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New Perspectives on *Brady* and Other Disclosure Obligations: Report of the Working Groups on Best Practices

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NEW PERSPECTIVES ON *BRADY* AND OTHER
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INTRODUCTION

The most effective and ethical prosecutor’s office is one where the leader sets a tone of ethical behavior, then hires and trains lawyers with good character who possess good judgment. In November 2009, the Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, convened at the Benjamin N. Cardozo School of Law to explore and identify the best practices that lead to such an office. Participants in the Symposium—including representatives from state and federal prosecutors’ offices, defense lawyers, judges, legal academics, cognitive scientists, social psychologists, doctors, as well as members of the medical and corporate risk management fields—took an inter-professional approach to discuss the core issues affecting prosecutors’ offices from around the country.

To structure the discussion in advance of the Symposium approximately seventy-five participants were split into six Working Groups, each meeting to discuss a core issue. Every group had a reporter and a discussion leader, who circulated to the participants short papers setting forth the issues and alternative views. During the Symposium, the groups met for five hours to discuss the issues and to try to reach a consensus about particular practices. The following Article presents the findings of each of the six Working Groups.

The Parts of this Article correspond to each group's discussions and recommendations. Part I discusses prosecutorial disclosure obligations and practices. Part II discusses the disclosure process. Part III discusses training and supervision. Part IV discusses systems and culture. Parts V and VI discuss internal and external regulation, respectively.

I. PROSECUTORIAL DISCLOSURE OBLIGATIONS AND PRACTICES:
REPORTED BY JENNIFER BLASSER¹

This Part summarizes the discussions of the Working Group on Prosecutorial Disclosure Obligations and Practices.² Participants in the group have practiced in state and federal criminal proceedings in jurisdictions across the country and therefore brought varied experiences and perspectives to the discussions.

A. *Background*

The subject of this Working Group was, in a sense, foundational for all of the other Working Groups. While other groups considered what prosecutors' offices should do to ensure that, in any given case, the office discloses what should be disclosed as a matter of law and office policy, this group discussed what information, material, and evidence prosecutors and their offices *should* disclose—whether as a matter of law, office policy, or individual discretion.

The group recognized that, at present, prosecutors' disclosure obligations vary from jurisdiction to jurisdiction and derive from various sources. All prosecutors' offices are subject to federal

¹ Discussion Leader: Bruce Green, Professor of Law, Fordham Law School; Reporter: Jennifer Blasser, Clinical Assistant Professor of Law, Benjamin N. Cardozo School of Law. Other members of the Working Group on Prosecutorial Disclosure Obligations and Practices included: Hon. Marcia G. Cooke, U.S. District Judge, Southern District of Florida; Patricia Coats Jessamy, State's Attorney for Baltimore City, Maryland; Mathias H. Heck, Jr., Prosecuting Attorney, Dayton, Montgomery County, Ohio; John T. Chisholm, District Attorney, Milwaukee County, Wisconsin; Alafair S. Burke, Professor of Law and Associate Dean of Faculty Research, Hofstra Law School; Paul Fishman, U.S. Attorney for the District of New Jersey; J. Vincent Aprile II, Esq.; Morris "Sandy" Weinberg Jr., Partner, Zuckerman Spaeder LLP; Anthony J. Servino, Second Deputy District Attorney, Chief, Appeal and Special Litigation Division, Westchester County, New York; Eric C. Rosenbaum, Assistant District Attorney, Chief, DNA Prosecution Unit, Special Victims Bureau, Queens County, New York; Anna-Sigga Nicolazzi, Assistant District Attorney, Homicide Bureau Chief, Kings County, New York; Gerald B. Lefcourt, P.C.; and John Schoeffel, Criminal Defense Practice, Special Litigation Unit, The Legal Aid Society.

² The summary does not seek to capture the discussions in the order they occurred but to capture the principal points of agreement and disagreement and their bases.

constitutional standards (e.g., *Brady* obligations), which have been interpreted differently by different courts. For state prosecutors, state constitutional case law may go beyond the federal constitutional minimum. Additionally, prosecutors are subject to legal obligations established by statutes and/or rules of criminal procedure that supplement and overlap constitutional obligations. Court rules, including judicially adopted rules of professional conduct,³ are another potential source of obligation. As discussions proceeded, participants referred to federal law,⁴ the law of their home states,⁵ proposed amendments to both federal and state law,⁶ different offices' policies, and the exercise of individual prosecutors' discretion.

Jurisdictions' statutes and rules call for the disclosure of specified documents, physical items, and other information. For example, in Wisconsin, the law requires the prosecution to disclose: written and recorded statements of the defendant; written summaries of the defendant's oral statements; the defendant's criminal record; physical evidence and specified other evidence that the prosecution plans to use at trial; a witness list and the witnesses' criminal records; prosecution witnesses' relevant written and recorded statements; expert reports; and "[a]ny exculpatory evidence."⁷

The federal constitutional case law generally calls for disclosure of material evidence and information favorable to the accused, whether it be useful in the defense's case in chief, for impeachment of prosecution witnesses, or for investigation that may lead to favorable evidence. The constitutional obligation is not limited to information that has been memorialized or to information in the prosecutor's immediate possession, but extends to certain information possessed by the jurisdiction's law enforcement investigators, including information known but not written down. The boundaries of the *Brady* decisions are uncertain and contested; because of the "materiality" requirement, they are not capable of being easily or mechanically applied—particularly if a prosecutor intends to disclose only what the law requires and no more.

³ Examples of these are state rules based on the ABA Model Rules of Professional Conduct Rule 3.8(d). This provision was the recent subject of an ABA ethics opinion. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 454 (2009).

⁴ E.g., Jencks Act, 18 U.S.C. § 3500 (2006); FED. R. CRIM. P. 16.

⁵ E.g., MD. R. 4-262, -263, -301; MINN. R. CRIM. P. 9.01; N.Y. CRIM. PROC. LAW art. 240 (McKinney 2010); WIS. STAT. § 971.23 (2009).

⁶ See, e.g., AM. COLL. OF TRIAL LAWYERS, PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16 (2003), available at http://www.actil.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=62; JOHN SCHOEFFEL, THE LEGAL AID SOC'Y, CRIMINAL DISCOVERY REFORM IN NEW YORK: A PROPOSAL TO REPEAL C.P.L. ARTICLE 240 AND TO ENACT A NEW C.P.L. ARTICLE 245 (2009), available at <http://www.legal-aid.org/media/73762/proposal%20for%20discovery%20reform%20in%20new%20york.pdf>.

⁷ WIS. STAT. § 971.23 (2009); see also *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

The discussions took place against the background of current law, as so described.

B. *Discussions*

1. Basic Premises of Prosecutorial Disclosure

Participants took as a given that prosecutorial disclosure is necessary to promote the public interest in achieving fair trials and reliable outcomes in the criminal justice system. At bottom, disclosure is one way in which prosecutors fulfill their fundamental role as “ministers of justice.” Fair trials and reliable outcomes require that defense lawyers serve their own assumed role in the criminal justice process—i.e., advising the client; investigating and preparing for trial; and, at trial, testing the prosecution’s proof, testing the credibility of prosecution witnesses, and offering evidence favorable to the accused. Much of the evidence or information that enables defense counsel to serve these necessary functions is either uniquely available to the prosecutor and other law enforcement authorities or, as a practical matter, inaccessible to the defense. As some recent exoneration cases illustrate, erroneous convictions can result when defense lawyers do not receive and take advantage of necessary evidence and information in the prosecution’s possession. Thus, prosecutorial disclosure is not a “technical” obligation but is generally central to the prosecutor’s function and essential to the proper functioning of the criminal justice process. These understandings informed the discussions about what prosecutors should disclose and when disclosure should be made.

2. Limits on Disclosure

At the same time, there was broad acknowledgment that, in some cases (or types of cases), legitimate considerations weigh against liberal disclosure. For example, witnesses in certain types of cases—such as those involving homicides, sexual assault, and domestic violence—may risk being physically injured because of their willingness to cooperate with law enforcement and/or to testify. In cases involving gang violence, the prosecution’s disclosure of witness lists has sometimes led to the dissemination of witnesses’ names throughout their neighborhood, thereby adding to the risk. In some cases, once disclosure is made, witnesses must be placed in protective custody; the earlier this occurs, the greater the burden on the witness and the prosecution, which may have limited resources.

In some contexts, disclosure of certain information may lead defendants or defense witnesses to contrive or tailor false testimony, as might be true if the prosecution were to disclose statements obtained from defense alibi witnesses. In other contexts, administrative or financial considerations suggest the need for limiting disclosure. For example, in some white collar cases, disclosure of voluminous documents may present administrative or financial challenges to the prosecution. Smaller jurisdictions may have limited available resources and access to information, which could in turn affect the timing, if not scope, of discovery.

There was not universal agreement on how frequently these concerns arise. For example, some participants noted that prosecutors in various jurisdictions around the country currently provide information about witnesses to the defense at an early stage in the process, and that there does not appear to be evidence that prosecution witnesses suffer greater harm in these jurisdictions than in those in which such information is produced much later in the process.⁸

It was agreed that as important as these considerations may be, they generally relate to a minority of cases. Therefore, concerns—although legitimate—about witness safety, false testimony, and similar considerations should not be the “tail wagging the dog” when it comes to the question of what prosecutors should disclose and when evidence and information should be disclosed. The law and internal policies should allow for dealing differently with disclosure in cases where these concerns are likely to arise. As discussed below, a range of viewpoints existed regarding precisely how laws and policies should account for these concerns.

3. Scope of Disclosure

A principal subject of discussion was the scope of disclosure: what evidence, documents, and information the prosecution should provide from the universe of material in the possession of, or available to, the prosecutor and other law enforcement authorities.

In general, participants thought that the kinds of information identified in existing disclosure statutes should be disclosed;⁹ no one expressed the view that the current law of her jurisdiction is too

⁸ Some members of the group suggested that there should be a formal study regarding the impact of early disclosure on witness safety before there is a requirement—in jurisdictions that do not currently provide early disclosure of witness information—to disclose witness information at an earlier stage of the process.

⁹ *E.g.*, MD. R. 4-262, -263, -301; MINN. R. CRIM. P. 9.01; N.Y. CRIM. PROC. LAW art. 240 (McKinney 2010); WIS. STAT. § 971.23 (2009).

demanding. Thus, it was agreed that the defense should generally be provided (among other things): witnesses' names and statements; police reports relating to the case; forensic evidence, scientific reports, and expert reports; defendants' statements and access to their property; pretrial identification evidence; relevant tapes and recordings; impeachment information relating to prosecution witnesses, including information about inducements provided to prosecution witnesses, their prior bad acts, and their inconsistent statements; subpoenas,¹⁰ grand jury minutes, and search warrant affidavits. Many, but not all participants took the view that as an ordinary matter, witnesses addresses should also be turned over.

Much of the discussion focused on how much more should be disclosed than typical laws currently require. Ultimately, the group reached consensus around a general principle that would be subject to exception in particular cases, or classes of cases. (In those cases, there are particular concerns—such as witness safety and preventing witness perjury—that justify limitations on the ordinary scope of discovery.) The principle was that, subject to exception, prosecutors should disclose all evidence or information that they reasonably believe will be helpful to the defense or that could lead to admissible evidence.¹¹ The idea was not that laws would necessarily codify this principle, but insofar as the law falls short, prosecutors would give effect to this principle as a matter of internal policy.

There was no agreement on precisely how far the law should go to conform to the general principle of liberal disclosure. Some expressed concern that such a broad principle, if codified in the law, would place too much authority in judges' hands,¹² while others responded that over-reliance on individual prosecutors' discretion could lead to excessive variation and an unduly conservative approach to discovery by many individual prosecutors.

Insofar as disclosure obligations are determined by law rather than internal policy, there was a preference for the development of a detailed statutory framework—one that streamlines discovery and makes explicit exactly what should be turned over—even if the statute (or rule of procedure) does not establish, and perhaps cannot be perfectly drafted to establish, the full limit of a prosecutor's legal duties. Correspondingly,

¹⁰ Some members of the group expressed the opinion that this should be limited only to information gained from subpoenas duces tecum.

¹¹ The group discussed whether prosecutors should also disclose all evidence or information that would support a suppression motion based on constitutional grounds, but no consensus was reached on this question.

¹² One participant expressed concern that courts would take overly broad approaches to evidentiary admissibility and, on that basis, order the production of information—such as embarrassing personal information about sexual assault victims—that legitimately should be kept confidential.

there was also broad agreement that the constitutional and statutory law should not be read to curtail what prosecutors disclose. Given the prosecution's role of promoting fair trials and just outcomes, there will often be a need for policies that call for additional disclosure as a matter of self-regulation as well as for the prudent exercise of discretion by prosecutors individually.

4. Witness Statements

With respect to legal obligations, considerable discussion was devoted to the disclosure of witness statements. The group agreed that statutes were too narrow insofar as they ordered the production only of statements of witnesses whom the prosecution intended to call as witnesses. Many, but by no means all participants took the view that in general, the prosecution should disclose the statements of all individuals with relevant, and potentially useful information. Further, it was agreed that disclosure should not be limited to recorded and transcribed statements or to formal reports of witnesses' statements, and that in some cases, unrecorded statements should be disclosed.

There was general agreement that as to potential prosecution witnesses, the following should be disclosed: (1) investigators' summary notes as well as reports of the witnesses' statements, (2) witnesses' exculpatory statements, and (3) witnesses' prior statements and omissions that are inconsistent with their expected trial testimony and, hence, useful for impeaching the witnesses on cross-examination. Many but not all participants agreed that there should also be disclosure of statements and investigators' notes relating to potential defense witnesses.

The group did not agree that prosecutors (as distinct from investigators) should generally be required to disclose their notes of meetings with witnesses. However, there was a strong view that, in the very least, the prosecutor should disclose when and where meetings with prosecution witnesses took place, so that the discussions could be explored in cross-examination. Some argued that prosecutors should disclose their notes to ensure that the defense received all of the witnesses' exculpatory and impeaching statements, but countervailing concerns included: prosecutors' notes might contain work product (e.g., prosecutors' mental processes), which should be kept confidential, a disclosure obligation might discourage note-taking or motivate prosecutors to write elliptical notes, and prosecutors' notes may be inaccurate.

5. "Open File" Discovery

Several prosecutors in the group worked in offices that (subject to some limitations and exceptions) provided as a matter of policy for "open file" discovery—i.e., for disclosure of all the documents in the prosecutor's individual case file. They expressed satisfaction with this approach.

Other participants, but not all, supported this approach, while recognizing that the concept requires elaboration and does not fully capture what ought to be disclosed. For example, the general concept does not specify what information in the possession of the police or other authorities should be included in the prosecutor's case file (or how the prosecutor should learn of, and gain access to, information outside the prosecutor's current possession). However, the concept that prosecutors, other than in exceptional cases, should disclose relevant information, rather than making individual judgments about what particular information in their file is or is not useful to the defense, was consistent with the broad principle on which the group ultimately agreed: The prosecution should generally provide information useful to enable defense counsel to assess the case, counsel the defendant, investigate, prepare for trial and, if the case goes to trial, effectively present the best available defense and put the prosecution to its proof.

6. Timing of Disclosure Generally

There was wide agreement among the group that the eve of trial is not the appropriate time to provide discovery and that, in the very least, *Brady* material should be disclosed as soon as it is known by the prosecutor. One participant observed that a prosecutor should never be in the position of having to explain to a judge how long *Brady* material has been in the prosecution's file and why it was not turned over sooner.

Ultimately, the group agreed on a principle regarding the timing of disclosure: As an ordinary matter, and subject to exception, prosecutors should disclose evidence and information as early as practicable. This would mean making disclosure of then-available material soon after arraignments on misdemeanors and after indictment on felonies so the defense can investigate, prepare the case, and counsel the client appropriately. The group also agreed that this should be a self-executing obligation, not one dependent on a request by defense counsel.

The group acknowledged, however, that considerations such as witness safety and preventing perjury should limit ordinary expectations

that disclosure be made early in the proceedings. Additionally, several participants maintained that the timing of prosecutors' disclosure was interrelated with the timing of defense disclosure—a subject slated for discussion at a follow-up conference—and that requirements relating to reciprocal discovery might therefore inform the applicable laws and policies.

7. Justified Limits on the Scope and/or Timing of Disclosure in Appropriate Cases

In light of the group's recognition that the general principles favoring broad and early disclosure must be limited in appropriate cases in light of countervailing law-enforcement concerns, time was devoted to the question of how these concerns should be given effect. In particular, the group focused on the concern for witness safety, which was generally regarded as the most pressing of these concerns, but this was not regarded as the only consideration justifying limits on the scope or timing of disclosure.

The group discussed, without reaching agreement on, several possible approaches. One would be to require prosecutors to obtain a protective order in situations where an exception should be made to otherwise broad and/or early disclosure obligations. Many favored this solution; but some responded that it was not necessarily feasible for the prosecution to obtain a protective order for a witness at an early stage given the limited resources of many prosecutors' offices. An alternative would be for laws and office policies to limit the extent of discovery, or to authorize disclosure to be delayed in certain identifiable categories of cases (e.g., those involving allegations of violence). Another would be for laws and office policies to give prosecutors discretion to decide on a case-by-case basis when it was legitimate to depart from the ordinary requirements, while perhaps making the prosecutor's decision judicially reviewable on application of the defense.¹³

8. Scope and Timing of Disclosure in the Context of Plea Negotiations

The group discussed the recent American Bar Association (ABA) ethics opinion interpreting ABA Model Rule 3.8(d)¹⁴ to require prosecutors to disclose favorable evidence and information to the

¹³ Possibly, the ideal approach would differ depending on the jurisdiction.

¹⁴ MODEL RULES OF PROF'L CONDUCT R. 3.8 (2006).

defense prior to a guilty plea.¹⁵ The discussion focused on the aspect of the opinion concluding that the ethical duty of disclosure was non-negotiable.

In general, participants agreed that *Brady* material that tended to negate the guilt of the accused (as distinguished from impeachment material) should be disclosed before a guilty plea, and that prosecutors should not require defendants to forgo the right to receive this information in exchange for a lenient plea agreement. Many disagreed with the ABA opinion, however, insofar as it suggested that before accepting a guilty plea, prosecutors should be obligated to comply with *all* of the ordinary disclosure obligations established by constitutional cases, statutes, and rules.

