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## PROFESSIONAL AND CONVICTION INTEGRITY PROGRAMS: WHY WE NEED THEM, WHY THEY WILL WORK, AND MODELS FOR CREATING THEM

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### ABSTRACT

*The best way to effectively prevent Brady violations and other forms of prosecutorial misconduct that cause wrongful convictions is internal regulation of the District Attorney's office. Civil liability, state or bar disciplinary action, the stigma of appellate reversal, and the threat of criminal prosecution have failed to provide effective deterrence against Brady violations as well as other forms of misconduct. However, the lack of alternatives is not the reason why internal regulation is the most promising way to prevent Brady violations, but rather because prosecutors themselves are in the best position to implement procedures that achieve this goal.*

*Prosecutorial offices, and the criminal justice system as a whole, can learn important lessons from recent reforms adopted by the medical profession to improve safety. Specifically, several organizational principles and practical remedies developed by the groundbreaking National Academies of Science study on improving hospital safety, *To Err Is Human*, can be readily transferred to the prosecutor's office.*

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*The Pareto principle, a staple of quality assurance theorists, holds that eighty percent of effects result from twenty percent of causes and, therefore, quality management resources should be focused on correcting this twenty percent of causes. Recognizing there is little empirical data on the causes of Brady violations, and in accordance with Pareto's principle, this Article conducts a "thought experiment" that postulates and then analyzes the top three causes of Brady violations: (1) The Brady material was not in the prosecutor's file because the police did not provide it in written form to the prosecutor working on the case; (2) The Brady material was in the prosecution's file, or known to the prosecutor from an oral communication, but the prosecution did not identify it as Brady and, therefore, did not turn it over to the defense; and (3) The prosecutor did not turn over to the defense information that he or she knew or strongly suspected could be Brady material out of fear.*

*What emerges from this analysis of the top three causes are concrete suggestions for setting up a Professional Integrity Program within a prosecutor's office that can identify, correct, and prevent Brady violations. The Professional Integrity Program features the use of pre-trial and post-indictment checklists and disclosure conferences, the non-punitive tracking of errors and "near misses," the development of clear office-wide legal definitions of Brady material, the administration of audits and root cause analysis in reversal and harmless error cases, and the creation of simulation exercises for training staff that builds on the lessons learned from "near misses" and audits. A Conviction Integrity Program to investigate plausible post-conviction claims of innocence is also proposed that draws upon the ethical principles enunciated in ABA Model Rule of Professional Conduct 3.8. It also draws upon "best practices" for co-operative, non-adversarial post-conviction innocence investigations employed by projects within the Innocence Network with the Dallas District Attorney and other district attorney offices. Finally, a model and organizational chart for the implementation of a Professional and Conviction Integrity Programs are presented and discussed.*

#### INTRODUCTION

Professional and Conviction Integrity Programs are models for internal regulation of prosecutorial offices. They draw upon quality assurance ideas that have been successfully employed by the medical profession to reduce error, which were, in turn, borrowed from business and industry. As Dr. Gordon Schiff pointed out at this Symposium, one need only read the recommendations in Chapter 8 of *To Err Is Human*,

the landmark report on this subject that has revolutionized the delivery of medical care, to envision with confidence and enthusiasm how similar measures, undertaken separately and collaboratively by prosecutors, defense counsel, courts, and police, would greatly reduce error within the criminal justice system.<sup>1</sup> A Professional Integrity Program, as Rachel Barkow points out, is not dramatically different than the oversight and compliance programs prosecutors often require as a condition for ensuring future good conduct by corporate defendants who have engaged in negligent, fraudulent, or deceptive practices.<sup>2</sup> But one should hasten to add that a Professional Integrity Program should not be seen as a punitive enterprise. On the contrary, the important objective of such a program is to differentiate between common variance and special variance—between errors that are commonly made because a faulty system “set up” an individual to fail as opposed to errors made by a special few due to laziness, incompetence, impairment, or bad character.<sup>3</sup>

A Conviction Integrity Program refers to a set of procedures adopted by a district attorney’s office to review and investigate cases where there is a plausible post-conviction claim of innocence—the ultimate system failure. This concept has emerged from cooperative efforts between district attorneys’ offices, the Innocence Project,<sup>4</sup> and projects within the Innocence Network,<sup>5</sup> while working on DNA

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<sup>1</sup> *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037, 2047-52 (2010) [hereinafter *Voices from the Field*] (citing INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 155-97 (Linda T. Kohn et al. eds., 2000) [hereinafter TO ERR IS HUMAN]).

<sup>2</sup> Rachel Barkow, Professor, Center on the Administration of Criminal Law, New York University School of Law, Presentation at the Cardozo Law Review Symposium: New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works? (Nov. 15, 2009) (transcript on file with the Cardozo Law Review).

<sup>3</sup> See *id.* at 2053. See generally TO ERR IS HUMAN, *supra* note 1, at 49-65 (stating generally that complex systems are prone to accidents and that latent errors built into the system pose the greatest threat to proper functioning of complex systems because they lead to human errors).

<sup>4</sup> The Innocence Project was founded in 1992 by the author and his colleague, Peter Neufeld, at the Benjamin N. Cardozo School of Law at Yeshiva University. An independent non-profit since 2004, though still affiliated with Cardozo Law School, the Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongly convicted people through DNA testing and reforming the criminal justice system to prevent future injustice. Innocence Project, <http://www.innocenceproject.org/index.php> (last visited June 23, 2010).

<sup>5</sup> The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom post-conviction evidence can provide conclusive proof of innocence. The fifty-five current members of the Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The member organizations include the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, The Exoneration Initiative, Georgia Innocence Project, Griffith University Innocence Project (Australia), Idaho Innocence Project, Innocence Institute of Point Park University, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New

exoneration cases and other matters where innocence was established without DNA evidence.<sup>6</sup> Taken together, Professional and Conviction Integrity Programs represent a new, practical, and promising approach to internal regulation that would not only reduce erroneous failures to disclose *Brady* material and correct miscarriages of justice, but would also systematically improve the performance of line prosecutors and supervisors through the adoption of a few strategically targeted best practices.

#### I. THE LIMITED UTILITY OF EXTERNAL SANCTIONS INCREASES THE NEED FOR INTERNAL REGULATION

It would be critically important for prosecutorial offices to have robust and effective quality assurance programs to prevent, identify, and correct *Brady* violations even if the processes and institutions that could provide external sanctions for *Brady* violations were functioning appropriately. After all, the fair administration of criminal justice is predicated on prosecutors *finding and disclosing Brady* material in the possession of the police, crime laboratories, and witnesses with due diligence—not just because it is the right thing to do, but because they are in the best position to do it.<sup>7</sup> Yet, as recent, comprehensive, and bi-

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Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Brandeis Innocence Project (Schuster Institute for Investigative Journalism at Brandeis University), Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wesleyan Innocence Project, Wisconsin Innocence Project, and the Wrongful Conviction Clinic. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented. Important post-conviction innocence work is also done by private lawyers, public defenders, and other organizations. Worthy of particular mention is Centurion Ministries, Inc. founded in 1983. As a pioneer in this field, they work on behalf of prisoners who are innocent of the crimes for which they have been unjustly convicted and imprisoned for life or death.

<sup>6</sup> See *Voices from the Field*, *supra* note 1, at 2069 (presentation by Terri Moore).

<sup>7</sup> The same point can and should be made about ineffective assistance of counsel. Public defenders and those charged with appointing and supervising the quality of lawyers representing the indigent are in the best position to prevent, identify, and correct serious negligence and

partisan studies have demonstrated, the courts and the bar have been reluctant to sanction either prosecutors or defense counsel where *Brady* violations have occurred. It would be naïve, if not irresponsible, to believe that the prospect of civil liability, disciplinary action, the stigma of appellate reversal, or the initiation of criminal prosecution really serve as credible deterrents to *Brady* violations. Indeed, it is the limited utility of these external sanctions that make the need for innovative approaches to internal regulation, such as the creation of Professional and Conviction Integrity Programs, all the more urgent.

### A. *Civil Liability*

Civil liability against prosecutors for *Brady* violations is severely circumscribed because the doctrine of absolute immunity is designed to accord broad protection for acts of prosecutorial misconduct committed during a “trial and the presentation of evidence.”<sup>8</sup> In fact, in its foundational case on absolute immunity, *Imbler v. Pachtman*, the Supreme Court explicitly acknowledges that civil actions cannot provide an adequate check against the worst forms of prosecutorial misconduct because absolute immunity “does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.”<sup>9</sup> Until recently, however, it was generally understood that absolute immunity did not extend to “investigative” activity by prosecutors, especially pre-indictment, or to “administrative” activities—areas where qualified immunity was deemed sufficient protection.<sup>10</sup> But last term, in *Van De Kamp v. Goldstein*, the absolute immunity doctrine was extended to include the concededly administrative acts of a district attorney’s office’s supervisory prosecutors in the systemic “training, or the supervision, or information-system management” of *Brady* and *Giglio* requirements for line prosecutors.<sup>11</sup>

This term, the Supreme Court was willing to entertain the surprising prospect of expanding absolute immunity to cover pre-

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misconduct, although the strictures of the attorney-client privilege present some special problems. Nonetheless, the same systematic approach to internal regulation and quality assurance recommended here for prosecutors ought to be undertaken by defender institutions and, as the organizers of this Symposium have observed, it would be a good focus for a follow-up symposium. Indeed, unless defense attorneys make it clear they are willing to police themselves with meaningful internal regulations, prosecutors will be skeptical and rightly concerned that such reform is a one way street.

<sup>8</sup> *Imbler v. Pachtman*, 424 U.S. 409, 426, 431 n.33 (1976).

<sup>9</sup> *Id.* at 427.

<sup>10</sup> *See id.* at 430.

<sup>11</sup> *See Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009).

indictment “investigative” activities and the evisceration of *Buckley v. Fitzsimmons*.<sup>12</sup> In *Pottawattamie County v. McGhee*, petitioners argued for the fairly extraordinary proposition that the pre-trial fabrication of evidence by a prosecutor to frame innocent citizens could receive an absolute immunity bath if the same prosecutor who fabricated the evidence also introduced it at trial.<sup>13</sup> Petitioners attempted to distinguish *Buckley*, and the principle that only qualified immunity applied to investigative activities, on the ground that the prosecutor who allegedly fabricated evidence in *Buckley* was not the prosecutor who presented the fabricated evidence at trial.<sup>14</sup> The petitioners argued that the fabrication of evidence by a prosecutor acting as an investigator pre-indictment was not, in itself, a substantive due process violation. Therefore, the wrongly convicted plaintiff could only make a trial-based procedural due process claim, i.e., the plaintiff’s conviction after trial was proximately caused by the presentation of the fabricated evidence.<sup>15</sup> But, since all prosecutors enjoy absolute immunity for their adversarial activities at trial, petitioners claimed that even a prosecutor who fabricated evidence as an investigator pre-indictment—who would otherwise be entitled only to qualified immunity for the fabrication, is entitled to retroactive absolute immunity as long as that prosecutor presents the fabricated evidence at trial.<sup>16</sup>

The *Pottawattamie County* case was settled after oral argument for \$12 million,<sup>17</sup> so it remains unclear as to whether the sweeping absolute immunity argument made by petitioners would have prevailed; but the very fact that the Court took the case indicates, for better or worse, that the breadth of absolute immunity for prosecutors might be expanding. Such an expansion would only exacerbate the problems faced by a wrongfully convicted plaintiff in the rare case where a civil rights lawsuit against a prosecutor was even possible.<sup>18</sup>

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<sup>12</sup> 509 U.S. 259, 273 (1993) (holding that a prosecutor acting in an investigative capacity, such as searching for clues and corroboration, is not entitled to absolute immunity).

