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## The Myth of Prosecutorial Accountability After *Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct

*This Essay takes the Supreme Court's recent decision in Connick v. Thompson as a point of departure for examining the efficacy of professional responsibility measures in combating prosecutorial misconduct. John Thompson, the plaintiff in Connick, spent fourteen years on death row because prosecutors concealed exculpatory blood evidence from his defense attorneys. In rejecting Thompson's attempt to hold the New Orleans District Attorney's Office civilly liable for failing to train its prosecutors in proper discovery procedures, the Connick Court substantially narrowed one of the few remaining avenues for deterring prosecutorial misconduct. Implicit in the Court's reasoning was a belief that district attorneys' offices should be entitled to reasonably rely on professional responsibility measures to prevent prosecutorial misconduct. This Essay subjects that premise to a searching critique by surveying all fifty states' lawyer disciplinary practices. Our study demonstrates that professional responsibility measures as they are currently composed do a poor job of policing prosecutorial misconduct. However, we also take seriously the Supreme Court's insistence that those measures should function as the primary means of deterring misconduct. Accordingly, in addition to noting the deficiencies of professional responsibility measures, we offer a series of recommendations for enhancing their effectiveness.*

### INTRODUCTION

On March 29, 2011, the Supreme Court—by a vote of five to four—overturned a \$14 million jury verdict in favor of John Thompson, a Louisiana

man who spent fourteen years on death row because prosecutors withheld exculpatory blood evidence from his defense attorneys.<sup>1</sup> Thompson had sued the Orleans Parish District Attorney's Office based on a failure-to-train theory, arguing that the office had denied him due process of law through its deliberate indifference toward the need to train its attorneys in proper disclosure procedures. Thompson's failure-to-train theory relied on *Brady v. Maryland*, a 1963 Supreme Court decision that requires prosecutors to share evidence with defendants in criminal cases when that evidence is "material either to guilt or to punishment."<sup>2</sup> The *Connick* Court, in an opinion authored by Justice Thomas, disagreed with Thompson's argument. According to Justice Thomas's majority opinion, a single *Brady* violation – i.e., a one-time failure to disclose "material" evidence – is insufficient to establish liability on a failure-to-train theory.<sup>3</sup>

While seemingly narrow in its holding, *Connick* is significant because it forecloses one of the few remaining avenues for holding prosecutors civilly liable for official misconduct.<sup>4</sup> The likelihood that a plaintiff will be able to prove the pattern of recurrent misconduct necessary to sustain a § 1983<sup>5</sup> action is remote.<sup>6</sup> In the wake of *Connick*, then, advocates of enhanced prosecutorial accountability must look beyond civil liability in search of alternative mechanisms for combating misconduct.<sup>7</sup>

1. *Connick v. Thompson*, 131 S. Ct. 1350 (2011).
2. 373 U.S. 83, 87 (1963).
3. *Connick*, 131 S. Ct. at 1361.
4. See discussion *infra* Part II.
5. 42 U.S.C. § 1983 (2006) is a federal statute that allows plaintiffs to sue "person[s]" – a term that has been held to include local governments – that violate their civil rights through the unlawful exercise of state law power. See discussion *infra* Section II.B.
6. See Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 FORDHAM L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1842963>; see also *infra* note 70 and accompanying text.
7. Two and a half months after issuing its opinion in *Connick*, the Supreme Court agreed to revisit the issue of prosecutorial misconduct in the Orleans Parish District Attorney's Office. On June 13, the Supreme Court granted certiorari in *Smith*. See *Smith v. Louisiana*, 131 S. Ct. 2988 (2011). Oral arguments are scheduled for Tuesday, November 8. See *Preview of United States Supreme Court Cases: Smith v. Louisiana*, AM. BAR ASS'N, [http://www.americanbar.org/publications/preview\\_home/10-8145.html](http://www.americanbar.org/publications/preview_home/10-8145.html) (last visited Oct. 25, 2011). The case has since been renamed *Smith v. Cain*, with an individual prison warden replacing the State of Louisiana as the nominal respondent. See Brief for Petitioner, *Smith v. Cain*, No. 10-8145 (U.S. Aug. 12, 2011), available at [http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other\\_Brief\\_Updates/10-8145\\_petitioner.pdf](http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-8145_petitioner.pdf). At issue in *Smith* is not only the alleged suppression by prosecutors of exculpatory evidence in a capital murder trial, but also the question of whether Louisiana courts' summary treatment of a

One alternative is readily apparent from the Court's *Connick* decision itself: state professional disciplinary procedures. In holding that district attorneys are reasonably entitled to rely on the "professional training and ethical obligations" of their subordinates,<sup>8</sup> the Court noted that "[a]n attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment."<sup>9</sup> Implicit in the Court's reasoning is a belief that disciplinary procedures effectively deter prosecutorial misconduct. This position echoes the Court's earlier holding in *Imbler v. Pachtman*, in which Justice Powell noted that "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."<sup>10</sup>

In reality, prosecutors have rarely been subjected to disciplinary action by state bar authorities. This Essay asks why that is so and what may be done to make bar associations more responsive to allegations against prosecutors. Our findings, based on an investigation into the professional conduct rules and attorney discipline procedures of all fifty states, suggest that disciplinary systems as they are currently constituted do a poor job of policing prosecutors. Nonetheless, we argue that with a few modest reforms, grievance procedures can function as an effective deterrent to prosecutorial misconduct. In Part I, we briefly review the *Connick* decision, and in Part II we discuss the widespread problem of prosecutorial misconduct in the United States and the limited capacity of the civil and criminal justice systems to hold prosecutors accountable for their misdeeds. In Part III, we examine the current state of ethics rules and disciplinary procedures. We then conclude in Part IV with recommendations for enhancing disciplinary procedures with the aim of constructing an efficacious check on prosecutorial misconduct.

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defendant's subsequent *Brady* claims amounted to a denial of his right to due process under the Fourteenth Amendment. *See id.* at 54 (noting that "[w]ithout issuing a written ruling or making any findings of fact or conclusions of law, the trial judge summarily rejected petitioner's claim from the bench, dismissively stating that he 'ha[d] been listening to this for quite a while' and 'didn't have to take any time for this'" (citation omitted)). The Court's decision to hear *Smith* may signal its realization of the potential collateral consequences of *Connick*, particularly the need for courts of appeal to undertake a more searching review when confronted with *Brady* claims.

8. *Connick*, 131 S. Ct. at 1363.

9. *Id.* at 1362-63.

10. 424 U.S. 409, 429 (1976).

## I. *CONNICK V. THOMPSON*

John Thompson's execution date was only weeks away when an investigator working for his defense team found an exculpatory blood-evidence report in an obscure file buried in the New Orleans Police Crime Laboratory.<sup>11</sup> By then, Thompson had already spent fourteen years on death row.<sup>12</sup> When Thompson was first tried in 1985, prosecutors in the Orleans Parish District Attorney's Office had strategically pursued the attempted robbery charge prior to the murder charge, to dissuade Thompson from testifying at his murder trial for fear of his criminal record being introduced to the jury.<sup>13</sup> Prosecutors also neglected to inform Thompson's public defender that the perpetrator of the robbery had left his blood on the pants leg of one of the victims. A test performed on a swatch of fabric taken from the pants conclusively established that the perpetrator's blood was type B; Thompson's blood, which prosecutors never tested, is type O.<sup>14</sup> Years later, when Thompson was finally cleared of the robbery charge and free to testify on his own behalf, the jury at his retrial for murder acquitted him after only thirty-five minutes of deliberation.<sup>15</sup>

Five prosecutors were implicated in the failure to turn over the exculpatory blood evidence. In 1994, nearly ten years after the misconduct occurred, Gerry Deegan, an assistant district attorney on the armed robbery case, confessed to a friend and former prosecutor, Michael Riehlmann, that he had "intentionally suppressed blood evidence."<sup>16</sup> Three other prosecutors—Bruce Whittaker, James Williams, and Eric Dubelier, all of whom worked with Deegan—knew of the blood evidence and failed to turn it over to Thompson's attorneys.<sup>17</sup>

Prior to trial, Thompson's attorneys made a motion to inspect all material evidence and scientific reports and all materials favorable to the defendant.<sup>18</sup> In her dissent from the majority opinion in *Connick*, Justice Ginsburg outlined three ways in which the prosecution's response to Thompson's motion "fell far

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11. *Connick*, 131 S. Ct. at 1375 (Ginsburg, J., dissenting). All of the facts regarding the failure to disclose in this Essay are as stated in the Supreme Court's majority opinion or in Justice Ginsburg's dissenting opinion. With respect to certain issues in the trial record, the majority opinion contains a more complete exposition; with respect to others, Justice Ginsburg's dissent is more thorough.

12. *Id.* at 1355 (majority opinion).

13. *Id.* at 1372 (Ginsburg, J., dissenting).

14. *Id.* at 1356 (majority opinion).

15. *Id.* at 1376 (Ginsburg, J., dissenting).

16. *Id.* at 1375.

17. *Id.* at 1370.

18. *Id.* at 1372.

short of *Brady* compliance.”<sup>19</sup> First, Dubelier’s response stated that “[i]nspection [was] to be permitted,” but the swatch was signed out of the property room the next day and was not returned until a week later, one day before Thompson’s robbery trial.<sup>20</sup> Second, after the swatch was initially returned, Deegan checked it out again almost immediately, on the morning of the first day of trial. The swatch itself, however, was never produced at trial or returned to the evidence room.<sup>21</sup> To this day, it has never been recovered; Thompson’s investigator could only locate a microfiche of the lab report.<sup>22</sup> Finally, either Dubelier or Whittaker ordered a pretrial test of the swatch to be rushed; Whittaker received the results, addressed to him, and immediately put them on Williams’s desk.<sup>23</sup> Though the test conclusively established the perpetrator’s blood type, the prosecution never turned it over to the defense.<sup>24</sup>

After the discovery of the exculpatory evidence and his subsequent acquittal, Thompson sued Harry Connick, Sr., the District Attorney of Orleans Parish, alleging that Connick’s deliberate indifference to an obvious need to train the prosecutors in his office caused the prosecutors’ failure to turn over exculpatory evidence in Thompson’s case. It became apparent from evidence presented at trial that Connick’s office offered no formal training to its prosecutors regarding *Brady* evidence.<sup>25</sup> Connick himself misstated *Brady*’s requirements in his testimony, as did the other prosecutors questioned.<sup>26</sup> Connick also conceded that he stopped reading legal opinions after he came to office in 1974<sup>27</sup> and was therefore unaware of important Supreme Court rulings

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19. *Id.* at 1372-73.

20. *Id.* at 1372-73.

21. *Id.* at 1373.

22. *Id.* at 1373, 1375.

23. *Id.* at 1373.

24. *Id.*

25. *Id.* at 1379-80.

26. For instance, Connick mistakenly testified that there could be no *Brady* violation arising out of “the inadvertent conduct of [an] assistant under pressure with a lot of case load.” *Id.* at 1378. However, *Brady* held that due process violations occur whenever exculpatory information is suppressed, “irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Further, according to a leader in the field of ethics and criminal law who testified on behalf of Thompson, “Dubelier had no understanding of his obligations under *Brady* whatsoever.” *Connick*, 131 S. Ct. at 1379 (Ginsburg, J., dissenting).

27. *Id.* at 1380.

concerning the scope of *Brady* obligations.<sup>28</sup> Shortly after Connick's retirement, "a survey of assistant district attorneys in the Office revealed that more than half felt they had not received the training they needed to do their jobs."<sup>29</sup> Based on this evidence, a jury in the Eastern District of Louisiana awarded Thompson \$14 million in damages. The verdict was affirmed by the Fifth Circuit, then reheard and reaffirmed by an equally divided en banc court.<sup>30</sup>

In overturning the Fifth Circuit, the Supreme Court put its full faith in the efficacy of professional standards and disciplinary procedures. Notably, the Supreme Court recognized that Connick knew both that prosecutors in his office encountered *Brady* issues frequently and that "erroneous decisions regarding *Brady* evidence would result in constitutional violations."<sup>31</sup> But a "licensed attorney making legal judgments, in his capacity as a prosecutor," the Court asserted, "simply does not present . . . [a] 'highly predictable' constitutional danger."<sup>32</sup> In reaching this conclusion, the Court determined

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28. As Justice Ginsburg outlined in her dissent in *Connick*, several changes in *Brady* obligations occurred while Connick was in office. See, e.g., *United States v. Bagley*, 473 U.S. 667, 676 (1985) (holding that impeachment evidence, as well as exculpatory evidence, falls within *Brady*'s requirements); *Weatherford v. Bursey*, 429 U.S. 545, 559-60 (1977) ("*Brady* is not implicated here where the only claim is that the State should have revealed that a government informer would present the eyewitness testimony of a particular agent against the defendant at trial."); *United States v. Agurs*, 427 U.S. 97, 103-07 (1976) (holding that *Brady* obligations are implicated when "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," when a pretrial request for specific evidence is made, or when only a general request for *Brady* material is made). None of these cases appeared in the Office's policy manual that compiled circulated memoranda. *Connick*, 131 S. Ct. at 1381 (Ginsburg, J., dissenting). The Louisiana Supreme Court also issued many decisions regarding *Brady* in the same time period. See, e.g., *State v. Brooks*, 386 So. 2d 1348 (La. 1980) (holding that a failure to disclose that a witness's testimony would contradict testimony of the state's sole witness requires a new trial); *State v. Carney*, 334 So. 2d 415 (La. 1976) (granting a new trial on the basis of the state's failure to disclose a deal that a state witness made with prosecutors).
  29. *Connick*, 131 S. Ct. at 1380 (Ginsburg, J., dissenting).
  30. *Thompson v. Connick*, No. 03-2045, 2007 WL 1772060 (E.D. La. June 18, 2007), *aff'd*, 553 F.3d 836 (5th Cir. 2008), *aff'd on reh'g en banc by an equally divided court*, 578 F.3d 293 (5th Cir. 2009).
  31. *Connick*, 131 S. Ct. at 1365 (majority opinion).
  32. *Id.* at 1363. In *City of Canton v. Harris*, the Supreme Court held that § 1983 claims "can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants." 489 U.S. 378, 392 (1989). Eight years later, in *Board of County Commissioners v. Brown*, the Court characterized the *Canton* decision as hypothesizing "the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations" only where "a violation of federal rights may be a *highly predictable* consequence of a failure to equip law

that professional training provided an adequate safeguard against constitutional violations. Justice Thomas, writing for the majority, specifically referenced lawyers' education in law school, their completion of the bar exam, continuing education requirements, character and fitness standards, on-the-job training from more experienced attorneys, and the potential imposition of professional discipline as reasons for rejecting single instance failure-to-train liability.<sup>33</sup>

Although *Connick* purported to answer a narrow question—“whether a district attorney’s office may be held liable under § 1983 for failure to train based on a single *Brady* violation”<sup>34</sup>—the holding has great significance for those who hoped to see a move toward accountability for prosecutors and their offices, as well as for those who favor prosecutors’ relative freedom from traditional disciplinary measures. In rejecting Thompson’s jury award, the Supreme Court reaffirmed its commitment to prosecutorial immunity, sharply limiting one of the few remaining avenues of redress for prosecutorial misconduct.<sup>35</sup> In the next Part, we provide a broader overview of the problem of prosecutorial misconduct in the United States and the troubling lack of accountability for such misconduct. The history of prosecutorial immunity in particular demonstrates that, in the wake of *Connick*, state bar disciplinary procedures stand as one of the few—and perhaps the only—means of holding prosecutors accountable for gross misconduct.

## II. PROSECUTORIAL MISCONDUCT AND IMMUNITY IN THE UNITED STATES

### A. Prosecutorial Misconduct: The Scope of the Problem

Several empirical problems hamper efforts to provide an accurate assessment of prosecutorial misconduct in the United States. First, prosecutors who engage in willful misconduct presumably do not want to be discovered and therefore take steps to conceal their misdeeds.<sup>36</sup> Even a scrupulous

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enforcement officers with specific tools to handle recurring situations.” 520 U.S. 397, 409 (1997) (emphasis added); see also discussion *infra* notes 63–69 and accompanying text.

33. See *Connick*, 131 S. Ct. at 1361–63.

34. *Id.* at 1356.

