

The Ethical Responsibilities of Prosecutors

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■ INTERCONNECTION BETWEEN ABSOLUTE IMMUNITY DOCTRINE AND ETHICS

Imbler v. Pachtman

- We emphasize that the immunity of prosecutors from liability in suits under Section 1983 does not leave the public powerless to deter misconduct or punish that which occurs.

... 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.*

424 U.S. 409, 428-429 96 S.Ct. 984, 47 L.Ed.2d 128

In re Roger W. Jordan, Jr., 913 So. 2d 775, 2004-2397 (La. 6/29/05)

In our system of justice, we entrust vast discretion to a prosecutor... Because a prosecutor is given such great power and discretion, *he is also charged with a high ethical standard. Id.* A prosecutor stands as the representative of the people of the State of Louisiana. He is entrusted with upholding the integrity of the criminal justice system by ensuring that justice is served for both the victims of crimes and the accused. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." ... The actions, or inactions in this case, of the prosecutor are paramount to a fair administration of justice; and the people of this state must have confidence in a prosecutor's integrity in performing his duty to disclose exculpatory evidence in order for the system to be just. *Any intentional deviation from the principle of the fair administration of justice will be dealt with HARSHLY by this Court.*

ABA Standard 3-1.2 The Function of the Prosecutor

- (a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

- (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

- (c) The duty of the prosecutor is to seek justice, not merely to convict.

- (e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

- ... though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that "justice shall be done."

U.S. v. Agurs, 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L. Ed.2d 342

- DISCLOSURE OF EVIDENCE TO THE DEFENSE, I.E. *BRADY*

Synopsis of "Brady" Rule

- The term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence -- that is, to any suppression of so-called "Brady material" -- although, strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued, i.e. the evidence suppressed must be "material to the defendant's guilt or punishment." Evidence is "material" when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."

Synopsis of "Brady" Rule

- A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough to "undermine[] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U. S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (internal quotation marks omitted).

Historical Progression of *Brady*

- *Brady v. Maryland*
- *Giglio v. United States*
- *U.S. v. Agurs*
- *U.S. v. Bagley*
- *Kyles v. Whitley*
- *Strickler v. Green*
- *United States v. Ruiz*
- *Cone v. Bell*
- *Smith v. Cain*

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

- *Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.*

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed2d 104 (1972)

- When reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within rule that suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution. *Giglio*, at 153

- A new trial is not automatically required whenever the combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. A finding of materiality is required. A new trial is required if the false testimony could *in any reasonable likelihood* have affected the judgment of the jury. *Giglio*, at 154

***U.S. v. Agurs*, 427 U.S. 97,
96 S.Ct. 2392, 49 L.Ed2d
342 (1976)**

- Extended *Brady* to require voluntary disclosure by the prosecutor of exculpatory matter in certain circumstances, even where no specific request therefore has been made by defense counsel:

- "A prosecutor does not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial." *Agurs*, at 2397-2400

- A prosecutor is not bound to disclose all information that might affect the jury's verdict. "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." *Agurs*, at 2400

- The prosecutor has no constitutional duty to routinely deliver his entire file to defense counsel. *Agurs*, at 2401

- "Whether or not procedural rules authorizing discovery of everything that might influence a jury might be desirable, the constitution does not demand such broad discovery; and the mere possibility that an item of undisclosed information might have aided the defense, or might have added the outcome of the trial, does not establish "materiality" in a constitutional sense. *Agurs*, at 2400

- "... there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'" *Agurs*, at 2401

- (Hypothetical example: The prosecution has fingerprint evidence demonstrating that the defendant could not have fired the fatal shot.)
Agurs, at 2401

- The Court identified and distinguished three situations in which a *Brady* claim might arise:

- First, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured.

- Second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence.

- Third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. (The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be of sufficient significance to result in the denial of the defendant's right to a fair trial.)

***U.S. v. Bagley*, 473 U.S. 667,
105 S.Ct. 3375, 87 L.Ed.2d
481 (1985)**

- *Bagley* defined the standard of materiality applicable to the third situation identified by the Court in *Agurs*, i.e. where the defense makes a specific request and the prosecutor fails to disclose responsive evidence.

