PROSECUTORIAL MISCONDUCT

Jon Sands Federal Public Defender Phoenix, Arizona	Steven Kalar AFPD San Francisco, California	Geoffrey Hansen Chief Assistant Public Defender San Francisco, California
Chris Miles R&W Attorney, FPD San Francisco, California	Peter Davids Associate Jones Day	Jonathan Katchen Assistant Attorney General State of Alaska, Dept. of Law

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor– indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

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

> . . . it is the responsibility of the United States Attorney and his senior staff to create a culture where 'win-at-any-cost' prosecution is not permitted. Indeed, such a culture must be mandated from the highest levels of the United States Department of Justice and the United States Attorney General. It is equally important that the courts of the United States must let it be known that, when substantial abuses occur, sanctions will be imposed to make the risk of non-compliance too costly.

United States v. Shaygan, 661 F.Supp.2d 1289, 1292 (S.D.Fla. 2009)

> "The Court finds [the government's] explanation wholly incredible."

United States v. Stevens, 593 F.Supp.2d 177, 181 (D.D.Ct. 2009)

Table of Contents

Introduction

Most experienced practitioners would agree that the vast majority of federal prosecutors behave in an ethical manner, and would further agree that federal prosecutorial misconduct has been the exception, rather than the rule. As will be described in greater detail below, federal prosecutorial misconduct is now a local inquiry as well as a constitutional inquiry – after 1998, *state* ethical rules now also bind federal prosecutors. Therefore, while this outline may be a useful starting point, counsel should be encouraged to turn to state bar rules of professional responsibility and, if questions arise, consult an ethics hotline.

I. Policing the Prosecutors

A. Ethical Immunity Before 1998

Before the late1990's, the system of ethical rules and restraints that constrained any other attorney – including defense counsel – did not apply to federal prosecutors. As will be discussed in greater depth below, Congressman McDade's 1998 Citizens Protection Act ("CPA" or " § 530B") revolutionized the application of state rules to federal prosecutors in ways that have still not been fully explored. Even before Joseph McDade successfully slipped the CPA into law, however, national discontent about the special treatment of federal prosecutors had been brewing.

Before 1998, federal prosecutors could be sanctioned for ethical misconduct by the federal court in which they practiced, or by the Department of Justice. Many commentators – including federal judges – were (and remain) dubious of the government's ability to self-regulate its attorneys. *See, e.g.*, Lynn R. Singband, *THE HYDE AMENDMENT AND PROSECUTORIAL INVESTIGATION: THE PROMISE OF PROTECTION FOR CRIMINAL DEFENDANTS*, 28 FORDHAM URB. L.J. 1967, 1978 (Aug. 2001) (discussing the creation – and limitations of – the DOJ Office of Personal Responsibility ("OPR.")). In 1993, Ninth Circuit Judge Kozinski, for example, openly questioned the failure of the United States Attorney to supervise the ethical behavior of its AUSAs:

> How can it be that a serious claim of prosecutorial misconduct remains unresolved – even unaddressed – until oral argument in the Court of Appeals? Surely when such a claim is raised, we can expect that someone in the United States Attorney's office will take an independent, objective look at the issue. The claim here turned entirely on verifiable facts: A dispassionate comparison between the transcript of the AUSA's statement to the jury and Nourian's plea agreement would have disclosed that the defense was right and the government was wrong. Yet the United States Attorney allowed the filing of a brief in our court that did not own up to the problem, a brief that itself skated perilously close to misrepresentation.

United States v. Kojayan, 8 F.3d 1315, 1320 (9th Cir. 1993).

Despite the shortcomings of self-regulation, it was the common view that a federal prosecutor was not subject to state or local ethical rules or restraints. This view was based on the position that the Supremacy Clause of the United States Constitution preempted state regulation of federal prosecutors, practical arguments about conflicts of local state rules arising in a national federal practice, and a healthy dose of self-interest from the Department of Justice.

Two issues helped to sharpen the debate over the propriety of an exemption for federal prosecutors from state ethical rules. *See* Fred C. Zacharias, Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 213 (2000). The first of these issues related to attorney contact of represented parties. Though such contact was widely prohibited by state local rules, in 1989 Attorney General Thornburgh distributed an infamous memorandum that purported to exempt federal prosecutors. This memorandum was controversial both within and outside of the legal community. *See* Dick Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 Judicature 290 (April/May 1991) ("Given the normally high quality of the articles in Judicature, I had hoped to see a discussion of the Department of Justice's policy on contacting representing persons that was free of the near-hysteria that has punctuated articles written by some members of the defense bar.")

The second debate focused on a prosecutor's ability to subpoena witnesses. Zacharias & Green, *supra* at 212; *see also Stern v. United States District Court*, 214 F.3d 4, 7 (1st Cir. 2000) ("The 1980s witnessed a dramatic increase in the number of subpoenas served on defense attorneys by federal prosecutors. The reasons for this trend are difficult to pinpoint, but some commentators have linked it with heightened efforts to fight organized crime and drug-trafficking, new forfeiture laws, and an unprecedented expansion of the Department of Justice (DOJ).")

In the wake of the controversy of the Thornburgh memorandum, in 1994 Attorney General Janet Reno issued formal regulations which continued the exemption for federal prosecutors from state ethical violations, but promised voluntary compliance with most professional rules (the "Reno Rule.") Zacharias & Green, *supra* at 212; *see also Communications With Represented Persons*, 59 FR 39910-01 (Aug. 4, 1994) (containing text of the Reno Rule regarding contact with represented persons).

Also fueling the fire of this ethical debate were a number of developments that sharpened the adversarial process and directly impacted the criminal defense bar, including federal grand jury subpoenas to defense attorneys, forfeiture of funds paid by defendants to retained counsel, and non-discretionary sentencing provisions in the Federal Sentencing Guidelines. *See* Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, Oct. 1996; *see also Note, Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2083 (2000) (discussing three Model Rules of Ethics that prompted national debate on state ethical limitations on federal prosecutors).

Outside of the national limelight of this ethical debate, however, a federal criminal prosecution was brewing – a prosecution which led to a further attempt to formally regulate federal prosecutors.

B. The Citizens Protection Act of 1998, 28 U.S.C. § 530B

In 1992, Pennsylvania Congressional Representative Joseph McDade was indicted with five federal counts relating to bribery. While Congressman McDade admitted that "errors had been made," he denied the allegations.[1] He kept his seat in office and – four years later – was acquitted by a jury of all of the charges. Zacharias & Green, *supra* at 212.

McDade complained that federal prosecutors had turned his life "into a living nightmare" and had harassed and hounded him.[2] In his role as a criminal defendant, he filed a number of motions alleging prosecutorial misconduct – all of which were denied. *See, e.g., United States v. McDade*, No. 92-249, 1992 WL 187036, at *2 (E.D. Pa. July 30, 1992) (discussing motion to dismiss arising from prosecutor's alleged conflict of interest).

Stinging from his recent personal experiences with federal prosecutors, McDade introduced in the House of Representatives a version of the Citizen Protection Act which would have imposed state and local ethical rules on federal prosecutors (as well as a number of other, wide-ranging changes). That bill was killed in committee, and a re-introduced bill the following year also never made it out of committee. Zacharias & Green, *supra*, at 214-15. Finally, in 1998 the CPA was introduced as a rider to an appropriations bill, and was passed without ever clearing committee – much to the chagrin of (DOJ advocate) Senator Hatch. *Id.* at 215. The bill's unique road to passage was a source of later criticism from DOJ allies and sparked later efforts at repeal; efforts that were unsuccessful. *See, e.g., NAAUSA Initiatives, Federal Prosecutor Ethics Act*, http://www.naausa/org./ initiatives/ethics.htm (visited Feb. 18, 2003) (discussing congressional testimony of national AUSA representative against CPA and describing alternative bills proposed).

The Citizen's Protection Act has been codified at 28 U.S.C. § 530B.[3]

§ 530B. Ethical standards for attorneys for the Government

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term "attorney for the Government" includes any attorney

---

[1] http://www.nytimes.com/1992/05/06/us/top-republican-on-a-house-panel -is-charged-with-accepting-bribes.html?pagewanted=1 (last visited 4/7/10)

[2] *Id.*

[3] The Citizen's Protection Act is referred to as the "CPA" or, more frequently, "§ 530B."

> described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

28 U.S.C. § 530B (West 2003). Section 530B has been worked into the Code of Federal Regulations ("CFR") and integrated into the United States Attorney's Manual. *See*, *e.g.*, 28 CFR § 77.3 (applying 28 U.S.C. § 530B to all attorneys for the government involved in, among other actions, all criminal investigations and proceedings); U.S.A.M. 9-13.200 (2005) ("Department attorneys are governed in criminal and civil law enforcement investigations and proceedings by the relevant rule of professional conduct that deals with communications with represented persons.").

As will be discussed in greater depth *infra*, remedies for violation of the CPA may be sparse. In one of the few published cases on the new statute and regulations, the Eleventh Circuit rejected the idea that a violation of a state ethical rule would support suppression of evidence in federal court. *See United States v. Lowery*, 166 F.3d 1119, 1124-25 (11th Cir. 1999) ("Assuming for present purposes that the rule is violated when a prosecutor promises a witness some consideration regarding charges or sentencing in return for testimony, a state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible.") Similarly, in *United States v. Syling*, the court held that any state ethical standards would not "override the law governing presentation of [exculpatory] evidence at grand jury proceedings." 553 F.Supp.2d 1187, 1192 (D.Haw. 2008). Indeed, the CFR itself provides that § 530B "should not be construed in any way to alter federal substantive, procedural, or evidentiary law or to interfere with the Attorney General's authority to send Department attorneys into any court in the United States." 28 CFR § 77.1.

The First Circuit has flatly refused to view the CPA as an inroad for state (or local) regulation of federal prosecutors in federal court. *See Stern*, 214 F.3d at 19. In *Stern*, the First Circuit rejected a local rule from the District of Massachusetts that required judicial authorization for grand jury subpoenas of defense attorneys. *Id.* Despite the clear language of the CPA, the Court in *Stern* concluded that Congress did not mean to "empower state (or federal district courts, for that matter) to regulate government attorneys in a manner inconsistent with federal law." *Id.*

Nonetheless, other federal courts have conceded that § 530B does extend state ethical rules to federal prosecutors. *See* Jennifer Blair, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations, 28 U.S.C. § 530B and the Reality of Inaction*, 49 UCLA L. REV. 625, 637 (Dec. 2001) (collecting federal authority acknowledging the extension of state ethical rules to federal prosecutors after 28 U.S.C. § 530B). One of the most thoughtful of these decisions is *United States v. Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999). In that case, the Tenth Circuit held that – in light of § 530B – a Colorado state ethical rule prohibiting "federal prosecutors [from] subpoenaing attorneys to divulge information on past and present clients in connection with a criminal proceeding other than a grand jury," was not inconsistent with federal law in violation of the Supremacy Clause of the United States Constitution. *Id.* at 1288-89.

The ultimate impact of § 530B on federal prosecutors remains an open question – one commentator has discovered that during a year-and-a-half long period only one federal prosecutor was disciplined out of the 1767 lawyers punished by ten state bar organizations. Blair, *supra*, at 641 ("If punishment for prosecutors was previously "lax," one federal prosecutor disciplined out of the 1767 lawyers punished by ten state bar associations from April 1999 until December 2000 does virtually nothing to increase the regulation of unethical behavior by federal prosecutors.")

Courts appear reluctant to file a complaint with a state bar organization. Currently, at least one federal prosecutor is in state disciplinary proceedings after allegedly withholding exculpatory evidence in a case.[4] The district court judge on that case filed the letter of complaint with state bar counsel after learning that DOJ had only issued a written reprimand to the prosecutor.[5] Another district court judge has reserved the right "to impose any further sanctions and/or disciplinary measures as may be necessary against [the federal prosecutors] after reviewing the results of the Justice Department's investigation." *United States v. Shaygan*, 661 F.Supp.2d 1289, 1325 (S.D. Fla 2009).

C. The Hyde Amendment

Another champion of ethical restraints on federal prosecutors has been Congressman Hyde. In 1997, his infamous "Hyde Amendment" exposed the federal government to civil liability for criminal lawsuits that are vexatious, frivolous, or in bad faith:

> **Attorney Fees and Litigation Expenses to Defense**
>
> Pub.L. 105-119, Title VI, § 617, Nov. 26, 1997, 111 Stat. 2519, provided that: "During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and

---

[4] *See* "Boston AUSA Faces Judicial Panel Over Alleged Misconduct," http://www.mainjustice.com/2010/01/22/boston-ausa-faces-judicial-panel-regarding-alleged-misconduct/ (last visited 4/9/10).