<sup>13</sup> See Brief for the Petitioners at 9, *Pottawattamie County v. McGhee*, cert. dismissed, 130 S. Ct. 1047 (2010) (No. 08-1065); see also Respondents’ Brief at 20-38, *McGhee*, 130 S. Ct. 1047 (No. 08-1065). Respondent’s counsel Paul Clement’s excellent merits brief for the respondents should be read for its forceful argument that when a prosecutor fabricates evidence to convict an innocent citizen, that conduct, in and of itself, constitutes a substantive due process violation. *Id.* at 24.

<sup>14</sup> Brief for the Petitioners at 20-25, *McGhee*, 130 S. Ct. 1047 (No. 08-1065); see Respondents’ Brief at 27-38, *McGhee*, 130 S. Ct. 1047 (No. 08-1065).

<sup>15</sup> Brief for the Petitioners at 20-25, *McGhee*, 130 S. Ct. 1047 (No. 08-1065).

<sup>16</sup> *Id.* at 9-20.

<sup>17</sup> Lee Rood, *\$12 Million Wrongful Conviction Settlement Is Hailed*, DES MOINES REGISTER, Jan. 5, 2010, at A1.

<sup>18</sup> As this Article goes to press, the Supreme Court has granted certiorari in *Connick v. Thompson*, a federal civil rights case where *Monell* liability was established against the Orleans Parish District Attorney’s office for admittedly egregious *Brady* violations. *Connick v. Thompson*, 578 F.3d 293 (5th Cir. 2009), cert. granted, 130 S. Ct. 1880 (2010) (No. 09-571).

The absolute immunity doctrine is not the only reason federal civil rights claims against prosecutors are, as a practical matter, rare and difficult to pursue. The qualified immunity “good faith” defense is a very substantial hurdle for a civil rights plaintiff as well. Though not a complete bar to liability, the Supreme Court has recognized that qualified immunity shields “all but the plainly incompetent or those who knowingly violate the law.”<sup>19</sup> After *Ashcroft v. Iqbal*, it is certainly more difficult for a plaintiff, without any discovery, to file a pleading that will survive a motion to dismiss on qualified immunity grounds.<sup>20</sup> Denials of the qualified immunity defense are also subject to interlocutory appeal, thereby making these lawsuits longer and more costly to litigate than ordinary cases.<sup>21</sup> And even when the plaintiff prevails, there are serious problems collecting substantial damages awards. The “bad faith” conduct that must be proven to overcome qualified immunity can often strip a defendant of insurance coverage or statutory indemnification by state or local entities because intentional torts and acts of moral turpitude are often excluded from these benefits.<sup>22</sup> For example, Mike Nifong, the prosecutor in the notorious “Duke Lacrosse” case, was disbarred and held in criminal contempt for a number of different acts of misconduct that he committed when bringing false sexual assault charges against three members of the Duke lacrosse team.<sup>23</sup> After a federal civil rights action was filed against Nifong by the three wrongly charged plaintiffs, the City of Durham refused to indemnify him<sup>24</sup> and he declared bankruptcy to shield himself from legal suits.<sup>25</sup>

All considered, it is, appropriately and by design, extremely difficult to obtain civil liability against prosecutors for a *Brady*

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Even though the Court declined to grant certiorari on petitioner’s claim that absolute immunity should be extended to preclude this *Monell* judgment, the Orleans Parish District Attorney has nonetheless explicitly asked the Court to address the absolute immunity issue in its merits brief. Petitioners’ Brief on the Merits at 41-54, *Connick v. Thompson*, 130 S.Ct. 1880 (2010) (No. 09-571). Whatever questions the Court decides to address, it is certain to have a profound effect on lawsuits by the wrongfully convicted against prosecutorial entities for *Brady* violations.

<sup>19</sup> *Burns v. Reed*, 500 U.S. 478, 495 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

<sup>20</sup> *See* 129 S. Ct. 1937 (2009).

<sup>21</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that a qualified immunity defense is separate from the merits of the action and therefore immediately appealable).

<sup>22</sup> John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 487 n.171 (1990).

<sup>23</sup> *Nifong Held in Criminal Contempt by Judge, Sentenced to Day in Jail*, CNN.COM, Aug. 31, 2007, <http://edition.cnn.com/2007/US/08/31/nifong.contempt/>.

<sup>24</sup> Martha Neil, *NC Won’t Defend Nifong in Civil Suit over Duke Rape Case*, A.B.A. J., Oct. 18, 2007, available at [http://www.abajournal.com/news/article/nc\\_wont\\_defend\\_nifong\\_in\\_civil\\_suit\\_over\\_duke\\_rape\\_case/](http://www.abajournal.com/news/article/nc_wont_defend_nifong_in_civil_suit_over_duke_rape_case/).

<sup>25</sup> Dawn McCarty & Jef Feeley, *Nifong, Duke Lacrosse Prosecutor, Files Bankruptcy (Update3)*, BLOOMBERG.COM, Jan. 15, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601079&refer=home&sid=aCZsc7aJFP5k>.

violation, or any other act of misconduct. Therefore, it cannot be realistically relied upon as a broadly effective deterrent. This is not to say that civil rights lawsuits cannot serve as a uniquely potent remedy. In the small class of cases where such claims are actionable, which would ordinarily be *Monell* claims against municipalities,<sup>26</sup> the process of civil discovery can reveal better than any other mechanism unconstitutional customs and practices that would otherwise remain undetected and uncorrected. A successful civil rights action against prosecutors or their offices for bringing about a wrongful conviction also gets the attention of companies that insure municipalities and state entities, as well as local legislative bodies, who are compelled to pay damages awards. It just does not happen very often.

### B. *State or Bar Disciplinary Actions*

In amicus briefs by district attorneys and attorneys general urging the extension of the absolute immunity doctrine in *Van de Kamp* and *Pottawattamie County*, the argument was made that state or bar discipline is a satisfactory check on prosecutorial misbehavior.<sup>27</sup> State or bar discipline against prosecutors for *Brady* violations or other acts of misconduct is simply an uncommon event.<sup>28</sup> Recent studies by commissions comprised of distinguished members of the bar, judges, prosecutors, and defense attorneys confirm that prosecutors and defense lawyers are almost never disciplined for misconduct or ineffectiveness even when the misconduct results in wrongful convictions.<sup>29</sup> Last year,

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<sup>26</sup> *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978). *Monell* held that personal liability exists “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983.” *Id.* Where the policy in question is related to a failure to train or supervise municipal employees, the liability under § 1983 attaches upon a showing that the failure amounts to “deliberate indifference” to the rights of persons with whom those employees will come into contact. JOSEPH F. LAWLESS, 1-13 PROSECUTORIAL MISCONDUCT § 13.24 (2009).

<sup>27</sup> Brief of the National Ass’n of Assistant United States Attorneys and National District Attorneys Ass’n as Amici Curiae in Support of Petitioners at 11-12, *Pottawattamie County v. McGhee*, cert. dismissed, 130 S. Ct. 1047 (2010) (No. 08-1065); Brief for the United States as Amicus Curiae Supporting Petitioners at 32, *McGhee*, 130 S. Ct. 1047; Brief for the States of Colorado et al. as Amici Curiae in Support of Petitioners at 16, *McGhee*, 130 S. Ct. 1047 (No. 08-1065); Brief for the States of Kansas et al. as Amici Curiae in support of Petitioners at 32, *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009) (No. 07-854).

<sup>28</sup> Bennett Gershman, Editorial, *High Time the Hands-Off Approach to Prosecutorial Misconduct Changes*, SAN JOSE MERCURY NEWS, July 11, 2007.

<sup>29</sup> See, e.g., Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 47 (1987) (“Disciplinary sanctions are rarely imposed against prosecutors.”); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (“[D]isciplinary charges have been brought infrequently

the New York State Bar Association Task Force on Wrongful Convictions found that *Brady* violations, among other misconduct, potentially caused over 50% of all wrongful convictions in New York State.<sup>30</sup> The Task Force's research found no public disciplinary steps were taken against prosecutors and concluded that prosecutors face little or no risk to themselves for failing to follow a rule of professional conduct.<sup>31</sup>

The California Commission on the Fair Administration of Justice found that judges did not report *Brady* violations or findings of prosecutorial misconduct to the State Bar for possible disciplinary action even though they were required to do so by law. The Commission's study reviewed all reported cases involving findings of prosecutorial misconduct from 1997 to 2006.<sup>32</sup> Altogether there were findings of misconduct in 444 cases (primarily *Brady* violations, improper closing arguments, use of false evidence, and improper examination of witnesses), but only fifty-four cases were reversed.<sup>33</sup> The rest were affirmed on "harmless error" grounds.<sup>34</sup> There was not one referral to the State Bar for disciplinary consideration despite the fact that state law required that all fifty-four reversals be reported.<sup>35</sup> The California Commission concluded that "a deep-seated reluctance on the part of trial judges to 'blow the whistle' on lawyers who appear before them" and a belief by district attorneys that "discipline of prosecutors should be left to the internal discipline mechanism in each individual District Attorney's office" as reasons why there was so little reporting to and discipline by the State Bar.<sup>36</sup> The study found, based

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and meaningful sanctions [have been] rarely applied."); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) ("[T]here is a notable absence of disciplinary sanctions against prosecutors, even in the most egregious cases."); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 277 (2004) ("[T]he disciplinary consequence [of prosecutorial misconduct] is often nil."); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 756-62, 774 (2001) (documenting the infrequency of discipline against prosecutors and identifying explanations).

<sup>30</sup> TASK FORCE ON WRONGFUL CONVICTIONS, N.Y. STATE BAR ASS'N, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 19 (2009) [hereinafter TASK FORCE ON WRONGFUL CONVICTIONS], available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf>.

<sup>31</sup> *Id.* at 29.

<sup>32</sup> See CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 71 (Gerald Uelmen & Chris Boscia eds., 2008) [hereinafter CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE], available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 73.

on media reports, only four cases in which prosecutors were disciplined between 2001 and 2005, three of which involved *Brady* violations.<sup>37</sup>

One of the most significant findings in the California Commission's study is that there is no qualitative difference in terms of prosecutorial conduct when comparing the small set of "reversal cases" with the much larger set of "harmless error" cases.<sup>38</sup> As discussed *infra* Part III.A.4, "harmless error" cases present a very good opportunity for supervisors engaged in a Professional Integrity Program to investigate and remediate improper practices in a "protected space"—there are more of these cases, there will be less fear of bar discipline, and hopefully there will be less of a tendency for colleagues to blame each other and shirk responsibility since the conviction has been affirmed.