35. See discussion *infra* Section II.B.

36. See Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 975 (1984) (discussing the empirical difficulty of measuring prosecutorial misconduct and arguing that much of it “goes unreported, either because it occurs in secret or in seclusion or because the various observers of the misconduct do not complain”).

prosecutor who witnesses a colleague engage in misconduct may nevertheless fail to report it for fear of professional repercussions.<sup>37</sup>

Second, prosecutors' offices enjoy considerable autonomy in shaping their internal policies. Although judicial oversight should theoretically check this autonomy, courts are generally loath to interfere with the inner workings of a coordinate branch of government.<sup>38</sup> Likewise, individual prosecutors exercise almost unlimited discretion over whom to prosecute and which offenses to charge. Pretrial hearings ostensibly exist to cabin these powers but in practice rarely operate as an effective safeguard.<sup>39</sup> The lack of any external oversight of prosecutors' offices creates an environment in which misconduct can go undetected and undeterred.

Third, the vast majority of known instances of prosecutorial misconduct come to light only during the course of a drawn-out trial or appellate proceeding. John Thompson's ordeal is illustrative: the blood evidence that ultimately exculpated Thompson was obtained at the eleventh hour through the "chance discovery" of a lone investigator hired by his defense team.<sup>40</sup> But most criminal cases in the United States result in plea bargains, which are rarely the subject of extensive investigation or judicial review, creating a heightened risk of undetected prosecutorial misconduct in the plea bargaining context.

Finally, those in the best position to report misconduct—namely judges, other prosecutors, and defense attorneys and their clients—are often disincentivized from doing so for both strategic and political reasons. From the

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37. See, e.g., Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 294 (2001) ("Prosecutors who do not want to get caught up in the scorekeeping, conviction-seeking mentality often do anyway because being the whistle blower is against the prosecutor's own self-interest in promotions or career advancement.").

38. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997 (2006) ("[T]here is a systemic failing in which prosecutors make the key decisions in criminal matters without a judicial check and without any of the structural and procedural protections that govern other executive agencies."); 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").

39. See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 970-71 (2009) (arguing that preliminary hearings exist primarily to ascertain the existence of probable cause and that "judges do not interfere with discretionary decisions about which charge to select or whether and how to plea bargain").

40. *Connick*, 131 S. Ct. 1350, 1370 (2011) (Ginsburg, J., dissenting).

defendant's perspective, there is little to gain from filing a bar complaint and much to lose. As one state judge has written:

It flies in the face of reason to expect a defendant to risk a prosecutor's actual or imagined displeasure by instituting proceedings that cannot directly benefit him. The defendant may not unreasonably believe such action will adversely affect his case in subsequent proceedings . . . or his later chances for parole.<sup>41</sup>

In other words, a bar complaint could itself negatively impact the outcome of ongoing litigation, if the prosecutor's need to defend against disciplinary proceedings, or simple resentment at being reported to the authorities, results in less favorable treatment of the defendant.<sup>42</sup> From the defense attorney's perspective, there is little time for bar complaints when trying a case or handling an appeal. These attorneys are also understandably reluctant to turn in their colleagues, especially given their ongoing professional relationships.<sup>43</sup>

What little evidence we do have indicates that prosecutorial misconduct is a serious problem. A 2003 study by the Center for Public Integrity, for instance, found over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals.<sup>44</sup> Another study of all American capital convictions between 1973 and 1995 revealed that state post-conviction courts found "prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty" in one in six cases

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41. *People v. Green*, 274 N.W.2d 448, 464 (Mich. 1979) (Levin, J., dissenting) (criticizing the majority's decision that the case need not be reversed despite the prosecutor's violation of a rule of professional responsibility); *see also* Steele, *supra* note 36, at 980 ("Even if a defendant had the capacity to recognize unethical trial conduct, reporting the prosecutor to a grievance committee does not serve the defendant's self-interests.").

42. *See* the discussion of *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983), in Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 734-36 (1987). The prosecutor who obtained a death penalty conviction of Smith later admitted in a sworn deposition that he had promised Smith's alleged accomplice a reduced sentence in exchange for his testimony at trial, an arrangement the accomplice had denied on the witness stand. The prosecutor, however, recanted his admission when faced with a state bar investigation, leading the district judge to conclude that no deal had been made, a finding later affirmed by the Eleventh Circuit. *See id.*

43. *See* Steele, *supra* note 36, at 980 ("[I]f defense counsel prejudices himself with the prosecutor by making a complaint to the grievance committee, he faces the prospect of the impact on cases of future clients.").

44. CTR. FOR PUB. INTEGRITY, *HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS*, at i, 2 (2003).

where the conviction was reversed.<sup>45</sup> Other scholars<sup>46</sup> and journalists<sup>47</sup> have also documented widespread prosecutorial misconduct throughout the United States.

Available statistics significantly underreport the extent of prosecutorial misconduct, not only because of the empirical challenges discussed above, but also because courts have embraced a “harmless error” standard when reviewing criminal convictions.<sup>48</sup> In order to win a reversal, a defendant must not only prove misconduct, but must also show that the misconduct substantially prejudiced the outcome of his or her trial.<sup>49</sup> Courts can therefore avoid making a finding of misconduct altogether by finding that the alleged error, even if proven, was harmless. By reducing the likelihood of reversal, the harmless error standard substantially weakens one of the primary deterrents to prosecutorial misconduct. Knowing that “minor” misconduct is unlikely to jeopardize a conviction on appeal, prosecutors may be more likely to bend the rules in the pursuit of victory.<sup>50</sup>

There is an obvious need for an effective check on prosecutorial misconduct. Yet, as this Essay will show, no such check currently exists.<sup>51</sup> The

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45. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1846, 1850 (2000).

46. See generally Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 59-64 (collecting authorities for the proposition that prosecutorial misconduct is widespread).

47. See, e.g., Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 11, 1999, <http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story> (finding that at least 381 homicide cases nationally were reversed between 1963 and 1999 because of *Brady* violations or prosecutorial misrepresentations to the court); Fredric N. Tulsy, *Review of More than 700 Appeals Finds Problems Throughout the Justice System*, SAN JOSE MERCURY NEWS, Jan. 22, 2006, [http://www.mercurynews.com/search/ci\\_5127591](http://www.mercurynews.com/search/ci_5127591) (finding that, over the course of five years in a single California state district, “[i]n nearly 100 cases, the prosecution engaged in questionable conduct that bolstered its effort to win convictions”).

48. See, e.g., *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that for *Brady* purposes, “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”).

49. See Steele, *supra* note 36, at 977 (“[M]any instances of harmless error occur when an appellate court finds trial misconduct by the prosecutor but does not reverse the conviction. In such cases the only apparent sanction for unethical conduct is that the conduct is described in the opinion, perhaps in opprobrious terms.” (footnote omitted)).

50. See *Rose v. Clark*, 478 U.S. 570, 588-89 (1986) (Stevens, J., concurring in the judgment) (“An automatic application of harmless-error review . . . can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case.”).

51. This Essay takes as its point of departure the Supreme Court’s repeated suggestions that professional discipline provides an adequate alternative to civil liability, aiming to

next Section reviews five potential means of providing accountability for prosecutorial misconduct and explains how each has been rejected by the courts, left unutilized, or diluted to the point of total ineffectiveness.

*B. Prosecutorial Immunity and the Decline of Accountability*

In the United States, five main avenues have been explored as potential mechanisms to punish the official misbehavior of prosecutors.<sup>52</sup> As this Section explains, two of these—common-law personal tort liability and personal tort liability under 42 U.S.C. § 1983—have been explicitly rejected by the Supreme Court. The third form of civil liability—municipal liability under § 1983—was, prior to *Connick*, generally recognized as a viable mechanism for keeping prosecutors’ offices in check. The potential for such liability was thought necessary in part because criminal punishment for prosecutorial misconduct, the fourth avenue, is almost never been utilized in practice. And, as we shall demonstrate, the final avenue—professional responsibility measures—is almost always ineffective in the prosecutorial misconduct context. This is precisely why *Connick*’s narrowing of municipal liability is so troubling. Indeed, it calls for reform of professional discipline systems to enable them to hold prosecutors accountable in a way that weakened civil remedies cannot.

Since the nineteenth century, American courts have recognized that prosecutors are immune from tort liability for actions performed in the line of duty.<sup>53</sup> After decades of general adherence to this principle by state courts, the Supreme Court recognized prosecutors’ common-law tort immunity from suits for malicious prosecution in 1927, affirming per curiam a decision of the Court of Appeals for the Second Circuit which held that “[t]he immunity is absolute, and is grounded on principles of public policy.”<sup>54</sup> The purposes underlying prosecutorial immunity, as stated by the Supreme Court, are “concern that

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demonstrate that this is not the case in the status quo and to suggest ways of reforming professional discipline to increase its effectiveness. Of course, we do not take the position that widening the availability of civil liability or other sanctions could not also be an effective means of deterring misconduct; professional discipline is simply our focus.

52. See, e.g., Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. 2089, 2094 (2010) (discussing civil liability, criminal liability, and professional discipline as potential external checks on prosecutorial misconduct). See generally Johns, *supra* note 46, at 70-71 (discussing criminal liability and professional discipline as potential, but inadequate, alternatives to civil liability).
53. See, e.g., *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896) (holding that prosecutors are exempt, as judicial officers, from individual civil liability for actions taken as part of official duties); *Parker v. Huntington*, 68 Mass. 124 (1854) (same).
54. *Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926), *aff’d per curiam*, 275 U.S. 503 (1927).

harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."<sup>55</sup>

While general tort liability for official misconduct by prosecutors has been regarded as unwise as a matter of policy, the specific issue of prosecutorial liability under 42 U.S.C. § 1983 has a more dynamic, contentious, and recent history. Congress enacted § 1983 during Reconstruction as part of an effort to permit federal courts to supervise compliance with the Fourteenth Amendment, particularly in former Confederate states. The statute creates a cause of action for damages or equitable relief against "[e]very person who, under color of" state law, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."<sup>56</sup> As Justice Douglas wryly noted in his dissent from the Court's opinion in *Pierson v. Ray*,<sup>57</sup> in which the majority held that state judges are absolutely immune from damage suits under § 1983, "[t]o most, 'every person' would mean *every person*, not every person *except* judges."<sup>58</sup> Yet the Supreme Court extended *Pierson's* absolute judicial immunity to state prosecutors in *Imbler v. Pachtman*.<sup>59</sup> Despite the objections of commentators who note that § 1983's very purpose was to provide an otherwise unavailable tort remedy for federal constitutional violations committed through the *ultra vires* abuse of state law power,<sup>60</sup> the Court held that § 1983 "is to be read in harmony with general

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55. *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976).

56. 42 U.S.C. § 1983 (2006).

57. 386 U.S. 547 (1967).

58. *Id.* at 559 (Douglas, J., dissenting).

59. *Imbler*, 424 U.S. at 409. Because *Imbler* is an extension of the Court's holding in *Pierson*, it entitles prosecutors to immunity only for actions taken pursuant to their judicial function. Prosecutors may be liable, subject to qualified immunity analysis, for investigative and other nonjudicial actions. See *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 861 (2009) (discussing the limits of *Imbler*).

60. See, e.g., *Pierson*, 386 U.S. at 559 (Douglas, J., dissenting) ("The congressional purpose seems to me to be clear. A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated. And its members were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify."); see also David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 502 (1992) (noting that a literalist approach to interpreting § 1983 would find "no basis for granting absolute immunity to any class of potential defendants" and arguing that the legislative history of the statute does not support the proposition that its drafters intended for certain defendants to

principles of tort immunities and defenses rather than in derogation of them.”<sup>61</sup> Thus, the Court applied the longstanding policy of prosecutorial immunity to § 1983 interpretation. The *Imbler* Court expressly held that prosecutors are absolutely immune from § 1983 damage suits alleging *Brady* violations.<sup>62</sup>

Perhaps the lack of a personal civil remedy against misbehaving prosecutors would be less consequential if other effective remedies were available. Municipal liability—the avenue for relief advanced by Thompson in *Connick*—has been considered one such alternative. The Supreme Court’s decision in *Monell v. Department of Social Services*<sup>63</sup> overturned part of a previous decision, *Monroe v. Pape*,<sup>64</sup> which had held that Congress did not intend for § 1983 to create liability for constitutional violations on the part of municipalities. In *Monell*, the Court delved deeply into the history of the statute and concluded:

Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 “person,” by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental “custom”

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enjoy good faith immunity); Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil Rights Cases*, 59 SMU L. REV. 265, 270 (2006) (“Nothing in the language of § 1983 suggests that Congress intended to extend official immunity defenses to defendants in civil-rights actions. And the legislative history does not demonstrate that Congress intended to preserve immunities. Indeed, since the entire goal of the statute was to impose liability on state officials who violated constitutional rights, it seems doubtful that Congress intended to insulate officials who violate civil rights by granting them immunity.” (footnotes omitted)).

61. *Imbler*, 424 U.S. at 418.

62. *Id.* at 431 n.34.

63. 436 U.S. 658 (1978).

64. 365 U.S. 167, 187 (1961).

even though such a custom has not received formal approval through the body's official decisionmaking channels.<sup>65</sup>

Municipal defendants enjoy neither absolute<sup>66</sup> nor qualified immunity,<sup>67</sup> and—while they cannot be sued under a respondeat superior theory—they are liable when a municipal policy or custom causes a constitutional injury.<sup>68</sup> Before *Connick*, it appeared that municipal liability could exist where a supervising prosecutor had failed to train line prosecutors regarding their constitutional obligations.<sup>69</sup> However, *Connick* suggests that plaintiffs will have great difficulty proving that a supervising prosecutor acted as a policymaker in failing to train subordinates—the showing necessary to obtain a remedy under § 1983. Because civil rights plaintiffs must establish that their rights were violated as a result of an official policy or custom, *Connick's* holding that a failure-to-train showing can only be made by demonstrating a pattern of violations—information that might be difficult for individual plaintiffs to access—will make such suits exceedingly difficult to win. Moreover, the Court appeared to signal in *Connick* that a pattern of extremely similar specific violations, rather than overall misconduct, would be necessary to establish municipal liability.<sup>70</sup> Thus, the class of facts potentially giving rise to municipal

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65. *Monell*, 436 U.S. at 690-91 (footnotes omitted).

66. *See id.* at 701 (“[M]unicipal bodies sued under § 1983 cannot be entitled to absolute immunity . . .”).

67. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) (rejecting qualified immunity for municipalities); *Owen v. City of Independence*, 445 U.S. 622, 656 (1980) (“[C]onsideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.”).

68. *Leatherman*, 507 U.S. at 166.

69. *See, e.g.*, Brief for the State of Kansas et al., as Amici Curiae in Support of Petitioners at 21, *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (No. 07-854), 2008 WL 2675129, at \*21 (arguing that where “a supervisory prosecutor is a ‘final policymaker’ for a municipality, then that official’s decisions may create policy that results in constitutional harm for which the municipality is liable under Section 1983” and that “[s]uch a ‘policy’ may include the ‘failure to train or supervise’ municipal employees” (citations omitted)); *see also City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (“Only where a failure to train reflects a ‘deliberate’ or ‘conscious’ choice by a municipality—a ‘policy’ as defined by our prior cases—can a city be liable for such a failure under § 1983.”).

70. *See Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011) (“None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put

liability in prosecutorial misconduct cases is significantly narrowed after *Connick*.

Alternatives to civil liability have proven no more successful. In the course of upholding official immunity, the Supreme Court in *Imbler* wrote that prosecutorial misconduct “is reprehensible, warranting criminal prosecution as well as disbarment,”<sup>71</sup> rather than civil damages. Unfortunately, history has not borne out the notion that criminal sanctions or bar discipline are effective tools for deterring and punishing prosecutorial misconduct.<sup>72</sup> In the popular imagination, the idea of criminal liability sometimes appears as a kind of poetically just punishment for unethical prosecutors. As John Thompson wrote in an op-ed published shortly after the Supreme Court’s decision: “I don’t care about the money. I just want to know why the prosecutors who hid evidence, sent me to prison for something I didn’t do and nearly had me killed are not in jail themselves.”<sup>73</sup> However, criminal sanctions for prosecutors who violate *Brady* are exceedingly rare. The 1999 Illinois trial of the so-called “DuPage Seven,” police officers and prosecutors accused of perjury and obstruction of justice for allegedly framing an innocent defendant in a capital murder case, appears to be the *first* time in American history that a felony prosecution of former prosecutors for misconduct<sup>74</sup> reached the verdict stage.<sup>75</sup> All of the

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Connick on notice that specific training was necessary to avoid this constitutional violation.” (footnote omitted)).