There was not sufficient time to fully discuss and seek agreement on precisely what information a defendant might legitimately be asked to forgo as part of a plea bargain. A consideration raised in arguing for broader pre-plea disclosure was the difficulty of providing competent advice to the defendant about whether to plead guilty in the absence of disclosure. Several countervailing considerations were identified, however. These included the administrative difficulty, particularly in jurisdictions with a high volume of criminal cases, of providing the full disclosure that would be expected prior to trial; the unfairness to the defendant who might have to remain incarcerated while the prosecution accumulated and produced information, when that defendant might otherwise be able to resolve the charges in a manner providing for release from incarceration; and the unfairness to the defendant who would be offered a favorable early resolution of the charges either because the prosecution was not yet aware of the actual strength of its case or because the prosecution seeks to conserve resources, when that benefit might be lost if the prosecution had to make full disclosure.

¹⁵ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 454 (2009).

C. *Recommendations and Conclusion*

Given the limited amount of time for discussion, substantial ground was covered, a fair amount of agreement was reached on a general level, and areas of disagreement, worthy of further and more detailed discussion, were identified. Not all of the agreement seemed obvious or inevitable at the outset. While there were areas of strong disagreement as well, it was often possible to narrow the extent of the initial disagreement, and there were some basic issues on which broad or unanimous agreement was reached. The latter included the following:

- *Scope of disclosure:* As a general principle, but subject to exceptions, prosecutors should disclose all evidence or information that they reasonably believe will be helpful to the defense or that could lead to admissible evidence.
- *Timing of disclosure:* Additionally, as a general principle, prosecutors should disclose evidence and information as soon as practicable.
- *Limits on the scope and timing of disclosure:* Various legitimate considerations justify limitations on these two general principles. Chief among these are concerns about protecting witnesses from intimidation or harm and preventing perjury. Limitations and exceptions should be provided in specific cases or categories of cases where the harms are more likely.
- *Disclosure as a matter of policy and discretion:* Existing constitutional and statutory obligations generally define the minimum of what should be disclosed, but they do not fully capture the general principles that ought to govern the scope and timing of prosecutorial disclosure. Therefore, prosecutors' disclosure should not, as a matter of principle, be limited to what the law of the particular jurisdiction requires at the particular moment in time. Rather, prosecutors should adopt and implement internal (although not legally enforceable) policies governing disclosure to conform disclosure practices to what, as a matter of principle, ought to be disclosed.
- *Disclosure laws:* Laws adopted to govern prosecutors' disclosure obligations should ideally be clear and conducive to ease of administration.

The discussions reflected the utility of bringing together lawyers with experiences in diverse jurisdictions and areas of criminal justice practice to explore differences and seek common ground.

II. THE DISCLOSURE PROCESS: REPORTED BY
KEITH A. FINDLEY¹⁶

The Working Group on the Disclosure Process was charged with considering how best to structure the procedures for disclosing to the defense all *Brady*¹⁷ material and other information appropriate for disclosure. The Working Group did not address *what* information prosecutors should disclose to the defense, but *how* to ensure that, whatever the scope of the disclosure obligation or commitment, it is effectuated. The Working Group took it as a given—or perhaps more accurately, as a matter for discussion by other Working Groups—that prosecutors will disclose appropriate information to the defense. Accordingly, the Working Group focused on policies and procedures to ensure that prosecutors receive all relevant case information from police so that they can comply with their disclosure obligations or commitments. In a nutshell, the Working Group focused largely, although not exclusively, on how to facilitate communication between police and prosecutors to ensure full access to disclosable information.

A. *Ensuring Full Flow of Information from Police to Prosecutors*

1. The Need for Formal Policies and Procedures

At the outset, the Working Group agreed on the principle that there should be a full flow of case information from police to prosecutors, so that prosecutors can ensure that they comply with their *Brady* obligations. Without access to full investigative information, prosecutors, who are charged under *Brady* with identifying and disclosing all exculpatory information in the state's possession, cannot meet that responsibility. Moreover, as the prosecutors in the Working Group noted, it is in law enforcement's interest to ensure the complete

¹⁶ Discussion Leader: Brandon L. Garrett, Associate Professor of Law, University of Virginia School of Law; Reporter: Keith A. Findley, Clinical Professor of Law, The University of Wisconsin Law School. Other members of the Working Group on the Disclosure Practice included: Rick Jones, Executive Director, Neighborhood Defender Service of Harlem; Irving Cohen, Esq.; Carlos F. Acosta, Deputy State's Attorney, Office of the State's Attorney for Prince George's County, Maryland; Adrian Wagner, James Mintz Group, Inc.; John Bradley, District Attorney, Williamson County, Texas; Sue Ellen Bienenfeld, Office of the Kings County District Attorney, Brooklyn, New York; Lou Reiter, Former Deputy Chief, Los Angeles Police Department; Jessica Roth, Visiting Assistant Professor, Benjamin N. Cardozo School of Law; Seymour W. James, Jr., Attorney-in-Charge of the Criminal Practice of The Legal Aid Society in New York City; and Christopher D. Chiles, Prosecutor, Cabell County, West Virginia.

¹⁷ *Brady v. Maryland*, 373 U.S. 83 (1963).

flow of information to prosecutors; in these prosecutors' experiences, the vast majority of the time the failure to turn over information hurts the prosecution more than the defense because the withheld information is most often not *Brady* material, but inculpatory information that the State would like to use in its case. Accordingly, the Working Group further agreed that it is important that each prosecutorial and police jurisdiction adopt formal policies and procedures to ensure the full and prompt flow of information from police to prosecutors.¹⁸

The Working Group recognized that very different procedures are followed in small as opposed to large jurisdictions, and that the appropriate policies and procedures will vary from jurisdiction to jurisdiction. In New York City, for example, the criminal complaint is drafted by prosecutors, so police must come to the prosecutors for initial charging. Prosecutors in New York, therefore, have the ability to insist that police bring all relevant investigative material with them when they seek the filing of a complaint. But that is only possible because prosecutors' offices in New York have attorneys on duty twenty-four hours per day, seven days per week. Smaller jurisdictions obviously cannot utilize such a procedure. And even in New York, the information provided to prosecutors for drafting the complaint is not exhaustive under present practice. Additional procedures to ensure a full flow of information from police to prosecutors are needed.

In most smaller jurisdictions, prosecutors are not on call to draft and file initial charging documents, so police go to a low level magistrate to issue charges. Accordingly, there is little opportunity in such systems for prosecutors to insist on production of the full complement of case-related documents at the time of charging. In many jurisdictions, there is no formal mechanism for ensuring that all case-related documents and materials are provided to prosecutors. Often, the procedure is informal, based upon implicit understandings and expectations. And even then, prosecutors often do not receive copies of all information developed by police. For example, even where prosecutors make it clear that they need to receive videos from cruiser cams, the experience in some jurisdictions is that police typically provide only one video—even if multiple squad cars were involved, each with their own squad cams, creating multiple videos with potentially unique information on each.

¹⁸ At least one state, Illinois, by law requires that “[t]he State should ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to place within its possession or control all material and information relevant to the accused and the offense charged.” ILL. SUP. CT. R. 412(f).

2. Case Information Checklists

The Working Group reached consensus that, to redress these inadequacies in current practice, each jurisdiction should adopt a rule requiring the use of checklists to ensure full and timely transfer of all relevant information from police to prosecutors.¹⁹ Under that rule, as soon as a prosecutor becomes involved in a case, that prosecutor should provide the checklists to each police agency involved in an investigation related to that case. Those checklists would require police and prosecutors alike to ensure that all of the types of information required by the checklist are in fact provided to the prosecutors. If, upon completion of the checklist, prosecutors determine that they have not received everything that should be provided, prosecutors should then submit a formal request to police—a “homework assignment” as one prosecutor in the group described it—memorializing the additional information the prosecutor needs from the police. The Working Group further agreed that, thereafter, once a prosecutor has become involved in the case, the policy should require that, if police generate any new investigative report in the case, they must simultaneously send the new report to the prosecutor.²⁰

This recommendation for use of checklists grew from several considerations. First, the Working Group benefited from presentations by experts in other fields that deal with information and risk management. Dr. Gordon Schiff,²¹ for example, explained that, in the medical field, significant advances have been made in managing the risk of diagnosis errors in hospitals by shifting from a focus on individual human errors (special cause variation), to a focus on redressing systemic problems that permit such errors (common cause variation). Dr. Schiff drew extensively on developments in Continuous Quality Improvement approaches to reducing errors, which emphasize that improved performance is generally best fostered by creating systems that provide

¹⁹ The use of discovery checklists garnered considerable support from several of the other Working Groups. See *infra* Part IV.B.3 (Working Group on Systems and Culture) (discussing the use of checklists in written guidance memoranda provided by prosecutors to promote a culture of better disclosure in their offices); *infra* Part V.A.3 (Working Group on Internal Regulation) (supporting the use of discovery checklists as a regulatory device); *infra* Part VI.B.7 (Working Group on External Regulation) (supporting “unanimously . . . the idea of checklists” for prosecutors to detail what is being disclosed and “a privilege log that lists what is withheld”).

²⁰ The Working Group noted that, to the extent the technology is available, supplemental reports can and should be automatically transferred electronically to the prosecutor assigned to the case. Even if electronic transfer options are not available—and they should be in most cases, given that the technology can be as simple as emailing the reports—the rules ought to require at least that hard copies of any new reports be transferred promptly to the prosecutor.

²¹ Dr. Gordon Schiff, Associate Professor of Medicine, Brigham and Women’s Hospital, Harvard Medical School.

support for performing a job correctly, rather than utilizing a threat of punishment for poor performance.

Under this analysis, a formalized checklist can be an important tool to support police and prosecutors in performing their responsibilities for sharing information. A checklist can be understood as a tool that serves not as a threat of punishment for failure to perform, but as a supportive guide that helps police identify and transfer all required information. The use of a formal checklist can be something that police can accept if they are trained to understand that completing the checklist will help them do their job more professionally and completely.

Second, and in a related way, police experts in the Working Group noted that police generally want to do a good job, and that, because police tend to be rule driven, formal rules can help them in their efforts to do a good job. Police are greatly assisted by having clear expectations and written rules. To aid in this process, prosecutors can and should make clear to police what their investigative files should look like, and should then provide feedback to police on their compliance. Thus, even with a checklist, training by prosecutors followed by audits of police compliance are important to the success of any information sharing system. The sense of the Working Group was that if prosecutors lay out their expectations in writing and through training, give police guidance on how to comply, and then audit police work, police will respond appropriately. Indeed, the Working Group noted that police are accustomed to working with checklists in other areas of their work; they can accept them and utilize them effectively in this aspect of their work as well.

Third, in suggesting the use of record-keeping and discovery checklists, the Working Group also drew on information presented about cognitive biases that can impede effective investigations and appropriate responses to disclosure obligations. Dr. Maria Hartwig,²² for example, explained that psychological factors that produce tunnel vision can impede the ability of investigators to recognize exculpatory evidence, and can ultimately contribute to miscarriages of justice. Cognitive distortions such as confirmation bias, asymmetrical skepticism, mistaken beliefs about the indicators of and ability to assess the veracity and credibility of suspects and witnesses, and biased hypothesis testing, can all lead to investigative failures and disclosure errors. Objective, formalized checklists can impose an external structure on the recording and compilation of case information, and thereby help police overcome these inherent cognitive biases. In this way, tools such as checklists can help police do their job, not only with

²² Maria Hartwig, Ph.D., Assistant Professor of Psychology, John Jay College of Criminal Justice.

regard to meeting their disclosure obligations, but also in terms of building stronger cases.

Finally, the Working Group took note that prosecutors' offices in some jurisdictions have already begun employing some forms that could be adapted to become complete disclosure checklists. The experience with these forms demonstrates that this approach is workable. Prince George's County, Maryland, for example, currently uses a formal charging memo, which essentially serves as an information checklist. Such a form with little additional effort could be adapted to become a checklist of the sort envisioned by the Working Group. In Oregon, a new paperless file system will allow scanning of documents and coding them to identify what kind of record they are, and whether they have been disclosed to the defense. This kind of electronic file management system has the potential to facilitate creation and use of an electronic checklist. The Multnomah County, Oregon, District Attorney's Office goes a step further in major homicide cases. In such cases, one person is responsible for maintaining a Homicide Major Crimes Discovery Assignment form, designed to ensure that job tasks, performance standards, and due dates are all met on all matters related to discovery. While such an approach cannot be implemented in all cases, it works well in big cases.

The Working Group also recognized that each jurisdiction will likely need to develop more than one checklist. Different checklists would probably be required for different kinds of crimes, because different crimes—robberies, homicides, sexual assaults, burglaries, etc.—might require attention to different types of evidence and information. Likewise, separate checklists might be appropriate for distinct types of witnesses. A case involving an informant or a jailhouse snitch, for example, might uniquely require inquiry into information such as prior cases in which the witness acted as an informant, prior deals bestowed upon the witness in other cases, prior record and dispositions in earlier cases, any recorded communications between the informant and others, and other such information related to the witness's incentives and veracity.

Cases involving potential electronic data can also trigger the use of technology-focused information checklists. Such checklists can be developed to help answer questions about how useful and accessible various types of electronic data can be. For example, significant GPS and mapping data can be developed from cell phones and digital cameras, which can help pinpoint the location of a call or a photograph. Technology specialists have already developed lists of various types of electronic devices and software, which describe how they operate, what kinds of data can be retrieved from them, and how to extract their data. Such checklists could be very useful in developing discovery checklists

that simultaneously assure appropriate flow of information to prosecutors and the defense, while also helping police investigators focus and enhance their investigations.

The Working Group considered how such a checklist-based system could be fostered in the United States. While individual prosecutors will want to work jointly with police and defense attorneys in their jurisdictions, the Working Group also concluded that the process could be facilitated if a group of experts were to develop a set of model checklists at the national level, much like a model code. If these model checklists were produced by a respected group of experts and of high quality, they could then be tailored by local prosecutors' offices to meet local circumstances and incorporate local terminology. Development of these checklists would require prosecutors to work jointly with investigators who regularly handle the kinds of cases at issue. The Working Group also concluded that the discussions should include defense attorneys to help identify what they think should be included as *Brady* material. The Working Group recognized that prosecutors would eventually confront defense demands for information in their cases, so it would make sense and be most efficient to consider those demands up front, when developing the discovery checklists.

The Working Group also generally agreed that the checklists should be publicly available, so that defense attorneys would know what kind of information is generally collected under the checklists. At the same time, the Working Group thought it important to keep in mind that the checklists should be designed to include all information that the prosecutor needs to know about a case, but would not necessarily define the scope of the information that the prosecutor would in turn be obligated to turn over to the defense.

3. Information Recording Requirements

The Working Group recognized that a significant barrier to full transfer of information from police to prosecutors, and then from prosecutors to the defense, is that important information sometimes is simply never recorded. The problem was noted in both police departments and prosecutors' offices. Too often, police fail to make a report or other record of information they receive on a case—from hotline tips that are not pursued to interviews or canvasses that produce no apparently incriminating evidence against a suspect. Likewise, prosecutors in the group noted that police frequently contact prosecutors with questions about an investigation, and talk with whomever answers the phone. Often, prosecutors fail to put information about such calls in their files. If such information were in prosecutors' files, it could serve

as another check that prosecutors could reference to make sure that they have received all of the follow-up police reports in a case. The Working Group generally acknowledged the need for procedures to ensure more complete recording of all such case information.

The Working Group noted that many crime laboratories have found a way to achieve fairly complete record-keeping. Crime laboratory files often include detailed notes about every step in the lab's forensic analyses, as well as notes of every communication with anyone (including police, prosecutors, and defense attorneys) about the case. The rules and the cultures of these laboratories have made this possible. Some in the Working Group thought that police cannot be as thorough in their record-keeping, because they work in the field, while lab analysts work in the laboratory with easy access to the files. But others in the group thought that police can be just as thorough—even if it means initially recording their activities on paper work logs in the field—and that they would comply if the rules, and the culture, clearly required it.

The Working Group noted that some police utilize an investigative chronology or investigator's overview—a document that records all activity on the case. The Working Group expressed general agreement that rules should require recording all case activity on such a log.

Police need to understand that they must write down even negative results from their investigations. For example, police must understand that, if they canvassed a neighborhood and found no one who saw the defendant or the perpetrator in the area, that kind of information is important and must be recorded. Recording such information is important both because it might indeed be meaningful *Brady* material, and because recording that information can prevent the waste of time occasioned when investigators, unaware of the earlier investigative efforts, go back and talk to witnesses who have nothing to report. In this way, full reporting of all case information helps police and prosecutors do their jobs more efficiently.

The Working Group agreed that getting police to record all such information, including information that might not be of obvious importance at the time, will require procedures and tools that make it easy for police to do a full and complete job of recording information. Again, the Working Group believed that specific checklists can be helpful to guide police in making judgments about what to record. Investigative checklists can be designed to ensure full recording of information by including specific requirements for recording information relating, for example, to all tips received, all persons interviewed, all canvasses conducted, all identification procedures conducted and witness responses (including failures to identify

anyone),²³ and the names of all officers present and involved at any stage of an investigation, among others. The checklist can also require that police turn over all “scratch notes”—that is, all notes taken in the field.

4. Compliance Audits

As noted, some in the Working Group observed that, to be effective, checklists should also be followed by audits that examine the extent to which police have met their information-sharing obligations. While no formal consensus on this point was expressed, the Working Group responded generally favorably, and without stated objection, to the suggestion that police should randomly select cases for audits by prosecutors’ investigators. Aside from identifying cases in which police failed to provide full disclosure of relevant case information, such audits can be important tools for changing the culture in police departments. Letting police know that there will be random audits for compliance with recordkeeping and information sharing responsibilities is a way to emphasize to police that this responsibility is important. It is a way to push police beyond being motivated merely to get their “arrest stat.”

5. Pretrial Discovery Conferences or Certification

The Working Group also recognized that ensuring a flow of all relevant and appropriate information from police to prosecutors, and then from prosecutors to the defense, can be facilitated by involving courts in the process. Massachusetts, for example, has a rule that requires a conference before trial to ensure that all discovery obligations have been satisfied.²⁴ Such a conference serves as a reminder to prosecutors and police to double-check their due diligence to obtain and disclose *Brady* material. The Working Group also thought that it is important to provide feedback to police about their performance that extends beyond case clearance records based on arrest and charging. One way to do that might be to require that police, as well as prosecutors, participate in pretrial discovery conferences. In that way, police become accountable to the courts, as well as to prosecutors, and

²³ Some states, by law, require that the government disclose to the defense a “summary of identification procedures” and all statements made by an identifying witness, *e.g.*, MASS. R. CRIM. P. 14(a)(1)(A)(viii), and others have codified detailed identification procedures and record-keeping requirements for police-conducted identifications, *e.g.*, N.C. GEN. STAT. § 15A-284.52(b) (2010); W. VA. CODE § 62-1E-2(a) (2009).