[5] *Id.*

other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

18 U.S.C. § 3006A, stat. history (West 2003).

Like § 530B, the Hyde Amendment had its origins in the eight-year prosecution of Congressman McDade. *See Singband, supra* at 1981-82; *see also United States v. Gilbert*, 198 F.3d 1293, 198-99 (11th Cir. 1999) (tracing legislative history of the Hyde Amendment). The Hyde Amendment has had some recent success in federal courts. *See id.* at 1986-88 (collecting *Hyde Amendment* cases). *See also United States v. Aisenberg*, No. 899-CR-324-T23 MAP, 2003 WL 403071, *39 (M.D. Fla. Jan. 31, 2003) ("Pursuant to the Hyde Amendment, the Aisenbergs are entitled to a reasonable attorney's fee in the amount of $2,680,602.22 and other litigation expenses in the amount of $195,670.32."); *United States v. Shaygan*, 661 F.Supp.2d 1289, 1324 (S.D.Fla 2009) (attorney's fees and costs in the amount of $601,795.88 awarded to the defendant); *United States v. Claro*, 579 F.3d 452, 456 (5th Cir. 2009) (noting the district court awarded and government paid $391,292.29 in attorneys fees pursuant to Hyde Amendment); *United States v. Adkinson*, 247 F.3d 1289 (11th Cir. 2001) (determining that defendants were entitled to attorneys fees where government included bank fraud in conspiracy indictment with knowledge that it was precluded by controlling precedent). *See also Brown v. United States*, SA-03-CV-0792-WRF (W.D.Tex. 2007)(wherein parties reached settlement agreement and government agreed to pay plaintiff $1,340,000 to settle plaintiff's complaint filed under the Federal Tort Claims Act based on nature of government's criminal investigation and prosecution of plaintiffs).

The Hyde Amendment certainly heightened the sensitivity of the DOJ to charges of vexatious prosecution. *See* Elkan Abramowitz, Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, THE CHAMPION (Mar. 1998) (discussing aggressive DOJ stance against Hyde Amendment before its adoption). The courts' recent awards suggest that the federal defense bar should continue to push for such recourse against the government for wrongful prosecutions.[6] *See also* Dick DeGuerin, Neal Davis, *If They Holler, Make 'Em Pay . . . The Hyde Amendment*, THE CHAMPION (Sept./Oct. 1999).[7]

---

[6] Larry Breuer, head of DOJ's Criminal Division, speaking at the ABA's white collar crime conference, called on the defense bar to refrain from terming discovery violations as endemic stating that "nothing could be further from the truth." He criticized those who "think it is acceptable to use motions for sanctions, or threats of OPR referrals, as a way to gain some sort of strategic litigation advantage." http://www.mainjustice.com/2010/02/25/breuer-tells-white-collar-bar-to-ease-up-on-prosecutors/ (last visted 4/12/10).

[7] This Champion article is an excellent starting point for any Hyde Amendment litigation, and includes a useful check-list for defense counsel to review before initiating a Hyde Amendment petition.

D. Criminal Contempt

The five DOJ employees who prosecuted Senator Ted Stevens in *United States v. Stevens* are currently the subject of criminal contempt proceedings instigated by U.S. District Court Judge Emmet Sullivan based in part on allegations of *Brady* and *Giglio* violations.[8] Judge Sullivan appointed a special counsel to examine the conduct of the prosecutors after the Justice Department moved to dismiss the case with prejudice. The DOJ's Office of Professional Responsibility is conducting a simultaneous investigation. Both reports are due to be completed in the near future.

E. Case Remedies - Mistrial, Dismissal, Jury Instruction

Unethical behavior or improper methods by the prosecutor may result in a mistrial or a reversal of a conviction where the methods "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). In *United States v. Ted Stevens*, the government itself motioned to set aside the verdict and dismiss the case with prejudice based on admitted *Brady* violations. The judge voided the conviction. In *United States v. Chapman*, the district court determined that the prosecutor violated both *Brady* and *Giglio* and the district court declared a mistrial. 524 F.3d 1073, 1083-84 (9th Cir. 2008).[9] Following a hearing on the matter, the district court judge dismissed the indictment with prejudice. *Id.* In *United States v. W.R. Grace*, CR 05-07-M-DWM (D.Mt 2009), based on the government's *Brady* and *Giglio* violations, the court explained to the jury why the government would not be permitted to do any redirect examination of one of the government's main witnesses and why they should view "any proof offered by [that main witness] with skepticism." *See Appendix A W.R. Grace Jury Instruction*. The court instructed the jury, in part, that, "the Department of Justice and the United States Attorney's Office have violated their constitutional obligation to the defendants and they have violated orders of the court." *Id.*

At the appellate level, "review of prosecutorial misconduct . . . consists of a two part test: first, was the prosecutor's conduct actually improper; second, did the misconduct, taken in the context of the trial as a whole, violate the defendant's due process rights." Andrew M. Hetherington, *Prosecutorial Misconduct*, 90 GEO. L.J. 1679 (May 2002). In evaluating the seriousness of the misconduct, courts will find "harmless error if the misconduct was not severe, effective curative measures were taken by the trial court, or if the weight of evidence made conviction certain absent the improper conduct." *Id.* at 1689 (footnotes omitted). Some courts will additionally "consider whether the misconduct was deliberately or accidentally made [and] the extent to which the defense was able to counter the improper conduct with rebuttal, or both,

---

[8] http://www.mainjustice.com/2009/10/21/welch-to-step-down-as-public-integrity-chief/ (last visited 4/9/10).

[9] On appeal, the Ninth Circuit held that the mistrial was supported by a valid determination of manifest necessity and thus, a retrial of the defendant would not violate the Double Jeopardy Clause. *Chapman*, 524 F.3d 1073, 1083-84 (9th Cir. 2008)

to their evaluation of the seriousness of misconduct." *Id.*

The one, universal lesson from all authority regarding remedies for prosecutorial misconduct is the need to object to preserve the error. Timidity in the face of prosecutorial misconduct will injure the client on later appellate review, where the (nearly insurmountable) plain error standard will be applied.

II. Winning-At-All-Costs: Prosecutorial Misconduct During Various Phases of a Criminal Prosecution

With the McDade and Hyde laws in hand and remedies in mind, we turn to examples of prosecutorial misconduct as they arise during various stages of a criminal prosecution and investigation.

A. Pre-Indictment Investigation and The Grand Jury

1. Subpoenas to Defense Counsel

Grand jury misconduct was one of the ethical issues that sparked the McDade revolution, and yet five years after § 530B was enacted, it still remains an unsettled issue. One of the most controversial aspects of grand jury practice has been the issuance of a grand jury subpoena to defense counsel, to secure information about a counsel's client. The American Bar Association has promulgated model ethical rules that limit this type of grand jury subpoena. *See Appendix B, ABA Model Rule of Professional Conduct 3.8(e).* Because the ABA Model Rules have been adopted in many states, after § 530B the issue is ripe for conflict in federal court. State ethical rules in Colorado provide a good example of the problem.

Grand jury subpoenas to defense counsel on the subject of their representation are prohibited by Colorado state ethical rules. *See Appendix C*, Colorado State Rule of Professional Conduct 3.8, Special Responsibilities of a Prosecutor.[10] The federal government's policy of

[10] Because this state rule is based on rules from "ABA Standards of Criminal Justice Relating to the Prosecution Function," the conflict between this state ethical rule and federal action is likely to arise more frequently. A non-exhaustive list of states that have adopted Model Rule 3.8, Special Responsibilities of a Prosecutor, (or a substantially-similar rule), includes Arizona, Colorado, Arkansas, Connecticut, Delaware, Indiana, Kansas, Maryland, Michigan, New Jersey, Massachusetts, Rhode Island, South Carolina, and West Virginia. California is currently proposing such an adoption. *See, e.g.*, http://calbar.ca.gov/calbar/pdfs/public-comment/2009/Revision-Rules-Professional-Conduct-11-Rules_11-13-09.pdf (comparing and contrasting other states' adoption and California's proposed changes) (last visited 4/9/10); *Arizona v. Talmadge*, 999 P.2d 192, 197 (Az. S. Ct. 2000) (discussing E.R. 3.8, Arizona Rules of Professional Conduct); *Colorado v. Mucklow*, 35 P.3d 527, 534 (Co. S.Ct. 2000) (discussing Colo. RPC 3.8(d)); Arkansas R. Prof. Conduct 3.8 (West 2002); Connecticut Rule Prof. Conduct 3.8 (West 2002); Del. R. Prof. Conduct 3.8 (West 2002); Indiana R. Prof. Conduct 3.8 (West 2003); *Kansas v. Dimaplas*, 978 P.2d 891, 894 (Ka. S.Ct. 1999); Md. R. Prof. Conduct 3.8 (West

forcing defense counsel to testify regarding their clients thus became an issue for the Tenth Circuit. *See United States v. Colorado Supreme Court*, 189 F.3d 1281, 1284 & n.3 (10th Cir. 1999).

The Tenth Circuit noted that before § 530B (McDade's Citizen Protection Act) was adopted there had been a circuit split on the issue of federal grand jury subpoenas to defense counsel, over state ethical prohibitions. *See United States v. Colorado Supreme Court*, 189 F.3d 1281, 1284 & n.3 (10th Cir. 1999) (discussing contrary authority permitting, and striking, local rules limiting federal government grand jury subpoenas of defense counsel). In *Colorado Supreme Court*, the Tenth Circuit managed to avoid the grand jury issue because that particular aspect of the Colorado state rule was not appealed. *Id.* at 1284.

The short, and unsatisfying, answer is that there is now no definitive authority on whether § 530B extends state ethical prohibitions on grand jury subpoenas to defense counsel. *See* Brenner & Shaw, *Federal Grand Jury: A Guide To Law And Practice*, FED. GRAND JURY § 13.5 (discussing conflicting authority on issue and Department of Justice Guidelines).

If faced with such a subpoena, the first step should be to turn to state ethical rules to see whether they prohibit such action (likely to be found in Rule 3.8, adopted from the ABA Model Rule). Defense counsel will then need to argue that this state ethical rule has been extended to the federal prosecutor by virtue of 28 U.S.C. § 530B, and that this statute trumps any Supremacy Clause issues.

2. Pre-indictment Contact with Represented Witnesses

Does a federal prosecutor violate state ethical rules when he or she speaks to a represented witness before indictment? That was the question before the Ninth Circuit in one of the lead cases on the subject, *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000). In *Talao*, a federal prosecutor spoke to an employee of a corporation that was represented by counsel – before indictment, and while that corporate counsel was banging on the door of the interview room. *Id.* at 1136. The district court held that the prosecutor had violated California ethical rule 2-100, prohibiting contact with represented persons. *Id.* at 1136. The Ninth Circuit reversed, but not before articulating several important rules regarding federal prosecutors, ethics, and contact with represented persons.

As an initial matter, it was by no means clear that *pre-indictment* contact with represented persons was prohibited. The Court turned to the Second Circuit's decision in *United States v. Hammand*, 858 F.2d 834 (2d Cir. 1988), and concluded that there was no bright-line

---

2002); Michigan R. Prof. Conduct 3.8 (West 2003); *New Jersey v. Torres*, 744 A.2d 699, 708 (N.J. S. Ct. 2000) (discussing R.P.C. 3.8); *In re: Grand Jury Investig.*, 15 Mass. L. Rptr. 354 (Super. Ct. Mass. 2002) (mem.) (discussing Mass. R. Prof. Conduct 3.8(f)); RI Rule Prof. Conduct 3.8 (West 2002); *South Carolina v. Quattlebaum*, 338 S.E.2d 105, 109 (S.C. S. Ct. 2000) (discussing South Carolina R. Prof. Conduct 3.8); West Va. R. Prof. Conduct 3.8 (West 2002).

categorical rule on the issue. *Id.* at 1139. The Ninth Circuit concluded that in the pre-indictment procedural context of the *Talao* case, there were "fully defined adversarial roles"[11] that triggered the ethical prohibition. *Id.*

The Court also was not troubled by the controversy over DOJ's previous position and the Thornburgh memorandum, which permitted contact with represented witnesses. *Id.* at 1139-40. The Ninth Circuit flatly concluded that 28 U.S.C. § 530B made state ethical rules applicable to federal attorneys, which "dissipated" any previous dispute. *Id.* at 1140.

The Court in *Talao* ultimately let the prosecutor off of the ethical hook, however, because it concluded that in the unique circumstances of a disgruntled employee seeking to distance herself from corporate counsel – an employee who was alleging subornation of perjury by the lead defendant – Rule 2-100 did not preclude contact. *Id.* at 1140.

The *Talao* case is notable because it un-hesitantly extends state ethical rules to federal prosecutors, extends the prohibition of represented-witness contact to the pre-indictment context, and it suggests that under a less-unique factual setting the disciplinary referral would have stood.

3. Exculpatory Evidence Before the Grand Jury

Consider the following hypothetical: The defendant is charged with being a felon in possession of a gun, in violation of 18 U.S.C .§ 922(g)(1). During his arrest, his girlfriend protests that it was *her* gun, and that the defendant was unaware that the weapon was in the house. Need the AUSA present the girlfriend's exculpatory statement to the grand jury before indictment?