71. *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976).
72. Contempt findings are another tool at the disposal of courts for sanctioning prosecutorial misconduct. See *Pounders v. Watson*, 521 U.S. 982, 988 (1997) (underscoring the trial judge’s contempt powers in the face of attorney misbehavior and noting that “[w]here misconduct occurs in open court, the affront to the court’s dignity is more widely observed, justifying summary vindication”). While there are little data available on the prevalence of contempt findings in prosecutorial misconduct cases, the data we do have suggest that citations are very rare. See Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 674 (1972) (“In preparing this article, I surveyed the reported decisions for the past twenty-five years. Although I uncovered a large number of cases in which defense attorneys had been punished for contemptuous courtroom behavior, I did not find a single case in which a prosecutor had been so disciplined.”); Rosen, *supra* note 42, at 703 n.56 (“No cases could be found in which a prosecutor was found in contempt for *Brady*-type misconduct.”).
73. John Thompson, Op-Ed., *The Prosecution Rests, But I Can’t*, N.Y. TIMES, Apr. 9, 2011, <http://www.nytimes.com/2011/04/10/opinion/10thompson.html>.
74. Here we use the term prosecutorial misconduct to refer only to violations of defendants’ legal rights. Criminal charges (and official discipline) against prosecutors for other types of misconduct, such as embezzlement or corruption, are outside the scope of this Essay.
75. Armstrong & Possley, *supra* note 47 (noting also that only two such cases had previously proceeded to the filing of charges, and both indictments were dismissed before trial).

defendants, however, were acquitted.<sup>76</sup> Although it is difficult to comprehensively determine exactly how many prosecutors have been subject to criminal sanctions for official misconduct throughout U.S. history, the number is surely extremely low.<sup>77</sup> Criminal sanctions are most likely rare because they are seen as an overly harsh punishment for “technical” errors made by people with demanding and stressful jobs.<sup>78</sup> Moreover, the federal criminal statute that allows for punishment of prosecutorial misconduct that violates a defendant’s civil rights—18 U.S.C. § 242—requires that the misconduct be willful, rendering the government’s burden in pursuing criminal punishment for unethical prosecutors under the law daunting and making criminal sanctions available only for a small fraction of instances of misconduct.<sup>79</sup>

Similarly, bar discipline procedures have not proved a fruitful sanction for deterring prosecutorial misconduct.<sup>80</sup> Many state bar disciplinary systems

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76. Robert McCoppin & Stacy St. Clair, *Rest of DuPage 7 Innocent*, CHI. DAILY HERALD, June 5, 1999, at D1.

77. See Barkow, *supra* note 52, at 2094 (observing that criminal charges against prosecutors are almost never brought); Johns, *supra* note 46, at 71 (noting that only one prosecutor has ever been convicted under 18 U.S.C. § 242, which provides for criminal liability for government officials who commit constitutional violations); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2122 (2000) (“[P]rosecution for malfeasance is all-but-unheard-of and always unsuccessful in the rare instances in which it occurs . . .”); Armstrong & Possley, *supra* note 47 (determining that in 381 homicide cases where a new trial was ordered because prosecutors withheld exculpatory evidence or knowingly presented false evidence, only two were indicted, and their charges were dismissed before trial). The recent guilty plea for subornation of perjury of Michigan prosecutor Karen Plants, who admitted colloquing with a judge and others to hide the fact that a witness in a drug trial was a paid informant, is a rare exception to the rule. See Joe Swickard, *Ex-Prosecutor Pleads Guilty to Misconduct*, DETROIT FREE PRESS, Mar. 3, 2011, at A6.

78. See Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 84 (2005) (“[E]ven where a knowing deprivation is proven, many judges and juries are hesitant to impose criminal sanctions for ‘technical’ constitutional violations. This provision would, thus, be reserved for only the most extreme cases of prosecutorial abuse resulting in what are perceived to be the most serious deprivations. Even in the context of extreme prosecutorial abuse, however, judges may prefer to use a less severe, quasi-criminal remedy available to sanction the misconduct, such as the contempt power.”).

79. See *id.* at 83-84.

80. See discussion *infra* Part III; see also Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 899 (1995) (“The practical reality is that few prosecutors are ever disciplined by these regulatory entities.”); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1432 (1987) (“[F]or the most part, ethical guidelines are too general, too infrequently revised, and too rarely refined through actual application to serve as the primary vehicles for delineating the constraints on prosecutorial activity.”); Steele, *supra*

barely seem to contemplate prosecutorial misconduct as a cognizable complaint, focusing instead on fee disputes and failure to diligently pursue a client's claim.<sup>81</sup> Indeed, only one of the five prosecutors responsible for violating John Thompson's constitutional rights has ever been disciplined by the attorney grievance system in place in Louisiana. Ironically, that prosecutor is Michael Riehlmann, the only one of the five who was not directly involved in prosecuting Thompson's case or implicated in any of the *Brady* violations that occurred and the only attorney to ever report the violations to Louisiana's Office of Disciplinary Counsel (ODC). Five years after Gerry Deegan had confessed to him about suppressing the blood evidence, Riehlmann reported his conversation with Deegan to ODC after Thompson's attorneys inquired about his knowledge of the newly discovered crime lab report. The Louisiana Attorney Discipline Board subsequently recommended that Riehlmann's law license be suspended for six months because he failed to report Deegan's confession within a "reasonable time" and this failure was "prejudicial to the administration of justice."<sup>82</sup> The Supreme Court of Louisiana, however, determined that Riehlmann's behavior was "merely negligent" and that a public reprimand was the appropriate sanction.<sup>83</sup>

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note 36, at 966 (noting that "both scholars and bar grievance committees have paid scant attention to prosecutorial ethicality, and consequently, prosecutors may have developed a sense of insulation from the ethical standards of other lawyers").

81. See discussion *infra* Part III; see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 105 (1991) ("In trying to maintain the bar's professionalism, discipliners naturally prefer to focus their limited resources on attorney misconduct driven by personal self-interest or greed.").

82. *In re Riehlmann*, 891 So. 2d 1239, 1245 (La. 2005).

83. *Id.* at 1249. The decision makes much of the personal troubles Riehlmann was experiencing at the time, quoting at length from Riehlmann's statement to the Office of Disciplinary Counsel:

I think that under ordinary circumstances, I would have [reported Gerry Deegan's confession]. I really honestly think I'm a very good person. And I think I do the right thing whenever I'm given the opportunity to choose. This was unquestionably the most difficult time of my life. Gerry, who was like a brother to me, was dying. And that was, to say distracting would be quite an understatement. I'd also left my wife just a few months before, with three kids, and was under the care of a psychiatrist, taking antidepressants. My youngest son was then about two and had just recently undergone open-heart surgery. I had a lot on my plate at the time. A great deal of it of my own making; there's no question about it. But, nonetheless, I was very, very distracted, and I simply did not give it the important consideration that it deserved. But it was a very trying time for me. And that's the only explanation I have, because, otherwise, I would have reported it immediately had I been in a better frame of mind.

*Id.* at 1242.

The lack of action taken in Thompson's case is emblematic of the broader failure of state bar disciplinary procedures to punish those directly engaged in prosecutorial misconduct. The following Part first reviews the ethics rules and disciplinary procedures of all fifty states, highlighting the pervasive flaws in those rules and procedures; and, second, explains how the existing disciplinary regime is ineffective at addressing prosecutorial misconduct.

### III. DISCIPLINING PROSECUTORS?

Given the Supreme Court's repeated endorsement of professional discipline as the appropriate vehicle for addressing allegations of prosecutorial misconduct, one might suppose that state bar agencies frequently sanction prosecutors. In fact, prosecutors are rarely held accountable for violating ethics rules. In 1999, *Chicago Tribune* reporters Maurice Possley and Ken Armstrong identified 381 homicide cases nationally in which *Brady* violations produced conviction reversals.<sup>84</sup> Not a single prosecutor in those cases was publicly sanctioned.<sup>85</sup> Four years later, a study by the Center for Public Integrity found 2012 appellate cases between 1970 and 2003 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals.<sup>86</sup> Yet prosecutors faced disciplinary action in only forty-four of those cases, and seven of these actions were eventually dismissed.<sup>87</sup> The most recent study indicates that depressingly little has changed since 2003, at least in California. The Northern California Innocence Project identified 707 cases between 1997 and 2009 in which courts made explicit findings of prosecutorial misconduct, 159 of which were deemed harmful.<sup>88</sup> The Project's review of the public disciplinary actions reported in the *California State Bar Journal*, however, revealed a mere six—out of a total of 4741—that involved prosecutorial misconduct.<sup>89</sup>

As these studies indicate, infrequent punishment of prosecutors cannot be blamed on a paucity of discoverable violations. Even when judicial findings of misconduct result in conviction reversals, disciplinary sanctions are almost

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84. Armstrong & Possley, *supra* note 47.

85. *Id.* (“Not one [prosecutor] received any kind of public sanction from a state lawyer disciplinary agency or was convicted of any crime for hiding evidence or presenting false evidence . . .”).

86. CTR. FOR PUB. INTEGRITY, *supra* note 44, at i, 2.

87. *Id.* at 79.

88. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at 3 (2010).

89. *Id.* at 55.

never imposed against the offending prosecutor.<sup>90</sup> This Part endeavors to explain why prosecutors are rarely sanctioned by state bar authorities.

Our conclusions derive from a comprehensive survey of the ethical rules and disciplinary practices of all fifty states. As part of the survey, we compiled comparative data on each state's rules of professional conduct and rules of disciplinary procedure. In addition, we consulted all fifty discipline agency websites and conducted telephone interviews with bar personnel to glean additional information about the complaint process. We further supplemented our research with statistical data compiled by the American Bar Association as part of its 2009 Survey on Lawyer Discipline Systems.<sup>91</sup>

The data from our survey suggest four broad causes for the breakdown in attorney discipline systems with respect to prosecutors. First, the ethical rules that govern prosecutorial behavior fail to proscribe most forms of prosecutorial misconduct. Second, the procedures governing attorney discipline systems afford complainants too few rights and administrators too much discretion. Third, those who are in the best position to discover prosecutorial misconduct—judges, prosecutors, and defense attorneys—routinely fail to report it. Fourth, overlapping policing mechanisms create confusion about the appropriate locus of disciplinary authority.

*A. Model Rule 3.8: A Weak Check on Prosecutorial Misconduct*

Ethics rules create legally enforceable obligations that can shape norms of behavior. Accordingly, this Part begins by discussing the ethical obligations of prosecutors as defined by Rule 3.8 of the American Bar Association's Model

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90. *Id.* at 48 (noting that, despite a California law requiring judges to report misconduct in cases where a judgment is modified or reversed based on misconduct, “there is little evidence courts are meeting even this limited reporting obligation”); *see also* CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 71 (2008), *available at* <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> (noting that the State Bar’s chief trial counsel, having reviewed half of fifty-four conviction reversals, had “yet to find a single example of a report by a court of misconduct resulting in a reversal of conviction”); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys To Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1062 (2009) (lamenting “the tepid reaction from many judges when cases of serious misconduct come to light” and noting that “many judges go to great lengths to redact the names of misbehaving prosecutors from trial transcripts quoted in judicial opinions”).

91. ABA Ctr. for Prof’l Responsibility, *2009 Survey on Lawyer Discipline Systems*, AM. BAR. ASS’N (Nov. 2010), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/discipline/2009sold.pdf>.

Rules of Professional Conduct.<sup>92</sup> In the next Section, we consider the degree to which individual states have deviated from this Model Rule in enacting their own rules of professional conduct. In the final Section, we examine the existing disciplinary mechanisms used by states to enforce their rules of professional conduct.

For over one hundred years, states have looked to the ABA for guidance when constructing their local rules for attorney discipline.<sup>93</sup> The Model Rules of Professional Conduct, first promulgated in 1983 and substantially revised in 2002, have proven especially influential.<sup>94</sup> Every state save California has adopted attorney ethics codes that substantially mirror the Model Rules.<sup>95</sup>

The Model Rules generally do not distinguish between private attorneys and prosecutors. All lawyers are expected to conduct themselves in accordance with its general provisions. Model Rule 3.8 is exceptional, however, in that it defines certain “special” ethical duties unique to prosecutors, including the obligation not to pursue charges against an individual in the absence of probable cause and the affirmative responsibility to disclose exculpatory evidence in a timely fashion.<sup>96</sup> While other Model Rule provisions apply equally to prosecutors and private attorneys, Rule 3.8 is the only rule that directly addresses the prosecutorial function.<sup>97</sup> Consequently, its provisions serve as a baseline for measuring prosecutorial misconduct.

Rule 3.8 embodies Justice Sutherland’s general admonition in *Berger v. United States* that “while [a prosecutor] may strike hard blows, he is not at

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

93. The ABA promulgated its first ethics code, the Canons of Ethics, in 1908. By 1914, the Canons had been adopted by thirty-one bar associations. See James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2395-96 (2003).

94. The Model Rules superseded the ABA’s Model Code of Professional Responsibility of 1969.

95. California has its own rules that differ substantially from the ABA’s Model Rules. While there is no equivalent to Rule 3.8 in California’s Rules of Professional Conduct, several provisions govern important aspects of a prosecutor’s professional duties. See, e.g., CAL. R. PROF’L CONDUCT 5-100 (“Threatening Criminal, Administrative, or Disciplinary Charges”); R. 5-120 (“Trial Publicity”); R. 5-200 (“Trial Conduct”); R. 5-220 (“Suppression of Evidence”); R. 5-300 (“Contact with Officials”); R. 5-310 (“Prohibited Contact with Witnesses”); R. 5-320 (“Contact with Jurors”).

96. MODEL RULES OF PROF’L CONDUCT R. 3.8(a), (d).

97. A nonexhaustive list of other Model Rules applicable to prosecutors includes Rule 3.3(a) (“Candor Toward the Tribunal”); Rule 3.4 (“Fairness to Opposing Party and Counsel”); Rule 3.6 (“Trial Publicity”); Rule 4.2 (“Communication with Person Represented by Counsel”); and Rule 8.4 (“Misconduct”). For a more complete discussion of ethical rules prosecutors are subject to and those they are most likely to violate, see Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. REV.* 721, 732-42 (2001).

liberty to strike foul ones.”<sup>98</sup> Commentary on the Rule underscores this admonition by noting that a prosecutor’s role is to be a “minister of justice and not simply . . . an advocate.”<sup>99</sup> Accordingly, the Rule places both negative and affirmative responsibilities on prosecutors. A prosecutor shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not

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98. 295 U.S. 78, 88 (1935).

99. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1.

commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,
  - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
  - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.<sup>100</sup>

On its face, Rule 3.8 appears to justify the Supreme Court's confident assertion that a "well-developed and pervasive mechanism" exists for policing prosecutorial misconduct.<sup>101</sup> The Rule addresses many of the prosecutor's most important ethical duties, including those related to his charging discretion in (a), discovery obligations in (d), subpoena power in (e), duty to inform the public in (f), and review of wrongful conviction claims in (g) and (h). Moreover, in some cases the Rule imposes obligations on prosecutors broader than those required by constitutional case law or rules of criminal procedure. For instance, under *Brady* a prosecutor is only required to produce evidence "upon request" that he determines is "material either to guilt or to punishment."<sup>102</sup> Rule 16 of the Federal Rules of Criminal Procedure similarly confines a federal prosecutor's discovery obligations to the production of *Brady* or *Giglio* evidence<sup>103</sup> "upon a defendant's request."<sup>104</sup> By contrast, Rule 3.8(d) obligates prosecutors to voluntarily turn over *all* favorable evidence and to do so in a *timely* manner.<sup>105</sup> In this way, Rule 3.8(d) is more rigorous than *Brady*'s material standard by requiring disclosure of exculpatory or mitigating evidence

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100. *Id.* R. 3.8.