²⁴ See MASS. R. CRIM. P. 11(a)(1).

the likelihood of full cooperation and compliance is increased. As an alternative, another possibility considered by the Working Group is a requirement that police must sign and file with the court a certification that they have exercised due diligence to identify and provide to the prosecutor all case-related information.

B. *Special Problems in Maintaining and Sharing Case Information*

1. Parallel Investigations

The Working Group noted that special challenges to ensuring the full flow of potentially relevant case information to prosecutors can arise where there are parallel investigations. By parallel investigations, the group meant investigations into separate crimes or separate suspects or involving separate investigators, which might be linked in some way, such as through a common perpetrator or common witnesses. Frequently, the presence of information in one case that is important in a parallel case goes unnoticed.

To address this problem, the Working Group agreed that the investigators in related cases should assign sub-case numbers to the parallel investigations, so they can be tracked and linked. New technologies can facilitate the sharing of information in parallel investigations. A paperless, electronic environment provides a particularly good opportunity for sharing information. With electronic files, prosecutor or police information technology personnel can assign linked case numbers to parallel investigations, even if the investigations are in different law enforcement jurisdictions. And the case information checklists can be designed to require inquiry into and disclosure about parallel investigations. But of course, these approaches require first that the prosecutor be made aware that the investigations are parallel.

The challenge, therefore, is to find ways to build identification of parallel investigations into case information checklists. Here again, new case management technologies have promise. In Oregon, for example, the new paperless case management system includes a case tracking system. Through that system, inputting a victim's name will identify any other cases that also mention that victim. Effective case tracking systems that permit searches for victims, witnesses, and other related information across cases, while difficult to develop, can be very important.

2. Misdemeanors

The Working Group reached less agreement on how to handle the disclosure of information in misdemeanors, as opposed to felonies. Some members of the Working Group contended that checklists like those proposed above would be less useful in misdemeanor cases than felony cases, because misdemeanors typically involve quick dispositions, with police reports disclosed early in the process (such as at arraignment), and little follow-up. Others in the Working Group, however, contended that, even if punishment in misdemeanors is light, misdemeanors can have serious collateral consequences, so early discovery is important to help guide the decision whether to plead. The group noted that frequently the information that is disclosed in misdemeanors is just a page or two that is comprised of the police report. Disclosing that police report does little to address *Brady* obligations. The prosecutors noted that, in misdemeanors, they disclose *Brady* material if they know about it, but they rarely even speak with the police officers in such cases, and therefore are often unaware of any potential *Brady* material.

To address these problems, some members of the Working Group suggested that it might be possible to build in some of the relevant *Brady* or investigative questions on the arrest sheet filled out by police, to help make officers understand that prosecutors need this kind of information even in misdemeanors. The Working Group did not pursue the problems in misdemeanors beyond that suggestion.

3. Prosecutors' Record-Keeping

The Working Group discussed questions that many prosecutors have about whether and how to make a record, or take notes, of witness and suspect interviews in which the prosecutors themselves participate. The Working Group recognized that many prosecutors are fearful of taking notes during such interviews. But the Working Group generally agreed that prosecutors should understand that taking notes during interviews is in their interest, because without notes they will not retain or recall the substance of those interviews. The Working Group agreed with the experienced prosecutors in the group that prosecutors must ensure that someone takes notes during those interviews, and that they should address their concerns about note-taking by doing their best to make certain the notes are accurate.

A more difficult question for the Working Group was the issue of who should take the notes during a prosecutor-assisted interview. The

problem can be especially difficult if multiple law enforcement agencies are involved in the investigation. Some agencies typically take copious notes; others take very few notes. The group generally agreed that prosecutors commonly want one consistent case agent to take notes for the group, and that the note-taker should be someone familiar with the issues in the case to ensure accuracy. Some in the Working Group suggested that, if such a case agent is not available, then the individual prosecutor might want to take the notes, to ensure reliability and consistency.

Finally, the Working Group noted that the Los Angeles District Attorney's Office has a *Brady* compliance unit that maintains a database of problematic witnesses, such as jailhouse snitches and police officers who have committed perjury. The Working Group agreed in general that such units can be very helpful, but they obviously require resources, which many jurisdictions do not have.

4. Electronic Recording of Interviews

The Working Group also discussed issues surrounding whether witness interviews should be electronically recorded. In particular, some in the group argued that electronic recording is especially important with regard to communications with cooperating witnesses.²⁵

The Working Group did not reach consensus on the question of electronic recording. While all agreed that electronic recording can be helpful, some expressed concern that electronic recording might make witnesses less forthcoming, and might cause them to hesitate because of concern that the defendant would be able to see the recorded interview. Others contended, however, that given the ubiquity of video recording in our lives today, witnesses are accustomed to and unconcerned about recording. They suggested that witnesses would be no more concerned about a defendant seeing their electronically recorded statement than about seeing a written report of their statement. And they suggested that the experience with electronic recording of suspects has revealed no problems with suspects becoming less forthcoming. The group noted that in some jurisdictions, police record all interviews with witnesses in homicide cases.

²⁵ The Working Group did not specifically address the question of electronic recording of custodial interrogations of suspects. Currently, at least ten states and more than 600 individual law enforcement agencies have adopted policies requiring electronic recording of custodial interrogations of suspects. See Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215, 216, 220 n.24 (2009).

C. *Ensuring Timely Disclosure of Evidence
from Prosecutors to the Defense*

While the Working Group focused the bulk of its attention on procedures to facilitate the flow of information from police to prosecutors, it also addressed in less depth some issues related to facilitating the disclosure of appropriate information from prosecutors to the defense. Again, the Working Group's focus was not on what should be disclosed, but on how to facilitate the disclosure of appropriate information.

In particular, the Working Group addressed concerns about the timing of disclosure of *Brady* material to the defense. Some in the group argued that prosecutors should turn over all appropriate information as soon as they receive it, with the exception of information that legitimately poses a risk to witness safety or a risk of witness tampering. The Working Group generally agreed that the names of witnesses and information about how to locate them should be disclosed well in advance of trial. There was less agreement about whether the substance of witness statements should be disclosed early in the process, although the group noted that, in many states, unlike the federal system, prompt and full disclosure of witness statements is the rule. The prosecutors in the Working Group suggested that they would be more inclined to agree to prompt and full disclosure of witness names and statements if the rules imposed reciprocal disclosure obligations. They also expressed skepticism, however, about whether judges do or will enforce reciprocal discovery requirements. And there was disagreement among group members, including among prosecutors, about whether early disclosure of witness statements leads to changes in witness statements between the time of the initial police interview and trial.

To resolve these matters, the Working Group suggested that various jurisdictions might consider experimenting with open and early discovery in a small category of cases, and then evaluate those cases to determine if such disclosure creates any problems. Prosecutors in Brooklyn reported that they operate under a system of full and early disclosure, and they have had no problems with it. If jurisdictions find that the experiment with a few crime categories produces no problems, they can then expand the full and early disclosure to other crime categories.

III. TRAINING AND SUPERVISION: REPORTED BY STEPHANOS BIBAS²⁶

The Working Group on Training and Supervision addressed ways to improve prosecutorial disclosure through improved internal training and supervision within prosecutors' offices. It sought to develop practical recommendations to address the issue. The goal was to reflect on the sources and causes of prosecutorial discovery issues and to offer a variety of suggestions for how offices could address and forestall these discovery issues.

A. *The Nature of the Issues*

To improve discovery, one must first appreciate its shortcomings. The group started by trying to characterize the nature and source of discovery issues. Calling prosecutorial discovery a problem, many agreed, may be too strong a label. The word "problem" may imply intentional choices not to disclose obviously relevant material. While, on occasion, police and prosecutors do intentionally break the rules, far more often discovery violations are probably negligent or inadvertent. As long as the law gives prosecutors discretion in deciding what and when to disclose, there will be discovery disputes. Prosecutors' offices must accept responsibility for setting internal disclosure standards, training their new hires on those standards, and supervising and monitoring compliance with those standards. Solutions ought to focus on raising awareness and implementing safeguards, not simply on trying to weed out a handful of rogues or bad apples.

Every actor in an adversarial system is susceptible to tunnel vision, and prosecutors are no exception. In the heat of adversarial combat, prosecutors may see only their own theory of the case, with blinders to how defense lawyers might defend the case and put a different spin on certain pieces of evidence. Because they may fail to see some evidence

²⁶ Discussion Leader: Adele Bernhard, Associate Professor of Law, Pace Law School; Reporter: Stephanos Bibas, Professor of Law and Criminology, University of Pennsylvania Law School. Other members of the Working Group on Training and Supervision included: Rachel E. Barkow, Professor of Law, New York University School of Law; Charles E. Clayman, criminal defense lawyer, Clayman & Rosenberg LLP; John Wesley Hall, Jr., criminal defense lawyer and past President of the National Association of Criminal Defense Lawyers; Robin M. McCabe, Assistant District Attorney, New York County, New York; Hon. Joseph Kevin McKay, Acting Justice, Supreme Court, Kings County, New York; Christina E. Miller, Assistant District Attorney, Suffolk County, Massachusetts; Kin W. Ng, Director of Training, District Attorney's Office, King's County, New York; Lois M. Raff, Counsel to the District Attorney, Queens County, New York; Richard P. Rosenthal, Chief of Police, Wellfleet, Massachusetts; and Abbe L. Smith, former public defender and Professor of Law, Georgetown University Law Center.

as materially favorable to the defense, prosecutors may not realize that they have to disclose it. Heavy workloads and inadequate training and supervision can exacerbate the danger, especially for young lawyers and for those with no or no recent defense experience.

Another factor that contributes to discovery issues is that the criminal justice system is chronically overtaxed. Large caseloads mean that police officers are extremely busy and may not follow every lead. Busy prosecutors likewise may not dig into their files early on to learn what information they have or do not have, let alone follow up with police to pursue fresh leads and gather available witness statements, police reports, and the like.

A related issue is the failure to memorialize information. Busy police officers may not take good notes, much less audiotape or videotape conversations or other evidence. Busy prosecutors likewise may not make good records themselves. Prosecutors' offices may be spread out, and as they move scattered files around, they may lose or mislay them. Particularly in horizontal-prosecution systems, when each prosecutor handles a different segment of the same case, earlier prosecutors may not take good notes and put them in the file, leaving later prosecutors ignorant of what earlier prosecutors learned. Information is especially likely to get lost in big cases, where no one person can know everything that has happened.

A final concern is that discovery rules and standards may be unclear. Prosecutors are expected to know an amalgam of statutes, case law, ABA standards, National Prosecution Standards, manuals, and local practices and culture, and should receive copies of these materials in training. Standards are broad and cannot possibly answer every situation, as the variety of possibilities defies exhaustive categories.

B. *Possible Solutions*

Some solutions to discovery issues are general. Even though rules cannot solve every problem, by listing recurring situations and types of evidence, rules can get prosecutors to focus. A useful rule of thumb would be, "If in doubt or in a gray area, disclose."²⁷ This rule of thumb, of course, cannot resolve cases in which prosecutors must balance disclosure against witness safety, or where a prosecutor simply cannot

²⁷ Some group members suggested that, at a minimum, prosecutors in doubt should submit potentially discoverable material to the court for in camera review. Others expressed concern about whether in camera review would be adequate. They also emphasized that, to make review effective, judges must view the relevance of the evidence from the defense's perspective. If judges do not disclose the evidence, they should make detailed records under seal, to facilitate appellate review.

see the defense's likely theory of the case. Nevertheless, it might be helpful, particularly if coupled with concrete guidance for recurring scenarios such as statements of witnesses who are hesitant, change significant details, or have cooperation agreements. Prosecutors might disclose evidence more fully if discovery were not framed simply as a windfall for defendants and an opportunity to blame prosecutors.

Prosecutors could reframe the issue as not simply about helping defendants with exculpatory or impeachment material, and not even just a matter of doing justice and being fair, but also about getting all the information to make a case and tell a full story. Seeing the complete picture assures prosecutors not only that they are being fair to the innocent but also that they have held the guilty responsible. The failure to investigate, unearth, memorialize, and share information prevents the prosecution from putting together a complete picture of the inculpatory evidence, weakening its case and ability to persuade guilty defendants to plead guilty. By reframing the issue as one of memorializing and sharing information more fully, prosecutors' offices might reduce cultural resistance to building better information systems.

For the most part, the Working Group focused on trying to implement these and other solutions at three institutional levels: prosecutors' offices hiring, training, and supervision practices. A discussion of each of these approaches follows.

1. Hiring and Other Personnel Practices

Hiring is an early and often-overlooked opportunity to improve discovery practices. The hiring process, like *voir dire*, has two main objectives. The more obvious one is to select good candidates and weed out bad ones. On this aspect, group members expressed skepticism about how well prosecutors can screen for unethical or problem candidates. Certainly they can telephone references and look for certain qualifications. For example, it may help to hire a certain fraction of former defense lawyers, who may have better perspective on how a defense lawyer might use certain evidence and so be more sensitive to the need to disclose. (In Britain, barristers routinely take both prosecutions and criminal defense assignments, making it harder for them to develop partisan blinders.) At the interview stage, however, candidates are packaged and prepared to say what they think will get them hired, not to admit to unethical behavior. Moreover, few if any candidates consciously plan to behave unethically. As noted above, the group was more concerned about negligent rather than intentional nondisclosure. It is hard to forecast who will behave negligently in the heat of adversary combat and under the pressure of crushing caseloads.

The second, less obvious goal of hiring is to teach a message, themes, priorities, and office culture. The parallel to jury selection is instructive: Good trial lawyers use *voir dire* to begin to instill their themes and theory of the case at the very beginning. In other words, prosecutors need to see hiring as a critical training moment, a chance to make lasting first impressions. Thus, the group recommends that prosecutors' offices, in hiring, take steps to communicate the message of ethical decisionmaking and erring on the side of disclosure.

The process of sending a message should begin in law school. Professors should teach students about the proper role of prosecutors and that doing justice requires more than a narrow or crabbed view of discovery obligations. Law schools need to relay feedback from their alumni who are now prosecutors and defense attorneys, and to bring them in to address students on the topic of discovery. Prosecutors' offices should send and reinforce these messages to their legal interns.

During the hiring process, prosecutors' offices' interviews should include hypothetical questions about discovery, as many offices already do. Interviewers could send out case law and statutes governing prosecutors' discovery obligations ahead of time and then pose hypotheticals during interviews to see how candidates respond. The point of these questions would not be to screen out candidates who came up with the wrong answers. Candidates are likely to be prepared and hear about the hypotheticals from fellow candidates, so it may not make sense to seek a particular right answer to screen out bad apples. It is more important to ask open-ended questions with no obvious right answer and gauge how candidates reason and respond.

Hypotheticals that involve serious, violent crimes are useful for raising the stakes both for disclosure and failure to disclose. Interviewers can complicate the scenario by having the prosecutor's supervisor absent. Another possible twist is to have a mentally unstable third party give a questionable confession to a crime and ask candidates what they would do with it.

At the end of the interview, interviewers could conclude with statements about how they might approach the issue and how important the topic is. They could also underscore that supervisors and colleagues will be there to offer advice and help prosecutors to do the right thing. And after candidates were hired, interviewers could solicit feedback from candidates about what they thought about the interviewing process.

The main point of these discovery hypotheticals would be to communicate the importance of full and fair discovery. Prosecutors' offices need to develop reputations for ethical decisionmaking, reputations that law students will hear about. By their very questions and sustained focus, these inquiries communicate that the office values

a thoughtful decisionmaking process, not just right answers. The focus in hiring on ethical disclosure and reputation speaks volumes about what the office stands for, far more than a sermon or uplifting speech would. Many group members were struck by how, after a series of discovery scandals, the new district attorney in Dallas County focused interviews on *Brady* disclosure obligations and discovery to communicate how much he and the office cared about ethical discovery.²⁸

Likewise, making a point of hiring some lawyers with defense experience would send an important message that defense lawyers are not evil nor the enemy. Choosing to hire some ex-defenders would both rebut that message powerfully and bring in a range of viewpoints.

Also important are the personnel practices for hiring police officers. The selection process for police officers should emphasize (1) investigating to develop relevant information, both before and after arrest, (2) reducing that information to writing, and (3) timely disclosing that information to prosecutors. Depending on the police department's internal culture, these steps may be difficult. Many departments focus on the number of arrests as a metric of success. Refocusing a department on gathering and disclosing information may not be easy but is worthwhile.

Other personnel practices could reinforce the pro-discovery message. Awards, plaques, and certificates could formally recognize police and prosecutors who do the right thing.²⁹ Rather than simply recognizing prosecutors who win trials, supervisors could also praise those who turn over evidence even at the cost of dismissing or weakening their cases.³⁰ Holding up ethical behavior as a model, even

²⁸ See *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037, 2069 (2010) [hereinafter *Voices from the Field*] (presentation by Terri Moore). Dallas County District Attorney Craig Watkins changed these hiring interviews as part of a series of reforms designed to change the culture of his office. See Steve Mills, 'Smarter Criminal Justice System'; *New Dallas County DA Advocates Fairness; Democratic Prosecutor Ends Win-at-All-Cost Attitude, Urging DNA Testing and Intervention*, HOUS. CHRON., Feb. 3, 2008, at B3 (reporting that Watkins changed the culture of the office by banishing the "win-at-all-costs mentality" and replacing many prosecutors with new ones of his own choosing); Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas; District Attorney Embraces Innocence Project and 'Smart on Crime' Approach*, WASH. POST, Mar. 5, 2007, at A4 (reporting that Watkins began speaking out against the win-at-all-costs mentality, inviting the Innocence Project to review hundreds of convictions for possible DNA testing, and firing or accepting resignations from nearly two dozen prosecutors).

²⁹ See Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 450 (2009).

³⁰ One group member noted as an example the Wylie-Hoffert murders in 1963. In that case, the Manhattan District Attorney's Office dismissed charges against the first accused, George Whitmore, that had rested on a false, coerced confession. That office later successfully prosecuted Richard Robles for the murders. See Selwyn Raab, *Parole Action Could Close Landmark Murder Case*, N.Y. TIMES, Oct. 2, 1988, § 1, pt. 1, at 38. The handling of that case became part of the culture of the office; prosecutors glorified the dogged and honest investigative

when it undercuts prosecutors' self-interest in winning convictions, would reinforce the message that prosecutors should not win at all costs. Likewise, prosecutors' offices should not only promote prosecutors based in part on their ethics, but also tell those promoted and others why they are being promoted. And, in cases involving intentional or persistent negligent violations, prosecutors' offices should stand ready to suspend or fire prosecutors to underscore how seriously they take discovery violations.