The federal rule – *before* § 530B – has been that a federal prosecutor need not present exculpatory evidence to the grand jury. *See United States v. Williams*, 504 U.S. 36, 52 (1992) ("Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this [grand jury] system.") Yet, despite the *Williams* rule, the United States Attorneys Manual states that when an AUSA "is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." U.S.A.M. § 9-11.233 (2008). The Manual also states that an indictment should not be dismissed for a violation of this policy, but appellate courts may refer prosecutors to the DOJ Office of Professional Responsibility for review if they violate the policy. *Id.*

Since enactment of § 530B, a district court has held that any state ethical standards requiring the presentation of exculpatory evidence would not "override the law governing

---

[11] The case had already undergone a civil investigation, a qui tam action, an corporate counsel had already initiated settlement discussions with the government. *Talao*, 222 F.3d at 1139.

presentation of [exculpatory] evidence at grand jury proceedings." *United States v. Syling*, 553 F.Supp.2d 1187, 1192 (D.Haw. 2008). The district court's opinion did not address any prosecutorial obligations created by the United States Attorneys Manual.

4. Miscellaneous Prosecutorial Misconduct Within the Grand Jury

If it is true that an experienced prosecutor can get a grand jury to indict a ham sandwich, then why would an AUSA cut corners to get an indictment? While unethical behavior before a grand jury seems particularly unnecessary, it nonetheless occurs. A good summary of prohibited acts can be found in *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979).

In *Samango*, an indictment was dismissed by a federal district judge in Hawaii. *Id.* at 878.[12] Samango was a witness called before the grand jury relating to a cocaine importation case from Tahiti. *Id.* The AUSA informed the grand jury of his dissatisfaction with Samango's performance under a non-pros agreement, chided the witness when he asked to see counsel, insinuated that the witness was lying and threatened to charge him as a defendant. *Id.* at 879. The AUSA later sought a "sanitized" indictment by dumping 1,000 pages of transcript on the grand jury, and telling them that he had a deadline for their consideration eight days later. *Id.*

The Ninth Circuit conceded that an attack against an indictment based on incompetent or inadequate evidence was not possible. *Id.* at 880-81 & n.6. The Court observed, however, that dismissal of an indictment can be appropriate "to protect the integrity of the judicial process . . . particularly the functions of the grand jury, from unfair or improper prosecutorial conduct." *Id.* at 877 (internal citations and quotations omitted).[13] This was such a case; "Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role." *Id.* at 882.

Other prosecutorial misconduct may be grounds to dismiss the indictment. An AUSA may not ask questions of a grand jury witness solely to discredit the witness. *United States v. DiGrazia*, 213 F. Supp. 232, 234 (N.D. Ill. 1963).

While this may seem self-evident, the government may not rely on perjured testimony to secure an indictment before the grand jury. *United States v. Useni*, 516 F.3d 634, 656 (7th Cir. 2008); *United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974) ("We hold that the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. Whenever the prosecutor

---

[12] Interestingly, the government did not make an appearance in the appeal.

[13] One leading case authorizing a dismissal of an indictment for prosecutorial misconduct is *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (discussing harmless error standard for dismissal of an indictment, and contrasting dismissal for errors deemed fundamental).

learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel – and, if the perjury may be material, also the grand jury – in order that appropriate action may be taken.").

Often it is the *cumulative* impact of grand jury misconduct that will cost the government an indictment. In *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983), the Court upheld dismissal of an indictment when the AUSA portrayed the defendant as a "hoodlum" in front of the grand jury, relied too heavily on hearsay evidence,[14] and presented false DEA testimony. *Id.* at 761 ("In summary, the incidents related are flagrant and unconscionable. Taking advantage of his special position of trust, the AUSA impaired the grand jury's integrity as an independent body.").

Another critical rule is the donut ban: an AUSA shouldn't "bond" with grand jurors by bringing them donuts at the beginning of their deliberations. *United States v. Breslin*, 916 F. Supp. 438, 442 (E.D. Pa. 1996). It is also improper to rush the grand jury's deliberations by suggesting that the assigned time was short, to make improper characterizations of the evidence, to suggest that live witness testimony was unavailable, or to warn that the statute of limitations was about to run on the charges. *Id.* at 442.

While the *DiGrazia* case is a useful laundry list of prosecutorial misconduct before the grand jury, the opinion is depressingly candid about a defendant's chances to prevail on such a claim. "It is rare that defendants have sufficient information from *Jencks* material to find a basis for a motion to dismiss. It is unusual that the trial judge would be required to review sufficient material presented to the grand jury to develop a concern for the cumulative unfairness of the grand jury proceedings." *Id.* at 446.

B. *Brady*, Due Process, and State Ethical Rules on Discovery

Even before state ethical obligations were extended to federal prosecutors, some federal courts did not hesitate to impose sanctions for prosecutorial misconduct relating to *Brady* violations. One inspiring example is found in *United States v. Ramming*, 915 F. Supp. 854 (S.D. Texas 1996). In that case, the district court carefully chronicled the various *Brady* and *Giglio* violations of the federal government in a banking prosecution. *Id.* at 868. The court concluded, "the government's contentions of equal access, neutral evidence, that the defendants were aware of the information possessed by the Grand Jury, that the testimony was merely impeachment, and that they acted in good faith, is incredible. *Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path.*" *Id.* (emphasis added). The defendant's motion to dismiss because of prosecutorial misconduct was granted. *Id.*

---

[14] Note that there is no *per se* ban on hearsay evidence before the grand jury. "Although there is no prohibition on the use of hearsay evidence before a grand jury, our decision in *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), indicates that extensive reliance on hearsay testimony is disfavored. More particularly, the government prosecutor, in presenting hearsay evidence to the grand jury, must not deceive the jurors as to the quality of the testimony they hear." *Hogan*, 712 F.2d at 761.

To date, few federal courts have equated discovery violations with ethical misconduct requiring bar referral. As stated *supra*, filing a complaint with the state bar authorities seems to be considered a last resort by most federal courts[15] even though such a sanction has been approved of and, in the appropriate case, encouraged by the circuit courts. *See United States v. Wilson*, 149 F.3d 1298, 1304 (11th Cir. 1998) ("[W]e want to make clear that improper remarks and conduct in the future, especially if persistent, ought to result in direct sanctions against an offending prosecutor *individually*."(emphasis in original)); *United States v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981) ("We suspect that the message of a single 30-day suspension from practice would be far clearer that the disapproving remarks in a score of appellate opinions.").[16]

Federal constitutional requirements for disclosure of exculpatory and witness-impeachment evidence are well-established. The United States Attorneys Manual disclosure policy exceeds constitutional obligations although the government notes that "the expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies." USAM 9-5.001 (2010). Those state ethical rules modeled after the ABA's Model Rule of Professional Conduct 3.8 impose a still higher duty of discovery than that required by constitutional due process or the United States Attorneys Manual. Query whether § 530B imposes a higher discovery obligation on federal prosecutors, by virtue of state ethical rules, and whether that is enforceable?

The American Bar Association has promulgated a model ethical rule relating to the production of discovery by the prosecutor:

Model Rule of Professional Conduct 3.8

---

[15] *See* Gibeaut, John, *The Roach Motel*, ABA JOURNAL, July 2009 ("Judges seldom discipline lawyers who practice before them for professional misconduct—though other actions, such as Rule 11 sanctions, sometimes attempt to curb the same behavior and may go unrecognized as punishment dealt to individuals"), http://www.abajournal.com/magazine/article/the_roach_motel (last visited 4/13/10); *United States v. Shaygan*, 661 F.Supp.2d 1289, 1325 (S.D. Fla. 2009) (judge reserved the right "to impose any further sanctions and/or disciplinary measures as may be necessary against [the federal prosecutors] after reviewing the results of the Justice Department's investigation."); *United States v. Jones*, No. CR 07-10289-MLW, 2010 WL 565478 (D.Mass. 2010) (court determined that imposition of sanctions against AUSA or government for failure to adequately train AUSA based on failure to disclose plainly material exculpatory evidence were neither necessary nor appropriate where, since violation disclosure, AUSA, US Attorney's Office and DOJ officials took actions such as participating in discovery training programs, which obviated need for sanctions).

[16] It appears that state courts are also reluctant to report prosecutorial misconduct to state bar authorities. In California for instance, it is rare that prosecutorial misconduct is referred to the California State Bar although required under California law. *See* "Crossing the Line: Responding to Prosecutorial Misconduct," at http://www.abanet.org/litigation/prog_materials/2008_sectionannual/016.pdf (last visited 4/9/10).

> The prosecutor in a criminal case shall:
>
> . . . .
>
> > (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Appendix B, Model Rule of Professional Conduct 3.8(d).

> This model rule is patterned after ABA Standard 3-3.11, Prosecution/Defense Function:
>
> Disclosure of Evidence by the Prosecutor
>
> (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, *at the earliest feasible opportunity*, of the existence of all evidence *or information* which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

ABA Standard 3-3.11 (emphases added).

The ABA has recently issued an 8-page formal opinion regarding the prosecutorial ethical duty to disclose evidence and information favorable to the defense which clearly exceeds constitutional discovery obligations. *See Appendix D, Formal Opinion 09-454 (July 8, 2009).* Key excerpts follow:

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

Id. at 4.

> Further, this ethical duty of disclosure is not limited to admissible 'evidence,' such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a

> de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

Id. at 5.

The Supreme Court has observed that federal due process requirements provide for less-complete discovery than the ABA standards. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Yet, the Court has also noted that, nonetheless, a prosecutor may have an obligation under applicable ethical or statutory rules to greater disclosure. *Cone v. Bell*, __ U.S. __, 129 S.Ct. 1769, 1783 n.15 (2009) ("As we have often observed, the prudent will err on the side of transparency, resolving doubtful questions in favor of disclosure.").

There are two primary differences between federal due process requirements and the ABA model ethical rules. The first relates to *scope* of disclosure. As noted in *Kyles*, the ABA model rule requires disclosure *of any evidence tending to exculpate or mitigate*. *Id.* (emphasis added). Federal due process, by contrast, is primarily a standard forged out of appellate review; it prohibits "the suppression by the prosecution of evidence favorable to the accused upon request, [which] violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The second distinction relates to the *timing* of disclosure. When the model rule is read in conjunction with the ABA standard, the prosecutor is required to disclose discovery "at the earliest feasible opportunity." By contrast, *Brady* law and *timing* focuses on prejudice to the defense viewed in the hindsight of an appeal – if there was no prejudice to the defense by failing to disclose *Brady* material before trial, no violation lies. *See, e.g., United States v. Knight*, 867 F.2d 1285, 1289 (11th Cir. 1989) ("Appellants received the information during the trial and have failed to demonstrate that the disclosure came so late that it could not be effectively used; and thus they cannot show prejudice.") Of even greater concern, federal due process does not require any disclosure of *impeachment* information before a defendant pleads guilty – so this *Giglio* information may never come to the attention of the defense.[17]

---

[17] Federal courts have long held that the government has a duty under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny to disclose favorable material evidence to the defense in time for the material to be of value to the defendant. *See, e.g., United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988). This duty to disclose includes impeachment evidence (sometimes known as "*Giglio*" material) as well as "actual innocence" evidence. *See, e.g., United States v. Bagley*, 473 U.S. 667, 676 (1985). The prosecutor has a duty to obtain this information from state as well as federal agents who have worked on the case. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

The Supreme Court has held that impeachment (*Giglio*) material *need not* be disclosed to the defense before a plea of guilt. *United States v. Ruiz*, 536 U.S. 622, 629 (2002). The Court reasoned that a defendant can constitutionally "misjudge" other components of his or her case

The tension between the federal due process discovery standards and the ABA model rule is more than just an academic debate; many states have adopted the ABA model rule or an analogous provision relating to discovery.[18] Consider another Colorado case as an illustration of the tension between state ethical rules and federal discovery requirements.

In *People v. Mucklow*, 35 P.3d 527 (Co. S. Ct. Office Discipline 2000), a district attorney twice failed to disclose exculpatory statements to the defense before preliminary hearings. *Id.* at 530-31. The Discipline Office of the Supreme Court emphasized that Colorado had adopted a version of ABA model rule 3.8, and that this rule meant "The prosecutor is required to provide exculpatory information and materials to the defense *as soon as it is practicable or feasible to do so*." *Id.* at 535. The opinion emphasizes the difference between due process discovery requirements and (the more rigorous) ethical discovery obligations created by the state ethical rule. *Id.* at 535. The D.A. who ignored that distinction did so at her peril; she was publically censured. *Id.* at 540.

For the federal practitioner in Colorado – or any state that has adopted a version of ABA model rule 3.8 – the *Mucklow* case is intriguing. If Congressman McDade's § 530B extends state ethical rules to federal prosecutors, then the Colorado ethical rule requiring early discovery should apply to an AUSA as well.