101. *Malley v. Briggs*, 475 U.S. 335, 343 n.5 (1986).

102. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

103. *Giglio* evidence is evidence that tends to impeach the credibility of a government witness. See *Giglio v. United States*, 405 U.S. 150 (1972).

104. FED. R. CRIM. P. 16(a)(1).

105. The Supreme Court recognized the heightened standard imposed by Rule 3.8 in *Kyles v. Whitley*, noting that due process only requires the production of "material" evidence, while Rule 3.8 requires "disclosures of *any* evidence tending to exculpate or mitigate." 514 U.S. 419, 437 (1995) (emphasis added).

regardless of whether the favorable evidence is dispositive of the ultimate issue of guilt. As the ABA noted in a formal advisory opinion interpreting Rule 3.8, section (d) “requires prosecutors to steer clear of the constitutional line, erring on the side of caution.”<sup>106</sup>

While Rule 3.8 might expose prosecutors to a heightened standard of conduct in theory, the Rule’s vague terminology undermines its efficacy and enforceability in practice. Rule 3.8(d) exemplifies this problem. Neither the text of that provision nor the accompanying commentary explains the proper standard for determining whether evidence is “favorable” to an accused. Likewise, the rule provides little guidance regarding the knowledge and timeliness requirements. In its formal advisory opinion, the ABA interpreted evidence that is “known to the prosecutor” to mean evidence of which the prosecutor has actual, rather than constructive, knowledge.<sup>107</sup> Consequently, according to the ABA’s interpretation, “Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.”<sup>108</sup> This interpretation greatly limits the Rule’s prophylactic potential and actually imposes an ethical standard below the constitutional minimum. As the Supreme Court explained in *Kyles v. Whitley*, under *Brady*, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”<sup>109</sup> But the ABA’s interpretation would permit a prosecutor to pursue a conviction without having familiarized himself with the most basic aspects of the case, such as the arresting officer’s police report and witness statements.<sup>110</sup> Even if a prosecutor did read these materials and in doing so discovered certain inconsistencies, it is not clear under the ABA’s interpretation of the Rule that he would be ethically bound to undertake further investigation.

Rule 3.8’s prescriptive force is also greatly diminished by its failure to address many important aspects of the prosecutorial function. Over ninety percent of federal criminal prosecutions result in guilty pleas,<sup>111</sup> yet the Model

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<sup>106</sup>. ABA Standing Comm. on Ethics & Prof’l. Responsibility, Formal Op. 09-454, at 4 (2009) [hereinafter ABA Opinion].

<sup>107</sup>. *Id.* at 5.

<sup>108</sup>. *Id.*

<sup>109</sup>. 514 U.S. at 437.

<sup>110</sup>. Indeed, the ABA Opinion recognizes as much in the context of plea bargaining by noting that, prior to a plea, “Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information.” ABA Opinion, *supra* note 106, at 6.

<sup>111</sup>. For instance, in 2010, 91.2% of federal prosecutions resulted in pleas. If one subtracts cases that were dismissed, the figure rises to 99.5%. See BUREAU OF JUSTICE STATISTICS, U.S.

Rule nowhere explains how prosecutors should conduct themselves in plea negotiations. Rule 3.8(a) obliquely addresses the issue of charging discretion by urging that a prosecutor should “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>112</sup> But the probable cause determination is a minimal standard that is typically decided by the grand jury; a body that, as the popular saying goes, could be convinced to indict a ham sandwich.<sup>113</sup> Furthermore, the ethics rules do not prohibit a prosecutor who wishes to gain leverage in plea negotiations from filing a charge that he has no intention of bringing to trial.<sup>114</sup>

Returning to the hypothetical posited above, suppose a prosecutor does undertake an investigation into inconsistent witness statements and learns of information unquestionably favorable to the defense, such as a disagreement between two primary witnesses over the defendant’s race. Under the Model Rules, a prosecutor who is nonetheless convinced of the defendant’s guilt is arguably under no obligation to present this information to the grand jury.<sup>115</sup> Nor is he necessarily obligated to disclose the information to defense counsel during plea negotiations. Although in its formal opinion the ABA interprets “timely” to mean “as soon as reasonably practical,”<sup>116</sup> that is not enforceable. A prosecutor looking to obtain a tactical advantage during plea negotiations may

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DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22 (2011), <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>.

112. MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2010).

113. See, e.g., TOM WOLFE, *THE BONFIRE OF THE VANITIES* 624 (1987).

114. For criticism of Rule 3.8’s failure to adequately address plea bargaining, see Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1590 (2003) (“[Rule 3.8] places no limits on the prosecutor’s authority to bring charges that are unprovable or disproportionately harsh to extract a guilty plea to charges that the prosecutor regards as just, to compel the defendant to give information or to testify, or to achieve other ends.” (footnotes omitted)); Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 436 (2009) (“[Rule 3.8 does not] address plea bargaining practices that are ethically problematic, such as overcharging in order to increase a prosecutor’s leverage in plea negotiations, or so-called ‘release-dismissal agreements,’ an ethically problematic practice in which prosecutors agree to drop (or not to file) criminal charges in exchange for the defendant’s agreement not to seek civil damages.”); Zacharias, *supra* note 97, at 734-35 (noting that the Model Rules refer to plea bargaining “obliquely, if at all”).

115. The Ethics 2000 Commission considered adding language that would have required prosecutors to present to the grand jury “material facts tending substantially to negate the existence of probable cause.” The proposal was scuttled, however, due to the strident opposition of the National District Attorneys Association. Kuckes, *supra* note 114, at 439.

116. ABA Opinion, *supra* note 106, at 6.

make a calculated decision to interpret “timely” as meaning any time prior to trial.

In sum, Model Rule 3.8 promises on its face more than it delivers in practice. While there are many instances of prosecutorial misconduct that clearly fall within its ambit, the Rule fails to address some of the more significant aspects of the prosecutor’s justice-seeking role. As one commentator has aptly noted, “there is no principled reason for a disciplinary code to include only the particular provisions now included in Model Rule 3.8.”<sup>117</sup> By failing to cover the full scope of prosecutorial misconduct, Model Rule 3.8 offers states a flawed template upon which to base their own ethics rules.

*B. Diluting Rule 3.8 at the State Level*

State disciplinary authorities have the potential to rein in unethical behavior by prosecutors. They can only perform this function, however, if states adopt ethics rules with bite. This Section describes the inconsistent and incomplete implementation of Rule 3.8 or other similar provisions by local disciplinary authorities. The failure of many states to adequately define the special role of a prosecutor in their rules casts doubt on the Supreme Court’s optimism about professional discipline’s potential to check prosecutorial misconduct.

While every state save California has adopted a version of Model Rule 3.8,<sup>118</sup> our research shows that few have gone beyond its minimal standards. Many states, in fact, have compounded Rule 3.8’s weaknesses by adopting watered-down versions of the Rule that omit or materially alter its most substantive provisions. States have also been slow historically in adopting strengthening amendments to the Rule. This trend has continued with the two most recent amendments promulgated in 2008, provisions (g) and (h), both of which focus much-needed attention on the steps a prosecutor must take when confronted with credible evidence of a convicted person’s innocence. The failure of many states to ratify these and other amendments in a timely fashion, together with the substantive deviations mentioned above, has resulted in a patchwork of ethics rules that lacks rhyme or reason.

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<sup>117</sup>. Green, *supra* note 114, at 1575.

<sup>118</sup>. California is currently in the process of updating its entire disciplinary code and, as part of this effort, is considering adopting a localized version of Model Rule 3.8. See COMM’N FOR THE REVISION OF THE RULES OF PROF’L CONDUCT, STATE BAR OF CAL., PROPOSED RULE 3.8 [RPC 5-110]: “SPECIAL RESPONSIBILITIES OF A PROSECUTOR” (Draft Feb. 27, 2010), available at [http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=dQ2fJdgbe\\_4%3D&tabid=2161](http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=dQ2fJdgbe_4%3D&tabid=2161).

The table below offers a visual depiction of the degree to which states have adopted Model Rule 3.8's various provisions. The data paint a decidedly mixed picture of state compliance. Only one state, Idaho, has adopted Model Rule 3.8 in its entirety.<sup>119</sup> While specific provisions garner nearly unanimous approval, others have proven less popular. Rule 3.8(g) and (h), which both deal with wrongful convictions, were approved by the ABA's House of Delegates in February of 2008.<sup>120</sup> However, as explained below, the slow pace of states' adoption of those provisions is itself indicative of a ratification process that is dysfunctional.

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<sup>119</sup>. See IDAHO R. PROF'L CONDUCT 3.8.

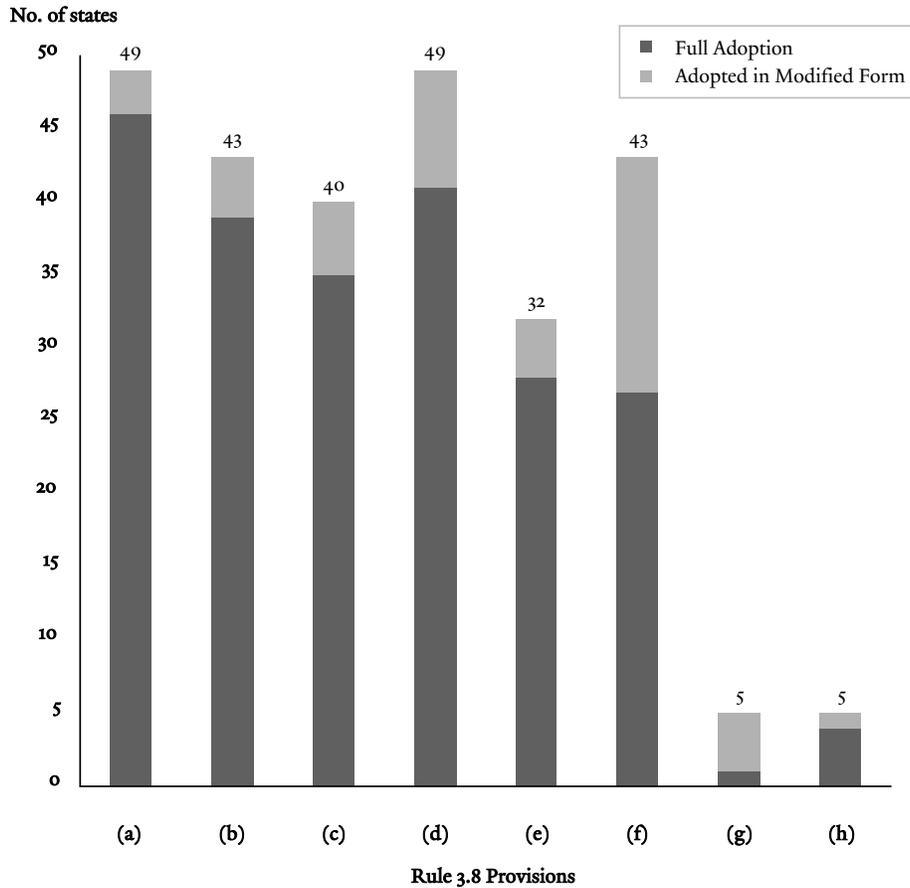
<sup>120</sup>. See Memorandum on 2008 Midyear Meeting of the American Bar Association and Meeting of the House of Delegates 7 (Feb. 29, 2008), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/constituencies/docs/SelectCommitteeNewYorkReport.doc>.

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

Figure 1.  
STATE ADOPTION OF MODEL RULE 3.8 PROVISIONS



As Figure 1 demonstrates, every state that follows the Model Rules has adopted some version of sections (a) and (d). This reflects the fact that (a) and (d) comprised the entirety of Rule 3.8 as first promulgated in 1969 in the predecessor to the Model Rules.<sup>121</sup> States' modifications to these provisions, however, have not followed a consistent pattern. Divergence between North Dakota and South Dakota in their respective adoptions of Rule 3.8(d) illustrates the point. North Dakota moderately strengthened the provision by

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121. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(A) to -103(B) (1969).

clarifying that the requirement of timely disclosure means disclosure that occurs “at the earliest practical time.”<sup>122</sup> South Dakota, on the other hand, kept the Model Rule’s vague timeliness requirement and replaced its emphasis on broader disclosure with *Brady*’s considerably less demanding standard.<sup>123</sup>

Provisions (b) and (c), two of the first amendments to the Rule,<sup>124</sup> have also been widely adopted.<sup>125</sup> Yet, such widespread adoption may be of little consequence, as the importance of these provisions has been questioned by commentators. Rule 3.8(b) requires a prosecutor to “make reasonable efforts” to ensure a defendant is advised of his right to counsel, and 3.8(c) prohibits a prosecutor from seeking a waiver of that defendant’s pretrial rights, including the right to a preliminary hearing.<sup>126</sup> Defendants, however, are normally advised of these rights during their first appearance before a judge. Neither provision is therefore likely to arise during the ordinary course of a prosecutor’s work.<sup>127</sup> One state—Wisconsin—has, in fact, adopted versions of provisions (b) and (c) that impose a far more substantive standard on prosecutors by requiring that they identify their “role and interest in the matter” when questioning a defendant in addition to apprising him of his right to counsel.<sup>128</sup> However, unless the ABA opts to update its rule to reflect these modifications, other states are unlikely to follow Wisconsin’s lead.

Rule 3.8(e), which concerns intrusions into the lawyer-client relationship through the use of lawyer subpoenas, has only been adopted in full or modified

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122. N.D. R. PROF’L CONDUCT 3.8.

123. S.D. R. PROF’L CONDUCT 3.8.

124. When the Model Rules were first promulgated in 1983, the ABA added provisions (b), (c), and a variation of current provision (f) to the preexisting Model Code provisions. *See* Green, *supra* note 114, at 1579.

125. *See infra* Appendix Table 1. However, they have not been universally adopted. California, Florida, Hawaii, Maine, New York, Ohio, and Oregon have not adopted provision (b). Alaska, California, Georgia, Hawaii, Kentucky, Maine, New York, Ohio, Oregon, and Virginia have not adopted provision (c).

126. MODEL RULES OF PROF’L CONDUCT R. 3.8(b)-(c) (2010).

127. *See* Green, *supra* note 114, at 1591-92 (noting that these provisions “rarely” arise and that “[n]either provision prevents prosecutors from inducing unrepresented defendants to waive constitutional rights that are in far greater need of protection”).

128. WIS. SUP. CT. R. 20:3:8(a)-(b). The State Bar of Wisconsin has also issued an ethics opinion interpreting the rule. *See* Wis. State Bar Prof’l Ethics Comm., Ethics Op. E-09-02 (2009), *available at* [http://www.wisbar.org/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm&Section=Wisconsin\\_ethics\\_opinions&ContentID=79725](http://www.wisbar.org/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm&Section=Wisconsin_ethics_opinions&ContentID=79725).

form by thirty-two states.<sup>129</sup> Since its introduction in 1990, Rule 3.8(e) has stirred substantial controversy.<sup>130</sup> The Justice Department, whose attorneys' aggressive use of the subpoena power prompted the provision in the first place, immediately expressed its disagreement with 3.8(e) by seeking court rulings exempting federal prosecutors from its reach.<sup>131</sup> After the Third Circuit issued a decision endorsing the Justice Department's position,<sup>132</sup> the ABA's House of Delegates voted to remove a clause from 3.8(e) that required prosecutors to obtain a judicial order before issuing a subpoena.<sup>133</sup> Even with this amendment, many states have opted to forego the new rule.

Finally, provisions (g) and (h) have only been adopted by five states since their introduction in 2008.<sup>134</sup> These important provisions extend a prosecutor's *Brady* obligations to evidence of non-guilt that comes to light after trial. The story of their enactment by the ABA and subsequent implementation by individual states is simultaneously encouraging and troubling. On the positive

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129. Twenty-eight states have adopted Rule 3.8(e) without modification: Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, Washington, and Wisconsin. See *infra* Appendix Table 1. Four states—Massachusetts, Minnesota, North Carolina, and Rhode Island—have adopted modified versions of (e). See, e.g., MINN. R. PROF'L CONDUCT 3.8(a)-(b) (eliminating (e)(3) requirement that a prosecutor reasonably believe "there is no other feasible alternative to obtain the information"); N.C. R. PROF'L CONDUCT 3.8(e) (adding a clause preventing prosecutors from "participat[ing] in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer").