2. Training

The group agreed on the need for both formal programs and informal training on *Brady* and disclosure. It rejected the notion, advanced by at least one district attorney, that district attorneys may rely exclusively on law school training and prosecutors' own sense of ethics as sufficient discovery training.³¹

Formal Training. Prosecutors' offices in large metropolitan areas typically provide in-house training on various aspects of criminal practice, including disclosure and ethical obligations. Organizations such as the New York Prosecutors Training Institute (NYPTI) and the National District Attorneys Association (NDAA) already offer training programs and simulations. These and other simulations should be offered nationwide over the internet. Websites can also collect relevant discovery case law, statutes, ethical standards, office policies, and the like for ready reference. Smaller offices, with fewer internet resources and lacking their own websites, may need to adopt alternative models.³² They may attend national or state programs and then share what they

work that had dared to challenge the police's certainty of Whitmore's guilt.

³¹ Brief for Appellants at 47-48, *Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009) (en banc) (No. 07-30443), 2007 WL 5110779.

³² In New York State, for example, close to a dozen prosecutors' offices in larger counties have full-time training directors. These training directors conduct extensive, repeated training of prosecutors on all aspects of criminal practice, including disclosure and ethical obligations, at various points in their careers. For example, newly hired prosecutors receive one set of training, those starting to prosecute felonies receive further training, and those prosecuting advanced or specialized cases receive still more specialized training. In addition, all prosecutors take part in monthly continuing legal education programs. To insure that smaller counties without the resources for in-house training directors receive similar training, the NYPTI provides regional training on a host of topics throughout the year. It also operates a summer school on the campus of Syracuse University Law School, offering both a basic training course for new prosecutors and intensive mini-courses on advanced topics. To insure that trainers exchange information and ideas, the District Attorneys Association of the State of New York established a training committee, which reviews training needs and conducts an annual one-day training course. All of these programs contain courses specifically highlighting ethics and disclosure obligations in both lecture and demonstration formats, as well as programs focused on the more difficult or nuanced ethical and disclosure obligations arising in specialized areas of prosecution, such as white-collar crime, domestic violence, and vehicular homicide.

have learned with their colleagues back home. Training programs can begin with lectures but should move on to substantive law and factual scenarios and test the application of law to facts.

One particular kind of training that has proven useful in law school clinics is the use of television and movie (both feature and documentary film) clips. These can include stories of false confessions, mistaken identifications, untruthful informants, police sleight-of-hand, and the like.³³

Training needs to go well beyond traditional trial advocacy skills of the sort emphasized by the National Institute on Trial Advocacy (NITA). In particular, training must include a specific focus on witness preparation of both police and civilian witnesses. Watching both live and videotaped witness preparation sessions can help viewers to spot examples of poor practices. These exercises can train prosecutors to question witnesses separately, to avoid leading questions whenever possible, and, in appropriate and important cases, to keep witnesses apart so that they do not taint one another's recollections.

Training can also benefit from having trainers and trainees bring their own real cases for discussion. Illustrating near-misses makes discovery issues more concrete, vivid, and clearly important. Trainers can also bring in high-profile cases from their own and other jurisdictions. The story and the amount riding on discovery violations can give these examples emotional power. Also, asking trainees about their experiences helps trainers and supervisors to adapt training to meet their needs.

The right trainers make training much more effective. Trainers should be those known for their ethical thoughtfulness and communications skills. Judges are exactly the kind of experienced, less partisan lawyers who should be more involved in cultivating and educating newer lawyers to see all sides of discovery issues. Many members of the group disagreed with advisory ethics opinions in New

³³ E.g., *Homicide: Life on the Street* (NBC television broadcast series 1993-1999) (featuring intensive police interrogations); *Murder on a Sunday Morning* (HBO cable television broadcast 2001) (Academy Award winning documentary about the wrongful prosecution of a fifteen-year-old black boy for murdering a tourist in Jacksonville, Florida); *MY COUSIN VINNY* (20th Century Fox 1992) (the best courtroom comedy ever, featuring a discovery scene in which Marisa Tomei instructs Joe Pesci—her fiancé and a defense attorney—on his right to see the prosecutor's whole file upon request); *The Plea* (PBS Frontline television broadcast 2004) (documentary about plea bargaining, including four stories about defendants who pleaded or refused to plead guilty, some of which implicate prosecutorial decision-making); *The Practice* (ABC television broadcast series 1997-2004) (featuring ethical dilemmas for prosecutors and defense lawyers); *THE THIN BLUE LINE* (Miramax Films 1988) (Errol Morris's gripping documentary about a man wrongly convicted of murder in Dallas County, Texas); *THE WRONG MAN* (Warner Bros. Pictures 1956) (haunting tale by Alfred Hitchcock based on a true story of a man wrongly accused of robbery).

York that have been (over)read to forbid judges to take part in training unless it includes both prosecutors and defense lawyers.³⁴

The timing of training also matters. Of course training should begin when new prosecutors join an office. But it should also remain periodic, perhaps annual or semiannual, throughout a prosecutor's career. When prosecutors advance to a new unit, such as homicide or narcotics, they should receive additional training that highlights recurring problems particular to that unit.

Two special kinds of training deserve separate mention. First, supervisors themselves need training, which should not be limited to traditional trial skills. It needs to emphasize ethics and professional development, especially how to supervise and teach. Supervisors, promoted because of their prosecutorial prowess, may not be accustomed to managing other prosecutors. Lawyers may need to learn to listen to understand, not just to respond persuasively.

The other kind of training that is often neglected is training prosecutors to deal and communicate with police. That training needs to be practical and task-related. Young prosecutors must learn interviewing skills generally. They need to learn to begin gathering information early, before arraignment. They must also learn to work with police witnesses, with multiple officers, and with multiple inconsistent recollections. They must be prepared to challenge police, to break down their conclusions, question their bases, and collect and review all documentation. They need to learn to ask police to investigate and follow up additional leads that could confirm or undercut guilt. And, even at the risk of civil liability,³⁵ prosecutors should be involved earlier in investigations, interrogation, lineups, and witness preparation. Unless they get involved early on, prosecutors may have no idea what discoverable information exists beyond the documents in the case file. On the other hand, prosecutors also need to learn to appreciate police caseloads and possible deficiencies in their training, so they have a sense of what information they can realistically get.

³⁴ See, e.g., N.Y. Advisory Comm. on Judicial Ethics, Op. 05-134 (2005), available at <http://www.courts.state.ny.us/ip/judicialethics/opinions/05-134.htm>. That opinion wisely counsels judges not "to promote a point of view or to support one side in a particular class of cases," as that would "cast doubt on his/her ability to remain impartial in those cases." In other words, the opinion correctly forbids judges not to become part of the prosecution team or to coach them on how to win. Unfortunately, some lawyers have over-read that and other opinions as barring training for prosecutors even on compliance with their legal obligations, unless the training also includes defense lawyers. It is this over-reading to which many group members object.

³⁵ See *Buckley v. Fitzsimmons*, 509 U.S. 259, 275-76 (1993) (explaining that when prosecutors act as investigators and not advocates, they are entitled not to absolute immunity but only to investigators' qualified immunity); *Burns v. Reed*, 500 U.S. 478, 496 (1991) (denying absolute immunity to prosecutors who give legal advice to police investigators).

Police likewise need training to memorialize witness statements and to document how they got physical evidence and maintained a clear chain of custody. They need to be trained to report this information to prosecutors so that prosecutors can evaluate and disclose it as necessary. Police training needs to be practical and focused on the unit's job or task; homicide detectives encounter investigative and discovery issues different from those of fraud units.

Informal Training. Training is not limited to formal programs such as continuing legal education. Informal training should be a regular part of an office's work. Supervision in a practical setting offers many opportunities for feedback and learning. Mentor programs and systematic second-chairing of new prosecutors can encourage feedback. Supervisors, mentors, and senior lawyers need to create a safe space that allows prosecutors to ask questions and admit mistakes. All prosecutors should be learning from their mistakes. In that respect, it is important to handle acquittals carefully. On the one hand, acquittals may signal that a case should not have been indicted, was prosecuted poorly, or failed to consider how required disclosures would ultimately weaken a case at trial. On the other hand, offices should be careful not to stigmatize acquittals too much, as they already carry plenty of sting, and it is better to lose a case after full disclosure than to win it by withholding discoverable evidence.

One can even think of informal training more broadly. Many management experts suggest creating spaces for employees to talk and interact, ranging from inviting lunchrooms and courtyards to water coolers and regular happy hours. These venues and events build community and create regular opportunities to solicit and give advice. In casually discussing one another's cases, prosecutors may come to see discovery issues and ways of handling them that they had not considered on their own. Developing community is part of fostering an office culture that values dialogue and reflection.

The overall goal is to regularly challenge line prosecutors' assumptions about their cases, to get them and their colleagues to question and reflect on their discovery and other decisions. The goal of discussions is to get prosecutors to keep an open mind and revisit their conclusions, so that tunnel vision and a conviction mentality do not blind them to discoverable evidence.

3. Supervision

Supervision is another important yet often overlooked tool for improving prosecutorial discovery practices. There are many ways to supervise prosecutors. Supervisors can walk into courtrooms and

observe how their prosecutors perform. They can perform retrospective reviews, especially after cases involving acquittals or wrongful convictions. They can schedule regular meeting times with the head prosecutor, bureau chiefs, and line prosecutors, as the Queens District Attorney's Office does. They can spot-check case files and look for factors that lead to *Brady* violations, such as failures to write down statements or to secure copies of statements.³⁶ Supervisors and line prosecutors can watch videos of how prosecutors perform and critique them or use them for training other prosecutors on best practices. All of these are opportunities for supervisors to give cases a fresh look, to study near misses and mistakes, and even to randomly audit cases. While training on hypothetical and past cases is helpful, there is no substitute for monitoring performance in real, ongoing cases.

One of the main goals of supervision should be to create feedback loops, so prosecutors can learn from their successes and their failures. But a single superior directly above a line prosecutor has only a limited amount of information and can monitor only sporadically. It would be much better to follow the management trend emphasizing 360-degree feedback. That means that feedback should come not only from immediate and higher-up supervisors, but also from colleagues, subordinates, victims, defendants, public defenders and other defense lawyers, judges, and police, even those in other jurisdictions. Likewise, supervisors should receive feedback from their subordinates on how they are doing. Police should receive feedback from prosecutors about bad arrests, discovery violations, and flawed interrogations and searches.

Feedback should be standardized, periodic, and routine (after each case ends, or every month or two) so that it does not single out particular prosecutors for blame. Routine feedback would allow supervisors to check for patterns of problems. In some situations, anonymous feedback might encourage more candor. Feedback could involve an easy, simple system such as eBay's post-transaction emails, asking buyers to rate their sellers on a handful of dimensions and provide one or two sentences of specifics.

For example, district attorneys could regularly meet with judges and public defenders. They could ask head public defenders to identify the handful of line prosecutors who have developed reputations for being unethical or overly aggressive, not simply for being tough but fair. Supervisors could order the minutes from pre-charge conferences and similar stages of trial, to monitor how prosecutors handle difficult

³⁶ Neither the Constitution nor any statutes or rules of which we are aware require prosecutors or police to write down witness statements. Nevertheless, many group members agreed that writing them down is usually the better practice, as it guards against forgetting—and thereby increases compliance with disclosure requirements.

and contentious issues. Some of this goes on already, but offices could make it more consistent and systematic.

Feedback from defense lawyers is particularly critical. If prosecutors turn over discovery early, the defense can offer feedback about what appears to be missing. Earlier discovery may also lead to earlier guilty pleas, offering a tangible benefit for disclosure. Earlier conversations with prosecutors allow defense lawyers to convey their theory of the case, which may lead prosecutors to recognize evidence as exculpatory or impeaching.

The broad range of feedback, including supervisors' own comments, can stress the importance of cultivating a reputation for ethical, trustworthy behavior. Unless they receive feedback, prosecutors may have little idea of how others perceive them.

To facilitate supervision, prosecutors need to document their decisions. Putting charging decisions, plea bargains, cooperation agreements, and the like in writing opens them to review. Prosecutors should check to see whether police are writing up witness statements, disclosing those statements, following domestic-violence checklists, and the like. Decisions that are not documented in writing can fall through the cracks, particularly as cases move from one prosecutor to another.

Other police and prosecutors within an office also play important supervisory roles. Line assistants and police officers should have ready access to a trusted expert who is open to assisting them with discovery questions large and small. Offices should protect and encourage whistleblowers, so that anyone who learns of possible discovery violations feels free to report them anonymously. They could also set up anonymous tip lines, so that prosecutors, police, defense lawyers, victims, and defendants could report complaints for supervisors to consider.

C. *Conclusion*

The point of these suggested reforms is to help prosecutors spot discovery issues and learn from their mistakes. Improving culture and training to reduce discovery errors may ultimately be more productive than blaming prosecutors, except in egregious cases. By hiring, training, and supervising better, prosecutors' offices can learn to gather all the exculpatory and inculpatory evidence and, when in doubt, disclose.³⁷ Painting a more complete picture of the evidence should help not only to free the innocent, but also to convict the guilty.

³⁷ Of course, prosecutors cannot ignore exculpatory information, and they have an ethical obligation to pursue truth and justice. As a rule, however, legally binding discovery obligations cover only information and materials within the custody or control of police, prosecutors, or other

IV. SYSTEMS AND CULTURE: REPORTED BY RONALD F. WRIGHT³⁸

The Working Group on Systems and Culture addressed the systemic and cultural aspects of a prosecutor's office that could best contribute to high compliance rates with the prosecutor's legal and ethical obligations to disclose information to the defense. Organizations develop their own cultures, and those cultures can influence the disclosure decisions of individual prosecutors. The organizational culture interacts with the systems that the chief prosecutor establishes in the office to promote compliance with disclosure obligations.

The topics addressed in this Working Group inevitably overlapped to some degree with the topics covered in other groups. In an effort to minimize this double coverage, the group de-emphasized *training*—particularly the training intended for relative newcomers to a prosecutor's office—treating this as the principal topic for the Working Group on Training and Supervision. The Systems and Culture group also avoided the topic of *remedies* for identified violations, leaving that territory for the Working Group on Internal Regulation. By putting aside the training of newcomers and remedies for violations, the emphasis for the Working Group remained on regularized office practices and values that lead to the prevention and detection of disclosure violations.

Two weeks before the start of the Symposium, the Working Group received an outline of issues from the group's discussion leader. The document included references to several books and articles from the relevant academic literature on each subtopic. The outline noted several features of organizational culture that could affect compliance:

agents of the state. While it may be salutary and praiseworthy for police and prosecutors to investigate further and collect additional information favorable to defendants, the Constitution does not obligate them to do so.

³⁸ Discussion Leader: Barbara O'Brien, Assistant Professor of Law, Michigan State University College of Law; Reporter: Ronald F. Wright, Professor of Law and Executive Associate Dean for Academic Affairs, Wake Forest University. Other members of the Working Group on Systems and Culture included: Paul Connick, District Attorney, Jefferson Parish, Louisiana; Gerald J. Coyne, Deputy Attorney General, Office of the Rhode Island Attorney General; Kristine Hamann, Executive Assistant District Attorney, Office of the Special Narcotics Prosecutor for the City of New York; Caroline Donhauser, Assistant District Attorney, Kings County, New York; Matthew Redle, County and Prosecuting Attorney for Sheridan County, Wyoming; Richard C. Goemann, Executive Director, D.C. Law Students in Court Program; Joel B. Rudin, The Law Offices of Joel B. Rudin; Lawton Posey Cummings, Visiting Associate Professor of Law, The George Washington University Law School; Madeline deLone, Executive Director, The Innocence Project; Dr. Maria Hartwig, Assistant Professor, John Jay College of Criminal Justice, The City University of New York; Dr. Larry R. Richard, Organizational and Management Consultant, Hildebrandt (a management consulting firm to the legal market); and Dr. Gordon Schiff, Associate Professor of Medicine, Brigham and Women's Hospital, Harvard Medical School.

leadership,³⁹ incentives,⁴⁰ personnel decisions, and professionalization. It also introduced several office systems that could influence the disclosure practices of prosecutors: horizontal or vertical organization,⁴¹ centralized or decentralized organization, election effects,⁴² a designated lead attorney for ethics within the office, written office guidelines regarding disclosure,⁴³ and after-the-fact audits of attorney disclosure.

A. *Culture of the Prosecutor's Office*

Sociologists tend to view organizational culture as something more than a defined hierarchy that formally assigns bureaucratic responsibilities. Organizations develop values. Members behave according to informal patterns of influence within the organization, which sometimes depart from the organization chart.⁴⁴ The culture of an organization offers “a learned body of tradition that governs what one needs to know, think and feel in order to meet standards of membership.”⁴⁵

The Working Group began the day's discussion by considering the relationship between culture and systems. Does the chief prosecutor aim for straightforward compliance with office procedures related to disclosure, or does he or she depend on a deeper commitment to the principles that support disclosure? Put another way, does the office rely on systems only, or does the lead prosecutor need to develop the culture of the office to promote proper disclosure?

There was widespread consensus in the Working Group that prosecutors cannot rely on systems alone. Culture needs to reinforce systems, and vice versa. Rules have limited influence, particularly where the compliance infrastructure related to the rule is weak. In these situations—which are inevitable in a world of limited resources—only a

³⁹ The outline directed readers to Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 996-1016 (2009).

⁴⁰ See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

⁴¹ See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

⁴² See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

⁴³ See Richard H. Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48, 55 (1975); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

⁴⁴ See W. Richard Scott, *Reflections on a Half-Century of Organizational Sociology*, in THE SOCIOLOGY OF ORGANIZATIONS: AN ANTHOLOGY OF CONTEMPORARY THEORY AND RESEARCH 2 (Amy S. Wharton ed., 2007).

⁴⁵ GIDEON KUNDA, ENGINEERING CULTURE: CONTROL AND COMMITMENT IN A HIGH-TECH CORPORATION 8 (1992).

deeper commitment to the values that support disclosure will accomplish the goal of full compliance.