### C. *The Stigma of Appellate Reversal*

The argument has been made that reversal by appellate courts, because of its stigma, serves as a deterrent to *Brady* violations and other forms of prosecutorial misconduct.<sup>39</sup> There are a number of problems with this contention in the current environment. First, appellate courts rarely mention the names of offending prosecutors in their decisions, and without such a permanent public shaming on the record as a "stigma," the deterrent effect of a reversal is undermined, although it must be acknowledged that even an anonymous reprimand is not a pleasant experience for any conscientious officer of the court. Secondly, as far as *Brady* violations are concerned, appellate courts often do not reach or specifically reference accurate allegations that prosecutors failed to disclose exculpatory evidence if the evidence was not "material" and a basis for reversal. So it is inevitable that appellate courts will tend to underreport the incidence of improperly suppressed exculpatory evidence and for that reason alone, the deterrent effect of appellate reversals will not be commensurate with the real dimensions of the problem. But finally, and most importantly, *if the stigma of appellate reversals or findings is to have any significant deterrent effect, it must be part of an effective internal quality assurance*

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<sup>37</sup> *Id.* at 71 n.4. The publication of these findings did lead to more disciplinary action by the State Bar, including getting tougher on deputy district attorneys who had traditionally avoided bar discipline when their conduct was questioned in criminal cases. Howard Mintz, *State Bar Fires Top Discipline Prosecutor*, SAN JOSE MERCURY NEWS, June 9, 2009. However, in 2009, Scott Drexel, chief trial counsel of the State Bar was removed, amidst criticisms by district attorneys who believed he had gone too far in prosecuting prosecutors. *Id.*

<sup>38</sup> CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 32, at 72.

<sup>39</sup> See Brief of the National Ass'n of Assistant United States Attorneys and National District Attorneys Association as Amici Curiae in support of Petitioners at 14, *Pottawattamie County v. McGhee, cert. dismissed*, 130 S. Ct. 1047 (2010) (No. 08-1065).

*program.* Without an objective and serious follow-up investigation within an office, prosecutors will be disinclined to accept the appellate court's findings as accurate, even if they are, and it will be hard to ascertain the extent of the problem, much less find remedies to prevent its recurrence.

#### D. *Criminal Prosecution*

As a simple matter of fact, criminal prosecution of prosecutors who suppress exculpatory evidence or engage in other acts of serious misconduct are extremely rare. And it should be stipulated that such prosecutions are rare because misconduct that would rise to a level of culpability that merits criminal prosecution is also a comparatively rare event. On the other hand, it is also evident that the aversion to prosecuting prosecutors is equal to or greater than the well-documented reluctance to bring bar discipline charges against prosecutors or criminal defense lawyers. Such a criminal prosecution is undoubtedly a traumatic event for a legal community that severs many longstanding relationships. There are also problems proving criminal intent and, when evidence of an egregious *Brady* violation arises years after a conviction, statute of limitation issues can complicate prosecution in some jurisdictions. But, even if there were more criminal prosecutions for flagrant and malevolent suppressions of exculpatory evidence, it is hard to see how this would provide a specific deterrent to the vast majority of garden-variety *Brady* violations, especially those cases where the prosecutor did not know about the *Brady* material or just failed to exercise due diligence when searching for it.

## II. INTERNAL REGULATION BY A PROFESSIONAL INTEGRITY PROGRAM IS THE MOST PRACTICAL AND EFFECTIVE WAY TO PREVENT AND CORRECT *BRADY* VIOLATIONS AND OTHER PROSECUTORIAL ERRORS OR MISCONDUCT

Given the limitations of external sanctions (civil liability, bar discipline, appellate reversal, and criminal prosecution), internal regulation through a formal Professional Integrity Program would seem, if only by default, to be the most promising way to prevent *Brady* violations. But this is more than a default argument—there are some concrete reasons to be optimistic that this approach will be both practical and effective.

First, it should be acknowledged that very few prosecutorial offices have formal, written quality assurance programs with manuals

containing checklists and best practices, explicit provisions for audits and remediation when errors are made, or sophisticated systems for collecting compliance data. Professor Lori Levenson, a former federal prosecutor, was tasked by the California Commission to obtain and analyze the internal procedures for supervision and discipline employed by prosecutors across the state.<sup>40</sup> She initially encountered much resistance by prosecutor's offices to getting any access to internal disciplinary procedures.<sup>41</sup> What information she was able to collect indicated many offices lack formal procedures for tracking and investigating complaints and certainly no uniform guidelines.<sup>42</sup> The tendency to rely on informal procedures resulted in the lack of any "track record" of an individual prosecutor's behavior and, consequently, no implementation of structural remedies to reduce error or misconduct.

The New York State Bar Association's Task Force on Wrongful Convictions did not study internal discipline extensively, but also concluded that at least in some offices, effective internal procedures were not implemented.<sup>43</sup> Survey responses from district attorneys in the state indicated that some offices had either an informal or formal review procedure, while other offices did not have any procedure at all.<sup>44</sup> Although the report did not comment on the sufficiency of informal procedures, it did conclude that "effective procedure[s]" for "preventing, identifying, and sanctioning misconduct" were necessary.<sup>45</sup> So, it seems safe to conclude that replacement of informal, unwritten, or ad hoc quality assurance programs with formal, written procedures by district attorney offices will, by itself, have a positive impact.

Secondly, the recent success of the medical profession in reducing error by adopting quality assurance programs used in business and industry serves as an instructive and very encouraging example. As discussed *infra* Part III, many practical recommendations and organizing principles proposed in *To Err Is Human* can be readily transferred to a prosecutor's office. There is much that can be learned and expeditiously implemented from positive changes in the health care delivery system. Such changes include concrete suggestions about the strategic use of checklists that reduce reliance on human memory and make tasks simpler, error tracking audits, non-punitive processes for reporting and addressing error, close analysis of "near misses," team training, simulations of unexpected crises, use of electronic databases to make important data "visible" in "real time," and broader directions

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<sup>40</sup> CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 32, at 74.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> TASK FORCE ON WRONGFUL CONVICTIONS, *supra* note 30.

<sup>44</sup> *Id.* at 30.

<sup>45</sup> *Id.* at 31.

about providing leadership, creating a learning environment, and respecting human limits in system design.

Finally, to clarify how these ideas could be directly applied to the *Brady* disclosure problem it would be helpful to start with the Pareto Principle, a staple in the quality assurance canon. The Pareto Principle, a theory of quality control in business management, generally dictates that eighty percent of effects result from twenty percent of causes and, therefore, quality management resources should be focused on correcting this twenty percent to achieve the most efficient improvement in quality.<sup>46</sup> In a perfect world, one would want to do a comprehensive and in-depth empirical analysis within a jurisdiction to determine the top causes of *Brady* violations. Such an analysis would be based on more than a censored data set of reported cases; but right now, no such data set exists. Nonetheless, performing a “thought experiment” that seeks to identify the top three causes of *Brady* violations, based on logic, experience, intuition, and observations from the Working Groups at this Symposium, can help distill some practical remedies and organizing principles that would substantially reduce failures to disclose *Brady* material.

A. *The Top Three Causes of Brady Violations: A Thought Experiment*

In rank order of frequency, the top three causes of *Brady* violations are: (1) The *Brady* material was not in the prosecutor’s file because the police did not provide it in written form to the prosecutor working the case; (2) The *Brady* material was in the prosecution’s file, or known to the prosecutor from an oral communication, but the prosecution did not identify it as *Brady* material and, therefore, did not turn it over to the defense; and (3) The prosecutor did not turn over information to the defense that he or she knew or strongly suspected could be *Brady* material out of fear.

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<sup>46</sup> Joseph Juran, the “father” of quality control and Columbia University Business School Professor, adapted Vilfredo Pareto’s economic theories regarding the 80/20 percent divide between the poor and the rich in wealth distribution to quality control management. Juran applied this theory to the cost of poor quality, noting that “a few contributors to the cost are responsible for the bulk of the cost. These vital few contributors need to be identified so that quality improvement resources can be concentrated in those areas.” While application of this principle would require an empirical analysis of the top contributors to *Brady* violations in our thought experiment, this data is unavailable and will be based on general postulations. JURAN’S QUALITY CONTROL HANDBOOK 22.19 (J.M. Juran ed., 1988).

1. Cause One: *Brady* Material Was Not in the Prosecution's File Because the Police Did Not Provide It to the Prosecutor Working the Case

Reasons why police might not provide *Brady* material to the prosecutor working on the case include, but are by no means limited to:

- (a) The police know they possess *Brady* material, written or oral, but deliberately hide it from the prosecutor;
- (b) The prosecutor does not ask for information that the police know, or strongly suspect, is *Brady* material and the police do not voluntarily disclose it;
- (c) A police officer working on a case receives oral information she believes, or strongly suspects, is *Brady* material but does not write it down and forgets it;
- (d) The prosecutor working on a case receives oral information from a police officer or a witness (perhaps through an informal phone call) that she knows, or strongly suspects, is *Brady* material, but does not write it down and forgets it;
- (e) A prosecutor who once worked on a case receives oral or written information that she knows, or strongly suspects, to be *Brady* material but neglects to put it in the file or to notify the prosecutor who is now in charge of the case about the existence of the material;
- (f) An investigator, paralegal, or administrative staffer in the District Attorney's office fails to put written documents containing *Brady* material into the file, or fails to reduce to writing oral *Brady* information received from police officers, lay witnesses, a "hotline" tipster, or some other source;
- (g) The same situation as above but this time it involves an administrative staffer in the police department and the police department file that, in the ordinary course of business, is transferred to the prosecutor;
- (h) A police officer working on a case sends a set of police reports to the prosecutor that is the basis of the information for a grand jury presentation or indictment, but forgets to send the

prosecutor a supplemental police report that turns out to contain *Brady* material after the defendant is arraigned on the indictment;

(i) A police officer working on a parallel investigation *deliberately* decides not to disclose information (written or oral) that the officer knows or strongly suspects is *Brady* material either to the police officer or prosecutor who are working on the case;

(j) The same situation as above but this time it involves a separate investigation by another law enforcement agency or prosecutor's office, be it state or federal entities;

(k) A police officer working on a parallel investigation *negligently* forgets to turn over information (written or oral) that the officer knows or strongly suspects is *Brady* material either to the police officer or prosecutor who are working on the case;

(l) The same situation as above but this time it involves a separate investigation by another law enforcement agency or prosecutor's office, be it local, state or federal entities;

(m) The police do not reduce oral statements to writing that turn out to be *Brady* material, or eventually lead to *Brady* material, because the police do not believe that such oral statements were in any way exculpatory;

(n) The police orally report information to the prosecutor that turns out to be *Brady* material, or would lead to *Brady* material, but neither the prosecutor nor the police officer believe the information to be *Brady* material or reduces it to writing;

(o) The police convey information orally to the prosecutor that they both know or strongly suspect is *Brady* material but both *deliberately* decide not to reduce it to writing;

(p) The same situation as above but the oral communication of *Brady* material occurs during a witness interview where *both* the prosecutor and police officer are present;

(q) A witness interview situation where both the prosecutor and police are present and do not reduce oral information to writing that later turns out to be *Brady* material, but neither the

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prosecutor or police officer believed it to be *Brady* material at the time;

(r) The same situation as above but the police officer knows or strongly suspects the witness interview information is *Brady* material, the prosecutor does not realize it, and the police officer does not bring the exculpatory nature of the information to the prosecutor's attention or reduce it to writing;

(s) The same situation as above but this time the prosecutor knows or strongly suspects the witness interview information is *Brady* material but does not bring it to the police officer's attention and the witness statement is not reduced to writing;

(t) The police deliberately do not pursue obvious leads that would result in the procurement of *Brady* material;

(u) The police do not pursue obvious leads that would result in the procurement of exculpatory evidence because they are overworked, inadequately trained, incompetent, impaired by alcohol or drugs, or are lazy;

(v) The police, district attorney investigator, or anyone else working on the case for the prosecution do not pursue obvious leads that would result in the procurement of exculpatory evidence because the prosecutor deliberately did not tell them to do so or actually asked them not to do so;

(w) The same situation as above except that the prosecutor did not realize there were obvious leads that could lead to the procurement of exculpatory evidence because she was overworked, inadequately trained, incompetent, impaired by drugs or alcohol, or lazy;

(x) The same situations as above involving prosecutors who do not pursue, or direct anyone to pursue, obvious leads that would lead to the procurement of exculpatory evidence, either deliberately or out of negligence, but the reason the exculpatory evidence did not get into the file is that the prosecutor's supervisor did not review the file at all, reviewed it inadequately, lacked the training or competence to identify the obvious leads, was incompetent, lazy, or impaired;

(y) The police fail to report, orally or in writing, that certain investigative activities were undertaken yielding negative results inconsistent with the prosecution's theory of the case, such as a neighborhood canvass of witnesses near the crime scene area soon after the crime who did not see the accused, or unsuccessful searches of the defendant's home, car or person for contraband, a murder weapon, proceeds from a crime, or trace evidence;

(z) Underlying data from forensic science tests not provided to prosecutors by police crime laboratory personnel contain *Brady* material showing that the apparently incriminating conclusions in forensic reports are unreliable, exaggerated, fraudulent, or actually exculpatory;

(aa) Failure to provide videos from more than one "cruiser cam" when more than one squad car responds to a scene, and the undisclosed videos contain *Brady* material.