130. See Kuckes, *supra* note 114, at app. A, at 468.

131. See *id.* For many years, the Department of Justice actively resisted efforts by state bar authorities to regulate federal prosecutors. In 1989, then-Attorney General Richard Thornburgh issued a memorandum outlining the Department's position that state ethics rules were not binding on its employees. See *In re Doe*, 801 F. Supp. 478, 489-93 ex. E (D.N.M. 1992). In 1998, Congress resolved the dispute against the Justice Department by passing the Citizen's Protection Act, which stipulates: "An attorney for the Government shall be subject to State laws and rules, and local Federal court 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." 28 U.S.C. § 530B (2006).

132. *Baylson v. Disciplinary Bd. of Supreme Court of Pa.*, 975 F.2d 102, 104 (3d Cir. 1992).

133. Kuckes, *supra* note 114, at app. A, at 488.

134. One state, Idaho, has adopted the provisions in full. See IDAHO R. PROF'L CONDUCT 3.8(g)-(h). Three states—Colorado, Tennessee, and Wisconsin—have adopted (h) and modified versions of (g). See COLO. R. PROF'L CONDUCT 3.8(g)-(h); TENN. R. PROF'L CONDUCT 3.8(g)-(h); WIS. SUP. CT. R. 20:3:8(g)-(h). One state—Delaware—has adopted a hybrid version of (g) and (h). See DEL. R. PROF'L CONDUCT 3.8(d)(2).

side, Rule 3.8(g) and (h) originated from a proposal made by the Bar of the City of New York to the New York State Bar.<sup>135</sup> This grassroots approach stands in stark contrast to the normal mechanism by which Rule 3.8 is amended. Ordinarily, revisions are made by an ethics committee whose members boast no particular expertise in criminal justice matters.<sup>136</sup> For instance, in preparation for the new millennium, the ABA instituted a major reform initiative called Ethics 2000, the object of which was to encourage state uniformity in rule adoption as well as to update those rules to better reflect the pace of technological change.<sup>137</sup> Despite a report identifying Rule 3.8's shortcomings, however, the Ethics Commission made only one minor alteration—one that arguably weakened the Rule.<sup>138</sup> The Ethics 2000 reforms did have the salutary effect, however, of causing state bar associations to revisit their ethics rules.<sup>139</sup> When the New York State Bar turned its attention to that task in 2005, its members found themselves troubled by a spate of wrongful convictions uncovered by the Innocence Project.<sup>140</sup> Rule 3.8(g) and (h) subsequently grew out of a reasoned debate among New York prosecutors, defense attorneys, and judges about what obligations prosecutors should have when confronted with new evidence that raises credible doubts about the validity of a conviction.<sup>141</sup> In further contrast to the way amendments to Rule 3.8 are normally adopted, provisions (g) and (h) were proposed to the ABA's

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135. Bruce A. Green & Ellen Yaroshesky, *Proposed Model Rules of Professional Conduct, Rule 3.8(g) and (h)*, N.Y. CRIMINAL BAR ASS'N (Nov. 7, 2006), available at <http://nycrimbar.org/Members/Newsletter/2006-2007/NYS-BarRules-Prosecutors.pdf>.

136. See Kuckes, *supra* note 114, at 437 (“The Ethics 2000 Commission itself was not a body of criminal justice experts, but a group of distinguished judges and lawyers charged broadly with reviewing the entire body of ethical rules applicable to lawyers in any type of practice.”).

137. See E. Norman Veasey, *Ethics 2000 Chair's Introduction*, AM. BAR ASS'N (Aug. 2002), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rule\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preface/ethics\\_2000\\_chair\\_introduction.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rule_of_professional_conduct/model_rules_of_professional_conduct_preface/ethics_2000_chair_introduction.html).

138. See Kuckes, *supra* note 114, at 439-40 (describing removal of reference to presentation of exculpatory evidence to grand jury).

139. See *id.* at 442 (“While the Ethics 2000 Commission did not change Rule 3.8, the Ethics 2000 process nonetheless influenced the shape of state prosecutorial ethics rules to a surprising extent.”).

140. See Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 317-18 (2010) (describing in detail the method by which the new provisions were proposed).

141. See *id.*

House of Delegates by the body's Criminal Justice Section rather than its ethics committee.<sup>142</sup>

The process of Rule 3.8(g) and (h)'s adoption, however, should also serve as a cautionary tale. To begin with, New York never adopted the rule that its own bar agency proposed. This is because state bar associations only have the power to propose rules; each state's highest court possesses the ultimate authority to issue rules governing attorney behavior.<sup>143</sup> In the abstract, there may be both substantive and symbolic reasons that justify this separation; however, in actuality, New York's highest court chose to reject the proposed changes without offering a single reason for its decision.<sup>144</sup>

The slow pace of Rule 3.8(g) and (h)'s adoption offers a second cause for concern. To date, only five states have adopted the provisions in full or modified form. Eleven other states are currently considering amending their versions of Rule 3.8.<sup>145</sup> The remainder, thirty-four states in total, have taken no action. The lesson appears to be that piecemeal ethics reforms are unlikely to garner significant attention from state bar associations. Indeed, the only reason the newest amendments have received as much attention as they have is because some states are still in the process of implementing the Ethics 2000 reforms.<sup>146</sup> The poor track record of amendment adoptions prior to Ethics 2000 is further evidence that rulemaking inertia may be the biggest stumbling block to meaningful reform efforts.

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<sup>142.</sup> Kuckes, *supra* note 114, at 457.

<sup>143.</sup> See, e.g., ALA. R. DISCIPLINARY P. pmbl. ("The Supreme Court of Alabama has inherent responsibility to supervise the conduct of lawyers who are its officers . . ."); TEX. R. DISCIPLINARY P. pmbl. ("The Supreme Court of Texas has the constitutional and statutory responsibility within the State for the lawyer discipline and disability system, and has inherent power to maintain appropriate standards of professional conduct . . .").

<sup>144.</sup> See Kuckes, *supra* note 114, at 455 n.137.

<sup>145.</sup> See *Variations of the ABA Model Rules of Professional Conduct Rule 3.8(g) and (h)*, AM. BAR ASS'N (Jan. 10, 2011), [http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/3\\_8\\_g\\_h.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/3_8_g_h.pdf). The states that have proposed, or are studying, the rule are: Alaska, California, Hawaii, Nebraska, New Hampshire, New York, North Dakota, Pennsylvania, Texas, Vermont, and Washington. *Id.*

<sup>146.</sup> Texas and West Virginia have issued draft proposals of the amended rules, while Georgia and Hawaii are still studying them. *Status of State Review of Professional Conduct Rules*, AM. BAR ASS'N (Nov. 3, 2010), [http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics\\_2000\\_status\\_chart.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.pdf).

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### C. Disciplinary Systems

The corollary to the ethics rules are the disciplinary systems established to enforce those rules. Without consistent enforcement by the bodies charged with overseeing attorney discipline, ethics rules are little more than empty promises. This Section therefore catalogs the various features of all fifty state disciplinary systems in an effort to explain the lax enforcement of prosecutorial ethics rules. In examining these systems to better understand why they fail to discipline prosecutors, we highlight the wide divergence between state disciplinary systems in terms of their transparency and responsiveness. Many states actively discourage potential grievance filers by erecting procedural barriers like statutes of limitations, notarized document requirements, or mandatory referral programs. Moreover, disciplinary agencies rarely initiate investigations *sua sponte*, preferring instead to rely on those personally affected by lawyer misconduct to bring claims to the agency's attention. While these deficiencies in state disciplinary systems are not peculiar to matters involving prosecutorial misconduct, their significance is heightened in that context given the potential liberty interests involved.

Like state ethics rules, most state disciplinary systems follow a model code developed by the ABA. The current version of the code, the Model Rules for Lawyer Disciplinary Enforcement, was adopted in 1989 and last amended in 2002.<sup>147</sup> Under this model, complaints are received by a central intake office, which determines whether the complaint states a colorable claim that merits further investigation.<sup>148</sup> Statistics show that, in most jurisdictions, the majority of complaints are dismissed at this stage.<sup>149</sup> Those that remain open are forwarded to an administrator for further review.<sup>150</sup> The attorney named in the complaint is then afforded an opportunity to respond before the disciplinary agency decides whether to file a formal complaint.<sup>151</sup> At this stage, many states offer attorneys accused of minor offenses the opportunity to participate in

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147. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, at xi (2007).

148. *See id.* R. 1(B).

149. Calculations based on data compiled by the ABA show approximately 57% of all complaints are dismissed at this stage across jurisdictions for which there are measurable data. In Colorado, for instance, 84% of complaints in 2009 were summarily dismissed at intake. In contrast, Arkansas and Massachusetts dismissed only 3% and 6% of total complaints received, respectively. *See* ABA Ctr. for Prof'l Responsibility, *supra* note 91, at tbl.1.

150. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11.

151. *Id.* R. 11(B)(2).

diversion programs or accept a private reprimand in lieu of further action.<sup>152</sup> Should an attorney accept either option, the investigation will remain confidential.<sup>153</sup> Once the administrator or hearing board files a formal complaint, however, the proceedings are made public.<sup>154</sup> Because most disciplinary agencies do not publish statistics concerning the number of prosecutorial misconduct claims they receive, there is no method to determine how many claims of that nature result in private sanctions. If a formal complaint is filed, adversarial hearings are scheduled to review the allegations and solicit testimony from the parties involved.<sup>155</sup> The hearing committee will subsequently issue findings of fact and recommend one of several possible dispositions: dismissal, reprimand, censure, probation, suspension, or disbarment.<sup>156</sup> Each state's court of last instance, under whose authority bar organizations operate, acts as an appellate body and retains final review over the imposition of any sanctions.<sup>157</sup>

While the ABA aspires to offer a "simple and direct procedure for making a complaint,"<sup>158</sup> even this modest aim has proven elusive. Only four states, for example, offer complainants the opportunity to submit their complaints online.<sup>159</sup> Most other states offer a complaint form that can be downloaded and mailed, but twelve states do not. Complainants in the latter must either file their complaints over the telephone,<sup>160</sup> request that a form be mailed to them,<sup>161</sup> or enter into mandatory consumer assistance programs.<sup>162</sup> Although

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152. See, e.g., Office of Chief Disciplinary Counsel, *Flowchart of the Missouri Attorney Discipline Process*, MO. SUPREME COURT, <http://www.ncldb.org/PDF/Diagram%20of%20Missouri%20Discipline%20Process.pdf> (last visited Oct. 25, 2011).

153. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(B).

154. *Id.* R. 16(A).

155. See, e.g., *id.* R. 11 (describing the general contours of disciplinary proceedings).

156. *Id.* R. 10.

157. *Id.* R. 2; see also *supra* note 143 and accompanying text.

158. *Id.* R. 1 cmt.

159. See *Charge Against a Lawyer*, STATE BAR OF ARIZ., <http://www.azbar.org/lawyerconcerns/disciplineprocess/acap/chargeagainstalawyer> (last visited Oct. 25, 2011); *Minnesota Office of Lawyers Professional Responsibility Complaint Form*, MINN. LAWYERS PROF'L RESPONSIBILITY BD., <http://prb.mncourts.gov/complaints/Pages/ComplaintForm.aspx> (last visited Oct. 25, 2011); *File a Complaint Online*, STATE BAR OF NEV., <http://www.nvbar.org/content/file-complaint-online> (last visited Oct. 25, 2011); *Lawyer Inquiry Form*, VA. STATE BAR, <http://vsbc.vipnet.org> (last visited Oct. 25, 2011).

160. See, e.g., *Filing a Complaint*, COLO. SUPREME COURT, <http://www.coloradosupremecourt.com/Regulation/Complaints.htm> (last visited Oct. 25, 2011).

161. See, e.g., *Complaint Procedure*, MISS. BAR, <https://www.msbar.org/complaint.php> (last visited Oct. 25, 2011) ("You may file a complaint against a Mississippi lawyer by contacting

no state charges a filing fee, both Kentucky and New Hampshire require complaints to be notarized.<sup>163</sup>

Some states actively discourage complainants from filing allegations of misconduct. Mississippi's bar association, for instance, goes to great lengths to warn complainants of the serious consequences that can result from filing a complaint. The bar association's website begins its appeal by reminding potential filers that "lawyers are human."<sup>164</sup> The website continues, "The lawyer [complained against] inevitably suffers from the accusation, regardless of whether any misconduct is ultimately found. But, if you believe the complaint is well-founded, by all means make it! A complaint cannot be withdrawn once it has been received in this office."<sup>165</sup> Georgia discourages complaints in a different way by requiring prospective filers to go through a mediation program before deciding whether to pursue a formal complaint.<sup>166</sup> The mediation program reflects a disciplinary system whose primary focus is private disputes between attorneys and their clients. In designing its disciplinary system, Georgia's bar officials apparently did not envision complaints concerning prosecutorial misconduct, which ordinarily would not be amenable to mediation.

Filing a complaint is only a minor hurdle compared to the subsequent steps that must be taken before a complaint is finally resolved. Primarily, the problem is that complaints must work their way through a byzantine structure of state disciplinary systems.<sup>167</sup> Compounding the problem is confusion over where the authority of the court ends and the disciplinary system begins.<sup>168</sup> In

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The Mississippi Bar. You should call or write The Mississippi Bar to request a complaint form. The address and telephone number are listed elsewhere in this brochure. The Mississippi Bar will be happy to furnish you a form on which your complaint can be written.").

162. See, e.g., *Consumer Assistance Program*, STATE BAR OF GA., [http://www.gabar.org/programs/consumer\\_assistance\\_program](http://www.gabar.org/programs/consumer_assistance_program) (last visited Oct. 25, 2011); *How To File a Complaint*, MASS. OFFICE OF BAR COUNSEL, <http://www.mass.gov/obcbbo/complaint.htm> (last visited Oct. 25, 2011).

163. See *Complaints Against Lawyers*, KY. BAR ASS'N, <http://www.kybar.org/235> (last visited Oct. 25, 2011); *How To File a Grievance*, N.H. OFFICE OF ATT'Y DISCIPLINE, <http://www.nhattyreg.org/grievance.php> (last visited Oct. 25, 2011).

164. MISS. BAR, *supra* note 161.

165. *Id.*

166. *Frequently Asked Questions: Question No. 3*, STATE BAR OF GA., <http://www.gabar.org/faqs/#3> (last visited Oct. 25, 2011).

167. See, e.g., MO. SUPREME COURT, *supra* note 152.

168. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995).

the context of prosecutorial misconduct in particular, disciplinary system administrators may be wary of inserting themselves into ongoing court proceedings.<sup>169</sup> The complexity of the procedure also results in substantial delay in resolving complaints. Data compiled by the ABA reveal that the amount of time between the filing of a complaint and the imposition of a public sanction in some states can take more than one thousand days.<sup>170</sup> This lag time is likely to disincentivize those who might have a legitimate grievance from pursuing a disciplinary remedy.

Statutes of limitation pose a further barrier to potential claimants that can be especially problematic in the context of prosecutorial misconduct because such violations often come to light only years after their occurrence. At least twenty-one states impose some kind of statute of limitations on grievance filers.<sup>171</sup> These range in length from as little as two years from the occurrence of the incident giving rise to the misconduct,<sup>172</sup> to as many as ten years after its discovery.<sup>173</sup> These statutes of limitations pose barriers to grievance filers and are fundamentally at odds with the ABA's Model Rules, which caution that such statutes are "wholly inappropriate in lawyer disciplinary proceedings."<sup>174</sup>

Although states that have statutes of limitations in place will generally toll them if the misconduct was not discovered due to fraud or concealment,<sup>175</sup> time limitations can be a major impediment to holding prosecutors responsible for misconduct, as a recent case in North Carolina demonstrates. In 2005, the State Bar of North Carolina brought a series of charges against two district

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169. *See id.* at 91-92 ("State disciplinary committees take the view that the district court is most familiar with the relevant circumstances surrounding the prosecutor's conduct and is therefore in the best position to determine whether the prosecutor acted improperly.").