C. Prosecutorial Misconduct During Trial

1. Misconduct During Jury Selection

Prosecutorial misconduct cases make for remarkable reading. One such case is *Williams v. Netherland*, 181 F.Supp.2d 604 (E.D. Va. 2002). In *Williams*, petitioner sought relief from a

---

before a plea; the quality of the State's case, the likely penalties, a change in law regarding punishment, the admissibility of a confession, and potential defenses. There accordingly was no constitutional problem with a plea if the defendant misjudged "the grounds for impeachment of potential witnesses as a possible future trial." *Id.* at 2455.

[18] States adopting a substantial equivalent of ABA Model Rule 3.8(d) include Colorado, Idaho, Maryland, and Pennsylvania. *See, e.g., People v. Mucklow*, 35 P.3d 527 (Co. S. Ct. Office Discipline 2000) (discussing Colo. RPC 3.8d, based on ABA Model Rule 3.8); Id. R. Prof. Conduct 3.8(d) (incorporating subsection (d) of ABA model rule relating to discovery); Md Rule of Prof. Conduct 3.8 (same); Pa Rule. Prof. Conduct 3.8 (same). Other states have adopted less-specific ethical rules regarding a prosecutor's disclosure obligations. California is in the process of adopting a rule based in large part on ABA Model Rule 3.8(d). *See, e.g.*, http://calbar.ca.gov/calbar/pdfs/public-comment/2009/Revision-Rules-Professional-Conduct-11-Rules_11-13-09.pdf (comparing and contrasting other states' adoption and California's proposed changes) (last visited 4/9/10).

capital conviction when i) a juror was the ex-wife of a government witness; ii) the prosecutor was this juror's former *divorce attorney* (and who therefore obviously knew about the relationship, and iii) neither the juror nor the prosecutor bothered to reveal these relationships during voir dire. *Id.* at 609-12. The court found that the prosecutor acted improperly and granted the writ. *Id.*

Less favorable is the Ninth Circuit's affirmance in *United States v. Steele*, 298 F.3d 906 (9th Cir. 2002). In *Steele*, the AUSA questioned a prospective juror on voir dire who had been employed as a public defender. *Id.* at 911-12. She asked, "In the course of trying [felony robbery cases], did you ever make a decision that your client was guilty and you've got to do whatever you have got to do because that's your job?" *Id.* at 912. The juror answered, truthfully, "I guess so, yeah. You know, it gets – the facts might show one way or the other, and you have to pursue the case if the client wants to or not, it's their decision." *Id.*

Defense counsel – sitting next to a client heading into a federal bank robbery trial – understandably objected to a question about defending guilty defendants at trial. *Id.* The Ninth Circuit, however, refused to find misconduct. "The prosecutor's questions in the present case may not have been the best way to elicit signs of bias, but the circumstances do not support the conclusion that there was prosecutorial misconduct." *Id.*

2. Improper Conduct During Opening Statements

In her opening statement, an AUSA states that the armed robbery case before the jury has "rocked the sense of security of an entire Maine community," a community that had been "relatively free from random acts of violence." *United States v. Mooney*, 315 F.3d 54, 58-59 (1st Cir. 2002). She continues on to comment that the defendant chose not to speak to the police, and encouraged the jury to compare that silence with the testimony of his cooperating- co-defendants. *Id.* Prosecutorial misconduct?

The government conceded as much in *Mooney*, choosing not to defend the prosecutor's opening remarks. *Id.* at 59. Instead, while finding misconduct the First Circuit focused primarily on the *remedy* (which it ultimately denied).

In *Mooney*, the First Circuit acknowledged its "dismay that any prosecutor in this circuit could apprise a jury in an opening statement that a defendant had chosen not to talk to the police. It is difficult to imagine a more fundamental error." *Id.* at 61 & n.1. Nonetheless, in light of the strength of the evidence and immediate curative instructions, the First Circuit upheld the conviction. *Id.*

One particularly interesting aspect of the *Mooney* decision is the Court's analysis of the *timing* of the misconduct. The Court observed "The context of the prosecutor's comments also weighs against a finding that they likely affected the outcome of the trial. The comments occurred during opening arguments, not during summation where the last words the jury hears have significant potential to cause prejudice." *Id.* at 60. Prosecutorial misconduct during opening statements thus may be more difficult to remedy on appeal than improper statements during closing arguments.

3. Ethical Problems with Government Witnesses and Trial Evidence

Government witnesses and evidence at trial present a grab-bag of ethical problems. One straightforward prohibition precludes eliciting a witness' opinion of another witness' testimony. *United States v. Geston*, 299 F.3d 1130 (9th Cir. 2002), nicely summarizes the due process concerns behind this rule. *Id.* at 1136 (collecting cases). In *Geston*, the Ninth concluded that the prosecutor's improper questioning "seriously affected the fairness, integrity, or public reputation of judicial proceedings, or [] failing to reverse [the] conviction would result in a miscarriage of justice." *Id.* (internal quotation and citation omitted). "In a case where witness credibility was paramount, it was plain error for the court to allow the prosecutor to persist in asking witnesses to make improper comments upon the testimony of other witnesses." *Id.* at 1137.

Not surprisingly, it is also improper for a prosecutor to intentionally elicit testimony precluded by a court's *in limine* ruling. *See Thomas v. Hubbard*, 273 F.3d 1164, 1175-76 (9th Cir. 2001), *as amend.* Jan. 22, 2002 (granting petition for writ of habeas from murder conviction when, among other things, the prosecutor intentionally ignored a court ruling prohibiting testimony about a defendant's previous use of a gun).

It is also unsurprising that it is prosecutorial misconduct for the government to sponsor perjured testimony, to permit its witnesses to commit perjury, or to fail to reveal a witness' lies to the defense. What *is* surprising is the vehemence of courts when confronted with this conduct.

Commonwealth v. Bowie, 243 F.3d 1109 (9th Cir. 2001), *as amend.* Mar. 23, 2001 is a remarkable example of a court's intolerance for such conduct. In *Bowie*, the defendant was implicated in a particularly brutal murder in the Northern Mariana Islands. *Id.* at 1111. Much of the government's case involved cooperating co-defendants, one of whom was caught early in the case, in a jail cell, while trying to discard an incriminating letter handwritten on yellow paper. *Id.* at 1112-13. That letter – by an unknown author – suggested that the author i) was actually guilty of the murder, ii) was conspiring to frame the defendant, iii) had lied during cooperation before, and iv) had lied to his lawyer about the murder. *Id.* The letter may have come from another cooperating witness.

Despite this dramatic evidence, the prosecutor did not investigate the letter, did not submit it for handwriting analysis, and never asked any of the cooperating witnesses about it. *Id.* at 1114.

The Ninth Circuit (in an opinion written by former federal prosecutor Trott), was – to put it mildly – livid in light of the "studied decision by the prosecution not to rock the boat, but instead to press forward with testimony that was possibly false on the apparent premise that all these accomplices were actually responsible for [the victim's] murder." *Id.* at 1118. The Court explained that the prosecutor's duty was not to merely disclose the letter to the defense, but to actively investigate the many (potentially exculpatory) ramifications of the evidence. *Id.* at 1117-18. "A prosecutor's responsibility and duty to correct what he knows to be false and elicit the truth . . . requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this

obligation by refusing to search for the truth and remaining willfully ignorant of the facts." *Id.* at 1118.

The Court did not particularly care what the defendant *actually did* with this letter during trial. "[The defendant] has certain constitutional rights that he could waive or forfeit, but he could not waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system . . . ." *Id.* at 1122.

Bowie is a useful place to start when researching prosecutorial misconduct regarding perjury.[19] First, the tone of the case is welcome righteous indignation – in contrast to so many cases that seem blandly resigned to prosecutorial misconduct. The case also includes a useful collection of authority regarding prosecutorial misconduct in the presentation in evidence. Finally, *Bowie* employs a thoughtful dual analysis – using both due process and prosecutorial misconduct authority – in arriving at its ultimate reversal. *See id.* at 1115-17.

4. Improper Closing Arguments

One of the lead cases on prosecutorial misconduct during closing arguments is the source for the wonderful quote used at the beginning of this outline - *Berger v. United States*, 295 U.S. 78 (1935). In *Berger*, the prosecuting attorney misstated evidence during cross examination, an argument that was "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Id.* at 86. The Court found pronounced and persistent misconduct, a case against the defendant that was not strong, and accordingly reversed and remanded for a new trial. *Id.* at 89.

What is interesting about the *Berger* opinion is the lack of analysis as to the Court's power to reverse in light of prosecutorial misconduct. The Court presumably acted under its supervisory power – a power that it handily distinguished fifty-one years later when presented with a capital habeas alleging improper closing statements. *See Darden v. Wainwright*, 477 U.S. 168 (1986). In *Darden*, the defendant had been convicted of an admittedly horrific murder and sexual assault. *Id.* at 172-74. In the closing argument, the prosecutor asserted that the only way to be sure that the defendant would not return to the public was the death penalty. *Id.* at 181 & n.9. The prosecutor argued that the defendant "shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." *Id.* at 181 & n.12. The prosecutor wished that the homicide victim "had had a shotgun in his hand when he walked in the back door and blown [the defendant's] face off. I wish that I could see him sitting here with no face, blown

[19] Other useful cases on perjured testimony include *United States v. Valentine*, 820 F.2d 565 (2d Cir. 1987) (reversing conviction when AUSA mischaracterized grand jury testimony during trial), and *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000) (reversing conviction when AUSA tolerated perjury from central government witness).

away by a shotgun." *Id.*[20]

The Court found that the comments did not deprive the defendant of a fair trial, setting a test that still haunts federal review: "The prosecutor's argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 181-82.

A persuasive dissent in *Berger* quotes a remarkably candid passage on the futility of condemnations without remedies:

> This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court – recalling the bitter tear shed by the Walrus as he ate the oysters – breeds a deplorably cynical attitude towards the judiciary. I believe this Court must do more than wring its hands when a State uses improper legal standards to select juries in capital cases and permits prosecutors to pervert the adversary process. I therefore dissent.

Id. at 206 (Blackmun, J., Brennan, J., Marshall, J., Stevens, J., dissenting) (internal quotations and citations omitted).

Recently, the Ninth Circuit signaled an end to the wringing of the hands. In *United States v. Reyes*, 577 F.3d 1069, 1076-79 (9th Cir. 2009), the court reversed and remanded for a new trial based on the prosecutor's remarks in closing argument. The Ninth Circuit found that the government had asserted material facts to the jury that it knew were false or had strong reason to doubt, based on contradictory evidence that was not presented to the jury. Id. The Ninth Circuit sternly warned the DOJ that, "[w]e do not lightly tolerate" such conduct, and that were was "no reason to tolerate such misconduct here." *Id.* at 1078.

Generally, however, courts routinely condemn prosecutor's conduct, but refuse to grant

---

[20] The district court has observed, "Anyone attempting a text-book illustration of a violation of the Code of Professional Responsibility . . . could not possibly improve upon [prosecutor White's final statement]." *Id.* at 189 & n.2 (Blackmun, J., Brennan, J., Marshall, J., Stevens, J., dissenting).

any relief to the defense. In 1970, for example, the First Circuit resignedly repeated warnings it had made many times before:

> We will recapitulate, we hope for the last time, in the light of the number of occasions it has been necessary to do so, the basic ground rules. Essentially, the prosecutor is to argue the case. He may discuss the evidence, the warrantable inferences, the witnesses, and their credibility. He may talk about the duties of the jury, the importance of the case, and anything else that is relevant. He is not to interject his personal beliefs. The prosecutor is neither a witness, a mentor, nor a thirteenth juror . . . . He must not appeal to the passion or prejudice of the jury directly, or by the introduction of irrelevant matter, indirectly.

United States v. Cotter, 425 F.2d 450, 452 (1st Cir. 1970). In *Cotter*, this meant that it was improper for a prosecutor to argue that a defendant's who failed to pay his taxes was jeopardizing future moon landings – the first landing was taking place during the trial. *Id.* Absent a timely objection, however, the Court declined to reverse. *Id.*

Forced to deal with repeated allegations of prosecutorial misconduct during closing arguments, federal appellate courts gradually developed stringent hurdles to overcome before a defendant would be entitled to any relief. The Second Circuit, for example, developed a three-part test to determine whether a prosecutor's statements during closing amounted to misconduct:

> The district court correctly identified the three-pronged analysis employed by this Court to determine whether the statements or actions of a prosecutor amount to misconduct. That analysis focuses on: the severity of the misconduct, the curative measures taken, and the certainty of conviction absent the misconduct.