What is immediately apparent from the reasons proffered in this "thought experiment," and similar examples cited by the Working Groups at this Symposium, is that most of the described *Brady* violations could be avoided by "redesigning the process to respect human limits," to use a precept emphasized in *To Err Is Human*. A first step in this direction is as follows:

[D]ifferentiate between cognitive mechanisms used when people are engaging in well-known, oft repeated processes and their cognitive processes when problem solving. The former are handled rapidly, effortlessly, in parallel with other tasks, and with little direct attention. Errors may occur because of interruptions, fatigue, time pressure, anger, anxiety, fear or boredom. Errors of this sort are expectable, but conditions of work can make them less likely. For example, work activities should not rely on weak aspects of human cognition such as short-term memory. . . . Problem solving processes, by contrast, are slower, are done sequentially (rather than in parallel with other tasks), are perceived as more difficult, and require conscious attention. Error are due to misinterpretation of the problem that must be solved, lack of knowledge to bring to bear, and habits of thought that cause us to see what we expect to see. Attention to safe design includes simplification of processes so that users who are unfamiliar with them can understand quickly how to proceed, training that simulates problems, and practice in recovery from these problems.<sup>47</sup>

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<sup>47</sup> TO ERR IS HUMAN, *supra* note 1, at 162-63.

So here it is important to differentiate between issues that arise from over-reliance on memory for often repeated tasks performed by fatigued people who are struggling with high caseloads in workplaces filled with interruptions (failures by the police, prosecutors, or their staff to reduce oral information from phone calls to writing or to make sure follow-up reports are properly filed) and issues that arise from more difficult problem-solving investigative tasks that require a knowledge base and conscious attention (identifying and pursuing obvious leads, and closely questioning police officers or witnesses who may be reluctant to volunteer exculpatory information).

Progress could be made on the first set of issues by just coming up with some simple, easy to follow techniques at the workplaces of prosecutors and police to reduce the content of informally received but important phone calls to writing. The solutions will obviously be different depending on the size of the offices and the available technology. One surely hopes low tech, inexpensive fixes can be invented or discovered in a jurisdiction that is quietly and quite efficiently making sure such oral statements are reduced to writing and properly filed. On the other hand, drawing upon “user centered” design concepts laid out in *To Err Is Human*—“affordances,” “natural mappings,” and “forcing functions”—one can envision a comparatively high tech solution.<sup>48</sup>

An “affordance” is a characteristic of equipment that communicates how it is to be used, like a telephone handset that is uncomfortable to be held in any position but the correct one. “Natural mapping” refers to the relationship between a control and its movement, like arranging knobs to match the arrangement of burners on a stove. A “forcing function” is a constraint that makes it impossible for a user to take an inappropriate next step, like the impossibility of starting a car once it is in gear. Imagine, then, a work station where a telephone (perhaps a headset that allows the hands to be free) is adjacent to a computer that can immediately pop-up a form with one keystroke to memorialize a witness statement (either through dictation or typing) for any informally received phone call that turns out to be relevant to a cases and then force functions the creator of the form to store it in the proper case file before exiting to another task.

Targeted responses to address the second, more complex set of problem-solving investigative issues might include: simple, sequentially designed checklists that help prosecutors and police officers accomplish a task in “real time”; standardized “brainstorming” exercises that help generate investigative leads;<sup>49</sup> training simulations of discussions with

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<sup>48</sup> *Id.* at 163-64 (citing the “user centered” designs of Donald Norman in DONALD A. NORMAN, *THE DESIGN OF EVERYDAY THINGS* (1988)).

<sup>49</sup> A number of simple, replicable exercises for developing leads or theories have been used

recalcitrant police or lay witnesses; clear policies as to who records a witness interview when both a prosecutor and police are present, and under what circumstances, if any, should no record be made of the interview; and protocols for conducting “team” investigation sessions between police and prosecutors on important cases.

There are undoubtedly more and better fixes that could be devised, but the real point here is to orient policymakers and administrators in district attorney offices and police departments to think systematically about re-designing their systems “to respect human limits.”

2. Cause Two: Failure by Prosecutors to Identify *Brady* Material That Is in Their File and, as a Consequence, Not Disclose It

Reasons prosecutors may fail to identify *Brady* material that is in their file, and consequently not disclose it, include:

(a) Prosecutors could literally miss the evidence, such as a police or laboratory report buried among many documents, due to crushing caseloads and not having enough time to review their file as carefully as they would like;

(b) The *Brady* material could be missed because of laziness or incompetence;

(c) Prosecutors may be aware of evidence that, objectively viewed, is plainly *Brady* material but fail to recognize its significance due to cognitive biases and distortions—tunnel vision, selection bias, hindsight bias, confirmation bias, asymmetrical skepticism, cognitive dissonance, and mistaken beliefs about the superior ability of prosecutors or police to assess the veracity and credibility of suspects and witnesses;<sup>50</sup>

(d) A mistaken belief that there is no *Brady* obligation to disclose impeachment material. For example, in a bar disciplinary proceeding arising out of the wrongful capital

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by clinical law teachers for years. For example, lawyers are asked to list the top five reasons one might lose a case, and then develop rebuttal arguments to each; and then list the top five reasons one might win the case, and anticipate the opponent’s rebuttal arguments. Similarly, lawyers try to list the top five “certain facts” on each side of the case and for each fact ask the question, “If this fact is true, what else should be true?”

<sup>50</sup> See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1602-03 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); *Voices from the Field*, *supra* note 1, at 2061-69 (presentation by Dr. Maria Hartwig).

conviction of Alan Gell in North Carolina, there was testimony by a senior prosecutor in the state's Attorney General's office that he thought it was office policy not to turn over impeachment evidence<sup>51</sup> in direct contravention of the rule in *Giglio v. United States*.<sup>52</sup> The office had no written policy on the disclosure of impeachment evidence;<sup>53</sup>

(e) Confusion about the legal definition of *Brady* an office follows, or should follow;

(f) Even if an office has a clear and uniformly understood legal definition of what constitutes *Brady* material, the evidence in

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<sup>51</sup> Joseph Neff, *N.C. Prosecutors Stifled Evidence; Lawyer Now Retreats from Testimony*, NEWS & OBSERVER, Dec. 19, 2004, at A1.

<sup>52</sup> 405 U.S. 150, 154 (1972).

<sup>53</sup> Neff, *supra* note 51. Alan Gell was wrongly convicted of capital murder in 1995 largely due to prosecutors' failure to turn over exculpatory evidence of eight witness statements indicating the slaying occurred while Gell was in jail and a tape recording of the state's star witness saying she had to "make up a story" about the killing for the police. Melissa Buscher, *Prosecutors in Alan Gell Case May Face Disciplinary Action*, WRAL.COM, Sept. 24, 2004, <http://www.wral.com/news/local/story/113238/>. Gell's exoneration ultimately came about after the North Carolina legislature enacted a discovery law in 1996 that required the State in post-conviction capital cases to "make available to the capital defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant." Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 262-63 (2008) (citing N.C. GEN. STAT. § 15A-1415(f)). After this law was enacted, including Gell, ten death penalty cases in North Carolina have been reversed after trial because of prosecution failures to provide *Brady* information. *Id.* at 261 n.11 (citing *State v. Canady*, 559 S.E.2d 762, 767 (N.C. 2002) (ordering new trial because the State failed to disclose the name of the confidential informant who implicated persons other than client in the murders)); *State v. Chapman*, Nos. 92-CRS 18186, 93 CRS 11980, slip op. at 184-85 (N.C. Super. Ct. Nov. 6, 2007) (on file with author) (vacating murder convictions resulting in death penalty case based, inter alia, on violations of *Brady* and *Napue v. Illinois*, 360 U.S. 264 (1959)); *State v. Walker*, Nos. 92 CRS 20762, 70920, slip op. at 39-42 (N.C. Super. Ct. May 15, 2006); (on file with author) (reversing conviction and vacating death sentence for violations of *Brady* and *Napue*); *State v. Pinch*, Nos. 80 CRS 16429-30, slip op. at 53-62 (N.C. Super. Ct. Mar. 30, 2005) (on file with author) (reversing convictions and vacating death sentences for violation of *Brady* and other errors); *State v. Hamilton*, No. 95 CRS 1670, slip op. at 14-16 (N.C. Super. Ct. Apr. 22, 2003) (on file with author) (ordering new trial because the State failed to disclose evidence that sole witness against client testified in hopes of a deal from the prosecution); *State v. Bishop*, Nos. 93 CRS 20410-23, slip op. at 19 (N.C. Super. Ct. Jan. 10, 2000) (on file with author) (ordering new trial for due process violation where the State failed to disclose evidence that placed client elsewhere at the time of the crime and contradicted key informant's testimony); *State v. Munsey*, No. 93 CRS 4078, slip op. at 23-25 (N.C. Super. Ct. May 14, 1999) (on file with author) (ordering new trial for due process violation where the State failed to disclose evidence that key witness against client had fabricated his story); *State v. Womble*, Nos. 93 CRS 1992-93, slip op. at 1 (N.C. Super. Ct. July 22, 1998) (on file with author) (ordering new trial for due process violation where the State failed to disclose evidence concerning victim's time of death inconsistent with evidence presented at trial).

question may just be ambiguous, and reasonable people may disagree as to whether it should be disclosed.

Finally, it is easy to see how a situation that combines three of these factors—confusion about the legal definition of *Brady* the office is supposed to follow, evidence that is ambiguous, and cognitive bias—would be particularly dangerous. By their very nature, *Brady* disclosure decisions require prosecutors to make anticipatory evaluations of how evidence will be used and evaluated at a trial that has not yet occurred, involving witnesses who have not yet testified, and a defense case that has not yet been presented. These difficulties are exacerbated when prosecutors use the most conservative *Brady* definition of what a prosecutor's office must disclose pre-trial—i.e., only “material evidence” that would create a “‘reasonable probability’ of a different result,” where “‘reasonable probability of a different result’ does not mean “whether the defendant would more likely than not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”<sup>54</sup> Professor Alafair Burke, a former prosecutor, explains how cognitive biases can distort this process:

*Brady* requires a prosecutor who is determining whether to disclose a piece of evidence to the defense to speculate first about how the remaining evidence will come together against the defendant at trial, and then about whether a reasonable probability exists that the piece of evidence at issue would affect the result of the trial. During the first step, a risk exists that prosecutors will engage in biased recall, retrieving from memory only those facts that tend to confirm the hypothesis of guilt. Moreover, because of selective information processing, the prosecutor will accept at face value the evidence she views as inculpatory, without subjecting it to the scrutiny that a defense attorney would encourage jurors to apply.

