoring the evidence and discovery status. In smaller offices, a more cost-effective approach might be to designate one or two supervisory prosecutors, such as the criminal chief and the appellate chief, to review cases where particularly thorny discovery issues arise.

Pursuant to the recent DOJ initiatives, each office has now designated a “discovery coordinator” to serve as a resource for discovery-related questions.<sup>56</sup> But even beyond the basic requirement to designate a coordinator, an office could further develop this position in conjunction with its adoption of an audit-style compliance policy. The discovery coordinator could become a leading figure in the office – a “discovery chief” – analogous to the criminal and appellate chief positions, which would underscore the importance of, and increase focus on, the discovery decision-making process. A more prominent discovery chief could additionally assume an active role in the management of certain cases’ discovery, either for randomly selected cases (in true audit form) or upon request. Again, as in the external arena, the discovery chief’s ability to evaluate authoritatively the myriad discovery issues that arise will be tied, to some extent, to the development of more specific guidance. And this depends on the evolution of the external audit and quality assurance system. Over time, however, there is reason to believe the process will form valuable “feedback loops” among prosecutors in the office.<sup>57</sup>

The distinct characteristics of the prosecution context recommend flexibility between the external and internal components of the system.<sup>58</sup> Stated simply, USAOs that voluntarily implement audit-style compliance mechanisms should be less often the subjects of OPR audits. Individual USAOs would trade off the ostensibly more rigid OPR audits for adoption of internal audit programs. However, offices should still be required to provide OPR with standard types of qualitative information; OPR’s data set remains complete, even without an attendant external audit. Such a proviso would thus allow OPR to further the system’s overarching quality assurance goal—to analyze errors and furnish interpretive guidance—while remaining solicitous of

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56. Summary of Actions Memorandum, *supra* note 9, at 3.

57. Miriam Baer, Posting of 15:50:13 EDT, PrawfsBlawg, July 7, 2009, <http://prawfsblawg.blogs.com/prawfsblawg/2009/07/brady-and-prosecutorial-compliance.html>. Also, as Mashaw cogently argues, “the feedback on trend analysis and on the causes of erroneous decisionmaking must be timely . . . and detailed enough to enable” prosecutors “to perceive how their performance should be improved.” MASHAW, *supra* note 38, at 152.

58. See Coglianese & Lazer, *supra* note 41, at 715 (noting that flexibility is one of the “potential advantages of management-based regulation”).

internal supervisors' judgment and the autonomy necessary for a well-functioning, high-morale prosecution office.

Finally, it bears mention that an audit system, the aims of which are guidance and compliance rather than sanction and censure, avoids some of the underlying reasons why disciplinary authorities may be reluctant to sanction 3.8(d) violations. The emphasis on institutional learning excises any adversarial qualities of the system and increases the likelihood of holistic improvement in discovery practices.<sup>59</sup>

## CONCLUSION

This Comment makes the case for audits of prosecutors' discretionary discovery decisions. The system detailed above advances the DOJ's discovery initiative and provides a ready-made template for USAOs interested in improving or innovating internal compliance systems. More generally, audits will dredge up data on how prosecutors exercise their discovery discretion—revealing the good and the bad—so that prosecutors can learn, improve their characters and techniques, and attain those “qualities of a good prosecutor” that Justice Robert Jackson once considered so “elusive and . . . impossible to define.”<sup>60</sup>

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59. See MASHAW, *supra* note 38, at 155-63 (discussing how quality assurance can facilitate cultural engineering).

60. Robert H. Jackson, Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of the United States Attorneys at the Department of Justice Building (Apr. 1, 1940), *reprinted in* 24 J. AM. JUDICATURE SOC'Y 18, 20 (1940), available at <http://www.roberthjackson.org/files/theman/speeches-articles/files/the-federal-prosecutor.pdf>.