170. *See* Appendix Table 2. It took Alaska, which only publicly sanctioned three lawyers in 2009, an average of 1932 days to issue those sanctions. Louisiana averaged 1151 days from the time a complaint was received to the issuance of a public sanction. *Id.*

171. The states are Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Louisiana, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, North Carolina, Pennsylvania, Texas, Utah, West Virginia, Wisconsin, and Wyoming. *See* Appendix Table 3.

172. *See Frequently Asked Questions*, N.H. OFFICE OF ATT'Y DISCIPLINE, <http://nhattyreg.org/faq.php> (last updated Sept. 1, 2011).

173. *See* WIS. SUP. CT. R. 21.18 (imposing a statute of limitations of ten years from discovery of misconduct).

174. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 32 cmt. (2007). The commentary concludes, "Misconduct by a lawyer whenever it occurs reflects upon the lawyer's fitness." *Id.*

175. *See, e.g.*, CAL. R. P. OF THE STATE BAR 51(c); COLO. R. CIV. P. 251.32(i); MO. SUP. CT. R. 5.085(b); TEX. R. DISCIPLINARY P. 15.06.

attorneys, Scott Brewer and Kenneth Honeycutt. The complaint charged the attorneys with violating a host of ethics rules for failing to report an immunity deal given to a witness in exchange for his testimony in a capital murder trial.<sup>176</sup> The North Carolina State Bar, however, requires that all grievances be filed within six years of the offense, exempting only actions involving felonious criminal conduct.<sup>177</sup> Because they were concerned about the potential negative impact of a bar complaint on their client's trial, the defendant's attorneys chose to wait before filing.<sup>178</sup> Consequently, the State Bar Disciplinary Hearing Commission held that the complaint was time-barred.<sup>179</sup> The Commission also invalidated the felonious criminal conduct exception because the North Carolina Supreme Court had failed to publish the rule as required by statute, effectively precluding any possible ethical sanctions against the prosecutors.<sup>180</sup> In upholding the Commission's decision, a panel for the North Carolina Court of Appeals wrote that it was "cognizant" that its decision would "leave the State Bar unable to act if an aggrieved party learns of concealed misconduct by an attorney but does not report it to the State Bar."<sup>181</sup> Nonetheless, the court felt bound by traditional canons of statutory interpretation to affirm the Commission's ruling.

State disciplinary authorities, which are comprised almost entirely of lawyers, also exercise nearly unbridled discretion in deciding whether to pursue individual complaints. While every state will dismiss a complaint for failing to state a colorable claim, it does not follow that every colorable claim is fully investigated. Instead, a disciplinary authority may decide not to pursue a complaint as a matter of resource allocation or because a reviewing attorney merely suspects that it lacks merit. In some states, like Florida, an investigation may be closed even where ethics violations are shown to have occurred, under the theory that "[t]he investigation of a complaint frequently has deterrent

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176. N.C. State Bar v. Brewer, 644 S.E.2d 573 (N.C. Ct. App. 2007). The failure prompted the presiding judge to order a new trial for the defendant involved, Jonathan Hoffman. Charges against Hoffman were eventually dropped. *Murder Charges Dropped Against Former Death Row Inmate from Charlotte*, WSOC TV (Dec. 12, 2007, 11:22 AM), <http://www.wsoc.com/news/14828163/detail.html>.

177. 27 N.C. ADMIN. CODE 1B.0111(f) (2011).

178. Memorandum and Order on Defendant's Motion To Dismiss, at 12 n.4, N.C. State Bar v. Brewer, No. 05 DHC 37 (Disciplinary Hearing Comm'n of the N.C. State Bar Apr 4, 2006).

179. *Id.* at 12.

180. *Id.* at 15-22.

181. *Brewer*, 644 S.E.2d at 578.

value in and of itself.”<sup>182</sup> Furthermore, disciplinary authorities often conduct their proceedings in secret and require strict confidentiality from complainants.<sup>183</sup> They may also decide to dispose of a case by issuing a private reprimand to the attorney involved. The lack of laypersons on hearing boards and review panels compounds the problem by creating the appearance of bias toward lawyers.<sup>184</sup>

Measuring state disciplinary systems’ responsiveness to prosecutorial misconduct in particular is hampered by a paucity of available statistics. Only one state, Illinois, publishes data on the number of complaints of prosecutorial misconduct received and investigated on an annual basis.<sup>185</sup> But if that data are indicative of the way most states handle such claims, they paint a bleak picture. The statistics show that, in 2010, charges against 4016 attorneys were docketed by the Illinois Attorney Registration and Disciplinary Commission, of which ninety-nine involved charges of prosecutorial misconduct.<sup>186</sup> Only one of these ninety-nine cases, however, actually reached a formal hearing. In other words, the Illinois disciplinary commission held as many formal hearings involving charges of prosecutorial misconduct as it did charges of “bad faith avoidance of a student loan.”<sup>187</sup>

To make matters worse, the grievance process in many states does not provide complainants with the opportunity to appeal the dismissal of their complaint unless it has reached the hearing stage.<sup>188</sup> As Florida explains to

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182. *Consumer Pamphlet: Inquiry Concerning a Florida Lawyer*, FLA. BAR (2009) (“Most lawyers who have been the subject of a complaint take immediate steps to prevent similar situations.”).

183. See Green, *supra* note 168, at 88 (“[M]ost state disciplinary authorities continue to conduct their investigations and hearings in secret, with no public record made of the filing of a complaint and, in many instances, no public disclosure of the committee’s ultimate determination.”).

184. See discussion *infra* notes 198-200 and accompanying text.

185. See ATT’Y REGISTRATION & DISCIPLINARY COMM’N OF THE SUPREME COURT OF ILL., ANNUAL REPORT FOR 2010 (2011) [hereinafter ILL. REPORT], available at <http://www.iardc.org/AnnualReport2010.pdf>. Oregon publishes statistics on the number of complaints received, but not the number investigated. See OR. STATE BAR CLIENT ASSISTANCE OFFICE, 2009 ANNUAL REPORT (2010), available at [http://www.osbar.org/\\_docs/resources/CAO-09AR.pdf](http://www.osbar.org/_docs/resources/CAO-09AR.pdf).

186. ILL. REPORT, *supra* note 185, at 16-17.

187. *Id.* at 23.

188. See, e.g., ALA. R. DISCIPLINARY P. 12(c)(1) (“The decision of the Disciplinary Commission not to pursue an inquiry is not appealable.”); COLO. R. CIV. P. 251.9 (“The decision of the Regulation Counsel shall be final, and the complaining witness shall have no right to appeal.”); DEL. LAWYERS’ R. DISCIPLINARY P. 15(h) (“The complainant in a disciplinary matter shall not be considered as a party and shall have no standing to appeal the

prospective filers in its bar consumer pamphlet: “Your role in a disciplinary complaint is that of the complaining witness, similar to the role of a victim in a criminal proceeding. As such, you are not a party to the adjustment proceeding in that the Bar counsel does not represent you as your lawyer.”<sup>189</sup> Twenty-three states provide no recourse for complainants wishing to appeal a disciplinary staff attorney’s decision to dismiss their complaint, while several other states provide for redress in only limited circumstances.<sup>190</sup>

In light of the foregoing shortcomings in state disciplinary procedures, the Supreme Court’s faith in the ability of those procedures to adequately check prosecutorial misconduct seems misplaced. Yet, rather than simply lamenting *Connick* as another barrier to holding prosecutors accountable for their misdeeds, scholars and advocates alike should take seriously the Court’s insistence that bar disciplinary procedures are the appropriate mechanism for policing misconduct. Accordingly, in the next Part, we offer suggestions for strengthening ethics rules and disciplinary procedures to achieve a regime of greater accountability for prosecutors.

#### IV. RECOMMENDATIONS

There are many important steps that prosecutors’ offices, state judiciaries, and bar associations should take to ensure an environment in which proper incentives and adequate training enable prosecutors to seek justice. Our recommendations here reflect our findings and focus on the responsibilities of the state courts of last instance, as well as on the role of state attorney grievance procedures, in building mechanisms that inform the responsibilities of

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disposition of such matter.”); R. REGULATING FLA. BAR 3-7.4(i) (“The complaining witness shall have no right to appeal.”); NEB. SUP. CT. R. 3-309(C) (“A declination by the Counsel for Discipline to investigate and dismissal pursuant to this rule are not appealable to the Committee on Inquiry or the Disciplinary Review Board.”); DISCIPLINARY CODE WYO. STATE BAR § 11 (“The decision not to open a file is not appealable.”); *see also* Appendix Table 4.

189. FLA. BAR, *supra* note 182.

190. The following twenty-three states afford complainants no right to appeal an initial dismissal: Alabama, Arizona, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Rhode Island, South Dakota, Virginia, and Wyoming. The following twenty-seven states provide complainants some right of appeal after an initial dismissal, often with time limits: Alaska, Arkansas, California, Connecticut, Georgia, Idaho, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. *See* Appendix Table 4.

prosecutors and that live up to the U.S. Supreme Court's expectations regarding the efficacy of lawyer discipline.

Prosecutors have different professional and ethical obligations than private attorneys.<sup>191</sup> Grievance mechanisms should be strong enough to hold prosecutors to these heightened obligations. To better protect the rights of the accused and to ensure a just system that adequately checks prosecutorial misconduct, state supreme courts and state bar associations should take the following actions to ensure that the rules governing prosecutorial conduct are adequate and that lawyer discipline procedures ensure the efficacy of the rules.

*A. Rules of Professional Conduct*

The starting point for improving state attorney grievance mechanisms is the promulgation of an effective rule defining the ethical obligations of prosecutors. The ABA should begin a dialogue with states and the Department of Justice about expanding Rule 3.8 to more completely address the unique ethical challenges that face prosecutors. Important areas of prosecutorial function include investigating crimes, negotiating pleas, and exercising discretion in charging crimes. These responsibilities are not adequately addressed in the Model Rules, an oversight that leaves much of the prosecutorial function outside the scope of ethical regulation or guidance.<sup>192</sup>

First, states should expedite the review and adoption of sections (g) and (h), which create new ethical obligations for a prosecutor who becomes aware of evidence suggesting or establishing the non-guilt of a convicted defendant. Since sections (g) and (h) were added to Model Rule 3.8 in February 2008, only one state—Idaho—has adopted the modified rule in its entirety. Three more—Colorado, Tennessee, and Wisconsin—have adopted section (h) and modified versions of section (g), and one further state—Delaware—has adopted a hybrid version of (g) and (h).<sup>193</sup> The Criminal Justice Section of the ABA emphasized the importance of these additions, noting that “[t]he obligation to avoid and rectify convictions of innocent people, to which the

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191. See, e.g., Zacharias, *supra* note 97, at 725-42 (exploring which Model Rules apply to prosecutors, which do not, and which rules prosecutors are more likely to violate).

192. See Kuckes, *supra* note 114, at 430 (explaining that the Ethics 2000 Commission failed to revise Rule 3.8 to “deal explicitly with any of the special ethical challenges posed by the two major arenas in which a modern prosecutor operates—investigating crime and negotiating guilty pleas”).

193. See *supra* note 134.

proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors.”<sup>194</sup>

Second, states can influence the ABA and the Department of Justice in the design of Model Rule 3.8. By promulgating tougher rules in their state codes, states can pressure the ABA to address the deficiencies in the Model Rule.<sup>195</sup> Proactively defining the scope of the ethical obligations that should govern prosecutorial conduct can inform the ABA’s own deliberation and amendment of its rules.

### B. State Grievance Procedures

Attorney grievance procedures must inspire confidence in the regulatory system governing attorney behavior. As such, bar associations and state supreme courts should take pains to avoid the pitfalls of a system that relies on self-regulation.<sup>196</sup> State supreme courts should assume full and independent control over disciplinary processes.<sup>197</sup> Elected bar officials governing the disciplinary process create the impression of self-regulation that can lead to suspicion of bias in the proceedings.<sup>198</sup> Laypersons should have an active and

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194. See Stephen J. Saltzburg, Chair, Section of Criminal Justice, *Report to the House of Delegates: Recommendation 105B*, AM. BAR ASS’N (Feb. 2008), available at [http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/sum\\_of\\_rec\\_docs/hundredfiveb\\_105B\\_FINAL.doc-2011-03-14](http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/sum_of_rec_docs/hundredfiveb_105B_FINAL.doc-2011-03-14).

195. See Kuckes, *supra* note 114, at 456 (“[A] final innovation . . . deserves separate consideration: The proposal of the New York State bar to add a provision spelling out the prosecutor’s ethical duty to help rectify wrongful convictions of innocent defendants. It was this inspired and ambitious reform—which originated in an idea generated by New York City’s local bar association—that ultimately led to the ABA’s recent successful action to amend Model Rule 3.8. This reflects the paradigmatic ‘ground-up’ innovation in prosecutorial ethics, and suggests a new model for rules reform . . .”).

196. See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1153 (2009) (“Conceiving of the disciplinary codes as mere professional self-regulation rather than as one element of an expansive regulatory regime governing the bar misleads courts, code drafters, lawyers, and laypersons alike. The myth of self-regulation has serious ramifications both for the development of the law governing lawyers and for everyday legal practice.”).

197. It may be preferable to create an independent agency to administer the disciplinary process; however, because the creation of such an agency would require a complete restructuring of the existing disciplinary system, we have decided not to address it in this Essay.

198. See ABA COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT (1992), available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report.html](http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html) (“To strengthen judicial regulation of the profession, it must be distinguished from self-regulation. Control of the lawyer discipline system by elected officials of bar associations is self-regulation. It creates an appearance of conflicts of interest and of impropriety. In many states, bar officials still investigate, prosecute, and

substantial role in the grievance process. Non-lawyers comprise a third of the grievance boards (i.e., appellate review) of nine states (Arizona, Connecticut, Delaware, Idaho, Louisiana, Massachusetts, Oregon, New Jersey, and New Mexico). Two states (Kansas and California) do not have any non-lawyers participating in grievance process, at the committee (i.e., trial) or board level.<sup>199</sup> In other states, disciplinary organizations are overwhelmingly controlled by the bar; South Dakota's disciplinary board, for instance, consists of six bar members appointed by the President of the State Bar Association and only one layperson appointed by the Chief Justice.<sup>200</sup> A more balanced distribution of influence between the judiciary and the bar would signal that disciplinary bodies take seriously the dangers of self-policing. Legitimacy and the perception of fairness decrease when self-regulation is the chosen method for governing attorney conduct.

Grievance procedures should be simple and accessible so that potential claimants are incentivized to file colorable claims of misconduct. Structural disincentives may dissuade potential claimants from using bar grievance mechanisms.<sup>201</sup> As our findings show, procedures for bringing a grievance complaint vary greatly in their accessibility and form from state to state. Any interested party—including third parties, such as advocacy organizations, law school clinics, and the general public—should be able to bring a grievance alleging prosecutorial misconduct. States should also lengthen or abolish statutes of limitations and explicitly provide for tolling where misconduct has been concealed or where equitable factors, such as the pursuit of a criminal appeal, have impeded parties from pursuing an ethics complaint. Furthermore, providing access to easy-to-use complaint forms in courthouses and online would facilitate filings. Many state supreme court and bar association websites are discouragingly difficult to navigate. State grievance procedures and infrastructure, as administered by state judiciaries and bar associations, should invite claims of prosecutorial misconduct by ensuring that both the public and interested parties can easily file a claim.

Procedures to investigate and sanction prosecutorial misconduct should also encourage adjudication of colorable claims. Because of infrequent adjudication and the opacity of most bar systems, the standards Rule 3.8

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adjudicate disciplinary cases. The state high court should control the disciplinary process *exclusively*. It should appoint disciplinary officials who are independent of the organized bar. The Court should oversee the disciplinary system with as much care and attention as it devotes to deciding cases.”).