Cognitive bias would also appear to taint the second speculative step of the *Brady* analysis, requiring the prosecutor to determine the value of the potentially exculpatory evidence in the context of the entire record. Because of selective information processing, the prosecutor will look for weaknesses in evidence contradicting her existing belief in the defendant's guilt. In short, 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.<sup>55</sup>

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<sup>54</sup> *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

<sup>55</sup> Burke, *supra* note 50, at 1611-12 (citations omitted).

What causes prosecutors not to disclose *Brady* material that is in their files presents complicated psychological and institutional issues that cannot be completely corrected by the targeted use of a good checklist. Strong training, skilled supervision, clear office-wide definitions, and “office culture” are also critical safeguards.

3. Cause Three: Prosecutors Sometimes Do Not Turn Over Information to the Defense That He or She Knew or Strongly Suspected Could Be *Brady* Material Out of Fear

The reasons a prosecutor might be afraid of disclosing information to the defense that he or she knew or strongly suspected was *Brady* material include:

- (a) Fear that late disclosure of *Brady* material would result in reprimand or a contempt citation from a judge;
- (b) Fear that late disclosure of *Brady* material would result in reprimand or punishment by supervisors in the District Attorney’s office;
- (c) Fear that late disclosure of *Brady* material received from a police officer might get the police officer in trouble;
- (d) Fear that late disclosure of *Brady* material would embarrass the prosecutor personally or severely undermine the prosecutor’s reputation, honesty, and good character;
- (e) Fear of losing the case—the internal and subjective insecurity, anxiety or fright that people experience when they feel inadequate or under attack;
- (f) Fear that the defense lawyer or defendant may use *Brady* material to tailor testimony or suborn perjury;
- (g) Fear that a defendant whom the prosecutor strongly believes is guilty will get away with a heinous crime;
- (h) Fear that a defendant the prosecutor believes is a danger to society, and/or guilty of other heinous crimes in the past, will go free, even though the prosecutor does not have a strong belief the defendant is guilty of the crime for which he is being tried;

- (i) Fear of losing a case to a defense lawyer as a matter of competitive pride; or
- (j) Fear that losing a case would prevent professional advancement or result in demotion.

Fear is a powerful driver that can subvert almost any system or set of rules, and fear of losing cases can powerfully subvert the better natures of both prosecutors and defense lawyers engaged in an adversary system. Of course, it is enormously important to hire people of good character whose personal codes of ethics would militate against breaking rules out of fear. However, as the Working Group on Systems and Culture concluded, to counteract a “winning is not everything, it’s the only thing” ethos, it is essential for the chief prosecutor (especially an elected prosecutor) to establish an environment where winning trials is not the most important measure of success, for the individual or the office as a whole.<sup>56</sup> Having a reputation in the courthouse as an honorable advocate (a “straight shooter”), someone who aggressively pursues and turns over *Brady* material even if that means “falling on her own sword,” should be prominently promoted and rewarded. Moreover, it must be emphasized that having, and earning, such a reputation for integrity in policing circles helps individual prosecutors, and the office as a whole, get more information and make better cases. It is not so much a matter of police officers worrying about being caught hiding *Brady* material, but of police officers following every lead, even potentially exculpatory leads, because they know that ethical prosecutors who look for potential *Brady* material are thorough and that prepared prosecutors demand and reward first rate work. As the Working Group on Prosecutorial Training and Supervision observed, by “reframing” the *Brady* disclosure issue as one of “memorializing and sharing information more fully, prosecutors’ offices might reduce cultural resistance to building better information systems.”<sup>57</sup>

Fear of making late disclosures of *Brady* material can be, by comparison, addressed more directly, applying key concepts health care professionals are using to create a culture of safety. Starting with clear signals from the top, everyone in the organization must believe that disclosure of *Brady* material is really a priority and that late disclosure of *Brady* material will really be a non-punitive event and an opportunity

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<sup>56</sup> See *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1988-89 (2010) [hereinafter *Report of the Working Groups*] (“Holding up ethical behavior as a model, even when it undercuts prosecutors’ self-interest in winning convictions, would reinforce the message that prosecutors should not win at all costs. Likewise, prosecutors’ offices should not only promote prosecutors based in part on their ethics, but also tell those promoted and others why they are being promoted.”).

<sup>57</sup> *Id.* at 1986.

to fix the system in a learning environment, not an occasion to fix individual blame. Indeed, a late disclosure of *Brady* material represents a “near miss.” Near misses have proven to be the very best kind of errors to study in high risk enterprises because the avoidance of disastrous consequences is conducive to creating a non-punitive, protected space for candid review of what went wrong. Near misses also tend to provide good information about the problems which are the most difficult to detect and the detection systems that most need improvement.<sup>58</sup>

### III. ORGANIZING PRINCIPLES AND PRACTICAL REMEDIES

Having made a best effort to ascertain the top three causes of *Brady* violations, as well as some general sense of how those problems could be addressed, it is time to make some concrete suggestions about how Professional Integrity and Conviction Integrity Programs could be organized as well as practical remedies they could employ. The specific focus here is the reduction and prevention of *Brady* violations, but the same principles and practical remedies could plainly be utilized to address other professional errors, omissions, or acts of misconduct.

#### A. *Professional Integrity Programs*

The term Professional Integrity Program refers to an office’s quality assurance and compliance program. In the organizational chart reproduced in Part IV *infra*, which was designed for a large prosecutor’s office, the Professional Integrity Program is being administered primarily by a Professional Integrity Unit. In smaller offices, or using a different model in a larger office, one might well choose to administer a quality assurance and compliance program through a different organizational structure. The discussion that follows, however, is premised on the idea that there are certain principles and practical tools for such programs that have general application.

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<sup>58</sup> *Id.* at 1997-99; TO ERR IS HUMAN, *supra* note 1, at 87 (“[Reporting] near misses is particularly useful for identifying types of errors that occur too infrequently for an individual health care organization to readily detect based on their own data, and patterns of errors that point to systemic issues affecting all health care organizations.”).

### 1. Checklists and Disclosure Conferences

Two key checklists and disclosure conferences should be part of a Professional Integrity Program: (1) A final pre-trial checklist and disclosure conference, similar to the one required in Massachusetts Federal Court<sup>59</sup> and recommended by the ABA, that occurs approximately a month before trial;<sup>60</sup> and (2) A post-arraignment checklist and disclosure conference that occurs soon after indictment when statutory discovery obligations start running.

As Dr. Atul Gawande's recent book *The Checklist Manifesto* expounds,<sup>61</sup> the medical community no longer doubts the surprisingly powerful utility of a properly designed and implemented checklist in the delivery of medical care. The most famous example involves Dr. Peter Pronovost, a critical care specialist, who, in 2001, developed a checklist system to prevent intravenous line infections, a major cause of preventable death.<sup>62</sup> The checklist was very simple, outlining the steps doctors must take to avoid infections when putting in a line.<sup>63</sup> Pronovost implemented the system at Johns Hopkins Hospital and found that after a year the ten-day line infection rate went from eleven to zero percent and after another fifteen months only two line infections occurred.<sup>64</sup> It is estimated that the checklist prevented forty-three infections and eight deaths, saving two million dollars in costs.<sup>65</sup> Hospitals in the United States and across the world have adopted a form of this checklist and achieved similarly dramatic results.

Like the Pronovost checklist, the kind of checklists that have proven most effective in reducing errors are those that: (1) reduce a multi-step procedure to a series of concrete, simple, mandatory tasks to be completed; (2) must be completed as the tasks are performed to force real-time rather than post-hoc confirmation that the task has been addressed and completed; and (3) can be easily audited to track

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<sup>59</sup> D. MASS. CT. R. 116.2(B); 116.5(C).

<sup>60</sup> See ABA House of Delegates, DAILY J., Rpt. 102D (Feb. 8-9, 2010), available at [http://www.abanet.org/leadership/2010/midyear/pdfs/Daily\\_JournalFINAL.pdf](http://www.abanet.org/leadership/2010/midyear/pdfs/Daily_JournalFINAL.pdf). The ABA adopted a resolution that

[U]rges federal, state, local and territorial courts to adopt [] a procedure whereby a criminal trial court shall conduct at a reasonable time prior to a criminal trial, involving felony or serious misdemeanor charges, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations.

*Id.*

<sup>61</sup> ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009).

<sup>62</sup> Atul Gawande, *The Checklist*, *THE NEW YORKER*, Dec. 10, 2007, at 91.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

uncompleted tasks or errors.<sup>66</sup> In other words, the best kind of checklists are those that help people do their jobs more efficiently in real time and facilitate effective supervision and review after the job is done.

A good pre-trial checklist would certainly meet these criteria with respect to *Brady* disclosures. A month before trial, a prosecutor going down a good checklist could itemize and certify to the court and defense counsel that she has in fact disclosed enumerated documents or items of evidence. There could literally be a list with a “check” in a box, a date of disclosure, and initials from the person who received it as well as a list indicating that the prosecutor systematically checked for *Brady* material with sources that experience with certain kinds of cases teaches would be the best places to look. In addition to standard information needed in all cases (criminal histories of witnesses, promises or benefits, prior inconsistent statements), the lists could be tailored by case type such as narcotics (sales, possessions, conspiracies), homicides, burglaries, sexual assaults, pornography, or commercial frauds. Each of these case types requires review of specialized data and, perhaps most importantly, emanates from specialized units of a police department, which have unique ways of doing business and must be queried for different kinds of documents and information in distinctive ways.

As Lou Reiter has pointed out, coordination with local and state law enforcement entities (some jurisdictions routinely deal with county police, city police, state police and multi-jurisdictional task forces) for the final checklist review is critical. He points out that many police information management systems are in “terrible shape,” but nonetheless stresses that police departments are also paramilitary organizations who respond well when given a clear set of rules and a chain of command, and that a final pre-trial checklist would provide a good way of documenting what is turned over and what is missing. This also means, as the Working Group on Disclosure suggests, that there should be a supervisor in a position of authority in the relevant police agency—a “point person”—who is responsible for making sure that police line personnel provide the information required by the final, pre-trial checklist in a timely fashion.<sup>67</sup> If line personnel fail to do so, that will reflect badly on the supervisor, who will in turn pressure the line personnel to meet their responsibilities. In the prosecutor’s office, depending on the size of the jurisdiction, there should be a supervisor who works with the police supervisor in charge of discovery to make

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<sup>66</sup> See *Report of the Working Groups*, *supra* note 56, at 1979, 2007-10; *Voices from the Field*, *supra* note 1, at 2038 (presentation by Dr. Gordon Schiff).

<sup>67</sup> See *Report of the Working Groups*, *supra* note 56, 1972-84 (Working Group on the Disclosure Process, reported by Keith A. Findley).

sure the work is coordinated and there are clear lines of authority in both institutions. This should be a transparent process so that judges will know exactly who has ultimate responsibility to make sure all the information on the final pre-trial checklist is produced. Judges, as everyone in the system knows, have busy calendars and the power to hold people in contempt. Their phone calls and requests tend to generate more prompt responses than those of the line prosecutor, a point of leverage the line prosecutor can use to get timely compliance with checklist requirements.