United States v. Burns, 104 F.3d 529, 537 (2d Cir. 1997). In *Burns*, a prosecutor clapped (sarcastically) after defense counsel finished their closing in tears. *Id.* & n.3. The government conceded on appeal that this was "inappropriate," but the court refused to reverse the denial of a new trial motion. *Id.*

At times, a court's tolerance of misconduct during closing argument is breathtaking. For example, in a habeas case arising from a murder conviction, the Ninth Circuit was confronted with a prosecutor who had actually taken the witness stand during closing argument, "testified" in the voice of the murdered, gay, victim, and who during this soliloquy characterized the victim as a "peaceful, gentle man" who did "nothing to deserve his dismal fate." *Drayden v. White*, 232 F.3d 704, 712-13 (9th Cir. 2000). While the Ninth Circuit agreed that the prosecutor had committed misconduct, it refused to hold that this misconduct had violated petitioner's due process rights. *Id.*

Faced with what Justice Blackmun characterized as an "attitude of helpless piety" from most federal courts reviewing allegations of prosecutorial misconduct, § 530B may provide some support. There are no shortage of state and local ethical rules directed towards prosecutorial misconduct in closing arguments. An ABA Model Rule of Professional Conduct, for example, prohibits an attorney from stating a personal opinion as to the credibility of a witness:

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

. . . .

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, *or state a personal opinion as to the justness of a cause, the credibility of a witness*, the culpability of a civil litigant or the guilt or innocence of an accused; or

Appendix E, ABA Model Rule of Professional Conduct 3.4 (2002) (emphasis added).

In states that have adopted this model rule[21] – or that have analogous limitations on closing arguments – such behavior during a federal closing should earn the prosecutor a referral to the state bar disciplinary committee in this post-§ 530B world. Even if the misconduct is not sufficiently prejudicial to entitle a defendant to relief, the specter of a public censure by the state bar should help to put some teeth into the judicial "hand wringing" that Justice Blackmun warned against in *Berger*.

Notably, even when courts do not directly censure AUSAs based on local ethical rules, the moral weight of these rules is gradually making its way into federal case law. For example, the Sixth Circuit reversed and remanded for a new trial a federal bank robbery case where the prosecutor misstated central eyewitness testimony during closing. *See United States v. Carter*, 236 F.3d 777, 793 (6th Cir. 2001). In its analysis of the threshold question[22] of whether the

---

[21] A non-exhaustive list of states that have adopted Model Rule 3-4 includes Connecticut, Kansas, Louisiana, Maryland, Montana, New Hampshire, North Carolina, Utah, West Virginia. *See, e.g., State v. Floyd*, 523 A.2d 1323 (Conn. App. 1987) (applying Rule of Professional Conduct 3.4 to alleged ethical violation); *State v. Pabst*, 996 P.2d 321, 326 (Kan. S.Ct. 2000)(same); *Merritt v. Karcioglu*, 668 So.2d 469, 475-76 (La. App. 4th Cir. 1996) (same); *Attorney Grievance Com'n v. Alison*, 709 A.2d 1212, 1215 (Md. Ct. App. 1998) (same); *State v. Stewart*, 833 P.2d 1085, 1089-90 (Mont. S. Ct. 1992) (same); *State v. Jones*, 558 S.E.2d 97, 127-28 (N.C. S. Ct. 2002); *State v. Bujnowski*, 532 A.2d 1385, 1387 (N.H. S. Ct. 1987) (same); *State v. Dibello*, 780 P.2d 1221 (Utah S. Ct. 1989) (same); *State v. Stephens*, 525 S.E.2d 301, 424 (W. Va. S. Ct. 1999)

[22] The Court in *Carter* articulated the Sixth Circuit's two-part test to determine whether prosecutorial misconduct has taken place:

> The Sixth Circuit has adopted a two-step approach for determining when prosecutorial misconduct warrants a new trial. *See United States v. Carroll*, 26 F.3d 1380, 1385-87 (6th Cir.1994). Under this approach, a court must first consider whether the prosecutor's conduct and remarks were improper. *Id*. at 1387; *see also Boyle v. Million*, 201 F.3d 711, 717 (6th Cir.2000). If the remarks were improper, the court must

AUSA's closing was improper, the Sixth Circuit quoted with favor the ABA Standard stating that "the prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw." *Id.* at 785 (quoting ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-5.8(a) (3d ed. 1993)).

Our personal experience in this field also reveals that the specter of ethical sanction is a powerful weapon in combating unethical behavior. A prime example is *United States v. Blueford*, 312 F.3d 962 (9th Cir. 2002), *as amend. & further amend*., Nov. 22, 2002. Northern District Assistant Federal Public Defender Joyce Leavitt ably litigated this felon in possession case. The defense – who had provided notice of an alibi defense – was presented with a huge stack of the client's taped conversations from the jail; and was first presented with these tapes in the midst of trial. *Id.* at 966. The AUSA suggested that he was going to use these tapes as impeachment material relating to the testimony of defense alibi witnesses – implying that the tapes revealed a defendant who was suborning perjury. *Id.* at 965. During the trial the AUSA elicited in his cross of defense alibi witnesses that they had spoken much more frequently to the defendant just before the trial. *Id.* at 966. In his closing, the AUSA asked the jury to infer that the defendant and the alibi witness fabricated the alibi defense just before trial. *Id.* at 967.

In reality, however, when the thirty hours of tapes were reviewed by the defense (after trial), they revealed the defendant telling an alibi witness, "[A]ll you got to do is tell the truth." *Id.* The district court judge was surprised to learn the tapes did not, in fact, reveal a defendant who was coaching alibi witnesses. *Id.*

The Ninth Circuit reversed; "It is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt, particularly when it refuses to acknowledge the error afterwards to either the trial court or this court and instead offers far-fetched explanations of its actions." *Id.* at 968.

> then consider and weigh four factors in determining whether the impropriety was flagrant and thus warrants reversal. These four factors are as follows: (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong. *Carroll*, 26 F.3d at 1385; *see also Boyle*, 201 F.3d at 717; *United States v. Collins*, 78 F.3d 1021, 1039 (6th Cir.), *cert. denied*, 519 U.S. 872, 117 S.Ct. 189, 136 L.Ed.2d 127 (1996).
>
> When reviewing challenges to a prosecutor's remarks at trial, we examine the prosecutor's comments within the context of the trial to determine whether such comments amounted to prejudicial error. *United States v. Young*, 470 U.S. 1, 11-12, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *Collins*, 78 F.3d at 1040. In so doing, we consider whether, and to what extent, the prosecutor's improper remarks were invited by defense counsel's argument. *Young*, 470 U.S. at 12, 105 S.Ct. 1038; *Collins*, 78 F.3d at 1040.

Carter, 236 F.3d at 783.

What is not clear from the opinion is the enormous publicity and controversy that this case generated in the Northern District of California. The government – and the AUSA himself – devoted enormous resources to seeking rehearing and (later, successful amendment) of the opinion alleging prosecutorial misconduct. Notably, the opinion does not clearly specify the AUSA involved in trial. *Id.* Nonetheless, the *Blueford* case and this AUSA's involvement are well-known by every federal practitioner and district judge in the Northern District. In short, the combination of a remedy for the defendant (reversal and new trial), and even an oblique moral sanction may have some impact.

D. Broken Promises: Breached Pleas at Sentencing

Is a broken plea agreement at sentencing best analyzed using contract law, or when framed as prosecutorial misconduct? More importantly, does it matter to the client as long as a remedy is secured?

The lead case on breached plea agreements is *Santobello v. New York*, 404 U.S. 257 (1971). In that opinion, the Supreme Court reversed and remanded after (the second) prosecutor in the case refused to make a sentencing recommendation agreed upon before the plea. *Id.* at 260. Despite the fact that the judge disclaimed any reliance on the D.A.'s recommendation, the Court found that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. While the Court did not engage in much analysis of the ethics of a breached plea, it made no mention of any principles of contract law. Justice Douglas' concurrence, however, emphasized that outright vacation is often appropriate after a breached plea promise, in light of "an outraged sense of fairness." *Id.* at 266 (Douglas, J., concurring) (internal quotations and citation omitted).

While deferring to *Santobello*, federal appellate courts have routinely avoided the ethical issues by analyzing plea agreement breach under contract law. In *United States v. Grimm*, 170 F.3d 760 (7th Cir. 1999), for example, the Seventh Circuit employed contract principles when an AUSA failed to recommend acceptance of responsibility and did not dispute a gun possession, in violation of the plea agreement. *Id.* at 764-66. Without engaging in any ethical finger-pointing, the Court vacated the sentence and remanded for resentencing. *Id.* at 765.

Ethical overtones in plea-breach cases are becoming more common, however. For example, in *Gunn v. Ignacio*, 263 F.3d 965 (9th Cir. 2001), the Ninth Circuit granted a petition for a writ of habeas corpus when a district attorney breached a plea agreement regarding concurrent time. *Id.* at 969. Because the Court granted relief, it did not get to the second issue raised by the Petitioner – *a claim of ineffective assistance of counsel* for failing to object to the prosecutorial misconduct arising from this breach! *Id.* at 968. Although *Gunn* did not consider the issue, Petitioner's claim is sobering: defense counsel too timid to raise prosecutorial misconduct challenges may regret their decision when faced with a later I.A.C. claim.

If sufficiently dramatic, a prosecutor's breach of a plea agreement may even prompt a Court to enforce promises that were actually unfulfillable! Such was the case in *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286 (2d Cir. 1976). In *Palermo*, the Petitioner had

been promised that state district attorneys would aggressively lobby the parole board for a reduced sentence, in return for him leading them to $4 million worth of stolen jewelry. *Id.* at 289-90. The jewels were recovered, sympathetic letters were written by the DA's to the parole commission – but at the same time, prosecutors sandbagged the defendant by calling a parole investigator and analogizing the defendant to another parolee who had received a lenient sentence and then committed a violent crime. *Id.* at 291. The state's case was not helped by contractions in the prosecutors' testimony, inconsistencies "too numerous to mention" that undermined their credibility. *Id.* at 294.

While contesting the habeas petition, the state argued that the prosecutors never had the authority to offer a bargain from another jurisdiction – the state parole commission. The Court was unimpressed. The Second Circuit proclaimed "fundamental fairness and public confidence in government officials require that prosecutors be held to meticulous standards of both promise and performance." *Id.* at 296. The Court accordingly held, "where a defendant pleads guilty because he reasonably relies on promises by the prosecutors which are in fact unfulfillable, he has a right to have those promises fulfilled." *Id.* The district court's unconditional release order was affirmed. *Id.*

To answer the question posed at the outset of this section regarding contract law versus ethical analysis, the *scope* of remedy may depend on whether a prosecutor's action in breaching a plea agreement was "egregious or intentional." *United States v. Brye*, 146 F.3d 1207, 1213. (10th Cir. 1998). In *Brye*, the Tenth Circuit analyzed a breach where the AUSA promised to "defer" on a motion for a downward departure, then undermined (albeit subtly) the defendant's motion at sentencing. *Id.* at 1212. While the Court found the breach, it observed that it would only permit the defendant to withdraw his plea when the breach was "egregious or intentional." *Id.* at 1213. Because the government's breach was "based on a misunderstanding of the plea agreement," the case was only remanded for resentencing. *Id.* The lesson from *Brye* is clear – when faced with a breach, defense counsel should argue contract law but should also emphasize the ethical violation, to secure better remedies for their client.

III. Normalizing Justice

A. The Proposed Expansion of Rule 16 and DOJ's Opposition

On April 28, 2009, Judge Emmet Sullivan, following the conclusion of *United States v. Stevens* case, wrote the Judicial Conference Advisory Committee and urged its members to consider an amendment to Rule 16 of the Federal Rules of Criminal Procedure. *See Appendix F (Sullivan, J. Letter, April 28, 2009)*. Judge Sullivan wrote, "A federal rule of criminal procedure requiring all exculpatory evidence to be produced to the defense would eliminate the need to rely on a 'prudent prosecutor' deciding to 'err on the side of transparency,' . . . and would go a long way towards furthering 'the search for the truth in criminal trials'and ensuring that 'justice shall be done.'" *Id.* He noted that it "has now been nearly three years since the United States Attorneys' Manual was modified to 'establish[] guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's discovery obligations as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case.'" *Id.* Judge

Sullivan also reiterated the serious *Brady* violations in the *Stevens* case.

Rule 16 currently requires "that the government produce, 'upon a defendant's request,' those documents and objects and the results of examinations and tests that are 'material to preparing the defense.'" Spivack, Roth and Golden, *Troubling the Heavens*, 34 CHAMPION 24 at 2. In contrast to the government's obligations under *Brady*, the government's Rule 16 obligation "to produce items 'material to preparing the defense' extends only to items material to 'the defendant's response to the govenrment's case in chief.'" *Id.*

In October 2009, Assistant Attorney General for the Criminal Division Lanny Breuer, addressed the committee and "described steps that the Department had taken in the aftermath of the *Stevens* trial, including forming a working group to study discovery in criminal proceedings and to suggest improvements. He said that while the Department took its obligations seriously, an Office of Professional Responsibility report of alleged Brady violations over the past nine years did not reveal evidence of a widespread problem." *See* October 13, 2009, Draft Minutes, Advisory Committee on Criminal Rules, http://www.uscourts.gov/rules/Agenda%20Books /Criminal/CR2010-04.pdf (last visited 4/9/10).[23]

He indicated that the DOJ would not object to amending Rule 16 to codify *Brady* disclosure requirements but would object to any proposed amendment beyond *Brady* obligations. *Id.* Presumably, the DOJ opposition to an expansion of Rule 16, even if only to the extent to which the United States Atorneys Manual now provides, is based on a concern that such an expansion would provide defendants with "an enforceable right to the government's disclosure of any and all exculpatory material, not just the information that the government deems to be 'material.'" *See* Spivack, Roth and Golden, *Troubling the Heavens*, 34 CHAMPION 24 at 10.