199. See Appendix Table 2.

200. S.D. CODIFIED LAWS § 16-19-24 (2008).

201. See *supra* Section III.C.

imposes on prosecutorial conduct are neither clearly defined nor given substance by precedential case law. State grievance agencies need to be properly resourced, both financially and with experienced investigators knowledgeable in the intricacies of criminal justice and the role of prosecutors. Further, disciplinary committees should institute automatic filing of ethics complaints, triggered whenever a court finds (whether on direct appeal, collateral review, or otherwise) that a prosecutor has behaved unethically.<sup>202</sup> Judges in particular should be compelled to flag an instance of misconduct for review by the grievance committee. Automatic filing will trigger investigation and take the process of submitting a formal complaint out of the hands of busy or disincentivized attorneys and court officials. All states should enforce rules requiring attorneys who are aware of prosecutorial misconduct to report it promptly; the entire profession should be held responsible for the administration of justice.<sup>203</sup> Increased adjudication of ethics complaints would better inform both bar investigators and prosecutors of the obligations and standards of prosecutorial behavior.

State grievance committees should undertake regular and randomized auditing of cases in their jurisdictions to increase the likelihood that prosecutorial misconduct will be discovered and remedied. A grievance investigator could be tasked with reviewing a randomly selected sample of cases and undertaking an investigation to ascertain whether professional and ethical rules are being followed. If the investigation uncovers errors, a state bar committee could—in addition to the regular grievance process in place—work directly with the prosecutor’s office to explain the errors, thus demonstrating the professional rules specifically applicable to prosecutors. Such a system of audits would contribute to prosecutors’ incentives to understand and comply with their legal and ethical obligations and serve a pedagogical role in educating prosecutors about the scope of those duties.<sup>204</sup>

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202. See Rosen, *supra* note 42, at 697 (“[I]nstead 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 . . .”).

203. See MODEL RULES OF PROF’L CONDUCT R. 5.1(b) (2010) (requiring supervisors to “make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct”); R. 8.3 (requiring attorneys to report the misconduct of other attorneys).

204. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463 (2001) (“Congress and state legislatures should pass legislation establishing Prosecution Review Boards. The purpose of these boards would be to review complaints and conduct random reviews of prosecution decisions to deter misconduct and arbitrary decision-making.”).

Finally, transparency of process is important both to legitimize the grievance process and to inform laypersons and prosecutors alike of the appropriate standards of conduct. To varying degrees in the states surveyed, bar disciplinary investigations are largely confidential. When a grievance committee dismisses charges before a public hearing, there is no record or published opinion. An increased practice of issuing written and public findings in disciplinary cases that do not result in sanctions by the state supreme court would increase transparency and legitimacy. Written opinions are, of course, routine in the context of dismissed civil lawsuits and criminal cases. Making all grievance decisions available to the public and easily searchable on an online database would serve to inform interested parties of the grievance's disposition and would educate prosecutors about their ethical and professional responsibilities.<sup>205</sup>

Further, complainants and interested parties should be able to discern the path their complaint will take once filed. The grievance procedures of many states make adjudicating a claim unnecessarily complex. A quick and efficient system with as few steps as possible between complaint and investigation is important to prevent colorable claims from falling through the cracks.

## CONCLUSION

The *Connick* decision reflects the Supreme Court's historical reliance on ethics rules and state disciplinary procedures to regulate prosecutorial behavior. Irrespective of the wisdom of the Court's reasoning, the ethics rules governing prosecutorial behavior need to be expanded and strengthened, and the disciplinary procedures tasked with enforcing them reformed, if our legal system is to justifiably rely on professional sanctions to deter prosecutorial misconduct. The job of a prosecutor is to do justice; the structure in which the prosecutor works should, at a minimum, enable and encourage ethical behavior in this pursuit.

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205. See, e.g., *In re* Revising the Rules for Lawyer Disciplinary Enforcement, No. AF 06-0628, at 10 (Mont. Nov. 9, 2010) (Nelson, J. dissenting) (“[U]nethical practice of law that is serious enough to warrant a formal complaint and, ultimately, punishment is not a private matter. That type of practice adversely affects the attorney-client relationship; is repugnant to the administration of justice; is destructive of the public’s confidence in the legal system; and, when not dealt with openly, breeds distrust in this Court and its disciplinary arms. If we expect the public to respect Montana’s lawyer disciplinary system, if we strive to instill universal confidence in the process, fairness, and effectiveness of that system, and if we are truly serious about demonstrating that the policing of our own profession actually works, then making the *entire* disciplinary process transparent is an indispensable step in obtaining these goals.”).

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**APPENDIX**

**Table 1.**

**ADOPTION AND MODIFICATION OF ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.8  
BY STATE**

**Key:**

- = adopted
- Δ = adopted with modifications
- = not adopted

We have treated the Model Rule as “adopted” where small linguistic changes have been made but the state rule leaves the full force of the Model Rule intact. We have also marked Model Rules provisions as “adopted” regardless of how they are labeled in a state rule; for example, if a state adopted Model Rule 3.8(a) as state rule 3.8(b), we would mark Model Rule 3.8(a) as adopted. Where a state has modified the Model Rule or added provisions not contained in the Model Rule, we have noted this in footnotes.

State	Source for State Rule	Model Rule Provisions							
		a	b	c	d	e	f	g	h
AL	ALA. R. PROF'L CONDUCT 3.8 <sup>206</sup>	■	■	■	Δ <sup>207</sup>	□	Δ <sup>208</sup>	□	□
AK	ALASKA R. PROF'L CONDUCT 3.8	■	■	□	■	■	■	□	□
AZ	ARIZ. R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	□	□
AR	ARK. R. PROF'L CONDUCT 3.8	■	■	■	■	□	■	□	□

206. Alabama has added a section (2) to its version of Rule 3.8, which provides:

(2) The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:

(a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and

(b) to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

207. Alabama's Rule 3.8(d) adds "not willfully fail to" before "make timely disclosure."

208. Alabama has replaced Model Rule 3.8(e) with a provision requiring prosecutors to "exercise reasonable care to prevent anyone under the control or direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6, and shall not cause or influence anyone to make a statement that the prosecutor would be prohibited from making under Rule 3.6."

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

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CA	CAL. R. PROF'L CONDUCT CH. 5 <sup>209</sup>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
CO	COLO. R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	Δ <sup>210</sup>	■
CT	CONN. R. PROF'L CONDUCT R. 3.8	■	■	■	■	□	Δ <sup>211</sup>	□	□
DE	DEL. R. PROF'L CONDUCT R. 3.8	■	■	■	■	■	■	Δ <sup>212</sup>	Δ <sup>213</sup>

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209. California's Rules of Professional Conduct are structured differently from the ABA Model Rules. *See also* discussion *supra* note 95.

210. Colorado's Rule 3.8(g) changes "likelihood" to "probability" and clarifies that action must be taken "within a reasonable time." Its Rule 3.8(g)(1) deletes the word "promptly." Its Rule 3.8(g)(1)(A) corresponds to Model Rule 3.8(g)(1)(i) but deletes the word "promptly" and deletes the "unless . . . delay" clause. Colorado has also added Rule 3.8(g)(1)(B), which holds that the prosecutor shall, "if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence."

211. Connecticut's Rule 3.8(5) tracks Model Rule 3.8(f), but deletes language before the word "exercise" in the middle of the paragraph and deletes "or this Rule" from the end of the section.

212. Delaware has adopted a hybrid version of Model Rule 3.8(g) and (h) as Rule 3.8(d)(2), which reads:

[W]hen the prosecutor comes to know of new, credible and material evidence establishing that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant and any appropriate court, or where the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred . . . .

213. *See id.*

<b>FL</b>	R. REGULATING FLA. BAR 4-3.8	■	□	■	■	□	□	□	□
<b>GA</b>	GA. R. PROF'L CONDUCT 3.8	■	Δ <sup>214</sup>	□	Δ <sup>215</sup>	■	Δ <sup>216</sup>	□	□
<b>HI</b>	HAW. R. PROF'L CONDUCT 3.8	Δ <sup>217</sup>	□	□	■	□	□	□	□
<b>ID</b>	IDAHO R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	■	■
<b>IL</b>	ILL. R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	□	□
<b>IN</b>	IND. R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	□	□

214. Georgia's Rule 3.8(b) requires a prosecutor to "refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel."

215. Georgia's Rule 3.8(d) deletes language after "mitigates the offense."

216. Georgia has added a provision, its Rule 3.8(e), which requires prosecutors to "exercise reasonable care to prevent persons who are under the direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under section (g)," which in Georgia's Rule is equivalent to Model Rule 3.8(f), except that Georgia Rule 3.8(g) deletes the language from Model Rule 3.8(f) after the word "accused," and adds to the end of the section: "The maximum penalty for a violation of this Rule is a public reprimand."

217. Hawaii's Rule 3.8(a) provides that prosecutors may "not institute or cause to be instituted criminal charges when [the prosecutor or government lawyer] knows or it is obvious that the charges are not supported by probable cause."

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

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<b>IA</b>	IOWA R. PROF'L CONDUCT 32:3.8	■	■	■	■	■	■	□	□
<b>KS</b>	KAN. R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	□	□
<b>KY</b>	KY. SUP. CT. R. 3.130(3.8)	■	■	□	■	■	■	□	□
<b>LA</b>	LA. R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	□	□
<b>ME</b>	ME. R. PROF'L CONDUCT 3.8 <sup>218</sup>	Δ <sup>219</sup>	□	□	Δ <sup>220</sup>	□	□	□	□
<b>MD</b>	MD. LAWYERS' R. PROF'L CONDUCT 3.8	■	■	■	■	□	Δ <sup>221</sup>	□	□

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218. Maine's Rule 3.8 adds provisions that do not specifically appear in Model Rule 3.8. Maine's Rule 3.8(c) requires that the prosecutor "refrain from conducting a civil, juvenile, or criminal case against any person whom the prosecutor knows that the prosecutor represents or has represented as a client." Maine's Rule 3.8(d) requires that the prosecutor "refrain from conducting a civil, juvenile, or criminal case against any person relative to a matter in which the prosecutor knows that the prosecutor represents or has represented a complaining witness."

219. Maine's Rule 3.8(a) adds "criminal or juvenile" before "charge."

220. Maine's Rule 3.8(b), which corresponds to Model Rule 3.8(d), requires that prosecutors "make timely disclosure in a criminal or juvenile case to counsel for the defendant, or to a defendant without counsel, of the existence of evidence or information known to the prosecutor after diligent inquiry and within the prosecutor's possession or control, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

221. Maryland's Rule replaces the language "investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor" from Model Rule 3.8(f) with "an employee or other person under the control of the prosecutor."

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<b>MA</b>	MASS. R. PROF'L CONDUCT 3.8 <sup>222</sup>	■	■	Δ <sup>223</sup>	■	Δ <sup>224</sup>	Δ <sup>225</sup>	□	□
<b>MI</b>	MICH. R. PROF'L CONDUCT 3.8	■	■	■	■	□	Δ <sup>226</sup>	□	□

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222. Massachusetts's Rule 3.8 contains several provisions not expressly contained in the Model Rule. These provide that a prosecutor shall:

(h) not assert personal knowledge of the facts in issue, except when testifying as a witness;

(i) not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein; and

(j) not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.

223. Massachusetts's Rule 3.8(c) concludes with language added to the Model Rule's wording: "unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel."

224. Massachusetts's Rule 3.8(f) is similar to Model Rule 3.8(e), but adds an additional requirement in (f)(2): that "the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding."

225. Massachusetts has not adopted Model Rule 3.8(f), but its Rule 3.8(e) requires that prosecutors "exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6," the general rule governing extrajudicial statements.

226. Michigan's Rule 3.8(e), which deals with extrajudicial statements, provides that a prosecutor shall "exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

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<b>MN</b>	MINN. R. PROF'L CONDUCT 3.8	■	■	■	■	Δ <sup>227</sup>	Δ <sup>228</sup>	□	□
<b>MS</b>	MISS. R. PROF'L CONDUCT 3.8	■	■	■	■	□	Δ <sup>229</sup>	□	□
<b>MO</b>	MO. R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	□	□
<b>MT</b>	MONT. R. PROF'L CONDUCT 3.8	■	■	■	■	■	Δ <sup>230</sup>	□	□
<b>NE</b>	NEB. SUP. CT. R. 3-503.8	■	■	■	■	■	■	□	□
<b>NV</b>	NEV. R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	□	□

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227. Minnesota has not adopted Model Rule 3.8(e)(3).

228. Minnesota's Rule 3.8(f) deletes the first half of Model Rule 3.8(f) and revises it to read: "exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."

229. Mississippi's Rule 3.8(e) requires prosecutors to "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."

230. Montana has added language to the end of the last sentence of Rule 3.8(f), reading: "consistent with the Confidential Criminal Justice Information Act."

NH	N.H. R. PROF'L CONDUCT 3.8	■	■	■	■	■	■	□	□
NJ	N.J. R. PROF'L CONDUCT 3.8	■	■	Δ <sup>231</sup>	■	■	■	□	□
NM	N.M. R. PROF'L CONDUCT 16-308	■	■	■	■	■	■	□	□
NY	N.Y. R. PROF'L CONDUCT 3.8	Δ <sup>232</sup>	□	□	■	□	□	□	□
NC	N.C. R. PROF'L CONDUCT 3.8	■	■	■	Δ <sup>233</sup>	Δ <sup>234</sup>	■	□	□
ND	N.D. R. PROF'L CONDUCT 3.8	■	■	■	Δ <sup>235</sup>	■	■	□	□

231. New Jersey's Rule 3.8(c) adds "post-indictment" before "pretrial."

232. New York's Rule 3.8(a) provides: "A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause."

233. North Carolina's Rule 3.8(d) is modified by the addition of "after reasonably diligent inquiry" to the beginning of the section.

234. The end of North Carolina's Rule 3.8(e) contains language not appearing in the Model Rule: "or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless . . ."

235. North Dakota Rule 3.8(d) replaces "make timely disclosure to the defense of" with "[d]isclose to the defense at the earliest practical time."

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

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**OH** OHIO R. PROF'L CONDUCT 3.8    ■    □    □    ■    ■    □    □    □

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**OK** OKLA. R. PROF'L CONDUCT 3.8    ■    ■    ■    ■    ■    ■    □    □

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**OR** OR. R. PROF'L CONDUCT 3.8    ■    □    □    ■    □    □    □    □

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**PA** PA. R. PROF'L CONDUCT 3.8    ■    ■    ■    ■    □    ■    □    □

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**RI** R.I. DISCIPLINARY R. PROF'L CONDUCT 3.8    ■    ■    ■    ■    Δ<sup>236</sup>    ■    □    □

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**SC** S.C. R. PROF'L CONDUCT 3.8    ■    ■    ■    ■    ■    ■    □    □

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**SD** S.D. R. PROF'L CONDUCT 3.8    ■    ■    ■    Δ<sup>237</sup>    ■    ■    □    □

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<sup>236</sup>. Rhode Island's Rule 3.8(f), which tracks Model Rule 3.8(e), states that the prosecutor shall "not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship."

<sup>237</sup>. South Dakota's Rule 3.8(d) replaces "tends to negate the guilt" with "tends to exculpate"; deletes "or mitigates the offense"; and replaces "mitigating information" with "exculpatory information."

<b>TN</b>	TENN. R. PROF'L CONDUCT 3.8	■	■	■	■	■	Δ <sup>238</sup>	Δ <sup>239</sup>	■
<b>TX</b>	TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09	■	Δ <sup>240</sup>	Δ <sup>241</sup>	■	□	Δ <sup>242</sup>	□	□
<b>UT</b>	UTAH R. PROF'L CONDUCT R. 3.8	■	■	■	■	□	Δ <sup>243</sup>	□	□

238. Tennessee's Rule 3.8(f) replaces "investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case" with "employees of the prosecutor's office." Tennessee's section (f) also concludes with added language: "and discourage investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule."

239. Tennessee's Rule 3.8(g) replaces the Model Rule language with the following:

- (1) if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose that evidence to an appropriate authority, or
- (2) if the conviction was obtained in the prosecutor's jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

240. Texas's Rule 3.09(b) requires a prosecutor to "refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."

241. Texas's Rule 3.09(c) replaces "seek" with "initiate or encourage efforts" and replaces the Model Rule's language after "important" with "pre-trial, trial or post-trial rights."

242. Texas's Rule 3.09(e), which corresponds to Model Rule 3.8(f), provides that prosecutors shall "exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07."