Similar benefits from a collaborative “team” effort to go through a final pre-trial *Brady* disclosure checklist comes from the active involvement of defense counsel. At this point, the defense should certainly have a well developed idea of its theory and will be in a position to ask with particularity for information that is or will lead to *Brady* material. Indeed, knowing the defense theory and obtaining reverse discovery (it wouldn’t hurt if the defense had its own final pre-trial checklist), will help the prosecutor and police realize that information they previously didn’t think was *Brady* material is, in fact, *Brady* material, given the defense theory of the case.

Several participants in the Working Group on Internal Regulation of Discovery Practices were reported as having:

[E]xpressed the sense that while doctors, nurses, pharmacists, and other medical professionals all have a shared goal of achieving patient wellness and avoiding patient harm, police, prosecutors, defense attorneys, and even judges may have divergent motivations—even if all can agree that, for example, a wrongful arrest or conviction is an event to be unequivocally avoided.<sup>68</sup>

While it would be naïve to overlook the contentious and competitive forces that underlie every day life in courthouses, it is worth observing that the unifying goal here is not avoidance of a wrongful conviction but making sure there is a fair trial where everyone is playing by the rules, a goal that is more widely understood and embraced by prosecutors, police, judges, and the defense than many might expect. Nor should one underestimate how difficult it has been to overcome the “divergent motivations” and hierarchies that underlie everyday life in hospitals. Dr. Provonost has recently commented that when he first tried to implement his checklist to prevent intravenous line infections,

You would have thought I started World War III! . . . As at many hospitals, we had dysfunctional teamwork because of an exceedingly hierarchical culture. When confrontations occurred, the problem was rarely framed in terms of what was best for the patient. It was: “I’m right. I’m more senior than you. Don’t tell me what to do.”<sup>69</sup>

<sup>68</sup> *Report of the Working Groups*, *supra* note 56, at 2019.

<sup>69</sup> Claudia Dreifus, *A Conversation with Dr. Peter J. Pronovost*, N.Y. TIMES, Mar. 9, 2010, at

Before describing the post-indictment checklist and conference, it is worth emphasizing the primacy of the pre-trial checklist and conference in terms of identifying and disclosing *Brady* material. Given the burdensome caseloads of prosecutors, police, defense attorneys and judges, and the natural proclivity under those circumstances to triage work according to deadlines, it is likely that most previously unknown, unrecognized, and unidentified *Brady* material is going to emerge during last minute pre-trial preparation when the prosecutor starts reviewing all documents in the file intensively, interviewing or re-interviewing witnesses, anticipating the defense theory, and tying up loose ends with additional investigation. For this reason alone, the final pre-trial conference checklist is the best place to begin systematic searches for undisclosed *Brady* material.

Nevertheless, a well-designed post-indictment checklist and discovery conference can ameliorate *Brady* disclosure problems and improve the quality of practice. In almost every jurisdiction, for both felonies and misdemeanors, there is a post-indictment or post-charging court appearance of some kind where the prosecution is supposed to start disclosing evidence required to be produced under state discovery laws as well as *Brady* material. Even in offices that have an “open file” discovery policy, a good “real time” checklist can significantly assist in this process by not only laying out the information that needs to be gathered, but also by providing an accurate running record of what has been done, what still needs to be done, precisely what was received by the defense, and when it was received. Prosecutors in the Working Group on the Disclosure Process recounted the value of having an initial meeting with the police, with a checklist, to start the process and checking off “homework” assignments for all involved and their support staffs with deadlines and ticklers for completion.<sup>70</sup> Of course, making the post-indictment checklist and the pre-trial checklist consistent with each other not only promotes efficiency but enables the prosecutors’ office to implement an effective error-tracking and data-gathering system.

## 2. Error Tracking, Data Gathering, and “Near Misses”

In *To Err Is Human*, it is stressed that “[i]n order to learn from error, health care organizations will have to establish and maintain environments and systems for analyzing errors and accidents so that the

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<sup>70</sup> *Report of the Working Groups*, *supra* note 56, at 1974.

re-design of processes is informed rather than an act of tampering.”<sup>71</sup> The same holds true for the criminal justice system.

Nonetheless, several members of the Internal Regulation Working Group expressed concern that “while the medical field has collected a significant amount of data on incidents of errors in patient care, the criminal justice system has little in the way of analogous empirical knowledge of the prevalence of discovery errors,” and accordingly felt that without such empirical data they could not “fashion evidence-based rules and practices—or for that matter, agree on whether there is any appreciable ‘problem’ of non-disclosure that might need to be addressed.”<sup>72</sup> The problem, of course, is a prosecutor’s office cannot get empirical knowledge about incidence of errors unless it attempts to track them, much less instructive information on how to best prevent and correct them. Fortunately, the tremendous value of instituting a pre-trial and post-indictment checklist system is that one can gather data on *Brady* disclosure errors while investing at the same time in a system that will almost certainly make prosecutors better prepared to win cases at trial and induce pleas before trial.

Most significantly, the errors that should be most carefully tracked, described, and evaluated using the pre-trial checklist system are the near misses, the late disclosures of *Brady* material that are made *after* the pre-trial disclosure conference. Systematic evaluation of these near misses would help pinpoint whether late-discovered *Brady* material repeatedly came in certain kinds of cases, from particular units of the police department or the prosecutor’s office, or on the watch of the same supervisors. Such tracking would also provide data on the types of errors—late witness interviews, prior oral statements not reduced to writing, misunderstandings of office-wide *Brady* definitions, failure to recognize the evidence was *Brady* material because of some identifiable cognitive bias, or even consistent reluctance to disclose in classes of cases which involve certain violent offenses, violent defendants (gang members), or even defense lawyers distrusted or disliked by some in the office. Again, one great advantage of tracking near misses is that it can be done within “protected space” where the individuals involved are more willing to be candid and self-critical because where these are generally “no harm, no foul” situations where the results of an “error tracking” investigation can be kept confidential.<sup>73</sup> Moreover, when reporting these “near miss” late *Brady* disclosures, it is important to do

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<sup>71</sup> TO ERR IS HUMAN, *supra* note 1, at 181.

<sup>72</sup> *Report of the Working Groups*, *supra* note 56, at 2019.

<sup>73</sup> It is easier to create and defend “peer review privileges” when analyzing “near miss” situations which will ordinarily not involve legal or ethical problems that require disclosure. *But see* TO ERR IS HUMAN, *supra* note 1, at 119-21 (noting that some states provide statutory peer review privileges for the medical industry to protect from discovery various records and deliberations of peer review committees).

so with sufficiently rich detail to create a “story” about what occurred, a story whose meaning is clear and can be a basis for recommending improvements.<sup>74</sup>

It is also encouraging to note that the Working Group on Internal Regulation pointed toward existing case-tracking, calendaring, document, and docket managing software that could be used to set up checklists, assign deadlines, and require real-time confirmation of completed tasks.<sup>75</sup> These systems can also help keep track of parallel investigations and promises or benefits made to cooperating witnesses (classic *Giglio* material) by different divisions of a prosecutor’s office and different law enforcement entities.

### 3. Clear Office-Wide Definitions of What Is or Is Not *Brady* Material

In certain cases where the exculpatory value of evidence is ambiguous there will always be room for reasonable people to disagree about whether the material should be disclosed. But vigorous efforts must be made to establish office-wide definitions about what constitutes *Brady* material to minimize disagreements and confusion about the legal standard that should be applied. Clear definitions, examples applying them, and simulation exercises should be a major focus in the training of new lawyers and continuing education of veteran personnel. The definitions and examples should be reduced to writing and even available on an office website.

The need for clarity about the law arises from the fact, laid out well by the Working Group on Prosecutorial Disclosure Obligations and Practices, that disclosure obligations vary from jurisdiction to jurisdiction—state constitutional case law may go beyond the federal constitutional minimum, discovery requirements derived from state statutes and/or local rules of criminal procedure may supplement or overlap with constitutional obligations, and court rules, including judicially adopted rules of professional responsibility or ethics rules and opinions issued by bar associations, are sometimes conflicting sources of authority that must be considered.<sup>76</sup> In short, while there are a number of legally permissible choices available to an office on what its disclosure policies could be, it is essential that the chief district attorney and the management team actually *make* those choices (admittedly a

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<sup>74</sup> *Id.* at 181.

<sup>75</sup> *Report of the Working Groups*, *supra* note 56, at 2011-29 (Working Group on Internal Regulation, reported by Jennifer E. Laurin).

<sup>76</sup> *Id.* at 1962-63.

matter of philosophy), communicate those choices with precision, and try to enforce them uniformly.

The underlying problem here is that the only guidance offered by federal constitutional case law is that evidence favorable to the accused must be disclosed if an appellate court retroactively concludes it was “material,”<sup>77</sup> thereby forcing prosecutors to make disclosure decisions based on prospective judgments about the impact undisclosed evidence *might* have at a trial that has not yet taken place without the benefit of hindsight.<sup>78</sup> No matter how restrictive a chief prosecutor wants to be about *Brady* disclosures as a policy matter, it is simply not enough to just use “materiality” as the office-wide *Brady* disclosure standard. Allowing line prosecutors, especially those who are young and inexperienced, to be making disclosure decisions based on their judgments about “materiality” is a recipe for disaster. Instead, it makes much more sense to explicitly abandon “materiality” alone as the office-wide standard and focus decision-making on assessing the character of evidence at issue—i.e., its exculpatory or impeaching nature.<sup>79</sup>

The ABA rejects a materiality standard. ABA Model Rule of Professional Conduct 3.8(d) provides that a prosecutor is obligated to make timely disclosure to the defense of all evidence or information known to him “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,” unless relieved of this duty by protective order of the tribunal.<sup>80</sup> The ABA has stressed that this rule does not implicitly include a materiality limitation in recognition that the purpose of disclosure is to serve justice, not to ensure winning.<sup>81</sup> The U.S. Department of Justice also employs a less restrictive standard, officially adopting a policy of disclosing information beyond that which is “material” to guilt as articulated in *Kyles*.<sup>82</sup> The American College of Trial Lawyers has proposed an amendment to Federal Rule of Criminal Procedure 16 that omits a materiality requirement.<sup>83</sup> The American College recommended a definition of “information favorable to the defendant,” arguing that a materiality standard is only appropriate in the context of appellate review as determinations of materiality are best

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<sup>77</sup> See, e.g., *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 432-35 (1995); *United States v. Bagley*, 473 U.S. 667, 674-75 (1985).

<sup>78</sup> *Report of the Working Groups*, *supra* note 56, at 2017.

<sup>79</sup> *Id.*

<sup>80</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008).

<sup>81</sup> See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

<sup>82</sup> U.S. ATTORNEYS' MANUAL § 9.5.001(C) (U.S. Dep't of Justice 2010) (citing *Kyles v. Whitley*, 514 U.S. 419, 439 (1995)).

<sup>83</sup> Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 114 (2004).

made in light of all the evidence addressed at trial,<sup>84</sup> and a pre-trial determination of materiality is simply not feasible.<sup>85</sup> Federal District Court Judge Emmet Sullivan recently urged expansion of Federal Rule of Criminal Procedure 16 to require disclosure of any exculpatory evidence.<sup>86</sup> This recommendation came in the wake of the infamous trial of Senator Ted Stevens over which Judge Sullivan presided, where federal prosecutors were found to have engaged in serious and repeated *Brady* violations.<sup>87</sup> Judge Sullivan reasoned that such an amendment to Rule 16 would reduce discovery disputes, provide clear guidance to prosecutors, and ensure timely disclosure to the defense.<sup>88</sup>

The Working Group on Prosecutorial Disclosure Obligations and Practices, after much serious debate about fundamental issues, reached unanimity on the general principle that “prosecutors should disclose all evidence or information that they reasonably believe will be helpful to the defense or could lead to admissible evidence,” as well as a policy on the timing of disclosure and the use of protective orders.<sup>89</sup> Whatever one’s views on the substance of the general principle or policies promulgated by the Working Group, the document itself stands as a good template for what a prosecutor’s office might produce to lay out office-wide definitions, assuming the addition of specific discussion of local rules and examples drawn from hard cases.