According to the draft minutes of the October 2009 meeting, "[a] participant suggested that the training of federal prosecutors should include presentations by members of the defense bar who could offer their perspective on discovery issues." *Id.* There was some discussion of an "open-file" policy that has been adopted by some U.S. Attorney Offices. "One member thought that the policy had been successfully used in the Northern District of California. However, Judge Tallman noted that as an appellate judge, he sees *Brady* issues arising in many cases from California, including that district." *Id.*

In a later March 2010 meeting, materials distributed to the members included the Ogden Memoranda outlining the DOJ's efforts to improve discovery practices by federal prosecutors, a letter from Judge Mark Wolf also advocating for an amendment to Rule 16 (*see Appendix G, Wolf, J. Letter, June 23, 2009*), a proposed draft survey of all federal judges designed by the

---

[23] At an April, 2010 panel session at the D.C. Judicial and Bar Conference, the director of the Criminal Division's Policy and Legislation, Jonathan Wroblewski, stated that "DOJ officials who have reviewed available data conclude there is no widespread misconduct when it comes to prosecutors turning over favorable material to defense lawyers . . . ." http://www.mainjustice.com/2010/04/13/doj-defends-against-critics-of-prosecutors-discovery-production/ (last visited 4/14/10)

Federal Judicial Center regarding discovery practices and judicial experience with *Brady* and *Giglio* violations, and the ABA's Formal Ethics Opinion 09-454.

Further discussion of the proposed amendment of Rule 16 will be held at the next meeting of the Advisory Committee on Criminal Rules in April, 2010.

B. For the Defense – Commentators' Opinions and Recommendations

From Pivack, Stephen R., *Troubling the Heavens: Production of Evidence Favorable to Defendants by the United States*, THE CHAMPION, January/February 2010:[24]

> One major remedy for these problems is an amendment to FRCrP 16, in line with that proposed by the Advisory Committee, that provides defendants an enforceable right to the government's disclosure of any and all exculpatory material, not just the information that the government deems to be "material." Such an amendment was endorsed by Judge Sullivan himself in the aftermath of the Stevens case, and would represent an important step towards safeguarding the rights of criminal defendants. It would codify the government's obligation to provide exculpatory and impeaching information regardless of its perceived materiality and would grant defendants a right that is enforceable in court and is not currently recognized by most courts absent a showing of materiality. In addition, it would help to ensure that federal prosecutors do not make decisions with respect to what information to provide to defendants based on an inherently subjective assessment of whether its use at trial would impact the outcome of the prosecution. Perhaps most importantly, amending FRCrP 16 would insulate defendants against future changes in Justice Department policy that might de-emphasize as a goal the full production of all exculpatory and impeaching information to criminal defendants. For all of those reasons, amending FRCrP 16 is an important and necessary step.
>
> . . . .
>
> Along with the adoption of specific new procedures and the retraining of prosecutors relative to existing requirements, the Department of Justice also should make clear that the failure of prosecutors to comply with the Department's internal guidelines will result in real and significant consequences.

From the blog of Scott H. Greenfield, Criminal Defense Attorney[25]:

---

[24] http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/e11dccac91ec12b9852576fc0073bc75?OpenDocument, (footnotes omitted) (last visited 4/12/10).

[25] http://blog.simplejustice.us/2009/07/09/brady-violations-not-just-a-rules-issue.aspx (last visited 4/12/10).

> The solutions to the *Brady* problem fall into two categories. Trust the DOJ or create a new rule that requires courts to trust the DOJ. While the new Rule 16 proposal has certain virtue, foremost of which is that it resolves the long-standing problem of when the government must disclose *Brady*, which it now holds to the very last second if it's to be disclosed at all, rendering the defense incapable of investigating or making good use of the information. But it still doesn't address the core issue: The determination of what is *Brady* is left to the discretion of the prosecution, and the duty to disclose it at all remains the decision of the prosecutor.
>
> The proposed 'solutions' are thus dependent on the answer to this question: Do you trust the prosecutor?
>
> If we can't trust the prosecutor, each and every prosecutor in every district throughout the country, to disclose *Brady*, to err on the side of disclosure, to disclose timely, then neither new rules nor procedures that continue to rely on the discretion of prosecutors will solve the problem. Clearly, former prosecutors and even judges who've been burned still seem to put their faith in the integrity of the government. Somehow, I don't find this satisfying, but then nobody engaged in this discussion seems to think that the defense side of the courtroom should have any say in the matter.

From Irwin H. Schwartz, *Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information*, THE CHAMPION, March, 2010:

> In the aftermath of the scandals of 2009, Attorney General Holder and Assistant Attorney General Breuer spoke about the Department's failures. Breuer said, 'The Department of Justice is committed to the very highest ethical standards.' Yet, when the Department issued its 2010 guidance on discovery, it made no mention of prosecutors' duty under Rule 3.8(d). It listed Rules 16 and 26.2, the Jencks Act, and *Brady* as sources 'generally establish[ing]' its 'discovery obligations.' How can the Department achieve 'the very highest ethical standards' when it does not acknowledge that Rule 3.8(d) establishes a duty of disclosure and a broader duty than the sources it listed? Worse, the guidance is inconsistent with Rule 3.8(d) on the critical matter of disclosure timing. The ABA Opinion requires disclosure of exculpatory information 'as soon as reasonably practicable.' The Department's guidance permits prosecutors to delay production of exculpatory information.
>
> Although acknowledging that *Brady* practices vary from office to office and even within offices, the guidance does not assure uniform practices within the Department. One way in which uniformity could be accomplished is by moving *Brady* discovery to Rule 16. Judge Emmet Sullivan, who tried the Ted Stevens case, asked the Supreme Court Advisory Committee on Criminal Rules to consider this idea. The Department opposed the suggestion, as it did in 2006. Recent cases show its efforts were not sufficient. Today, the Department clings to a narrow view of its disclosure obligations and continues to oppose rules reform.

> NACDL led the way to passage of 28 U.S.C. § 530B and passage of the Hyde Amendment. Recent events show that defense attorneys need to roll up their sleeves again -- in court and Congress. If the Department of Justice is unwilling or unable to mandate compliance with Rule 3.8(d), and if it is unwilling or unable to assure compliance with the rule, then courts or Congress must step in to mandate compliance. Now.

From Professor Ellen Podgor's White Collar Crime Prof Blog:

> In the wake of recent events that demonstrate discovery violations, DOJ has issued three new policies. It is wonderful to see that DOJ is beefing up its discovery practices and taking a hard look at what should happen in the future. It also sounds like a better management system is being considered. But that said, looking at the actual guidance memo, here are a few preliminary comments -
>
> After telling prosecutors that they need to familiarize themselves with *Brady, Giglio* and other discovery rules and statutes, the paragraph ends with a statement that this new memo 'provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits.' Yes, this is the standard language one finds throughout the DOJ manual. But wait a minute -- although DOJ guidelines can be guidelines, these mandates are constitutional, statutory, and rules - they often **do** have the force of law. This fact should be emphasized to prosecutors.
>
> The memo states - 'Prosecutors should never describe the discovery being provided as 'open file." The memo explains the fears of missing something. It seems odd that the DOJ doesn't want prosecutors to accept credit when they do the right thing and provide all discovery. Saying not to call it 'open,' for fear of missing something, implies that this is not a policy that recognizes the value of an 'open file' system that can work well and provide efficiency. And taking this one step further -- if it is not acknowledged as an 'open discovery' practice, and something is missed - will it sound any better to the accused who failed to receive their discovery material?
>
> The memo gives no real guidance as to when a prosecutor has to turn over *Jencks* material, and leaves it to the individual offices to create their individual rules. It is ironic that DOJ wants sentencing consistency, but doesn't want discovery consistency. Should a defendant in Wyoming have different rights to witness statements than the defendant in New York?
>
> It is good to see memorialization of witness statements is important. But only turning over 'material variances in a witness's statements?' Shouldn't all variances be turned over?
>
> It is interesting how the memo provides an extensive review process of discovery material - will this hold up getting the materials to defense counsel? Also will defense counsel be given an equal amount of time to review these materials and

> time to conduct additional investigation that may be warranted as a result of the materials provided?
>
> And yes, it is important to protect witnesses and national security - but should DOJ be the one deciding when they think they can withhold evidence? Shouldn't that be for neutral parties like the judiciary?
>
> It is good to see DOJ trying to do a better job than past administrations, but what really needs to be done is setting forth clearer rules and statutes by independent parties, as opposed to a working group made up of 'senior prosecutors from throughout the Department and from United States' Attorney Offices, law enforcement representatives, and information technology professionals,' so that our system does 'do justice' as desired by AG Holder.[26]

Parting Thoughts

> It is the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win . . . . It is not.

United States v. Blueford, 312 F.3d 962, 968 (9th Cir. 2002) *as amend. & further amend*., Nov. 22, 2002 (internal quotations and citations omitted).

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be.

United States v. Wade, 388 U.S. 218, 256 (1967) (White, J., concurring and dissenting) (footnote omitted).

> The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (Brandeis, J., dissenting).

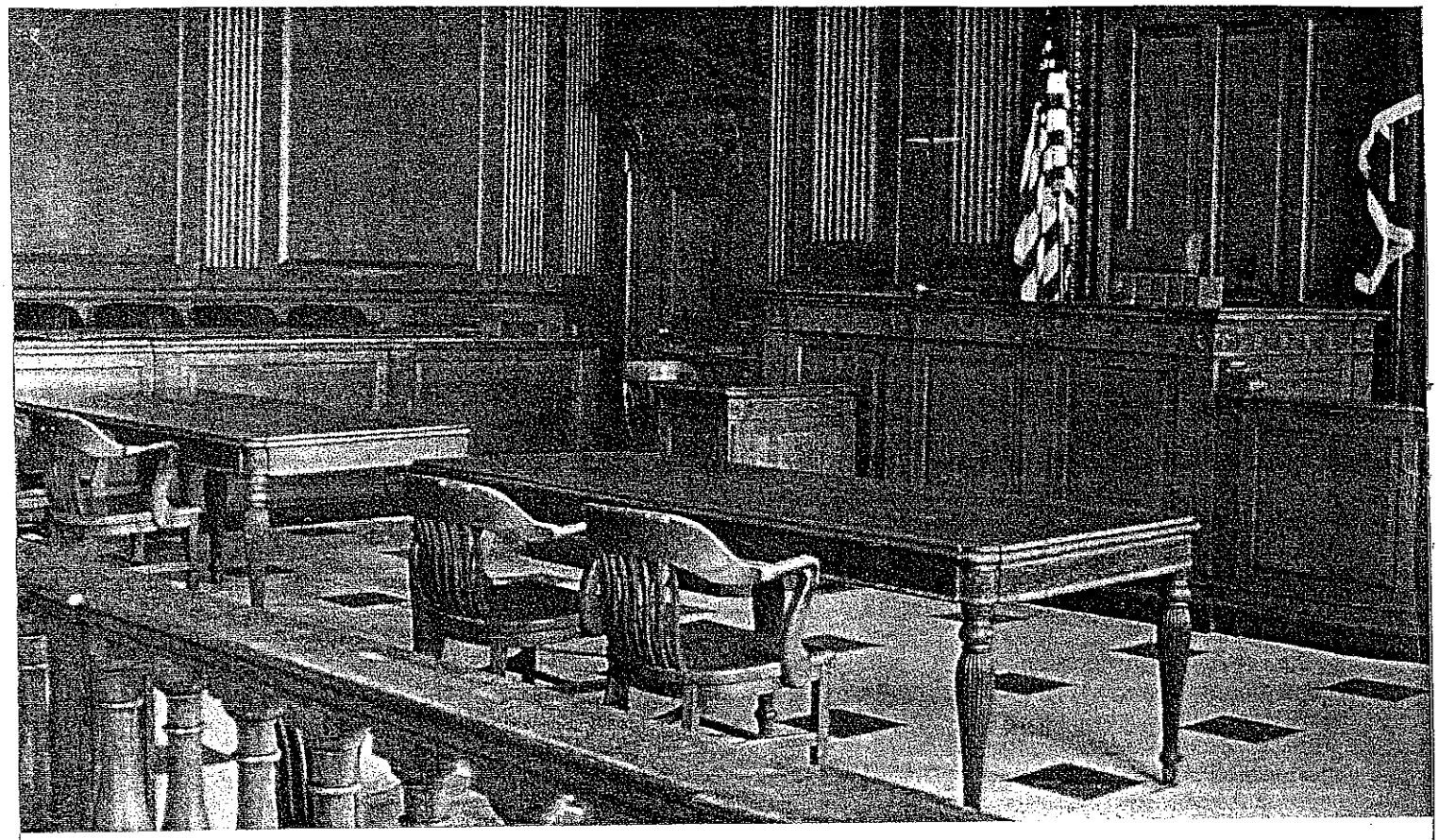
> [T]he Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise. The Model Code of Professional Responsibility, on the other hand, encompasses the attorney's duty to 'maintain the highest standards of ethical conduct.' Preamble, Model Code of Professional

---

[26] *New DOJ Discovery Policies Fall Short*, http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/01/new-doj-discovery-policies.html (last visited 4/14/10).