The value of a culture that reinforces the power of rules is easy to see when reflecting on a typical context for hard disclosure questions. Every prosecutor experiences moments when he or she believes that the defense attorney has failed to carry out the legal duties of disclosure. If the prosecutor complies with the rules without any underlying commitment to a culture of compliance, he or she will be sorely tempted to cheat in this setting: “If the defense attorney cheats, why shouldn’t I?” A prosecutor can look beyond this perception that others are failing to follow the rules if one believes in the intrinsic value of compliance.

Some observed that prosecutors come from a broader American culture that celebrates individual success as an overarching value. In the prosecutor’s office, the attorneys must depart from that habit of mind, and instead define success as the achievement of a social benefit, rather than pursuit of immediate self-interest. This reformulation of the ideal of success means that an attorney sometimes must “fall on the sword” if that is what justice demands.

1. Leadership

One of the chief sources of an office culture is leadership from the top of the organization. As one participant put it, “a sports team adopts the personality of its coach, and something like that happens in the prosecutor’s office.”

Leadership within a prosecutor’s office must convey to the rank and file that the goal of the prosecutor is the protection of the public, but adherence to ethical principles is the essential means of obtaining that goal. Recall that most prosecutorial decisions about disclosure take place in gray areas that compel some judgment. If prosecutors view the mission of the office as simply to protect public safety, they will be hostile to the disclosure of impeachment evidence that might confuse the jury’s view of a witness, a witness that the prosecutor views as truthful. The chief prosecutor’s description of the objectives of the office—while they surely do include public safety—must include some endorsement of the adversary process and respect for the role of jurors in resolving disputes about credibility. Put another way, the chief prosecutor’s definition of success must go beyond the notion of a “win” in the adversarial trial setting.

Prosecutors can define the organization’s concept of success through the telling of war stories; the Working Group reached broad consensus that the war stories chosen to tell and re-tell in an office must include examples of litigation fairness along with trial victories. The

defense attorneys in the group noted that the leader in a Public Defender's office—given the small number of acquittals—already must find stories that celebrate something other than wins at trial. Where defense attorney leaders might praise extra effort, diligence in investigation, or creativity in developing legal challenges, a prosecutor might honor an attorney who discloses relevant information as duty requires, despite the risk of a loss at trial.

Chief prosecutors who consider ways to facilitate offenders' re-entry to society send a broader message that they take their non-adversarial roles seriously. The elected prosecutor can celebrate cases resulting in diversion and treatment, which successfully rehabilitates an offender.

The Working Group also agreed that a case overturned on appeal cannot provide the only definition of failure in the disclosure context. Disclosure "failures" happen even where the conviction is saved. The group found merit in the concept of the "near miss" from the medical context, instances where a health care practitioner makes an error that luckily does not result in a bad outcome for a patient. Risk managers in the health care context treat these "near misses" as important diagnostic tools to improve systems. Prosecutors might use in this same manner any cases affirmed on appeal after a finding of no materiality or no prejudice.

One of the most intriguing and important leadership tasks that the Working Group identified is this: The chief prosecutor must develop among the attorneys and support staff a shared sense of responsibility for cases. Group members agreed that line prosecutors stumble into disclosure violations too often when they hold the mindset that a prosecution is "my case." Chief prosecutors and the office supervisors need to break that mindset and stress to line prosecutors that the entire office shares responsibility for the cases.

Another leadership issue relates to the standard that attorneys in the office use for judging *Brady* issues. At least one prosecutor in the Working Group instructs all the attorneys in his office to focus on "favorability" questions, while ignoring the issue of "materiality." Under this standard, line prosecutors know that if the evidence is favorable to the defense, they must disclose it and leave for later judicial rulings any questions of relevance or admissibility at trial. As a result, the prosecutors err on the side of disclosure in all close cases. The Working Group as a whole reached no consensus about whether this policy was feasible or desirable in other prosecutors' offices.

The members of the Working Group disagreed on the capacity of chief prosecutors to announce coherent and consistent objects for their offices. The prosecutors in the group noted that classic statements by

Justice Sutherland⁴⁶ are widely admired among prosecutors. These statements could form the basis for a shared set of objectives among different prosecutors' offices. The defense attorneys and other observers were less convinced that prosecutors could articulate a set of objectives for the attorneys in their office that would amount to more than boilerplate or truisms about criminal prosecutions.

2. Election Effects on Leadership

Given that local voters elect the overwhelming majority of chief prosecutors in the United States, the Working Group considered the effect of electoral politics on the leadership of chief prosecutors. The requirements of political campaigns could have good or bad effects on office leadership. On the positive side, political sensitivity of an elected prosecutor could promote a long-term perspective on office credibility, recognizing the practical value of a public reputation for fairness. Direct political accountability to local voters can also promote even-handed justice and make prosecutors more willing to pursue charges against other elected officials. New York observers in the Working Group noted that in New Jersey, the state prosecutors rarely file corruption charges, perhaps because they are appointed through the statewide political structure. In New York, by contrast, the elected District Attorneys with their own local political bases seem more willing to bring corruption cases against state officials.

On the negative side of the ledger, elected prosecutors are highly aware of the likely reactions of voters, and might expect line prosecutors to cut corners to increase short-term success. One of the academic observers in the group proposed an election law policy that would prevent candidates from discussing conviction rates during re-election campaigns for incumbents. The prosecutors in the group were quick to dismiss this proposal as unrealistic and undesirable because important and revealing conversations grow out of these numbers, giving voters a legitimate basis for evaluating the incumbent.

The elected prosecutors in the group described the choice they must make between a short-term and long-term perspective. In an immediate sense, there might be some electoral benefits if the office wins important cases, and aggressive nondisclosure might help the office win some of those cases. But in the long run, there are serious reputational costs if attorneys in the office cut corners. Particularly if a

⁴⁶ See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[A prosecutor] may strike hard blows, [but] is not at liberty to strike foul ones. It is as much [the prosecutor’s] 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.”).

case is overturned on review, the elected prosecutor must explain the error to the victims and their families, and ultimately to the public. Once the office gets a reputation for breaking the rules, the prosecutors will become less effective in front of juries and community groups. The prosecutors pointed to Mike Nifong in North Carolina and to former Attorney General Alberto Gonzales as examples of prosecutors who made poor prosecutorial decisions based on political considerations. One prosecutor offered this summary about the irony of electoral politics in the work of prosecution: "If you consider politics in doing the job, you will be a one-termer."

For these reasons, the elected prosecutors in the Working Group endorsed the long-term perspective. During the campaign, an incumbent needs to discuss more than conviction rates and successes in prominent recent cases; the incumbent also needs to inform voters about litigation fairness, diversion programs, drug testing, outreach in schools, and the whole range of office programs that promote public safety. This strategy reduces the tension between electoral politics and compliance with disclosure obligations.

3. Personnel Practices

The attorneys that a prosecutor's office hires provide the "raw material" that is shaped by culture and systems in the office. If new attorneys are attentive to their disclosure obligations, the measures taken in the office to promote proper disclosure are more likely to be effective.

It is clear that District Attorneys' offices do not rely on law school instruction to inform new prosecutors about their ethical and legal obligations of disclosure. The prosecutors in the Working Group all adopted a working assumption that new law school graduates were "tabula rasa."

The entire group expressed enthusiasm for a practice of the District Attorney in Dallas, Texas, described during the first day of the Symposium.⁴⁷ Each interviewee for a job as a prosecutor receives a copy of *Brady* and is asked to read the case in preparation for the interview. The interviewers discuss the case with each applicant.

The Working Group did not linger on the topic of training programs for newly-hired attorneys, in an effort to avoid duplicating the work of the Working Group on Training and Supervision. Nevertheless, the conversation did touch on this topic. One observer suggested a simple, short course on disclosure that could be created

⁴⁷ *Voices from the Field*, *supra* note 28, at 2069 (presentation by Terri Moore).

through collaboration among different professional associations, from both the prosecution and defense sides. Such a standardized training session might be built around some hard *Brady* cases. The Working Group generally endorsed the idea that disclosure obligations should be integrated into training on other topics. By avoiding a separate label of “ethics training,” the leadership can promote the habit of keeping ethical responsibilities at the forefront in all of a lawyer’s activities.

The academic observers noted that we know too little about the professionalization of attorneys. We do not yet understand the relative importance of various groups in forming the professional identity and habits of prosecutors and other attorneys. Those influences might come from legal education; professional associations at the international, national, state, and local levels; formally-appointed leaders within an office; or more informal leaders or peer groups. A substantial body of sociological research examines the professionalization of fields such as medicine. Relatively little such research exists as to the legal profession.

4. Culture Embodied in Incentives

Line prosecutors understand that some actions in their offices lead to advancement and rewards, while others lead to disadvantage. The realities of such incentive systems, in the long run, will matter more than any verbal affirmations of values in the organization. Incentives embody the organizational culture. Incentive systems that punish proper disclosure by a prosecutor, whether through formal or informal consequences, will overwhelm any verbal affirmations about the importance of fair play.

The Working Group first considered financial incentives—payments made to attorneys who fulfill their disclosure obligations. In general, the group was unenthusiastic about financial incentives. For one thing, budgets are already tight and prosecutors would find it difficult to divert money from other office functions to offer such incentives. In addition, many in the group found it objectionable to “reward people for doing their jobs.”

The Working Group also remained skeptical about financial rewards because of the issues raised in the presentation by Barry Schwartz on the first day of the Symposium.⁴⁸ The participants were concerned that placing a monetary value on compliance would reframe this conduct as something other than an ethical duty, meaning that the “extra” reason to comply (money) would undermine the original reason and actually make it less likely that prosecutors would behave properly.

⁴⁸ *Id.* at 2083 (presentation by Barry Schwartz).

Instead of financial rewards, the Working Group discussed non-financial incentives to comply with disclosure obligations. The group tried to identify rewards that reinforce the ethical component of disclosure rules. While acknowledging the intrinsic value of compliance, incentives might appear intermittently to reinforce good conduct. The incentives might not be promised ahead of time, but would add some benefits on occasion for those who performed well.

The incentives might take the form of support of the line prosecutor in the midst of institutional conflicts. For instance, prosecutors noted that it is costly in relationship terms for an assistant district attorney (ADA) to pursue an integrity question originating in the police department. Leaders in the prosecutor's office must incentivize this behavior by signaling that they will support the line prosecutors if the police object to the inquiry. A supervisor can encourage further inquiry with other officers, or can arrange meetings with higher-level officials at the police department if an ADA uncovers a systemic non-compliance problem among police officers.

The Working Group acknowledged that heavy caseloads, especially for the least experienced attorneys, create poor incentives for prosecutors when it comes to the most difficult or subtle disclosure questions. A burdensome caseload sometimes prevents thoughtful processing of cases. As one defense attorney phrased it, "the caseload becomes the practical training," and sets a pattern for the prosecutor's entire career. One of the academic observers asked about the prospects of assigning lighter caseloads to the newest ADAs, at least during their first few months on the job. The practicing attorneys in the Working Group all found this suggestion to be highly impractical.

The participants discussed their widely varied views about the incentives currently operating in prosecutors' offices. The prosecutors in the group believed that the non-financial incentives largely support high-quality ethical compliance with discovery obligations. By and large, they believe that attorneys in their offices are rewarded for doing good work, and "good work" includes the obligation to comply with all legal and ethical obligations, including disclosure of evidence. The prosecutors noted that the people who are attracted to criminal prosecution as a profession tend to treat virtue as its own reward.

On the other hand, the defense attorneys and some of the non-practitioner observers offered a very different account. They pointed to particular cases or practices that conflicted, in their view, with this positive account of the incentives at work. They suggested that a narrower vision of success—one based on convictions above all—is the norm for prosecutors' offices.

B. *Structure of the Prosecutor's Office*

The latter half of the day's discussion was devoted to particular structures within a prosecutor's office that support a positive culture. These structures might have the explicit goal of promoting disclosure compliance; more frequently, however, the practices and institutions described here serve some other principal purpose, and compliance with disclosure obligations amounts to a side benefit.

1. Horizontal Versus Vertical Organization

Chief prosecutors typically face a basic choice in organizing their offices. A horizontal organization assigns the attorneys to units that perform certain specialized functions in a case. For instance, the Screening Unit might handle early decisions for a file, then hand it to the Trial Unit, where the attorneys obtain a resolution in the case, before passing it along to the Appeals Unit. A vertical organization, on the other hand, assigns a single attorney (or the same group of attorneys) to handle the case from start to finish. In reality, most prosecutors' offices combine aspects of vertical and horizontal organization.

In theory, the Working Group acknowledged that a horizontal organization might be more conducive to ethical disclosure practices. For one thing, a horizontal organization might reinforce the concept of joint ownership of cases. It also allows more attorneys to review the file and the evidence, decreasing the risk that evidence to disclose will go unnoticed through negligence.

On the whole, however, the Working Group concluded that this structural choice has little practical impact on disclosure practices in an office. Either horizontal or vertical organization could support high-quality disclosure practices.

Whether the office is organized in a horizontal or vertical manner, it is important to structure the office in ways that make attorneys interdependent to some degree. This might be accomplished through a somewhat centralized organization, assigning supervisors who remain informed about the work of line prosecutors. An office that is accountable in specific ways to report to statewide agencies (perhaps in the state Attorney General's office) is more likely to create this culture of accountability, although statewide control is not necessary. One prosecutor, however, noted a conundrum: Supervisors in a prosecutor's office normally make strong reputations by "protecting their people," and handling problems within their own units. The office leadership needs to find a way around this common norm in order to encourage

supervisors to pass along information about improper disclosure practices by an attorney in the unit.

One of the participants drew a parallel to the medical arena: Doctors tend to know when one of their colleagues is prone to mistakes, and they take corrective actions of various sorts. Similarly, a well-structured prosecutor's office should make it possible for other attorneys to notice when one of their peers (or underlings) is prone to mistakes. The prosecutors indicated that feedback about mistake-prone prosecutors could arrive from judges or police officers, or even from victims who ask to meet with the chief prosecutor. Not all of these groups have access to information about disclosure errors, but prosecutor errors of various types might correlate with disclosure violations.

2. Designated Expert

Many large private law firms in the United States have begun to appoint one of their own attorneys as Legal Counsel for the firm, responding to questions from the firm's attorneys about ethics and resolving other legal questions that face the law firm as a business enterprise. The firm's counsel also identifies sources of risk for the organization, such as gender bias or misconduct in the sale of firm information. Could a similar model—designating a “disclosure expert” or “ethics expert” within the prosecutor's office—identify and reduce sources of risk in the criminal adjudication context?

The disclosure expert would encourage line prosecutors to consult others whenever problem cases arise. To accomplish this, the disclosure expert must offer more than just a few training sessions for new prosecutors. The training must happen on a regular schedule. The training should include law clerks and investigators, along with anyone else who interacts with the police department. During the intervals between the scheduled training sessions, the disclosure expert might issue “alerts” to describe new court rulings or other important developments in the field. At least one of the prosecutors in the Working Group already employs a version of this model. The lead prosecutor appoints a “*Brady* officer,” who issues periodic “*Brady* alerts” to all the attorneys in the office and asks them to sign a statement acknowledging that they have read each alert.

The disclosure expert would not only disseminate information to the office, but he or she would also collect information from the attorneys about any appeals or other claims of failure to follow disclosure rules. In this way, the disclosure expert aggregates in one place all the available information about office practices. On the basis

of this office-wide view, the prosecutor who handles this portfolio can spend some time thinking about risk management. The most dangerous choices are those that happen without thinking, in the middle of battle. A designated expert can approach these questions from a dispassionate vantage point.

The disclosure expert can also counter the “habituation” phenomenon, in which members of an organization lose their ability to think of an event as a preventable problem after they become habituated to such events. An office ethics counsel can shake up the routine and freshen the thinking about disclosure problems. The non-practitioner observers in the Working Group commented that firms in the financial industry train their employees how to protect confidential client information. They might be able to propose better routines about disclosure.

Who should the lead prosecutor designate as the disclosure expert? The Working Group reached a clear consensus that this person should not carry the authority to discipline office employees for violation of disclosure rules. The expert should remain more a “confidante” than a “hatchet person.” Several noted that the U.S. Department of Justice uses a similar arrangement, separating the function of advice and training on ethics issues from the function of those who discipline attorneys for ethical lapses.⁴⁹

The Working Group also agreed that the designated expert should be someone with experience in the office, and someone who has earned broad respect among the attorneys. In all but the largest and most specialized prosecutors’ offices, the designated expert would carry other duties. It could be effective to assign this function to someone in the appeals unit of the office. Such an attorney could monitor appeals related to disclosure violations, and identify the “teachable moments” that arise from the appeals.

3. Written Guidelines

The Working Group explored the viability of written guidelines to shape the disclosure decisions of line prosecutors. Many offices already generate written guidelines to deal with certain charging and disposition questions, such as the acceptable plea bargaining outcomes for

⁴⁹ For a description of the Office of Professional Responsibility, which investigates allegations of misconduct involving Department of Justice Attorneys, see United States Department of Justice, Office of Professional Responsibility, <http://www.justice.gov/opr/> (last visited June 9, 2010). The Professional Responsibility Advisory Office is a separate entity within the Department. United States Department of Justice, About PRAO, <http://www.justice.gov/prao/> (last visited June 9, 2010).

categories of cases. Some guidelines designate the acceptable range of substantive outcomes, while others specify a process to follow before taking certain actions (such as a requirement that a line attorney consult with a supervisor before dismissing certain types of charges). The group addressed the question of whether similar written guidelines might be helpful in the context of disclosure practices.

Rachel Barkow's comments from the first day of the Symposium⁵⁰ drew an analogy between prosecutor compliance programs and corporate compliance programs written in response to the federal sentencing guidelines.⁵¹ Part of the value of such compliance programs is the deliberate thinking and diagnosis that occurs during the drafting of such guidelines.

Initially, the practicing attorneys in the group expressed concern about the ability of written rules to account for subtle case-specific facts. As the conversation progressed, however, the prosecutors in the group came to the view that they already issue several relevant forms of written guidance. For instance, some offices produce "investigation manuals," consisting of checklists and other guidance in the preparation of investigation files for trial.⁵²

The group decided that written guidance might prove most useful in obtaining the relevant disclosure information from police investigators. This is especially true regarding impeachment evidence. Several of the prosecutors in the group noted that they already use standard letters to request information from police personnel files that could contain impeachment evidence related to officers who might testify at trial.