#### 4. Audits in Reversal and Harmless Error Cases

A Professional Integrity Program must include a system for auditing cases where there has been a reversal on appeal for *Brady* violations or other acts of misconduct (the most common forms of misconduct are use of false evidence, improper examination of witnesses, and improper argument).<sup>90</sup> These are not near misses but

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<sup>84</sup> *Id.*

<sup>85</sup> *See id.*

<sup>86</sup> Letter from Emmet G. Sullivan, U.S. District Judge, to Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure 1 (Apr. 28, 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR%20Suggestions%202009/09-CR-A-Suggestion-Sullivan.pdf>.

<sup>87</sup> Joe Palazzolo, *Justice Department Opposes Expanded Brady Rule*, MAIN JUSTICE, Oct. 15, 2009, available at <http://www.mainjustice.com/2009/10/15/justice-department-opposes-expanded-Brady-rule/>.

<sup>88</sup> Letter from Emmet G. Sullivan, *supra* note 86, at 3. Defense counsel for former Senator Stevens, Robert Cary, agrees that “[m]any prosecutor—even those acting in good faith—may be unlikely in the heat of battle to turn over information that they know will hurt their case so long as they can argue ‘materiality’ to justify their decision.” Shana-Tara Regon, *Bringing an Unlawful Verdict to Light: Discussing Prosecutorial Misconduct with Defense Attorneys in United States v. Ted Stevens*, CHAMPION, Jan./Feb. 2010, at 16.

<sup>89</sup> *Report of the Working Groups*, *supra* note 56, at 1966.

<sup>90</sup> *See* CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT, *supra* note 32.

matters where actual harm was done. The audit must start with a “root cause” analysis to determine whether the violation occurred because of “common variation” or system error as opposed to “special variation” or individual errors. Was the *Brady* material in the prosecution’s file not identified? Why wasn’t it identified—a cognitive bias problem, a definition problem, or an act of misconduct? Was the *Brady* material not in the file? Were the police at fault, the prosecutor, or crime laboratory personnel? Was it a witness statement that was not reduced to writing? And most importantly, *why didn’t the supervisors identify and prevent the Brady violation?*

In addition to this root cause analysis of the particular cases, there should be at least some spot auditing of other cases handled by the line prosecutor and the supervisor. If more problems are discovered in the spot audit, additional cases will have to be reviewed.

Harmless error cases should also be reviewed. Sometimes appellate courts will explicitly find that evidence was exculpatory and should have been disclosed but the error was harmless, and sometimes they will not bother to address allegations on appeal or in post-conviction itemizing evidence that the defense claims should have been disclosed. In either situation, appellate and post-conviction units should track these allegations and report on them. If it turns out that in harmless error cases, prosecutors failed to disclose evidence that office policy would have required them to disclose, then a root cause analysis should be done as well as spot audits of the line prosecutor and supervisor.

Again, like near misses, the harmless error cases are good opportunities to create a non-punitive learning environment in the office. All involved are more likely to be candid and receptive about the disclosure issue because the case was affirmed on appeal. Reversals are more serious matters and in some jurisdictions, like California, require referral for bar disciplinary review. But even in cases that must be referred for disciplinary review, it is still critical for the office to undertake its own investigation for quality assurance purposes.

## 5. Training

The importance of a training program for new lawyers and continuing education for experienced staff to a Professional Integrity Program is self-evident. It is critical to establishing a culture of integrity within an office and, as a practical matter, the success of all the elements of a Professional Integrity Program that have been discussed so far—pre-trial and post-indictment checklists and disclosure conferences, error tracking and data gathering, analysis of near misses,

office-wide definitions of *Brady*, audits of harmless error cases and reversals. None of these initiatives can work unless everyone in the office understands why they are being undertaken, the dangers posed by cognitive biases, and, consequently, buys into the effort. The Working Group on Prosecutorial Training and Supervision offered an excellent array of suggestions on how to do training that are perfectly complementary to the Professional Integrity Program outlined here and need not be repeated.<sup>91</sup> It is worth noting, however, that their suggestions about “team training” with police, defense lawyers, and judges correspond to recommendations made in *To Err Is Human* for medical professionals<sup>92</sup> as well as simulation exercises dealing with crisis situations.<sup>93</sup> In this connection, designing simulation exercises that plan for system failures—late *Brady* disclosure situations—are very important. These would include: dealing with new, inconsistent witness statements; following up on leads; investigating and confronting police officers who may not be telling the truth; managing disagreements with supervisors about what should be disclosed; and devising ways to inform the court and defense counsel.

### B. Conviction Integrity Programs

A Conviction Integrity Program refers to a set of procedures a prosecutor’s office adopts to review plausible claims of factual innocence that are brought to their attention.

#### 1. ABA Model Rule of Professional Conduct 3.8 and the Prosecutorial Duty to Correct Wrongful Convictions

The ABA has adopted Model Rule of Professional Conduct 3.8, which essentially requires prosecutors to disclose and investigate new exculpatory evidence when it is material and credible, and requires them to try to overturn or otherwise rectify convictions when they know of “clear and convincing” evidence that the defendant was in fact innocent.<sup>94</sup> This rule serves as a good organizational principle for a

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<sup>91</sup> *Report of the Working Groups*, *supra* note 56, at 1984-95.

<sup>92</sup> *TO ERR IS HUMAN*, *supra* note 1, at 173.

<sup>93</sup> *Id.* at 176-77.

<sup>94</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8 (2008). The full text of the rules state:

(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,

prosecutor's office to satisfy a prosecutor's duty to correct wrongful convictions. The ABA notes that prosecutors have a special responsibility as "minister[s] of justice," which includes a responsibility to take "special precautions . . . to prevent and to *rectify* the conviction of innocent persons."<sup>95</sup> While this rule sets a high threshold of "new, credible and material evidence creating a reasonable likelihood that the convicted individual is innocent," it does not imply that evidence that does not reach this standard should be ignored.<sup>96</sup> The rule contemplates that prosecutors would give new exculpatory evidence some level of scrutiny in order to determine whether it is significant enough to require disclosure.

The U.S. Supreme Court first explicated a prosecutor's duty to correct wrongful convictions in *Imbler v. Pachtman*. The Court expounded that absolute immunity was, in part, justified by the prosecutorial duty to correct for wrongful conviction by following up on evidence suggesting innocence post-conviction.<sup>97</sup> The Court noted that:

The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial, this duty is enforced by the requirements of due process, *but, after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.*<sup>98</sup>

Clearly, the Court intended such responsibility to be an internal function of the prosecutor's office. And, based on greater prosecutorial access to evidence and witnesses, the prosecutor's office would be the proper place to investigate and take steps to correct wrongful convictions.

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(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>95</sup> *Id.* cmt. 1 (emphasis added).

<sup>96</sup> See Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. OF CRIM. L. 467, 511 (2009) (citing MODEL RULES OF PROF'L CONDUCT R. 3.8(g)).

<sup>97</sup> *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976).

<sup>98</sup> *Id.* (emphasis added) (citing MODEL CODE OF PROF'L RESPONSIBILITY § EC 7-13 (1969)); see also *id.* at 426-27 (citing ABA, American Bar Association Project on Standards for Criminal Justice, Prosecution and Defense Function §§ 3.9(c), 3.11 (Approved Draft 1971)).

## 2. Best Practices for Conviction Integrity Units

The most prominent and successful model for a Conviction Integrity Unit is the one set up by Dallas District Attorney Craig Watkins and administered by Terri Moore, a participant in this Symposium, and Mike Ware.<sup>99</sup> There are some “best practices” that have made this unit work well. First, if the Innocence Project or other entity presents a plausible claim of innocence,<sup>100</sup> the prosecution’s entire file, including work product, is made available. Secondly, the Unit is willing to investigate leads proposed by the party claiming innocence which the Unit is uniquely situated to pursue.<sup>101</sup> Third, the Unit is willing to allow the Innocence Project or lawyers for other claimants to investigate leads they are uniquely situated to pursue. Fourth, the Unit has a close working relationship with the public defenders’ office that permits a free exchange of information and joint investigations.<sup>102</sup> Fifth, the leader of the unit, Mike Ware, was for many

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<sup>99</sup> See Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas*, WASH. POST, Mar. 5, 2007, at A4. The Dallas District Attorney’s Office has been involved in the exoneration of twenty individuals on the basis of DNA evidence: Charles Chatman, Jerry Lee Evans, Donald Wayne Good, Wiley Fountain, Larry Fuller, James Curtis Giles, Andrew Gossett, Eugene Henton, Entre Karage, Johnnie Lindsey, Thomas McGowan (in two cases arising out of the same incident), Billy Wayne Miller, Steven Phillips (in two cases for which he went to trial and nine pleas), David Pope, Billy James Smith, Keith Turner, James Waller, Patrick Waller (in two cases arising out of the same incident), Gregory Wallis, and James Woodard. The Dallas District Attorney’s Office has been involved in the exoneration of two individuals on the basis of non-DNA evidence, Claude Simmons and Christopher Scott. E-mail from Michael Logan Ware, Special Fields Bureau Chief, Dallas County District Attorney’s Office, to the Innocence Project, Inc. (Mar. 17, 2010, 14:19 ET) (on file with author).

<sup>100</sup> In Texas, several organizations and individuals have worked to exonerate the wrongfully convicted, which include Michelle Moore of the Public Defender’s office, the Innocence Project of Texas, the Texas Center on Actual Innocence, Professor John Stickles, the Texas Innocence Network, and the Wesleyan Innocence Project.

<sup>101</sup> One excellent example is the case of Steven Phillips. Phillips was convicted of a sexual assault with an unusual modus operandi—the perpetrator would break into spas or gyms, using a German luger, demand that women perform unusual sexual acts, and then flee in a red Cadillac. After going to trial and getting convicted for one of these transactions, Phillips pled guilty to four others in order to avoid a lifetime in prison. The prior Dallas District Attorney opposed DNA testing in the case where Phillips was convicted after trial maintaining an exculpatory result would not be a basis for vacating the guilty plea convictions. After the Conviction Integrity Unit consented to DNA testing in the trial case, which did exonerate Phillips, Jim Hammond, the Unit’s police investigator, pursued a lead generated from internet research by Matt Kelley, an Innocence Project staff member, that pointed to similar types of crimes being committed in Kansas and California by a convicted sex offender. When Hammond interviewed the ex-wife of that sex offender, he was able to establish this individual used the luger and red Cadillac in the cases where Phillips pled guilty. See Jeff Carlton, *Judge Tosses Sex Crime Convictions of DNA Exonoree*, ASSOCIATED PRESS, Aug. 6, 2008.