> Responsibility (1981). The Code is designed to safeguard the integrity of the profession and preserve public confidence in our system of justice.

United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988).



Unjust Courtroom Practice: Always Seating The Prosecution Closest to the Jury

Jurymen seldom convict a person they like, or acquit one they dislike. The main work of the trial lawyer is to make a jury like his client, or at least to feel sympathy for him; facts regarding the crime are relatively unimportant.[1]

Clarence Darrow

How can a criminal defense attorney make the jury feel anything for a client when the accused is seated halfway across the room at an uncomfortable proximity?

In courtrooms across America, it is well established that the prosecution always sits at the table closest to the jury. There are no laws mandating such, but it has become an unwritten, uncodified rule of implicit understanding. Whenever a defense lawyer challenges such custom, the judge or prosecution typically replies that the state or government has the burden of proof and is therefore entitled to an added advantage. This article brings to light the illegality of such practice. The fact that the state always sits at the table nearest to the jury proves this is indeed beneficial.

Our laws are designed to be fair to all parties in litigation. In civil suits where the plaintiff carries a burden, the plaintiff has no entitlement to sit closest to the jury. The custom of seating arrangements is determined by which party arrives in the courtroom first to claim its table. So the notion that "having the burden of proof" requires special treatment carries no legal weight. If anything at all, our law points to the defendant in a criminal case as being granted special privileges: the right to a lawyer where he cannot afford one, the privilege not to testify, and compulsory process for obtaining witnesses in his favor, all of which do not exist for a party in a civil suit.

The Sixth Amendment to the U.S. Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed. ...

The Fifth Amendment guarantees "due process of law" to all persons. The Constitution makes it clear that people accused of crime are entitled to due process of law by an impartial jury. So, simply put, any added benefit to the state violates due process.

Does seating the prosecution nearest to the jury create *in any way* a partial jury? The clear and unequivocal answer to that question is yes. This is

BY MIMI COFFEY

based not just on the prosecution's act of sitting closest to the jury each time, but on the vast body of social science literature. Between 1964-2003, more than 1200 research papers on personal space were recorded in the PsycInfo database, with two-thirds (67.6 percent) published before 1983 proving the study of personal space in the socio-environmental context is highly relevant to the understanding of processes in social psychology.[2]

Intangible and immeasurable factors do influence judgments of law: "Law is neither all reason nor all emotion; it is neither all explicit rules nor intuitively assessed principles of justice; it is a composite."[3] Major theorists of psychology over the past century have argued that physical distance cues have adaptive significance.[4] People communicate their feelings and intentions by regulating the distance they maintain between themselves and others.[5] Construal level theorists purport that temporal, social, and spatial distance fall under the umbrella of *psychological distance*; however Lawrence Williams in a 2008 study determined that it is the other way around.[6] A primitive understanding of distance develops in infants at 3-4 months of age, and it is this foundation of psychological distance that gives humans the pervasive tendency to conceptualize the mental world by analogy to the physical world.[7]

A 2008 Yale study proved that perceptual and motor representations of spatial distance could influence people's phenomenal experience. In this study, participants were asked to plot points on a Cartesian plane.[8] The greater the distance plotted by participants, the less emotional attachment they felt towards others, family, and even their own hometowns.[9] Greater distances were also associated with more enjoyment of violence and embarrassments.[10] There is overwhelming evidence that people with a positive attitude toward others stand or sit closer to each other than those who do not.[11] From a basic sociological perspective, lay people understand that physical proximity is a reflection of our basic instincts of others. We tend to physically distance ourselves from those for whom we do not harbor positive feelings. A defendant isolated from the jury box sends the message he is distanced for a reason. This is highly dangerous because people often look to their environment for clues on how they should feel, as a natural part of the situational appraisal process.[12]

Interpersonal Distance

The study of interpersonal distance (IPD) of human beings is known as proxemics. IPD is defined as the distance individuals characteristically keep, or desire to keep, between themselves and others. It is related to such variables as liking, acquaintance, personality characteristics, and social attitudes.[13] IPD is a very salient cue to both young and old given its ethological significance, thereby making it a particularly effective nonverbal signal for the attainment of various goals.[14] Not only are proximity and interpersonal distance social dynamics integral in human relationships, but also once a level of social intimacy is established, it takes on a life of its own in the maintenance of those relationships.

Concomitant with proximity is attachment theory. Attachment theory is the presumption of a biologically based drive for proximity with potential caregivers amongst humans and other primates, developed through natural selection.[15] Bowlby's models of attachment are working cognitive models that detail the structure of attachment experiences, which guide individuals' perceptions regarding themselves, others, and close relationships.[16] These models are presumed to play a significant role in motivating people to seek or avoid emotional proximity to others and promote the show of behaviors or behavioral strategies that further these attachment goals.[17]

At the root of attachment is genuine likeability. According to the principle of propinquity, other things being equal, people are most likely to be attracted to those in closest contact with them.[18] Closer interaction distances are related to less directly confronting orientations and minimized conflict.[19] This comports with one of the most productive research foci in contemporary social psychology — the investigation of factors influencing attraction.[20] Among such factors, the major determinants are attitude, similarity, personality, physical proximity, and frequency of exposure.[21]

Physical proximity can affect one subconsciously. A 1978 University of Miami study showed that relationships were seen as significantly less positive with increased distance.[22] The closer an individual is to another person, the more positive the individual's attitude towards that person.[23] A 1981 study of Harvard students proved that people who are in closer proximity to others are rated as more sincere, natural, likeable, and loving than others; these folks ~~are~~ also perceived to be less dominant by peers.[24]

In addition to close physical proximity, people prefer face-to-face seating for communication.[25] Females prefer even closer proximity standing or seated compared to their male counterparts.[26] Race can also have an effect on proximity.[27] One study, which recorded space preferences varying with race, found that African Americans prefer smaller interaction distances than Whites.[28]

The most obvious perception of space proximity involves threats with the attachment system serving to protect people from physiological and emotional distress.[29] Spatial distance and affect are inextricably linked due to the belief that "distance equals safety," which is deeply ingrained in humans' biological makeup.[30] Greater distance is preferred in situations of relatively high tension.[31] The experience of failure or high anxiety levels is regarded as negative, which correlate spatially with greater interpersonal distances.[32] People prefer more distance when anticipating stressful situations.[33] A study using 60 interviews with four psychiatrists showed patients displayed anxiety the farther they sat from therapists,[34] proving highly anxious people stand farther away from others compared to less anxious people.[35] In a study of 73 New Zealand prisoners, violent offenders clearly preferred a significantly larger interpersonal distance than nonviolent offenders.[36]

Forcing the citizen accused to sit farthest from the jury sends the message he or she is a threat to either each juror's person or peace of mind. It appears to shadow a predetermined uncomfortable verdict or, at the very least, a level of anxiety in the nature of being a juror. This feeling of discomfort is unconscious, as people unconsciously use information about space proximity within their environment to construct psychological frameworks of reference.[37] The message of "keep a distance" from the defendant that is sent to jurors may exacerbate their insecurities and influence the potential of a first impression into becoming more, particularly since the table positioning never changes.[38]

How Proximity Affects Defendants

There are two ways of looking at space proximity in a courtroom and how it affects the citizen accused. First,

one can view it from the perspective of the other person. For example, if the courtroom seats the defendant farthest away from the jury, what does that say about the defendant? Outside of sending the nonverbal message the citizen accused is a threat, jurors may also wrongly perceive that the defendant feels he is guilty and desires space. It has been shown that a more confident person can tolerate closer interpersonal distances.[7] This suggests people choose an interpersonal conversational distance that aligns with how they feel about themselves versus how they feel about others.[8] As evidence of the comfort zone people prefer, it has been shown people talk longer about personal topics at an intermediate distance of five feet (versus two or nine feet).[9] This puts the state's positioning at the closest table in the most ideal range for communication both verbally and nonverbally.

The party closest to the jury has the added advantage of picking up on more body language signals communicating how the jury is both thinking and feeling. Unintended cues to emotion are present in people's body posture and movement.[10] It has been suggested that 80 percent of our decisions are influenced by nonverbal language, which includes body signals, gestures, mimicry, and actions.[11] Nonverbal cues account for more message variance than verbal clues.[12] Clearly, if a verbal message is ambiguous, nonverbal cues become critically important in interpreting what was said.[13] Distance also amplifies the effect of space proximity in what is known as "the immediacy principle." Professor Albert Mehrabian states, "More immediate postures and positions of a communicator are associated with his greater liking ... and leads the addressee to infer that the communicator likes him more."[14] Even in a therapy setting, it was proven patients felt closer to therapists with high immediacy, eye contact, and closer distance, as opposed to a therapist with low immediacy.[15]

Eye contact is critical in nonverbal communication. It has been said the "eyes reflect, mirror, speak — not infrequently, more strongly than words and body language combined."[16] The lack of eye contact between the defendant and the jurors sends a devastating message. By not looking at a person, that person becomes designated as a "nonperson"; not to receive eye contact for an extended time span leaves one feeling uncomfortable, irritated or rejected, and it becomes extremely difficult to counteract this nonverbal exclusion communication.[17]

Not only does distance make it difficult to pick up on eye signals, but also sitting farthest from a jury makes other gestures difficult to ascertain. It is important to note that a smiling expression increases one's perceived physical attractiveness and people associate it with positive attributes.[18] Great communicators read from people's body language the desired communication style. It is said there are two styles one can read from looking at a person's body language according to regulatory fit: eager and vigilant. Eagerness is characterized by movements forward, the use of gestures that involve animated, broad movements, and hand movements that openly project outward: forward leaning body positions, fast body movement and fast speech rates.[19] Vigilance is characterized by gestures that show precision: "pushing" motions represent slowing down, slightly backward-leaning body positions, slower body movement and a slower speech rate.[20]

When tested, an eager nonverbal delivery style results in greater message effectiveness for promotion-focus recipients, while a vigilant nonverbal delivery style is more effective for prevention-focus recipients.[21] Doctors understand the importance of body cues. Doctors who are good at reading and correctly interpreting people's nonverbal languages have more satisfied patients.[22] In analyzing patient satisfaction, it has been found that face plus voice encoding measures are slightly better predictors than voice only encoding measures.[23] Greater patient satisfaction has been associated with expressive nonverbal behavior such as more gestures, forward leanings, closer interpersonal distance and more gazing.[24] This shows that the ability to read and interpret body language is critical to effective communication.

Space proximity is necessary for the decoding of emotional messages sent by body language. There is evidence that emotion, in its physical component of the amygdala, is deeply and necessarily involved in judgments.[25] The importance of emotional states has been linked to moral thinking in the context of normative judgments.[26] Ronald deSouza argued that far from being the enemy of good judgment, emotion is an essential element in rational thought.[27] The ability of the jury to see a defendant also may influence verdicts and the defendant's emotional state. For example, one study found the defendant's emotion significantly affected jurors' judgment of guilt when the defendant was a female.[28] Another study showed that when a defendant appeared sincere throughout the trial, the defendant was more likely to be spared death in a capital case.[29] However, all of this is irrelevant if the jury is not situated close enough to read the defendant's body language.

Jurors seek to achieve "total justice," and many studies cite emotional and intuitive factors in their thinking that cannot be satisfied by blinding them to the defendant by use of physical space.[30] A survey of 4,654 jurors in North Carolina found that the chief complaint of jurors was the time spent in jury service.[31] The defense is in control of how long a trial will endure, as they have no burden to prove, yet is at the biggest disadvantage in the courtroom of gauging jurors' needs because of an inability to read their body language due to distance.