The next step in the use of checklists to prepare for trial might be to collect checklists from different offices, and to develop knowledge and practices that are transferable to other jurisdictions. It would also be useful to employ information technology that allows different users to enter in one location all the actions taken to complete the relevant checklist in preparing a case for resolution. Remarkably, such a

⁵⁰ Rachel Barkow, Professor, Center on the Administration of Criminal Law, New York University School of Law, Presentation at the Cardozo Law Review Symposium: New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works? (Nov. 15, 2009) (transcript on file with the Cardozo Law Review); see also Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089 (2010).

⁵¹ See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2009).

⁵² The use of discovery checklists garnered considerable support from several of the other Working Groups. See *supra* Part II.A.2 to A.3 (Working Group on the Disclosure Process) (reaching consensus on prosecutors' use of checklists and agreeing on the advantages of police officers' use of investigative checklists); *infra* Part V.A.3 (Working Group on Internal Regulation) (supporting the use of discovery checklists as a regulatory device); *infra* Part VI.B.7 (Working Group on External Regulation) (supporting "unanimously . . . the idea of checklists" for prosecutors to detail what is being disclosed and "a privilege log that lists what is withheld").

straightforward data system is not available in most prosecutors' offices.

4. Audits

The Working Group spent considerable time in the afternoon session talking about "audits" as a pro-active method to identify problems with disclosure. The group drew a parallel to the "morbidity review panels" in health care, that is, efforts to diagnose areas for improved treatment based on a review of poor outcomes. An internal review team or an external group of evaluators might conduct the audits in a prosecutor's office. These audits might take place after the complete resolution of the case, or an "interim" audit might evaluate the work of the line prosecutor at various stages in the processing of a case.

Early in the discussion, the prosecutors in the group were quite skeptical of the value or viability of audits. Some pointed out that defense attorneys already serve as effective auditors of the disclosure practices in their offices, through the appeals and post-conviction relief claims that they file. Others pointed out that every attorney in the office is already swamped with active files, leaving no extra time to respond to the questions of any external auditors or to conduct any internal audits.

The non-practitioners in the group pointed out that audits could take place even in the presence of tight resources. The available time and budget might limit the audits to an extremely small random sample of cases, but some sample could receive a post hoc review even on a very limited budget.

The difficulty with appeals as a device for identifying disclosure problems is that they do not represent a random sample of all the cases that a prosecutor's office processes. There may be types of violations that rarely or never result in appeals. Recall that a defense attorney would need to have some inkling of the evidence not disclosed before filing such a claim. Only a few defendants make Freedom of Information Act (FOIA) requests, which is one method to obtain documents they did not receive before trial. The FOIA officer apparently follows different disclosure practices than the trial attorney, raising hopes that auditors might also take a different view of the case than the trial attorney.

The prosecutors in the group noted that certain forms of "interim" audits already occur for at least some cases. In some offices, "trial preparation conferences" require the trial attorney (and possibly the lead investigating officer from the police department) to present to a leadership group all the available proof and the status of trial readiness, including any disclosures made to the defense. Similarly, *Brady* issues

sometimes are anticipated in a “charging conference” that reviews the evidence before the filing of charges in certain serious cases. Once again, however, this subset of cases is not a random sample of all the cases handled in a prosecutor’s office.

At least one prosecutor in the group has already instituted a randomized interim audit system. On an unannounced basis, an ADA is asked to bring all of his or her files to the section chief, and to walk through each of them to explain past actions and future plans. Disclosure of evidence is one topic that the section chief and the trial attorney discuss during this spot check.

Over time, the discussion uncovered some features of internal audits that might appeal to some prosecutors. For instance, an office with an active auditing practice would compel prosecutors to record all of their discovery actions in the case file. The discipline of building a record, following automatic rules about information to be recorded in the file, could serve as a memory jog for the attorney. It is not the post hoc inspection that creates quality; rather, it is the engineering of the case in anticipation of the later inspection.

The prosecutors also concluded that a case audit would prove more attractive in their offices if the scope of the review went beyond disclosure issues. The auditor might ask if the attorney properly protected witnesses and communicated well with the victim. Some prosecutors believed that the auditors would routinely encounter a “big mess” in some files, and would treat any disclosure problems as a secondary concern when compared to the overall organizational deficits of the trial attorney.

Another form of internal interim audit occurs when the office leadership reassigns attorneys to cases on a periodic basis. For instance, some offices assign particular line prosecutors to a given courtroom, and then reassign all the attorneys to new courtrooms on a regular basis to prevent the distorting effects of familiar relationships with judges and defense counsel. After the reassignment, each attorney gets a detailed view of many files and may assess the actions of his or her predecessor in prosecuting the cases.

Turning from interim audits to post-adjudication reviews that are completed after the resolution of a case, the most easily-achieved audit would be a “file only” audit. The auditing attorney would review the file to identify any evidence that should have been disclosed, and then look for evidence in the file that the evidence was in fact disclosed to the defense. A more meaningful—but far more expensive and intrusive—review would be a “file plus” audit. This form of audit would require the reviewing attorney to go beyond the available file documents in the prosecutor’s office. The reviewer would obtain the police department’s investigative file, interview the investigating

officers and the key witnesses in an attempt to identify the full range of required disclosure. The Working Group reached a consensus view that such a thoroughgoing audit would not be administratively or politically sustainable. Nevertheless, the partial “file-only” audit would uncover a meaningful set of problems.

The prosecutor captures the real value of audits only by monitoring the patterns of potential shortcomings from case to case. The auditing structure needs to be concentrated in a few individuals, or the auditors must record their findings in a database available to others. Whatever form it takes, some method must be present to allow the leadership to see repeated problems in the process, or to flag individual police officers or line prosecutors who are involved with an unusually high number of problem cases.

The group spent only a brief time discussing external audits. Several prosecutors noted that teams from the NDAA and the National Association of Attorneys General already perform management review audits for a few local prosecutors upon request. There is some question as to how deep an external review team can get into the operation of the office in a short time, but the teams already do case-level reviews, and talk to all employees if possible. At least one prosecutor in the group reported poor experiences with such external auditors. They took too long, and missed the larger picture while becoming too focused on “the weeds.” Others in the group were more sanguine about the prospects for an external audit that might take the shape of the accreditation reviews that the American Bar Association performs in law schools every seven years. The NDAA standards might serve as a basis for evaluating the office, or the auditors might look to the ABA standards for prosecutors.⁵³

There are precedents for external audits of similar institutions. One prosecutor noted that audits are currently a routine part of certifications for crime laboratories. Law enforcement agencies, jails, and prisons can also volunteer to submit to audits in an effort to achieve certifications of certain levels of professional competence and quality. Others drew analogies to the external audits of hospitals. While such audits of a prosecutor’s office would almost surely remain voluntary, an elected prosecutor might have political incentives to obtain some form of external approval and credibility. A newly-elected prosecutor might find an external audit at the beginning of the term office useful, to establish a baseline for measuring progress over the first few years in office. Just as sheriffs and prison administrators convince the funding authorities to pay for these external audits, prosecutors might be able to accomplish the same.

⁵³ See NAT’L PROSECUTION STANDARDS (Nat’l Dist. Attorneys Ass’n, 3d ed. 2009); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION & DEF. FUNCTION (3d ed. 1993).

The Working Group closed with a discussion of public access to the results of any audit. The group did not reach agreement on this question. Some expressed concern that conclusions about general office practices or evaluations of actions in particular cases could fall into the hands of defense attorneys. These participants believed that the audits would prove attractive and useful to prosecutors only if they received explicit protection from state open records laws or other forms of disclosure. Others, however, believed that a prosecutor might want to publish the results of any audit as a demonstration of transparency and a method to promote public confidence in the quality of the work taking place in the office.

C. *Conclusion*

The systems and culture that the Working Group discussed all began with an active role for the leadership in the prosecutor's office. All the participants envisioned an office that promoted active discussion of office objectives and lawyering decisions. Ideally, an office treats compliance with the legal and ethical obligations of disclosure as an articulated and jointly-held responsibility. It is not left to the unmonitored and unspoken judgment of individual prosecuting attorneys. Compliance grows out of coordination.

V. INTERNAL REGULATION: REPORTED BY JENNIFER E. LAURIN⁵⁴

The Working Group on Internal Regulation⁵⁵ addressed the question of what role guidelines and processes that are developed and carried out within individual prosecutors' offices can and should play in governing evidentiary disclosure. A variety of internal controls can serve to regulate behavior within prosecutors' offices, including supervision, training, written policies, cultural norms, and disciplinary processes. All of these techniques and factors have a role to play in, and must be considered in assessing, internal regulation. Only some, however, were considered to be within the scope of the work of the Working Group—both because not all were core to the notion of internal regulation, and because some topics were taken up by other working groups. Thus, for example, exploration of supervision and training was left to the Working Group on Training and Supervision.⁵⁶ And, while organizational culture clearly has a bearing upon internal regulation, that topic was left for development by the Working Group on Systems and Culture.⁵⁷ Furthermore, while the precise contours of a prosecutor's disclosure obligations are obviously fundamental to the question of what internal regulation aims to achieve, discussion of the substance of those obligations was left to the Working Group on Prosecutorial Disclosure Obligations and Practices.⁵⁸ The Internal Regulation Working Group proceeded on an assumption that the goal of

⁵⁴ Discussion Leader: Daniel S. Medwed, Professor of Law, S.J. Quinney College of Law at The University of Utah; Reporter: Jennifer E. Laurin, Assistant Professor, University of Texas School of Law. Other members of the Working Group on Internal Regulation included: Dr. Karen L. Amendola, The Police Foundation; Dr. Rohit Bhalla, Montefiore Medical Center and Assistant Professor, Albert Einstein College of Medicine of Yeshiva University; Rhonda Ferdinand, Deputy Chief Assistant District Attorney, Office of the Special Narcotics Prosecutor for the City of New York; Christopher Hill, Assistant District Attorney, New York County, New York; Morrie Kleinbart, Assistant District Attorney, Richmond County, New York; John M. McEnany, Associate United States Attorney, Southern District of New York; Wayne McKenzie, Vera Institute of Justice; Lohra L. Miller, District Attorney, Salt Lake City, Utah; Shana-Tara Regon, Director of White Collar Crime Policy, National Association of Criminal Defense Lawyers; Jenny M. Roberts, Visiting Associate Professor of Law, Washington College of Law, American University; Rebecca Roiphe, Associate Professor of Law, New York Law School; Anne Swern, First Assistant District Attorney, Kings County, New York; and Hon. James Yates, Justice, Supreme Court, New York County, New York. Institutional affiliations are provided for identification purposes only. All group members have had an opportunity to review this Part of the Article. The views expressed herein do not necessarily reflect the opinions of any particular participant or any entity with which he or she is associated.

⁵⁵ For discussion purposes, the Working Group treated the term "internal regulation" as encompassing compliance-generating oversight as a general matter, and did not presume it to connote any particular point on a spectrum ranging from highly specific, rule-type commandments to more flexible guidelines for conduct.

⁵⁶ See *supra* Part III.

⁵⁷ See *supra* Part IV.

⁵⁸ See *supra* Part I.

internal regulation of discovery practices would be to ensure compliance with *some* legal and ethical disclosure norms.

With those parameters set, two broad areas of internal regulation were explored by the Working Group: (1) the development of written guidelines for the substance and process of disclosure; and (2) auditing and oversight. Exploration of each of these topics drew primarily upon the experiences of group members in the criminal justice field, but also substantially upon lessons from organizational management in other professions. In particular, insights from recent quality control and oversight innovations in the field of medicine and hospital management, some of which were presented at the first day of the Symposium proceedings,⁵⁹ informed several aspects of the group's discussion. While analogies between the medical and criminal justice arenas should not be hastily drawn,⁶⁰ some parallels do seem apt. As this Part discusses, a number of internal regulatory practices that have developed in medicine did garner substantial support, and in some instances emerged as a consensus recommendation.

A final introductory observation concerns the scope of recommendations presented from the Working Group, and the intended beneficial value of this Part. In each of the two overarching areas of discussion, general agreement emerged as to the following recommended practices:

- (1) Written guidelines addressing both the substance of prosecutors' evidentiary disclosure obligations, and the procedures by which those obligations should be effectuated, should be promulgated within prosecutors' offices.
- (2) Prosecutors' offices would benefit from the development and use of "checklists" that enumerate the categories or items of evidence to be disclosed in the course of a criminal case, as well as other tasks associated with the discovery process.
- (3) Prosecutors' offices should adopt prospective auditing mechanisms that provide a mechanism of routine oversight of disclosure obligations, and generate data that can be used to improve development of and compliance with those guidelines.

Although articulation of these areas of agreement is an important contribution of the group's work, it must nevertheless be emphasized that the group reached a true consensus on relatively few matters. Moreover, as the listed recommendations illustrate and as the discussion that follows will elaborate, consensus could be articulated only at high

⁵⁹ *Voices from the Field*, *supra* note 28, at 2038.

⁶⁰ *See infra* Parts V.A.3, V.B.

levels of generality. There are good and important reasons for this. First, time limitations significantly constrained the work of the group. Second, even within the group, the diversity among represented jurisdictions and prosecutors' offices was substantial—from the standpoint of size and budget (contrast, for example, the Department of Justice and the City of Salt Lake), as well as organizational mission (contrast the Manhattan District Attorney's Office with the Office of the Special Narcotics Prosecutor of the City of New York). This is only a tiny microcosm of the diversity that exists when the United States criminal justice system as a whole is considered. Hence, group members were understandably and appropriately sensitive to the fact that there were very few one-size-fits-all approaches that could be developed for implementation across the range of prosecutors' offices that exist in the country.⁶¹

Accordingly, this Report enumerates and describes the broad recommendations as to which consensus was reached, but also describes the group's range of opinions concerning the details of implementing those recommendations, as well as splits of opinion that prevented consensus from being reached in other areas upon which discussion touched. The hope is that the work of the group might offer not simply, or even primarily, recommended practices in these areas, but also a rich foundation upon which greater and perhaps more context-specific exploration of best practices in these areas might rest.

A. *Written Guidelines Concerning Discovery*

Prosecutors' offices should promulgate internal written guidelines that govern prosecutors' disclosure obligations. Such guidelines should be addressed not only to the content of discovery obligations, but also to process, and should describe and affirmatively direct such steps as consultation with supervising prosecutors and coordination with law enforcement to obtain evidence and information that may be subject to disclosure. Prosecutors' offices would benefit from the development of disclosure checklists enumerating disclosure tasks and requiring verification of the completion of those tasks over the life of a criminal case.

⁶¹ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, Publ'n No. NCJ 213799, PROSECUTORS IN STATE COURTS, 2005, at 1-3 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc05.pdf> (summarizing diverse attributes of more than 2300 state prosecutors' offices across the country).

The evidentiary disclosure obligations of American prosecutors are rooted in a number of sources: *Brady v. Maryland*⁶² derives from the United States Constitution and takes shape through decades of Supreme Court and lower court opinions; individual jurisdictions have judicially created or statutorily enacted discovery requirements; and ethical rules and standards developed by states, the NDAA, the ABA, and state or local bar associations also guide practice. Notwithstanding the existence of external guidance to prosecutors, offices should develop internal, written guidelines to govern discovery practices. Written guidelines serve two important goals. First, they provide clear and distilled direction to prosecutors—particularly those who are early in their careers—who would otherwise be left to sort through the vast universe of externally developed rules and standards. Second, written guidelines communicate a message through the office that good discovery practices are mandated from the top of the chain of command, and are part of the fabric of both the rules and culture of the office.

A variety of approaches might guide the formulation of written discovery guidelines; as detailed below, no single approach emerged as a consensus recommendation from the group. One overarching principle was, however, reflected in the views and considerations of all group participants: Incidents of nondisclosure by prosecutors are overwhelmingly attributable to mistakes regarding the contours of discovery obligations, or negligence in execution of those obligations, rather than bad faith or intentional wrongdoing. Disclosure guidelines must therefore be focused on eliminating unintentional errors—whether born from ignorance, time pressures, misjudgment, or laziness—as much if not more than eliminating misconduct.

1. Hard Versus Soft Guidelines

As a general matter, written guidelines concerning discovery practices could take many forms. One point of conceptual contrast is between hard and soft guidelines, i.e., between specific, constraining directives and more general or hortatory statements of goals. In the discovery context, the former category of “hard” guidelines would include rules describing specific items of evidence to be disclosed and, perhaps, the time and manner in which disclosure should be effectuated. For example, an office might promulgate a written open file policy requiring all prosecutors to include certain specified categories of documents within their case files, and to provide defense counsel with access to that file upon request any time following arraignment. Or, an

⁶² 373 U.S. 83 (1963).

office policy could enumerate specific categories of evidence or documents that are required to be disclosed to defense counsel. The latter category of “soft” guidelines would include written principles without accompanying mandates for how those principles should be applied in a given situation. For example, an office might promulgate a written policy stating, “All prosecutors must promptly disclose to defense counsel all evidence or information that reasonably tends to undermine guilt or severity of punishment, or that tends to discredit a witness called by the prosecution at trial.”

No single conception of the optimal “hardness” or “softness” of guidelines garnered unanimous support within the group. As discussed below, a hybrid approach eventually emerged to garner majority, though not unanimous, support within the group. Before detailing that approach, however, the considerations and concerns cited by group members in relation to the development of guidelines are described.

A majority of group members favored a regime of soft guidelines. Proponents of that view expressed three primary concerns about the consequences of hard disclosure rules. First, hard rules may be inherently incomplete. Even within a single prosecutors’ office, describing with precision the evidence or information that must be turned over in any and every given criminal case is an impossible task. Different types of cases have distinctive evidentiary components—consider, in DWI versus narcotics versus sexual assault cases, the range of scientific evidence alone—and any given office might deal with a range of law enforcement agencies, each having their own forms. The generality and flexibility afforded by soft rules, by contrast, afford greater adaptability to changing institutional environments, and may therefore, perhaps counter-intuitively, afford better guidance than a closely tailored but hole-ridden hard regime. Second, hard rules preclude the exercise of prosecutorial discretion that, in the minds of many group members, is at the heart of any lawyer’s craft; converting discovery into a wholly robotic practice devoid of judgment creates bad habits of mind. This effect is particularly problematic, advocates of softer rules say, given one of the inevitable deficiencies of hard rules, their inherent incompleteness. A prosecutor trained not to make case-by-case judgments about the propriety of disclosure will be more apt *not* to disclose evidence or information that *should* be provided to the defense but that is not specifically enumerated within the guidelines upon which she is rendered dependent. The same holds for the inexperienced or lazy prosecutor—two high-risk categories for negligent nondisclosure. Thus, say the soft rules proponents, harder rules might lead to *under*-disclosure. Finally, in response to the assertion that open file policies are hard guidelines that insure against under-disclosure, a number of group members argued that this view

downplays the negative consequences of open file policies, emphasizing in particular the collateral consequences to witnesses of broad disclosure—from jeopardized security, to simple embarrassment at the revelation of intimate or private details that are known to investigators and otherwise have no bearing on a criminal case.