- *Brady* does not require prosecutor to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive him of a fair trial. *Bagley*, 675

- Regardless of whether any request is made by the defense, or whether there is a general request or a specific request, evidence favorable to the accused is material, and constitutional error results from its suppression by the Government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." *Bagley*, 682, 685

***Kyles v. Whitley*, 514 U.S.
419, 115 S.Ct. 1555, 131
L.Ed.2d 490 (1995)**

- In *Kyles*, the Supreme Court held that the State's obligation under *Brady* to disclose evidence favorable to the defense turns on the cumulative effect of all evidence suppressed by the Government, and that the "prosecutor" remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention.

- The constitution does not demand that prosecutors have an "open" file policy (however such a policy might work out in practice). *Kyles*, at 436

- In determining whether evidence not disclosed by the State was "material," in violation of *Brady*, cumulative effect of all suppressed evidence favorable to the defense is considered, rather than considering each item of evidence individually. *Kyles*, at 436.

- While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.

- *This in turn means that 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. But whether the prosecutor succeeds or fails in meeting this obligation (whether that is, a failure to disclose is in good faith or bad faith, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable. Kyles, at 437-438*

- **... a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. (“[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure”).**

- This is as it should be. Such disclosure will serve to justify trust in the prosecutor as “the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.”

- And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. **The prudence of the careful prosecutor should not therefore be discouraged.** *Kyles, at 439-440.*

- **BEWARE THE SOLE EYEWITNESS**
- **BEWARE THE WITNESS WHO HAS GIVEN MULTIPLE STATEMENTS TO THE POLICE**
- **BEWARE THE WITNESS WHO MATERIALLY CHANGES THEIR TESTIMONY IN A PRE-TRIAL INTERVIEW**
- **BEWARE THE WITNESS WHO TESTIFIES DIFFERENTLY THAN HIS GRAND JURY TESTIMONY**
- **BEWARE EXCULPATORY GRAND JURY TESTIMONY**

- *Imbler v. Pachtman*
- *Knapper v. Connick*
- *Monell v. New York City Department of Social Services*
- *Burge v. Parish of St. Tammany*
- *Cousin v. Small*
- *Thompson v. Connick*

RULE 3.8(d)



RULE 3.8(d)

- Broader than *Brady*
- Litigation Tactic
- No Statute of Limitations
- Trump Card
- Open File

Rule 3.8 - Louisiana Rules of Professional Conduct (*amended 4/12/2004*)

- The prosecutor in a criminal case shall:
 - (d) make timely disclosure to the defense of all evidence or information known to the prosecutor *that the prosecutor knows, or reasonably should know*, either 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;

Amicus Brief Filed By The American Bar Association In Support of Juan Smith's Petition For Writ of Certiorari:

- To the extent Louisiana has modified Rule 3.8(d), it has done so (like three other jurisdictions) only to impose more rigorous disclosure obligations on prosecutors. The Louisiana rule thus requires not only disclosure of evidence that the prosecutor "knows" to be exculpatory but also disclosure of evidence that the prosecutor "reasonably should know" is exculpatory.

A prosecutor's ethical duty to make disclosures such as these, however, does not depend on their materiality. Louisiana Rule 3.8(d), like Model Rule 3.8(d), does not consider the materiality of the evidence or information. ABA Formal Opinion 09-454 at 11a explains:

Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.

By requiring prosecutors to disclose more than material exculpatory evidence, the ABA Model Rules seek to avoid pitfalls that might arise if a prosecutor attempts to determine materiality before making a disclosure. As commentators have highlighted, assessing materiality pre-trial requires prosecutors to "anticipate what the other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence at issue would place 'the whole case' in a different light."

In addition, "compared to a neutral decision maker, the prosecutor will overestimate the strength of the government's case against the defendant and underestimate the potential exculpatory value of the evidence whose disclosure is at issue. As a consequence, the prosecutor will fail to see materiality where it might in fact exist." ... ; see also Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. GRIM. L. 467, 488 (2009) ("Tunnel vision has had an obvious impact in the pretrial stage: having formed an initial judgment that a particular defendant is guilty of a crime, prosecutors and police will tend to discredit or discount the significance of new exculpatory evidence or fit it into their preexisting theory.").