<sup>102</sup> As Green and Yaroshefsky observe, the stance of a Conviction Integrity Unit within a prosecutor’s office would be more like one taken by a neutral administrative agency than a party engaged in an adversary proceeding. Green & Yaroshefsky, *supra* note 96, at 506 (citing Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124

years a defense lawyer and worked at an innocence project. He has earned respect from both the defense bar and his colleagues at the district attorney's office as someone who is fair and trustworthy. Sixth, the Unit has formally adopted Rule 3.8 as official policy. And finally, the Conviction Integrity Unit reports directly to First Assistant Terri Moore and the elected District Attorney Craig Watkins. Watkins believes and publicly proclaims that the success of the Unit, and the correction of wrongful convictions in past cases, plays an important role in establishing the integrity of his office when it brings prosecutions and seeks convictions in new cases. Such complete support for the mission of a Conviction Integrity Unit from the chief prosecutor is indispensable to its independence and effectiveness.

### 3. The Federal Constitutional Backdrop

The lurking probability that post-conviction proof of actual innocence can, by itself, constitute a federal constitutional claim provides an important backdrop to the formation of Conviction Integrity Units, much like Learned Hand's famous observation that the ghost of an innocent man convicted haunts our procedure like an unreal dream.<sup>103</sup> As the Court's discussion in *Imbler v. Pachtman* long ago made clear, and Rule 3.8 recently confirms, prosecutors have an ethical duty post-conviction to disclose evidence that "casts doubt on the correctness of a conviction" if they happen to find it or some party provides it to them. There seems little doubt that if the appropriate case gets there, the Supreme Court will confirm that proof of actual innocence does state a constitutional claim. Six Justices in *Herrera v. Collins* expressly took the position that truly persuasive "freestanding" innocence claims would clearly be cognizable.<sup>104</sup> And last term, before the confirmation of Justice Sotomayor, seven justices (Kennedy, Stevens, Ginsberg, Souter, Breyer, Roberts, and Alito) transferred an original writ in the case of Troy Anthony Davis to a federal district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."<sup>105</sup> Justice Stevens, joined by Justices Ginsburg and Breyer, expressly rejected Justice Scalia's charge that this transfer was a "fool's errand," asserting that a finding of actual

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(1998)).

<sup>103</sup> *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

<sup>104</sup> *See* 506 U.S. 390, 419-20 (1993) (O'Connor and Kennedy, JJ., concurring); *id.* at 429 (White, J., concurring in the judgment); *id.* at 430-31 (Blackmun, Stevens, and Souter, JJ., dissenting).

<sup>105</sup> *In re Davis*, 130 S. Ct. 1, 1 (2009).

innocence could render any procedural habeas bar posed by § 2254(d)(1) unconstitutional.<sup>106</sup> Given the viability of actual innocence claims, can one really doubt there is constitutional force to a prosecutor's ethical obligation to disclose "clear and convincing" evidence of innocence discovered post-conviction, or evidence that approaches that threshold? Is there really much doubt that a prosecutor who suppresses a surveillance videotape discovered post-conviction showing the convicted defendant was not a bank robber, or DNA results from probative biological evidence, like vaginal swabs in a rape case, that exclude a defendant convicted of rape, is engaging in either a substantive or procedural due process violation, or both? As Conviction Integrity Units are created, and procedures are developed for re-investigations and access to evidence in cases involving plausible post-conviction innocence claims, the contours of the liberty interest that the Supreme Court recently acknowledged exists for pursuing post-conviction relief will emerge.<sup>107</sup> The pre-trial *Brady* framework which imputes a pro-active obligation on prosecutors to find and disclose exculpatory evidence possessed by anyone in law enforcement will give way to a more reactive "conviction integrity" framework where the prosecutor's post-conviction obligation to investigate and disclose evidence uniquely in its possession is triggered by persuasive factual innocence proffers.

#### IV. A MODEL AND ORGANIZATIONAL CHART

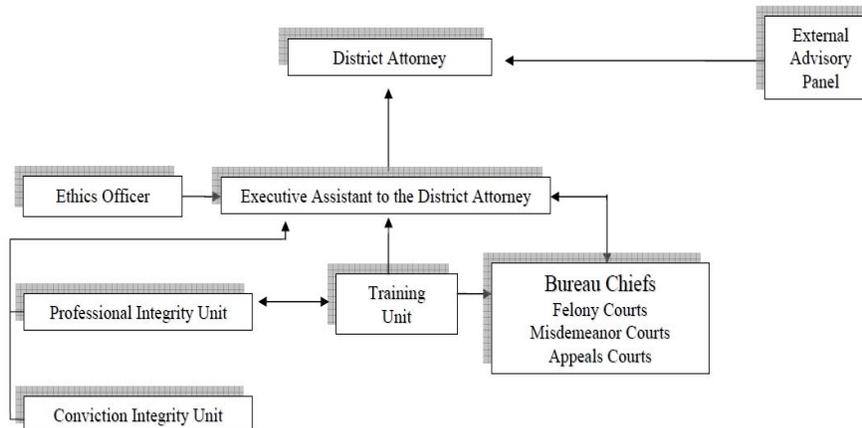
Using as a template the typical organizational chart of a prosecutor's office in a large urban jurisdiction, what follows is a brief description of a model for implementing Professional and Conviction Integrity Programs. The ideal organizational structure for Professional and Conviction Programs is graphically illustrated below, utilizing the organizing principles and practical remedies outlined *supra* Part III.

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<sup>106</sup> *Id.* at 1-2.

<sup>107</sup> Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321-22 (2009).

## Professional and Conviction Integrity Programs



The model is comprised of five basic structures: (1) the Executive Level—the District Attorney, Executive Assistant to the District Attorney, and an Ethics Officer; (2) the Professional Integrity Unit; (3) the Conviction Integrity Unit; (4) the Training Unit; (5) the Bureau Chiefs; and (6) an External Advisory Panel that offers policy advice to the District Attorney. Generally, the executive level provides the leadership necessary to implement internal regulation that encourages appropriate *Brady* disclosure and integrity. The Professional Integrity, Conviction Integrity, and Training Units are responsible for the day-to-day implementation of the organizing principles and practical remedies. The Bureau Chiefs generally serve a reporting, evaluation, and oversight function.

### A. The Executive Level

The executive level is comprised of the District Attorney, the Executive Assistant to the District Attorney, and the Ethics Officer. Consistent with any form of internal regulation, all officers and units that comprise the Professional and Conviction Integrity Programs report to the District Attorney.

The Executive Assistant to the District Attorney would oversee the Professional and Conviction Integrity Programs and report directly to the District Attorney. The Executive Assistant would be responsible for evaluating audits and root cause analyses of reversals for *Brady* violations and other misconduct, harmless error cases, and near misses as well as determining appropriate next steps in cooperation with the

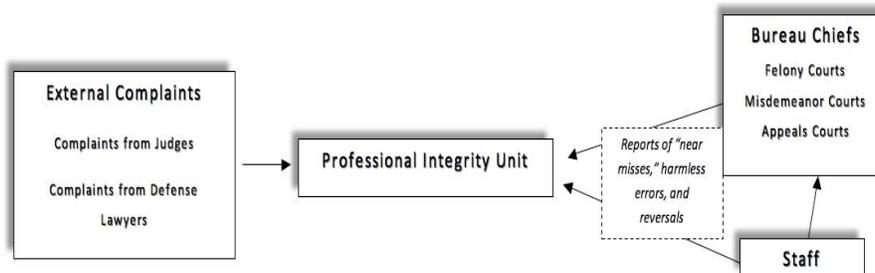
Professional Integrity Unit and the Bureau Chiefs. The Executive Assistant would audit the “quality” of overall office performance on *Brady* disclosures, data gathering, and error tracking from reports by the Professional Integrity Unit and Bureau Chiefs based on pre-trial and post-indictment checklists. In general, while the Professional Integrity Unit would be responsible for developing recommendations to prevent future errors, the Executive Assistant, as Chair of the Bureau Chiefs committee, and the Bureau Chiefs committee, would evaluate the effectiveness of the recommendations and how best to implement them.

Finally, the Ethics Officer would advise the Executive Assistant on the relevant rules or law with respect to ethical problems that create particular uncertainty.

### B. *The Professional Integrity Unit*

The Professional Integrity Unit is responsible for implementation of most of the practical remedies discussed *infra* Part II on the ground level. This Unit would also field complaints from inside and outside the office (judges, defense lawyers, the general public) about professional misconduct, identify problems, track errors, develop systemic solutions to problems, and implement systemic solutions as indicated by the Flow of Complaints to Prosecution Integrity Unit graphic below.

## Flow of Complaints to Prosecution Integrity Unit



Obviously, this Unit would play several roles, one of which would involve balancing an atmosphere of “protected space” to encourage error disclosure and the need for accountability for intentional *Brady* violations or other serious misconduct. By funneling external

complaints through the Professional Integrity Unit first, an independent pathway is created for the evaluation of complaints against line staff, supervisors, and Bureau Chiefs. In turn, under appropriate circumstances (e.g., well-grounded fear of reprisal) line staff can report complaints directly to the Professional Integrity Unit rather than supervisors or Bureau Chiefs, and Bureau Chiefs can report complaints directly to the Unit for the investigation of line staff.

The Unit should strive to analyze complaints from the perspective of possible system failure leaving consequential decisions about cases plainly involving serious individual fault, such as reversals, to the executive level.

### C. *The Conviction Integrity Unit*

The Conviction Integrity Unit would serve the larger purpose of complying with prosecutorial duty to “right” wrongful convictions as directed by *Imbler* and ABA Model Rule of Professional Responsibility 3.8. The Unit would investigate innocence claims either independently or in liaison with outside parties such as projects within the Innocence Network, public defender offices, or defense lawyers who present plausible claims of factual innocence.

### D. *The Training Unit*

The Training Unit bears a primary responsibility for establishing clear office-wide legal definitions of what is or is not *Brady* material. As indicated by the double arrows between the Professional Integrity Unit and the Training Unit in the graphic above, there would be a two-way information exchange between the Prosecution Integrity Unit and the Training Unit. The Training Unit would adapt its new lawyer and veteran staff course of instruction based on findings by the Professional Integrity Unit, and the Training Unit would also help the Professional Integrity Unit teach staff how to work with the pre-trial and post-indictment checklists in the context of the disclosure conferences; create simulation exercises that anticipate system failures and formulate best practices for responding; and explain the rationale for error tracking, data gathering, and non-punitive remediation.

### E. *The Bureau Chiefs*

The Bureau Chiefs Committee would be chaired by the Executive Assistant and provide general support to the Professional Integrity, Conviction Integrity, and Training Units. The Bureau Chiefs individually are responsible for reporting errors or violations arising from cases originating from their respective bureaus. Collectively, the Bureau Chiefs would evaluate new systemic processes proposed by the Prosecution Integrity Unit and offer recommendations. This cooperative organizational structure would implicitly and directly help foster a “learning environment” culture where the first priority is to respond to mistakes by fixing systems as opposed to fixing individual blame.

### F. *The External Advisory Panel*

The External Advisory Panel would be a group of former prosecutors, defense attorneys, former judges, academics, and former law enforcement officials who will offer the District Attorney confidential advice on policy matters but not individual cases.

## CONCLUSION

The development of Professional Integrity and Conviction Integrity Programs within district attorneys’ offices represents an extremely significant first step toward achieving serious quality assurance in the criminal justice system generally. Without question, similar programs must be formulated to improve the quality of representation delivered by defender organizations and court appointed counsel systems. The medical industry and business community have already recognized that the best way to ensure “quality” in any process is to build systemic safeguards. The legal system simply needs to play catch-up by adopting many of the same practical remedies and organizing principles. In the same way that the medical profession is learning to develop a culture of safety through implementing a formal system for tracking errors, proposing error-reducing systemic solutions, and implementing structural reforms, prosecutorial offices can foster a culture of integrity. This work has just begun.