2. A Hybrid Approach: Soft Rules with Commentary

A majority of the group viewed a combination of hard and soft elements as the optimal approach to written disclosure guidelines. Broad mandatory provisions could be accompanied by comments providing specific examples of circumstances where disclosure should and should not be made, which would be intended to guide prosecutors' discretion in applying the general mandatory principles. For example, the above-stated example of a soft guideline could be enacted as follows: "All prosecutors must promptly disclose to defense counsel all evidence or information that reasonably tends to undermine guilt or severity of punishment, or that tends materially to discredit a witness called by the prosecution at trial." That mandatory rule would be accompanied by comments that provided hard exemplary applications, such as the following: "In a robbery prosecution involving three eyewitnesses, two of whom testified, physical descriptions inconsistent with the defendant that were provided by the non-testifying witness were held to be subject to disclosure." Such guidelines would thus be similar in form and effect to the canon and commentary structure of codes of conduct for the judiciary.⁶³ Finally, written guidelines should direct consultation with appropriate supervisory individuals in order to confer regarding uncertainty in application.

With regard to the development of guideline comments, and in particular the issue of what sources they should draw from, two potential approaches were contemplated: examples taken from or based upon practice experiences within the office, or discovery-related holdings in judicial opinions. Several positive and cautionary features of each view should be considered.

Comments developed from experience have a number of advantages that derive from their context specificity. Office- and jurisdiction-specific applications of the discovery guidelines permit direction to be tailored to the day-to-day discovery situations that line

⁶³ See, e.g., MODEL CODE OF JUDICIAL CONDUCT pmb. (2004), available at http://www.abanet.org/cpr/mcjc/pream_term.html#PREAMBLE (describing "Canons" and "specific rules set forth in Sections under each Canon" as "authoritative," and indicating that "Commentary" is meant to "provide[] guidance with respect to the purpose and meaning of the Canons and Sections[,] . . . [but] is not intended as a statement of additional rules").

prosecutors actually face. Practice-derived comments might be tailored and targeted by unit supervisors to reflect the experiences of particular divisions within offices. Imagine, for example, a dedicated sexual assault unit, or narcotics division, or task force developing comments that reflect particular types of evidence, police forms, witness safety issues, or other special concerns faced by the particular group. Furthermore, directing prosecutors to follow the real-life examples of colleagues and supervisors in discovery furthers the goal of signaling that the culture of the organization is supportive of positive and appropriate disclosure practices. The flip side of these positive features, however, is that practice-derived comments might be *too* context-specific to provide the desired level of guidance. Relatedly, practice-based discovery guidance runs the risk of being susceptible to multiple interpretations of the correct, preferred, or acceptable approach, undermining the goal of the comments in providing hard guidance to supplement the soft principles.

Judicial opinions, by contrast, have all the advantages of hardness: They point prosecutors to the mandatory outer bounds of discretionary application of the office's guidelines. On the other hand, the retrospective character of judicial opinions on discovery matters could limit or complicate their utility as guideposts for prosecutors, since they are often generated by appellate courts that ask whether evidence is material in light of the full record developed through, and perhaps subsequent to, trial. Prosecutors making prospective judgments about disclosure obviously lack the benefit of such hindsight. But more importantly, supervising prosecutors within the group felt that line prosecutors should *not* be encouraged to weigh materiality-type questions, and should instead be guided to base disclosure decisions simply on the character of evidence at issue—i.e., its exculpatory or impeaching nature. Therefore, if judicial opinions are utilized as the basis for guideline comments, care should be taken in the selection and presentation of courts' holdings so as not to suggest that the retrospective materiality considerations are appropriate factors in prospectively assessing disclosure.

Finally, advocates of the soft-rules-with-comments model felt that, even accounting for the perceived limitations of a full hard guidelines regime, targeted hardening might nevertheless be desirable. One arena generated the most discussion and the broadest consensus in this regard: The principle that more junior prosecutors benefit from harder disclosure rules garnered the support of even those group members who expressed skepticism about written guidelines as a general matter. New prosecutors were broadly viewed as not only unfamiliar with their discovery obligations, but also systematically disposed to be *reluctant* to disclose evidence. Thus, they are a particularly high risk group for

accidental nondisclosure. Moreover, from the standpoint of effectiveness, while more experienced attorneys might be viewed as apt to chafe under specific mandates that constrain the discretion they ordinary enjoy in the management of their cases, younger attorneys were viewed as *wanting* closer and more specific guidance. Prosecutors' offices might therefore consider enacting harder, rule-based disclosure obligations that are specifically targeted to early-career prosecutors—for example, by promulgating such rules within misdemeanor divisions, or with respect to low-level felony cases typically staffed by newly promoted attorneys.

3. Checklists

As either a variation on or supplement to written guidelines for disclosure, the regulatory device of a discovery “checklist” garnered considerable support within the group.⁶⁴ The idea draws significantly upon lessons from the medical field: In response to mounting evidence over the last decade that a large number of preventable errors were attributable to mistake or negligence in the performance of routine care functions, hospitals began to develop and utilize checklist forms to govern a variety of patient care protocols, and provide real-time monitoring of compliance with good practices. The experience of hospitals has been that effective checklists, i.e., those that successfully reduced errors or bad outcomes in patient care, had three essential attributes: (1) They reduced a multi-step procedure to a series of discrete, mandatory tasks to be completed (e.g., “wash hands prior to examining patient”); (2) they were completed concurrently with the tasks, to force real-time rather than post hoc confirmation that a task has occurred; and (3) they were completed by a third party—typically a nurse who observed and confirmed a doctor’s performance of a given task by literally checking the appropriate box, and who had the authority and obligation to halt the process if a checklist task was *not* performed.⁶⁵

⁶⁴ The use of discovery checklists garnered considerable support from several of the other Working Groups. See *supra* Part II.A.2 to A.3 (Working Group on the Disclosure Process) (reaching consensus on prosecutors’ use of checklists and agreeing on the advantages of police officers’ use of investigative checklists); *supra* Part IV.B.3 (Working Group on Systems and Culture) (discussing the use of checklists in written guidance memoranda provided by prosecutors to promote a culture of better disclosure in their offices); *infra* Part VI.B.7 (Working Group on External Regulation) (supporting “unanimously . . . the idea of checklists” for prosecutors to detail what is being disclosed and “a privilege log that lists what is withheld”).

⁶⁵ For a recent popular account of the adoption of checklists in the medical field, see Claudia Dreifus, *A Conversation with Dr. Peter J. Pronovost—Doctor Leads Quest for Safer Ways to Care for Patients*, N.Y. TIMES, Mar. 9, 2010, at D2 (discussing implementation of checklists at Johns Hopkins Hospital).

It must be emphasized that neither the medical and criminal justice fields as a whole, nor the patient care and criminal discovery contexts in particular, are entirely analogous. Three primary and overarching difficulties with the medical analogy were discussed by the group.⁶⁶ First, while the hospital and the criminal justice system are similar in that there are multiple players whose interrelated actions all bear upon the task of disclosure, the two fields might differ in the extent to which those multiple players are united in goal and motivation. Thus, several participants expressed the sense that while doctors, nurses, pharmacists, and other medical professionals all have a shared goal of achieving patient wellness and avoiding patient harm, police, prosecutors, defense attorneys, and even judges may have divergent motivations—even if all can agree that, for example, a wrongful arrest or conviction is an event unequivocally to be avoided.

Second, several group members observed that, while the medical field has collected a significant amount of data on incidents of errors in patient care, the criminal justice system has little in the way of analogous empirical knowledge of the prevalence of discovery errors. Accordingly, we are less able to fashion evidence-based rules and practices—or, for that matter, to agree on whether there is any appreciable problem of nondisclosure that might need to be addressed. Third, and finally, hospitals are incentivized to utilize checklists and other internal regulatory mechanisms by substantial monitoring from external (e.g., government) and quasi-internal (e.g., boards of directors) entities that require data on patient care outcomes. Prosecutors' offices, by contrast, have very little if any comparable, systemic outside oversight, which enhances the difficulty of justifying the financial and bureaucratic costs of implementing comparable systems.⁶⁷

Nevertheless, group members on the whole viewed checklists as a feasible and beneficial approach to internal regulation of discovery. (Indeed, similar though more limited measures to document the disclosure process had been successfully instituted in one jurisdiction represented within the group: In conjunction with the office's open file policy, prosecutors were required to log the occurrence and date of evidentiary disclosure.) The checklist should enumerate either specific documents and items of evidence (e.g., forms by name or number, officer memo books), categories of documents and evidence (e.g., police reports, recorded witness statements, lineup forms), or a combination thereof, which are required to be disclosed to the defense; a checkmark would be made upon disclosure, perhaps with annotation

⁶⁶ See *infra* Part V.A.3.c for further discussion of potential complications in applying lessons from the medical model to the criminal justice field, in particular the problem of finding an analog to the “nurse in the room” to serve as a third party checker.

⁶⁷ See *infra* Part VI (Working Group on External Regulation).

of the date or other relevant details of the disclosure event. Checklists should also enumerate tasks associated with and essential to good discovery practices but not involving the hand-over of evidence—in particular, consultation with law enforcement, and consultation with supervisors within the office. Checklists could be developed for office-wide use, or could be targeted at particular divisions where the need for or feasibility of hard oversight is particularly high—for example, in misdemeanor divisions where prosecutors are typically less experienced, and cases are typically less document-intensive.⁶⁸

The group's general embrace of the checklist device carried several important implementation-related caveats.

a. The Dangers of Suboptimally Inclusive Checklists

Perhaps the greatest challenge posed by the implementation of discovery checklists is the development of the list itself. If the primary goals are seen as (1) informing prosecutors about *how* to effectuate disclosure, and (2) minimizing accidental nondisclosure by forcing prosecutors to confirm execution of disclosure tasks, then it is clear that an under-inclusive checklist, or one that lists items at too great a level of generality, will be ineffective. Equally ineffective, however, might be the over-inclusive checklist. Consider, for example, the prosecutor facing a list of discovery tasks, only forty percent of which are actually applicable to her case. The busy or lazy attorney might well respond to such a situation by internalizing a *disregard* of the list, and simply falling back on habit or other informal discovery customs. This, too, would defeat the list's value.

Hence, checklists must be prepared with great care—optimally, in collaboration with not only division supervisors within a prosecutors' office, but also with law enforcement representatives who are most knowledgeable about the nature of information that is flowing from their agencies.⁶⁹ Additionally, office-wide checklists might be tailored by supervisors within particular divisions, to enumerate specific documents or evidence that are typically and uniquely gathered and disclosed in their cases.

⁶⁸ Some group members observed that as checklists are more closely tailored and specialized within particular offices, they are less useful as auditing devices to generate data on comparative discovery practices across prosecutors' offices. Policymakers should be aware of that dynamic, although the broader question of whether and to what extent external auditing or regulation is desirable is beyond the scope of the group's agenda. See, e.g., *infra* Part VI (Working Group on External Regulation).

⁶⁹ See *infra* Part V.A.4 for further discussion of inter-agency relationships.

b. Harnessing Technology to Enable Concurrent and Real-Time Checklists

Lessons from the medical model point to the importance of checklists being completed in real time: Completion of a specific event must be confirmed concurrent with its performance, rather than at the end of an entire process, in order best to prevent accidental omission of a step in the process. Within the criminal justice field, existing case tracking systems, which increasingly are computer-based, can and should be adapted to facilitate the use of such concurrent checklists. For example, several group members noted that calendaring and document-management software utilized by their offices could be utilized to set checklist tasks, assign deadlines, and require real-time confirmation of completion.

c. Putting a Nurse in the Room

The medical checklist model depended significantly on “putting a nurse in the room,” i.e., separating responsibility for performing a given task (usually lodged with the doctor) from responsibility for confirming the task’s completion on the checklist (usually lodged with a nurse). The division of labor provides an additional check against accidental (or even more deliberate) failures of protocol. The group discussed a number of practical limitations to this dynamic in criminal discovery. In the day-to-day work of a prosecutor’s office, the assignment of a “nurse” to each prosecutor for real-time checklist management is unlikely to be feasible from a resource perspective (and of debatable value from a training perspective).

Further reflection by group members after the Symposium elicited an additional point, related to the potential limitations of checklists in general.⁷⁰ While some tasks performed by prosecutors in relation to their disclosure obligations *are* discrete, many are more time-intensive, more complex, and more dependent upon a prosecutor’s judgment—and therefore possibly less amenable to real-time oversight and verification by a third party. An exemplary contrast in tasks might be, “Meet with case agent; request file, notes, and physical evidence” (discrete, relatively easily verifiable), versus, “Review agent notes for discrepancies with reports” (protracted, dependent upon a series of complex judgments internal to a prosecutor’s mind). While offices should construct checklists with an eye to distilling these broad and

⁷⁰ See *supra* Part V.A.3.a.

evaluative processes to their smallest and most readily verifiable constituent parts, there may be discovery tasks which must be included in the checklist in the interest of comprehensiveness, but are simply not susceptible to further reduction in complexity. Thus, as a checklist grows more comprehensive, including not only ministerial tasks but also critical evaluative steps in the disclosure process, some categories of action might not be readily and meaningfully verifiable by an individual who lacks legal expertise (such as a supervisor) or who stands outside of a prosecutor's mental processes (essentially *any* third party).

Nevertheless, the metaphor of a nurse in the room gained significant traction within the group's discussions of how checklists might be executed. There *are* players in the criminal justice system who can serve as "nurses," and might be affirmatively incorporated into the process of utilizing checklists. Supervisors, of course, should confirm their subordinates' use of the checklists. Courts and even defense attorneys could be provided with the checklists, using the process to create a clear record of disclosure at the trial level (thus avoiding problematic reconstruction hearings in the event of an appellate issue) and simultaneously to confirm a prosecutor's compliance with the checklist device. And, to a certain extent, the above-discussed technological adaptations can serve as virtual nurses, to the extent that computer-based case management systems are designed to require and record real-time verification of checklist compliance. Some group members suggested that something closer to the nurse model—a dedicated second set of eyes on the checklist process—might be systematically instituted in particular types of cases identified as being at high risk for discovery deviations or disputes. Others, however, countered that such measures might inappropriately miss the more routine discovery judgments or misjudgments that are made in unremarkable cases, particularly by more junior prosecutors.

Finally, in selecting appropriate "nurses," attention must be given to the above-discussed concern that, as discovery tasks grow less ministerial and more dependent upon intellectual judgments, the universe of individuals who can perform meaningful verification becomes more limited. Paralegals, for example, might be well-suited to verify more ministerial tasks; individuals with greater legal expertise, such as supervisors, would likely be required to verify more complex disclosure processes and events.

4. Guidelines for Inter-Agency Interaction

Group members agreed that an important consideration in formulating discovery guidelines internal to prosecutors' offices is the extent to which inter-agency interaction should be addressed by those guidelines—in particular, interaction with the law enforcement departments within the office's jurisdiction.⁷¹ The discovery context is of course only one of many areas in which prosecutors and law enforcement must coordinate efforts in a criminal case, but it is one of the most vital. Prosecutors are charged with effectuating disclosure obligations, and are hampered in doing so in a complete and timely manner if they do not receive evidence and information that is gathered by and known to police investigators.⁷² Hence, the relationship between prosecutors and law enforcement, and the procedures for ensuring information flow between those actors, are central to the discovery practices of a prosecutors' office.

At the same time, developing constructive and productive relationships with law enforcement can be one of the most difficult aspects of the prosecutor's job. There is a strong perception among prosecutors that law enforcement organizations and actors operate within a different institutional culture, and under different and sometimes incompatible incentives in regard to discovery. This complicates the task of convincing police of the need to assist in fulfilling the obligation of full and timely disclosure of evidence by promptly providing prosecutors with all that they have gathered and generated in a case—especially when, as is often the case, the prosecutor lacks full knowledge of the investigative and documentation practices of a given officer or law enforcement agency. Moreover, these challenges are felt particularly intensely by early-career prosecutors—those already most susceptible to mistaken nondisclosure. For the junior prosecutor, these difficulties are commonly exacerbated by unfamiliarity and lack of confidence as to her own discovery

⁷¹ Offices will vary, of course, in the extent to which they routinely deal with one or multiple law enforcement offices. District attorneys' offices are frequently county-based, while police departments are often (though not always) organized at the municipal level; furthermore, a given county might be comprised of both municipal police forces and county-based sheriffs' offices. Therefore, prosecutors in a single district attorney's office might regularly receive cases from multiple law enforcement organizations. At the federal level, U.S. Attorneys' Offices deal not only with multiple federal law enforcement agencies—e.g., the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, Firearms, and Explosives—but also frequently interface with local law enforcement within their districts.

⁷² Conversely, police are only one, albeit the most prominent, example of other players in the criminal justice system from whom prosecutors must routinely obtain information that might be encompassed by disclosure obligations. Other examples could include crime laboratory and medical examiner personnel.

obligations, inexperience in navigating the potential gulf in motivations and incentives animating the prosecutorial and law enforcement roles, and the power imbalance that can exist between a young attorney and a more experienced police officer or detective.

For all of these reasons, it is desirable for internal discovery guidelines to affirmatively address the manner in which prosecutors should work with law enforcement actors throughout the life of a criminal case to obtain in a timely matter the evidence and information that will be subject to disclosure obligations. Written guidelines should provide for an initial meeting with law enforcement early in the case, and should direct prosecutors to explain the disclosure obligations under which they operate, to emphasize importance of full and forthright disclosure from police in the process, and to request immediate access to the documents or information that the law enforcement agency has typically generated by that stage in the case. Guidelines should also mandate that prosecutors follow up with law enforcement closer to trial to ensure that all evidence and information in the case has been received. To the extent discovery checklists are adopted, these meetings with law enforcement should be included on the checklist. Additionally, the checklists should be shared and discussed at the initial meeting to determine whether they accurately and completely reflect the documents and processes that are utilized by the relevant law enforcement agency. All documentation processes within that agency must be ascertained by the prosecutor and, as appropriate, added to an updated checklist.

Group members generally felt that in addition to formal guidance, prosecutors also needed to be encouraged to develop informal contacts within law enforcement organizations—trusted individuals in prosecutors' offices and police departments who could assist in negotiating potential conflicts over discovery issues specifically or pretrial coordination issues more generally. Several individuals noted the importance in their own careers of having those relationships themselves, or of being able to turn to experienced mavens within their offices who could share their own cross-institutional relationships.