The court places itself in an unethical position of making a comment on the weight of evidence by signaling that the defendant, due to strategic farthest placement from the jury, is either undesirable or a danger. It is well established in the social sciences that while far interpersonal distances may be appropriate in some contexts, the message of "keep a distance" may influence the potential of a first meeting to become "something more" in social science parlance.[32] Lawrence E. Williams and John A. Bargh summarized the importance of space proxemics:

> The basic concept of spatial distance has profound effects on the cognitive processes involved in appraisal and affect. ... These effects reveal the fundamental importance of distance cues ... in shaping people's judgments and affective experiences, and highlight the ease with which aspects of the physical environment (and the spatial relations therein) can activate feelings of closeness or distance without one's awareness.[33]

In short, one need not be a social scientist to understand that interpersonal proximity is directly related to the nature of the evaluative feedback anticipated or perceived.[34] It is time for judges to stop sending biased signals to

juries regarding the citizen accused and his placement in the court theater, which indirectly comments on the weight of evidence. If the prosecution wants to argue it deserves an advantage in trial because it carries the burden of proof, prosecutors need to reacquaint themselves with the Bill of Rights. The citizen accused has been afforded every advantage in a criminal trial due to the principles of the Founding Fathers in recognizing that liberty is valued most of all, and before it is taken the government must satisfy its burden. It would not be in the spirit of the Founding Fathers and the principles they laid out in the Bill of Rights to place a citizen accused in the worst possible physical position in the courtroom, particularly where it places jurors in a disadvantageous position to fulfill their duties in administering justice. The government cannot continue to claim this added advantage at the expense of the citizen accused as envisioned by the Constitution.

Conclusion

Jurors deserve proximity to the defendant when assessing the citizen's fate. Much is lost in nonverbal communication that is essential to the fundamentals of justice deserved by a citizen accused. People accused of crime cannot be afforded optimal defense when their lawyers are shielded both visually and audibly from juries. Even billion dollar sports industries operate on the premise of changing sides to negate any added advantage of space proximity (e.g., basketball, football, tennis, soccer). At a bare minimum, laws should be passed to address the disadvantage to which the defendant is being subjected despite the fact that the defendant has the right to remain silent, has no burden of proof, and has the ability to employ the government to secure and subpoena witnesses. No such automatic advantage applies to a plaintiff in a civil suit. For the prosecution to claim automatic entitlement without question is manifestly unjust, particularly in light of the overwhelming proof from the social sciences that exists regarding the importance of space proximity in communication.

Notes

1. Hermen E. Mitchell & Donn Byrne, *The Defendant's Dilemma: Effects of Jurors' Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERSONALITY AND SOC. PSYCHOL. 123 (1973).

2. David Uzzell & Nathalie Horne, *The Influence of Biological Sex, Sexuality, and Gender Role on Interpersonal Distance*, 45 BRIT. J. SOC. PSYCHOL. 579 (2006).

3. Oliver R. Goodenough & Kristin Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, 359 PHIL. TRANS. R. SOC. LOND. B 1709, 1719 (2004).

4. Lawrence E. Williams & John A. Bargh (hereinafter Williams & Bargh), *Keeping One's Distance: The Influence of Spatial Distance Cues on Affect and Evaluation*, 19 PSYCHOL. SCI. 302, 303 (2008).

5. Jeffrey L. Sanders et al., *Use of an Auditory Technique in Personal Space Measurement*, 112 J. SOC. PSYCHOL. 99 (1980).

6. Williams & Bargh at 302-303; *see also* N. Liberman, Y. Trope & E. Stephan, (in press), *Psychological Distance*, *in* E. T. HIGGINS & A. W. KRUGLANSKI (eds.), SOCIAL PSYCHOLOGY: A HANDBOOK OF BASIC PRINCIPLES.

7. Williams & Bargh at 302-303; *see also* A.M. Leslie, *The Perception of Causality in Infants*, 11 PERCEPTION 173 (1982); J.M. Mandler, *How to Build a Baby*, 99 PSYCHOL. REV. 587 (1992).

8. Williams & Bargh at 307.

9. *Id.*

10. *Id.*

11. Carol L. Lassen, *Effect of Proximity on Anxiety and Communication in the Initial Psychiatric Interview*, 81 J. ABNORMAL PSYCHOL. 226, 231 (1973).

12. Williams & Bargh at 302; *see also* R.S. Lazarus, *Cognition and Motivation in Emotion*, 46 AM. PSYCHOLOGIST 352 (1991) and Y. Trope, *Identification and Inferential Processes in Dispositional Attribution*, 93 PSYCHOL. REV. 239 (1986).

13. Edward Greenberg. et al., *Inkblot Content and Interpersonal Distance*, 33 J. CLINICAL PSYCHOL. 882 (1977).

14. Marsha Kaitz et al., *Adult Attachment Style and Interpersonal Distance*, 6 ATTACHMENT & HUM. DEV. 285, 287 (2004).

15. *Id.*

16. *Id.* at 286.

17 *Id.* at 286-287.

18. Richard W. Brislin, *Contact as a Variable in Intergroup Interaction*, 76 J. SOC. PSYCHOL. 149 (1968).

19. Miles L. Patterson, *Interpersonal Distance, Affect and Equilibrium Theory*, 101 J. SOC. PSYCHOL. 205, 210 (1977).

20. Thomas Blass & P. Damian Schwarcz, *The Relative Importance of Four Determinants of Attraction*, 117 J. SOC. PSYCHOL. 145 (1982).

21. *Id.* at 145.

22. A. Rodney Wellens & Myron L. Goldberg, *The Effects of Interpersonal Distance and Orientation Upon the Perception of Soc. Relationships*, 99 J. PSYCHOL. 39 (1978).

23. Aaron Wolfgang & Joan Wolfgang, *Exploration of Attitudes via Physical Interpersonal Distance Toward the Obese, Drug Users, Homosexuals, Police and Other Marginal Figures*, 27 J. CLINICAL PSYCHOL. 510 (1971).

24. Dan P. McAdams & Joseph Powers, *Themes of Intimacy in Behavior and Thought*, 40 J. PERSONALITY & SOC. PSYCHOL. 573, 584 (1981).

25. Michael J. White, *Interpersonal Distance as Affected by Room Size, Status, and Sex*, 95 J. SOC. PSYCHOL. 241 (1975).

26. Walter Leginski & Richard R. Izzett, *The Selection and Evaluation of Interpersonal Distances as a Function of Linguistic Styles*, 99 J. SOC. PSYCHOL. 125, 126 (1976).

See also Michael J. White, *Interpersonal Distance as Affected by Room Size, Status and Sex*, 95 J. SOC. PSYCHOL. 241, 248 (1975).

27. Edward Greenberg et al., *Inkblot Content and Interpersonal Distance*, 33 J. CLINICAL PSYCHOL. 882, 883 (1977).

28. Gay H. Tennis & James M. Dabbs Jr., *Race, Setting and Actor-Target Differences in Personal Space*, 4 SOC. BEHAV. & PERSONALITY 50 (1976).

29. Williams & Bargh at 303.

30. *Id.* at 302-303.

31. Gary T. Long, *Psychological Tension and Closeness to Others: Stress and Interpersonal Distance Preference*, 117 J. PSYCHOL. 143, 144 (1984).

32. Stuart A. Karabenick & Murray Meisels, *Effects of Performance Evaluation on Interpersonal Distance*, 40 J. PERSONALITY 275, 284 (1972).

33. Gary T. Long et al., *Effects of Situational Stress and Sex on Interpersonal Distance Preference*, 105 J. PSYCHOL. 231 (1980).

34. Carol L. Lassen, *Effect of Proximity on Anxiety and Communication in the Initial Psychiatric Interview*, 81 J. ABNORMAL PSYCHOL. 226, 229 (1973).

35. Denis C. E. Ugwuegbu & A. U. Anusiem, *Effects of Stress on Interpersonal Distance in a Simulated Interview Situation*, 116 J. SOC. PSYCHOL. 3 (1982).

36. D. Ross Gilmour & Frank H. Walkey, *Identifying Violent Offenders Using a Video Measure of Interpersonal Distance*, 49 J. CONSULTING & CLINICAL PSYCHOL. 287, 289 (1981).

37. Williams & Bargh at 307.

38. Marsha Kaitz et al., *Adult Attachment Style and Interpersonal Distance*, 6 ATTACHMENT & HUM. DEV. 285, 300 (2004).

39. David J. A. Edwards, *Perception of Crowding and Tolerance for Interpersonal Proximity and Separation in South Africa*, 110 J. SOC. PSYCHOL. 19, 27 (1980).

40. Marsha Kaitz et al., *Adult Attachment Style and Interpersonal Distance*, 6 ATTACHMENT & HUM. DEV. 285, 299 (2004).

41. Gerald L. Stone & Cathy J. Morden, *Effect of Distance on Verbal Productivity*, 23 J. COUNSELING PSYCHOL. 486, 488 (1976).

42. M. Robin DiMatteo et al., *Predicting Patient Satisfaction From Physicians' Nonverbal Communication Skills*, 18 MED. CARE 376, 379 (1980).

43. S. Porchet-Munro, *Aspects of Nonverbal Communication*, 121 RECENT RESULTS IN CANCER RESEARCH 313, 314 (1991).

44. Conrad Lecomte et al., *Counseling Interactions as a Function of Spatial-Environmental Conditions*, 28 J. COUNSELING PSYCHOL. 536 (1981).

45. Marianne Schmid Mast, *On the Importance of Nonverbal Communication in the Physician-Patient Interaction*, 67 PATIENT EDUC. & COUNSELING 315, 316 (2007).

46. Mark Sherer & Ronald W. Rogers, *Effects of Therapist's Nonverbal Communication on Rated Skill and Effectiveness*, 36 J. CLINICAL PSYCHOL. 696, 696-697 (1980); *see also* ALBERT MEHRABIAN, NONVERBAL COMMUNICATION (1972).

47. Mark Sherer & Ronald W. Rogers, *Effects of Therapist's Nonverbal Communication on Rated Skill and Effectiveness*, 36 J. CLINICAL PSYCHOL. 696, 698.

48. S. Porchet-Munro, *Aspects of Nonverbal Communication*, 121 RECENT RESULTS IN CANCER RESEARCH 313, 317 (1991).

49. *Id.*

50. Millicent H. Abel & Heather Watters, *Attributions of Guilt and Punishment as Functions of Physical Attractiveness and Smiling*, 145 J. SOC. PSYCHOLOGY 687 (2005).

51. Joseph Cesario & E. Tory Higgins, *Making Message Recipients 'Feel Right': How Nonverbal Cues Can Increase Persuasion*, 19 PSYCHOL. SCI. 415, 416 (2008).

52. *Id.*

53. *Id.* at 418-419.

54. Marianne Schmid Mast, *On the Importance of Nonverbal Communication in the Physician-Patient Interaction*, 67 PATIENT EDUC. & COUNSELING 315, 316 (2007).

55. M. Robin DiMatteo et al., *Predicting Patient Satisfaction From Physicians' Nonverbal Communication Skills*, 18 MED. CARE 376, 384 (1980).

56. Marianne Schmid Mast, *On the Importance of Nonverbal Communication in the Physician-Patient Interaction*, 67 PATIENT EDUC. & COUNSELING 315, 316 (2007).

57. Oliver R. Goodenough & Kristin Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, 359 PHIL. TRANS. R. SOC. LOND. B 1709, 1717 (2004).

58. *Id.* at 1712.

59. *Id*; *see also* RONALD DESOUSA, THE RATIONALITY OF EMOTION (1987).

60. Carolyn Semmler & Neil Brewer, *Effects of Mood and Emotion on Juror Processing and Judgments*, 20 BEHAV. SCI. & L. 423, 424 (2002).

61. Michael E. Antonio, *Arbitrariness and the Death Penalty: How the Defendant's Appearance During Trial Influences Capital Jurors' Punishment Decision*, 24 BEHAV. SCI. & L. 215 (2006).

62. Oliver R. Goodenough & Kristin Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, 359 PHIL. TRANS. R. SOC. LOND. B 1709, 1712 (2004).

63. Brian L. Cutler & Donna M. Hughes, *Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Juror Survey*, 19 BEHAV. SCI. & L. 305, 311-312 (2001).

64. Marsha Kaitz et al., *Adult Attachment Style and Interpersonal Distance*, 6 ATTACHMENT & HUM. DEV. 285, 300 (2004).

65. Williams & Bargh at 307.

66. Les R. Greene, *Effects of Verbal Evaluative Feedback and Interpersonal Distance on Behavioral Compliance*, 24 J. COUNSELING PSYCHOL. 10, 11 (1977).

About the Author

Mimi Coffey is the founder of the Coffey Firm, which focuses exclusively on Texas DWI. She has passed the DUI Defense Board certification exam administered by the National College of DUI Defense and has completed courses on NHTSA Standardized Field Sobriety Testing as both a practitioner and an instructor. Coffey has completed the Robert F. Borkenstein course on Alcohol and Highway Safety Testing: Research and Litigation.

Mimi Coffey
4700 Airport Fwy., Ste. B
Ft. Worth, TX 76117
817-831-3100
Fax 817-831-3340
E-MAIL mimi@mimicoffey.com