243. Utah's Rule 3.8(e), which corresponds to Model Rule 3.8(f), only includes part of the Model Rule's provisions: "(e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

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<b>VT</b>	VT. R. PROF'L CONDUCT 3.8	■	■	Δ <sup>244</sup>	■	■	Δ <sup>245</sup>	□	□
<b>VA</b>	VA. R. PROF'L CONDUCT 3.8	■	Δ <sup>246</sup>	□ <sup>247</sup>	Δ <sup>248</sup>	□	Δ <sup>249</sup>	□	□
<b>WA</b>	WASH. R. PROF'L CONDUCT 3.8	■	■	■	Δ <sup>250</sup>	■	■	□	□

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244. Vermont's Rule 3.8(c) omits the Model Rule's phrase "such as the right to a preliminary hearing."
245. Vermont's Rule 3.8(e), which corresponds with Model Rule 3.8(f), states that the prosecutor shall "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case who are in the employment of or under the control of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."
246. Virginia's Rule 3.8(b) provides that a prosecutor shall "not knowingly take advantage of an unrepresented defendant."
247. Virginia's Rule 3.8(c) provides that a prosecutor shall "not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense."
248. Virginia's Rule 3.8(d) provides that a prosecutor shall "make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court."
249. Virginia's Rule 3.8(e), which corresponds to Model Rule 3.8(f), provides that a prosecutor shall "not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."
250. Washington's Rule 3.8(d) omits the word "unprivileged" from the Model Rule.

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<b>WV</b>	W. VA. R. PROF'L CONDUCT 3.8	■	■	■	■	□	Δ <sup>251</sup>	□	□
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<b>WI</b>	WIS. SUP. CT. R. 20:3.8	■	■	Δ <sup>252</sup>	■	■	Δ <sup>253</sup>	Δ <sup>254</sup>	■
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<b>WY</b>	WYO. R. PROF'L CONDUCT 3.8	■	Δ <sup>255</sup>	■	■	□	■	□	□
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251. West Virginia's Rule 3.8(e), which corresponds to Model Rule 3.8(f), states that prosecutors shall "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."
252. Wisconsin's Rule 3.8(b) provides: "When communicating with an unrepresented person in the context of an investigation or proceeding, a prosecutor shall inform the person of the prosecutor's role and interest in the matter." Wisconsin's Rule 3.8(d) provides:
- When communicating with an unrepresented person a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights, but a prosecutor, other than a municipal prosecutor, shall not:
- (1) otherwise provide legal advice to the person, including, but not limited to whether to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights or how the tribunal is likely to rule in the case, or
- (2) assist the person in the completion of (i) guilty plea forms (ii) forms for the waiver of a preliminary hearing or (iii) forms for the waiver of a jury trial.
253. Wisconsin's Rule 3.8(f)(2) provides that a prosecutor shall "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under SCR 20:3.6."
254. Wisconsin's Rule 3.8(g)(2)(i) adds "make reasonable efforts to" after "promptly," and (g)(2)(ii) adds "make reasonable efforts to" at the beginning of the subsection.
255. Wyoming has adopted Model Rule 3.8(b) with its own language added to the beginning of the section: "prior to interviewing an accused or prior to counseling a law enforcement officer with respect to interviewing an accused . . . ."

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

Table 2.  
ATTORNEY GRIEVANCE STATISTICS BY STATE

These statistics are compiled from the American Bar Association's 2009 Survey on Lawyer Discipline.<sup>256</sup>

State	Number of Lawyers with Active License	Number of Complaints Received by Disciplinary Agency	Number of Active Licensed Lawyers per Complaint <sup>257</sup>	Number of Lawyers Privately Sanctioned	Number of Lawyers Publicly Sanctioned	% Non-lawyer Members at Hearing Committee/ Trial Level <sup>258</sup>	% Non-lawyer Members at Appellate/ Board Level <sup>259</sup>	Average Time from Receipt of Complaint to Imposition of Public Sanction (Days) <sup>260</sup>
AL	17,715	1824	10	29	53	N/A	N/A	87
AK	3006	266	11	3	3	20	25	1932
AZ	16,914	4224	4	N/A	151	0	33	462
AR	8523	861	10	46	44	29	N/A	N/A
CA	169,411	20,788	8	50	374	0	0	N/A
CO	23,198	4169	6	2	86	33	0	448
CT	36,908	1143	32	N/A	124	33	33	240

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<sup>256</sup> ABA Ctr. for Prof'l Responsibility, *2009 Survey on Lawyer Discipline Systems*, AM. BAR. ASS'N (Nov. 2010), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/discipline/2009sold.pdf>. The ABA Survey compiles reporting from the fifty states and the District of Columbia and in footnotes explains the different methods states use to tabulate these figures. For explanations of how individual figures were tabulated, refer to the ABA Survey. In this Table, U.S. totals, minimums, maximums, and medians are calculated by the authors from the ABA statistics. A notation of "N/A" signifies that data for that subject matter/jurisdiction are either not available or not applicable.

<b>DE</b>	3123	205	15	8	8	33	33	210
<b>DC</b>	67,896	1232	55	N/A	96	33	22	N/A
<b>FL</b>	73,181	10,034	7	N/A	361	N/A	N/A	N/A
<b>GA</b>	31,315	2100	15	42	57	N/A	N/A	426
<b>HI</b>	4772	405	12	11	3	14	28	N/A
<b>ID</b>	4253	463	9	63	12	33	33	365-548 (est.)
<b>IL</b>	84,777	5834	15	N/A	137	30	0	N/A
<b>IN</b>	17,187	1456	12	10	71	N/A	N/A	N/A
<b>IA</b>	8777	651	13	74	56	20	N/A	699 (est.)
<b>KS</b>	10,750	885	12	11	44	0	0	730
<b>KY</b>	16,330	1223	13	48	40	N/A	19	849
<b>LA</b>	20,857	3165	7	9	109	33	33	1151
<b>ME</b>	5037	378	13	37	22	N/A	N/A	N/A
<b>MD</b>	34,569	1885	18	N/A	63	20	N/A	730
<b>MA</b>	53,004	1001	53	20	131	33	33	735
<b>MI</b>	38,607	2810	14	137	107	0	33	N/A
<b>MN</b>	23,178	1206	19	129	38	39	0	821

257. All percentages are rounded to the nearest whole number.

258. All percentages are rounded to the nearest whole number.

259. These figures are calculated from dividing “Number of Lawyers with Active License” by “Number of Complaints Received by Disciplinary Agency” and rounding to the nearest whole number.

260. The ABA’s Survey reports some of these figures in months. We convert months into days by multiplying the number of months by the mean number of days in a month calculated in a non-leap year (30.42) and rounding this product to the nearest whole number. When the number of months is greater than twelve, we add 30.42 multiplied by the number of months greater than twelve to 365.

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

<b>MS</b>	8523	568	15	7	8	N/A	N/A	90
<b>MO</b>	29,320	2224	13	N/A	36	33	25	N/A
<b>MT</b>	3477	356	10	29	13	36	N/A	365
<b>NE</b>	6586	450	15	11	22	N/A	N/A	365-730
<b>NV</b>	6585	1828	4	26	16	N/A	N/A	122-365 (est.) <sup>261</sup>
<b>NH</b>	4809	64	75	N/A	21	N/A	N/A	777
<b>NJ</b>	68,431	1476	46	N/A	148	22	33	832 <sup>262</sup>
<b>NM</b>	6413	572	11	11	15	33	33	365 (est.)
<b>NY</b> <sup>263</sup>	192,578	15,061	13	527	1,659	N/A	N/A	N/A
<b>NC</b>	23,744	1489	16	119	71	33	N/A	270
<b>ND</b>	2052	151	14	12	15	33	N/A	186
<b>OH</b>	42,684	4677	9	N/A	114	33	14	626
<b>OK</b>	16,438	1500	11	20	10	33	0	548
<b>OR</b>	14,070	1626	9	N/A	67	33	0	638
<b>PA</b>	61,124	4755	13	75	97	0	14	514
<b>RI</b>	4930	433	11	10	9	N/A	N/A	365-423
<b>SC</b>	10,748	1661	6	58	31	33	N/A	364 (est.)
<b>SD</b>	2361	66	36	16	2	N/A	N/A	365-730 <sup>264</sup>
<b>TN</b>	19,622	898	22	55	57	N/A	N/A	N/A

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<sup>261</sup>. The time range is 122-274 days if the complaint is uncontested and 274-365 days if the complaint is contested.

<sup>262</sup>. This includes days untriable.

<sup>263</sup>. The ABA Survey reports data for New York's four judicial departments and distinct districts therein; this Table aggregates these data to give one overall figure for New York.

<sup>264</sup>. Range depends on whether there is an agreement (365) or trial (730).

<b>TX</b>	86,075	7108	12	68	231	33	0	N/A
<b>UT</b>	7866	1163	7	13	19	24	0	N/A
<b>VT</b>	2200	260	8	4	6	N/A	N/A	547 (est.) <sup>265</sup>
<b>VA</b>	28,240	4120	7	83	80	30	20	564
<b>WA</b>	27,795	1938	14	N/A	56	0	28	406 (est.)
<b>WV</b>	6380	555	11	N/A	9	33	0	730 (est.)
<b>WI</b>	23,591	2228	11	40	40	N/A	N/A	N/A
<b>WY</b>	2341	161	15	3	3	29	0	90 (est.)
<b>U.S.</b>	1,482,271	125,596	12	1916	5045			
<b>Max.</b>	192,578	20,788	75	527	1659	39	33	1932
<b>Min.</b>	2052	64	4	2	2	0	0	87
<b>Medn.</b>	16,914	1232	12	28	44			

<sup>265</sup>. Estimate assumes that there is no appeal.

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

Table 3.  
STATES WITH STATUTES OF LIMITATIONS

State	Source for State Rule	Years	Discovery/Incident <sup>266</sup>
AL	ALA. R. DISCIPLINARY P. 31	6	Incident
AK	ALASKA BAR R. 18	5	Discovery
CA	CAL. R. P. OF THE STATE BAR 51(a)	5	Incident
CO	COLO. R. CIV. P. 251.32(i)	5	Discovery <sup>267</sup>
CT	CONN. SUPERIOR CT. R. 2-32(a)(2)(E)	6	Incident
FL	R. REGULATING FLA. BAR 3-7.16(a)	6	Discovery
GA	GA. R. PROF'L CONDUCT 4-222(a)	4	Incident
LA <sup>268</sup>	LA. SUP. CT. R. XIX, § 31	10	Incident
MA	Telephone Interview with Anne Kaufman, First Assistant Bar Counsel, Office of the Bar Counsel (Aug. 29, 2011)	6	Incident
MS	R. DISCIPLINE FOR THE MISS. STATE BAR R. 4(d)	3	Discovery
MO	MO. SUP. CT. R. 5.085(a)	5	Discovery <sup>269</sup>
NV	NEV. SUP. CT. R. 106(2)	4	Discovery
NH	N.H. SUP. CT. R. 37A(I)(i)(1)(B)	2	Incident
NM	N.M. R. GOVERNING DISCIPLINE 17-303	4	Discovery <sup>270</sup>
NC <sup>271</sup>	27 N.C. ADMIN. CODE 01B.0111(f)	6	Incident

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266. The entry in this column denotes whether the statute of limitations runs from the date of the violation (“Incident”) or the date on which the complainant becomes aware of the violation (“Discovery”).

267. Colorado procedure requires complaints to be filed within “five years of the time that the complaining witness discovers or reasonably should have discovered the misconduct.”

268. In Louisiana, this provision is only applicable where the mental element is negligence.

269. Investigations “may be undertaken only within five years after the chief disciplinary counsel knows or should know of the alleged acts of misconduct.”

270. The grievance must be filed within four years after complainant “knew or should have known.”

271. North Carolina’s statute of limitations does not apply if the act was intentional or criminal.

<b>PA</b>	PA. DISCIPLINARY BD. R. § 85.10	4	Incident <sup>272</sup>
<b>TX</b>	TEX. R. DISCIPLINARY P. 15.06	4	Incident <sup>273</sup>
<b>UT</b>	UTAH SUP. CT. R. PROF'L PRACTICE 14-529	4	Discovery
<b>WV</b>	W. VA. R. LAWYER DISCIPLINARY P. 2.14	2	Discovery <sup>274</sup>
<b>WI</b>	WIS. SUP. CT. R. 21.18(1)	10	Discovery <sup>275</sup>
<b>WY</b>	DISCIPLINARY CODE WYO. STATE BAR § 28	4	Discovery <sup>276</sup>

272. The statute of limitations does not apply when the case involves theft or misappropriation, conviction of a crime, or a knowing act of concealment. The statute of limitation is tolled for any period when litigation was pending that resulted in the finding of an act of prosecutorial misconduct.

273. The statute of limitations is tolled for concealment or fraud.

274. The rules require that “[a]ny complaint filed more than two years after the complainant knew, . . . or in the exercise of reasonable diligence should have known, of the existence of a violation of the Rules of Professional Conduct, shall be dismissed by the Investigative Panel” (emphasis added).

275. According to the Wisconsin rule, “[A] grievance concerning the conduct of an attorney shall be communicated within 10 years after the person communicating the . . . grievance knew or should reasonably have known of the conduct, whichever is later . . .” (emphasis added).

276. This statute of limitations does not apply when the misconduct involved “theft, misappropriation, conviction of a serious crime, or a knowing act of concealment” or when the misconduct is “part of a continuing course of misconduct if at least one of the acts of misconduct occurred within four (4) years of the commencing of the complaint.” Further, the statute of limitations is tolled when “there has been litigation pending that has resulted in a finding of misconduct; however, the complaint must be commenced within one (1) year of the final order making such finding.” It is likewise tolled when “complainant is under the age of majority, insane, or otherwise unable to file a complaint due to mental or physical incapacitation; however, the complaint must be commenced within one (1) year after the disability is removed.”

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MYTH OF PROSECUTORIAL ACCOUNTABILITY

Table 4.  
STATES AFFORDING COMPLAINANTS A RIGHT TO APPEAL AN INITIAL DISMISSAL

State	Source for State Rule
AK	ALASKA BAR R. 25(C)
AR	ARK. SUP. CT. P. REGULATING PROF'L CONDUCT § 5(C)(5)
CA	CAL. R. P. OF THE STATE BAR 5.151
CT	CONN. SUP. CT. R. 2-32(c)
GA	Telephone Interview with Cathy Hall-Payne, Legal Secretary, Office of the Disciplinary Council (Aug. 19, 2011)
ID	IDAHO BAR COMM'N R. 509(d)
LA	LA. SUP. CT. R. 19.11(B)(3)
ME	ME. BAR. R. 7.1(c)(1)
MA	MASS. SUP. JUD. CT. R. 4:01, § 8(1)(a)
MI	MICH. CT. R. 9.122(A)
MN	MINN. R. LAWYERS PROF'L RESPONSIBILITY 8(e)
MO	MO. SUP. R. 512(b)
MT	MONT. R. LAWYER DISCIPLINARY ENFORCEMENT 10(C)(3)
NM	N.M. R. GOVERNING DISCIPLINE 17-307
NY <sup>277</sup>	N.Y. SUP. CT. APP. DIV., FIRST DEP'T, R. & P. OF THE DEPARTMENTAL DISCIPLINARY COMM. §§ 605.8(c) & (d)
ND	N.D. R. LAWYER DISCIPLINE 3.1(D)(8)
OH	OHIO SUP. CT. R. GOV'T BAR V, § 4(I)(5)
OR	OR. STATE BAR R. P. 2.5(c)
PA	PA. DISCIPLINARY BD. R. § 87.9(c)
SC	S.C. R. LAWYER DISCIPLINARY ENFORCEMENT 18(b)
TN	TENN. SUP. CT. R. 9, § 8.1
TX	TEX. R. DISCIPLINARY P. 2.10
UT	UTAH JUD. COUNCIL R. JUD. ADMIN. 14-510(a)(6)
VT	VT. SUP. CT. R. ADMIN. ORDER 9
WA	WASH. R. ENFORCEMENT OF LAWYER CONDUCT 5.6
WV	W. VA. R. LAWYER DISCIPLINARY P. 2.4
WI	WIS. P. LAWYER REG. SYS. SCR 22.05

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277. Only the procedures of the First Department were examined in New York, as each Department has different procedural rules.