EXAMPLES

HYPOTHETICALS

- *In re Roger W. Jordan, Jr.*, 913 So. 2d 775, 2004-2397 (La. 6/29/05)

- *Disciplinary Counsel v. Kellogg-Martin*
- *The North Carolina State Bar v. Michael B. Nifong*

ABA Model Rule 3.8

- g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not 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.

Imbler v. Pachtman

Knapper v. Connick

Connick v. Thompson

THE DECISION TO PROSECUTE:

- Louisiana Code of Criminal Procedure Article 61
- *Chinn v. Cantrell*
- *State v. Pierre*
- *Imbler v. Pachtman*
- *Pembaur v. City of Cincinnati*

Rule 3.8 - Louisiana Rules of Professional Conduct (*amended 5/19/2006*)

- The prosecutor in a criminal case shall:
- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

Probable Cause

- More than suspicion
- Reasonable, trustworthy information
- Sufficient to justify a reasonable man in believing that the person has committed a crime

- *In re: Disciplinary Proceedings Against Lucareli*
- *The North Carolina State Bar v. Michael B. Nifong*

THE RESPONSIBILITIES AND LIABILITIES OF SUPERVISION

- Louisiana Rules of Professional Conduct (*amended 5/19/2006*) Rule 5.1. Responsibilities Of Partners, Managers, And Supervisory Lawyers
- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

- (b) *A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.*

- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

- In the matter of *Donald V. Myers*

Failure To Train And Supervise As A Basis Of Individual Liability Under Section 1983

- *Van de Camp, et al. v. Goldstein*

ETHICAL FAIR COMMENT ON PENDING CRIMINAL PROCEEDINGS

- Rule 3.6 - Louisiana Rules of Professional Conduct (*amended 5/19/2006*) Standard - TRIAL PUBLICITY

- A lawyer who is participating or has participated in the investigation or litigation of a matter **shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.**

Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;

- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation

- (c) Notwithstanding paragraph (a), *a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.* A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

- (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

- *Attorney Grievance Commission of Maryland v. Gansler*
- *The North Carolina State Bar v. Michael B. Nifong*
- *Buckley v. Fitzsimmons*
- *Siegert v. Gilley*
- *Lee v. Pennington*

U.S. Attorney Patrick Fitzgerald

Blagojevich 's behavior took "us to a truly new low."

Blagojevich's conduct "would make Lincoln turn over in his grave."

- **NO BLOGGING ABOUT CASES**
- **NO COMMENTS ON SOCIAL MEDIA**

**ONCE WRITTEN
EVER WRIT**

CONFLICTS OF INTEREST

Louisiana Rules of Professional Conduct Rule 1.7

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

In re Toups

**REPORTING KNOWN
INSTANCES OF
ANOTHER ATTORNEY'S
MISCONDUCT**

Louisiana Rules of Professional Conduct Rule 8.3

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel.

In Re: Riehlmann

... the rule [8.3] has three distinct requirements: (1) the lawyer must possess unprivileged knowledge of a violation of the Rules of Professional Conduct; (2) the lawyer must report that knowledge; and (3) the report must be made to a tribunal or other authority empowered to investigate or act on the violation. We will discuss each requirement in turn.

Knowledge

- ... it is clear that absolute certainty of ethical misconduct is not required before the reporting requirement is triggered. The lawyer is not required [under Rule 8.3 (a)] to conduct an investigation and make a definitive decision that a violation has occurred before reporting; that responsibility belongs to the disciplinary system and this court. On the other hand, knowledge requires more than a mere suspicion of ethical misconduct.

We hold that a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question.

When to Report

- Once the lawyer decides that a reportable offense has likely occurred, reporting should be made promptly. Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 298 (Winter 2003). The need for prompt reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer. *Id.* This purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented.

Appropriate Authority

- Louisiana Rule 8.3(a) requires that the report be made to "a tribunal or other authority empowered to investigate or act upon such violation." The term "tribunal or other authority" is not specifically defined. However, as the comments to Model Rule 8.3(a) explain, the report generally should be made to the bar disciplinary authority. *Therefore, a report of misconduct by a lawyer admitted to practice in Louisiana must be made to the Office of Disciplinary Counsel.*

Determination Of Respondent's Misconduct And Appropriate Discipline

- Applying the principles set forth above to the conduct of respondent in the instant case, we find the ODC proved by clear and convincing evidence that respondent violated Rule 8.3(a).