Two caveats should be emphasized. First, while a functional working relationship between prosecutors and law enforcement is essential to effective discovery practices, prosecutorial independence is an important competing concern. In light of the need for prosecutors to evaluate the quality and credibility of evidence (including, for example, the credibility of police witnesses), and the legality and propriety of police conduct (including, for example, searches or witness contacts), their ability to objectively and critically assess the conduct of law enforcement actors must not be compromised.

Second, while regulating prosecutor-police interactions at the line level is a necessary condition of effective discovery practices, it is not a sufficient one. Law enforcement agencies are structured around their own chains of command, and officers will be most responsive *not* to the urgings of outside agencies, but rather to the signals sent by their own leadership. As one group member expressed the dilemma, if a police officer is backed by supervisors saying she does not have to disclose documents, then she is unlikely to disclose the items regardless of the prosecutor's request for them. Therefore, command-level leadership, and in particular coordination across the top levels of the prosecutor and police organizations, is essential. Leadership within prosecutors' offices must work closely with their command-level law enforcement counterparts to ensure that both organizations have strong and coordinated internal policies and procedures with regard to documentation and disclosure of evidence in criminal investigations and prosecutions.⁷³

5. Public Access to Internal Discovery Guidelines

To the extent prosecutors' offices promulgate written guidelines to internally regulate discovery practices, these guidelines are likely to be public records, accessible through whatever freedom-of-information channels exist in a given jurisdiction. This is the case, for example, with regard to the Department of Justice's *United States Attorneys Manual*, which is publicly accessible via the electronic Freedom of Information Act Reading Room.⁷⁴ The experience of federal prosecutors' offices has been that this public access to office policies has not been problematic, particularly since the policies themselves create no enforceable rights.

In light of the fact that some level of public access to internal discovery regulations is almost certainly inevitable, prosecutors' offices might consider making affirmative efforts to publicize its disclosure policies—by, for example, posting them on the office's web site.⁷⁵ Such a symbolic gesture of transparency would have the advantage of, again, communicating a leadership-level message concerning the

⁷³ Such internal policies were unheard of within police organizations until relatively recently. The International Association of Chiefs of Police—the leading professional association of police administrators—developed a model disclosure policy in 2009. INT'L ASS'N OF CHIEFS OF POLICE, *BRADY DISCLOSURE REQUIREMENTS MODEL POLICY* (2009). While some large departments have implemented such policies, they remain extremely rare.

⁷⁴ U.S. ATTORNEYS' MANUAL (U.S. Dep't of Justice 1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html.

⁷⁵ See, e.g., TRAVIS COUNTY DIST. ATTORNEY'S OFFICE, *DISCOVERY POLICY FOR CRIMINAL CASES* (2008), available at <http://www.traviscountyda.com/published/discoverypolicyfinal.pdf>.

office's commitment to positive discovery norms, and might, particularly in a time of increasing concern about the risks of wrongful convictions, enhance the good faith extended to the office by the public and the defense bar.

B. *Audits and Oversight*

Prosecutors' offices should adopt prospective auditing mechanisms that provide for routine oversight of disclosure obligations, and generate data that can be used to improve development of and compliance with those guidelines.

A natural and necessary corollary to the development of written discovery guidelines is oversight of compliance with those guidelines. The group reached consensus on the general principle that rules standing alone are not sufficient to ensure full compliance with discovery obligations, and that some mechanism to audit and oversee compliance is necessary to prevent both deliberate and, perhaps more importantly, unintentional instances of inappropriate nondisclosure.

1. The Importance of Prospective Auditing

The mechanism of an "audit" could be understood in a variety of ways. One increasingly debated auditing device in the criminal justice system is the *retrospective* audit—usually in response to a determination that an error was made, often a wrongful conviction. Retrospective audits of this sort might be conducted on an ad hoc basis,⁷⁶ or by dedicated units established within prosecutors' offices.⁷⁷ While extremely valuable for the information they can generate about the nature of and reasons for erroneous prosecutions, such efforts to reconstruct criminal investigations and prosecutions, often years after their conclusion, are extremely time consuming and expensive. As such, they are beyond the means of many if not most prosecutors'

⁷⁶ LESLIE CROCKER SNYDER ET AL., REPORT ON THE CONVICTION OF JEFFREY DESKOVIC (2007), available at <http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf> (reviewing investigation and prosecution of DNA exoneree through independent panel assembled at request of Westchester County District Attorney); TASK FORCE ON WRONGFUL CONVICTIONS, N.Y. STATE BAR ASS'N, PRELIMINARY REPORT OF THE NEW YORK BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS (2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/TFWrongfulConvictionsreport.pdf> (reviewing fifty-three New York exonerations).

⁷⁷ See, e.g., Dallas County District Attorney's Office, Conviction Integrity Unit, www.dallasda.com/conviction-integrity.html (last visited June 9, 2010).

offices in the United States, which, with the significant exceptions of the Department of Justice and a select number of large jurisdictions, are overwhelmingly small offices operating with extremely limited budgets.⁷⁸

Some mechanism of *prospective* auditing, however, is available to most, if not all offices. Crucially, such mechanisms can and should be instituted as a routine matter, not prompted by error or reflective of blame, but rather viewed as standard management tools for obtaining information that can be utilized to improve the performance of prosecutors who *want* to serve the organizational mission. Furthermore, prospective auditing of this sort is necessary in order to effectively craft the organization's written discovery guidelines. Data on what current practices are and where errors are commonly made are essential for a variety of purposes—including, for example, the development of comments to accompany soft guidelines, knowing if such comments need to be better tailored, or determining whether soft guidelines need to be hardened in particular areas of practice or for particular subsets of prosecutors (e.g., junior members of the office).

Finally, and consistent with other aspects of internal regulation discussed by the group, it bears emphasis that the *existence* of an auditing mechanism of this sort is important in and of itself to signal and develop an organizational culture that is conducive to effective discovery practices. It conveys a top-level commitment to integrity and evidence-based best practices, and, when implemented as a routine and non-punitive program, reinforces the commitment of the office *not* to second-guessing the judgment of its attorneys, but to supporting their professional development and success.

2. Realistic Possibilities for Prospective Auditing Mechanisms

The group was perhaps most sensitive in this arena to the absence of a viable one-size-fits-all approach, and to the desirability of programmatic proposals that were realistic and generally accessible—rather than refining the contours of best auditing practices. To that end, the group discussed and favorably viewed several prospective auditing ideas that could be implemented by most prosecution offices.

First, group members observed that the vast majority of prosecutors' offices have *some* mechanism for routine monitoring of ongoing cases. Examples include supervisor check-in correlating with speedy trial deadlines, supervisor approval for negotiated pleas, or inter-

⁷⁸ See BUREAU OF JUSTICE STATISTICS, *supra* note 61, at 3 (identifying the median size of prosecutors' offices as employing only nine attorneys, though also revealing the wide variation among large, medium, and small offices in the United States).

division consultation that occurs when a case is handed off from a grand jury unit to a trial unit. At any of those already-existing points of contact between supervisory and subordinate prosecutors, or between coequal attorneys, a discovery check could be formally institutionalized as an auditing mechanism. Regardless of whether an office has already institutionalized procedures that lend themselves to incorporating discovery oversight, random prospective spot checks could be performed by supervisors.

If the office has written guidelines, the check could consist of a formal confirmation that each guideline and procedure had been followed. If the office has adopted a discovery checklist, that checklist could be reviewed and confirmed by the supervisor or colleague.

In all events, auditing and oversight should not only check discovery compliance, but should also generate and preserve data. This is critical notwithstanding the understandable concern that the push to identify error or wrongdoing may drive a wedge between supervisors and their subordinates—the consequence of which is to discourage line prosecutors from openly and honestly seeking guidance. While the message must be conveyed that auditing is being pursued for organizational benefit and not to persecute, information collection and maintenance is the only way for organizational trends to be identified, and for discovery guidelines, supervision, and training to develop effectively.⁷⁹

Discovery checklists may offer prosecutors' offices additional benefits in this arena. Here again, lessons can be learned from the medical arena. Hospital managers were initially daunted by the challenge of how to identify and fix errors in complex and multi-factored processes such as disease diagnosis and treatment. The development of checklists helped the hospitals to break down those processes, identify and track discrete errors within them (by, for example, tracking every instance where a nurse had to remind a doctor to perform a given step), and then analyze whether those discrete errors represented a trend that needed to be remedied at the organizational level. Similarly with regard to discovery checklists, offices could record and track any instance where a disclosure task was delayed or not completed, and could use that data to determine, for example, whether further internal training was required, or whether an information flow breakdown had occurred between law enforcement

⁷⁹ Further reflection by group members following the Symposium raised the concern that internally generated data about discovery practices and compliance could be discoverable in civil law suits—regardless of whether an individual prosecutor or a prosecutor's office is named as a party to the suit (an eventuality that will frequently, though not always, be precluded through absolute immunity or Eleventh Amendment immunity). This points to concerns about the role of external regulation and oversight—an area which was, in the main, beyond the scope of the group's agenda. *See infra* Part VI (Working Group on External Regulation).

and prosecutors. The possibility of facilitating this type of routine monitoring should be considered by prosecutors' offices in deliberations on whether and how to adopt checklists.⁸⁰

Finally, the group was concerned that very small prosecutors' offices might be prevented from pursuing any effective auditing or oversight not only by general resource constraints but also by an insufficient staff for any independent monitoring of a case. In small offices with, for example, only one or two prosecutors staffing an entire "unit" (e.g., felony prosecutions) there may be no internal staff member who can review a case without the inherent conflict of passing judgment on her own work. In other words, many offices lack the capacity to put a nurse in the room. In such circumstances, offices might consider regional collaborations, or drawing upon the resources of local or state district attorney associations to set up quasi-external auditing on a routine prospective basis, or at a minimum, to have an established mechanism for independent retrospective monitoring.

VI. EXTERNAL REGULATION: REPORTED BY COOKIE RIDOLFI⁸¹

The Working Group on External Regulation addressed the question of whether, how, and to what extent, courts, disciplinary authorities, and other external bodies should regulate *Brady* disclosure obligations and correlative ethics rules. The group was charged with exploring the

⁸⁰ Further reflection and discussion by group members after the Symposium generated the additional insight that checklists may be most useful as internal auditing devices if they reflect a high degree of standardization within an office, because this provides maximum data for comparison of compliance rates across divisions or branch offices.

⁸¹ Discussion Leader: Jane Campbell Moriarty, Professor of Law and Director of Faculty Research and Development, The University of Akron School of Law; Reporter: Kathleen "Cookie" Ridolfi, Professor of Law and Director of the Northern California Innocence Project, Santa Clara University School of Law. Other members of the Working Group on External Regulation included: Robin L. Baker, Executive Deputy Attorney General for Criminal Justice, New York; Hon. Phylis S. Bamberger, retired, New York Court of Claims, Supreme Court, Bronx County, New York; Anthony Barkow, Executive Director, Center on the Administration of Criminal Law, New York University School of Law; Stephanie Batcheller, Staff Attorney, New York State Defenders Association; Hon. Joel L. Blumenfeld, Acting Justice, Supreme Court, Queens County, New York; Mady J. Edelstein, Principle Attorney, Departmental Disciplinary Committee, Appellate Division, First Judicial Department, New York; Brian Gillette, Assistant Prosecutor, Middlesex County, New Jersey; Anthony J. Girese, Counsel to the District Attorney, Bronx County, New York; Tracy L. Kepler, Senior Counsel, Director at Large, National Organization of Bar Counsel; Wendy Lehmann, retired, Chief of Appeals, District Attorney's Office, Monroe County, New York; Donald R. Lundberg, Past President, National Organization of Bar Counsel, Executive Secretary, Indiana Supreme Court Disciplinary Commission; Amanda Masters, civil rights attorney, Giskan Solotaroff Anderson & Stewart LLP; Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers; Hon. Michael R. Sonberg, Acting Justice, Supreme Court, New York County, New York; and Peter J. Tomao, New York criminal defense attorney.

effectiveness of existing external systems in ensuring compliance with legal standards imposed by law and disciplinary authorities; to examine the role of state and federal disciplinary committees, judicial oversight, and judicial reporting in the process; and to consider the need for improvement in these systems. The group also considered proposals to improve compliance with disclosure obligations including mandatory disclosure conferences, mandatory reporting to disciplinary committees, and prosecutorial compliance statements.

The discussion leader, Jane Moriarty, opened the meeting by putting questions on the board aimed at identifying areas where there would be broad agreement and the areas, range, and depth of disagreements among the group.⁸² The goal was to generate an open dialogue that could lead to further discourse and reflection to ultimately enhancing the fairness of the system.

A. *Current Disciplinary Standards*

With the exception of ABA Model Rules, the group did not address specific rules and standards. For clarity, the group distinguished the regulation of *Brady* compliance, where the focus is materiality and due process, from the ethical obligations imposed by rules regulating ethics and professional conduct.⁸³ The use of the term “*Brady*” in this Part refers to both. People uniformly agreed that the

⁸² The questions and answers were as follows:

1. What one thing do you believe everyone in this diverse group can agree on?

Answers:

External regulation is necessary.
Disciplinary agencies have a key role to play in regulation.
There is not complete overlap between *Brady* obligations and ethical obligations.
It is essential that police conduct also be externally regulated.
The judiciary has a critical role—both at the trial and appellate level.
The prosecutor’s culture that must be reinforced is “do justice, not just win cases.”
Disclosure of both exculpatory and mitigating evidence is essential.

2. What is one issue you believe will generate significant controversy?

Answers:

The stage at which disclosure must occur.
The nature of what should be disclosed.
Publishing the names of errant prosecutors in the appellate opinions.
Time spent by courts. Is all this really worth it?

⁸³ The standards for decisions about *Brady* violations as a matter of criminal procedure are different from the ethical standards. First, the ethics rules do not require defendants to request the material; rather, there is an ethical obligation on prosecutors to disclose with or without a request. Second, the disclosure under the ethical rules has a timeliness requirement. Third, *Brady* has a materiality requirement, unlike the ethics rules. And fourth, the *Brady* duty runs to the State generally, whereas the ethical duty is personal to the prosecutor and is only triggered to the extent the prosecutor knows of information that tends to negate guilt or mitigate the offense. For more on the difference between the two, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 454 (2009).

rules and regulations in place now are not doing enough because they are inadequate and sometimes not enforced at all. There was strong consensus that more and better external regulation is needed.

The prosecutors at the table said that a big problem for them is law enforcement. Police officers are not always cooperative and fail to turn over discovery even to them. The group agreed that this is a serious problem and needs to be corrected. The group stressed the need for regulations governing police conduct in the discovery process in the form of specific rules that direct the police to turn everything over to prosecutor in a timely manner.

B. *A Bigger Role for the Courts*

The group spent a lot of time talking about how much more could be achieved if the courts were more directly involved in monitoring the discovery process. Judges should have a central role in ensuring that the attorneys practicing before them are abiding by the rules and ethics of the profession. This should be happening at pretrial, at trial, and through the appellate process. The group talked about ideas for what could be done to make the system better and understood that scarcity of resources was an important consideration in deciding whether to implement any of the proposals.

1. Mandatory Pretrial Conferences

Everyone in the group agreed that at pretrial conferences, judges can do a lot more to force compliance with *Brady* and overall to improve the discovery process. All agreed that pretrial discovery conferences should be mandatory. One of the problems frequently referred to in the session was a culture of nondisclosure among some prosecutors in some offices. A more active role by judges in overseeing the process can help promote a culture of disclosure.⁸⁴

⁸⁴ The ABA Criminal Justice Section has created a Draft Recommendation on the Judicial Role in Avoiding Wrongful Convictions, which provides:

Resolved: That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following practice: Prior to trial, courts should conduct a conference to resolve issues of turnover during which the prosecutor and defense counsel shall certify that they have delivered all required documents to the other party.

STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES NO. 102D (2010), available at <http://www.abanet.org/crimjust/policy/midyear2010/102d.pdf>.

2. Mitigating Evidence

The group agreed it would be a good idea that judges make clear that a prosecutor's duty under *Brady* includes disclosure not only of exculpatory evidence but mitigating evidence too.

3. Judicially Imposed Deadlines and Vertical Case Assignment

Members of the group suggested that the court impose deadlines at the outset of a case for when material had to be turned over. Judges in the group suggested that judges would be better equipped to monitor the discovery process if cases were assigned vertically, with one judge overseeing a case from beginning to end. The judge would also be able to take action to enforce the deadlines if that became necessary.

4. Affirmation and Certification

Most of the group thought that prosecutors should be required to affirm on the record and/or by written certification that they have turned over all *Brady* material.⁸⁵

5. Reminder Rule

Members of the group said that judges should remind prosecutors that obligations under *Brady* are continuous and that discovery must be turned over as soon as they get it. Since prosecutors often get discoverable material after the trial has started, it would be a good idea for judges to periodically remind them of the obligations under *Brady* and have them reaffirm on the record.

6. Maintain Discovery in Court File

It was suggested that when prosecutors turn over discovery, they should be required to file copies with the court. Maintaining a parallel file can alleviate disputes that may arise concerning the question of what was or was not turned over.

⁸⁵ See also *id.*

7. Checklist System and Privilege Log

The group unanimously supported the idea of checklists.⁸⁶ Prosecutors should be asked to submit a checklist that details what is being turned over and a privilege log that lists what is withheld. This can be done without turning over the contents of the privileged document. The reason for withholding should also be stated.

8. Database System

People thought that subject to confidentiality requirements, a court database, where discovery can be uploaded and made accessible to both sides, would be very useful.

9. Address Problems in Real Time

Brady violations and instances of prosecutorial misconduct have to be addressed in real time.⁸⁷ Appellate opinions that find prosecutorial misconduct years after the violation has occurred have very little, if any, deterrent effect. Prosecutors may not even be notified that their conduct was found improper; sometimes, those whose conduct is addressed are no longer even prosecutors. The serious lag time between violations and disciplinary action is not a very effective way of providing either guidance or deterrence for active prosecutors. Thus, the group (at the judges' suggestion) thought it was exceptionally important for judges to be involved in regulating disclosure and doing so early in the case, where such involvement could short-circuit problems relating to lack of disclosure and would be helpful for prosecutors in making decisions about whether and what information should be disclosed. Intervention should be as early in the process as possible. In cases in which the defendant is innocent, this will also increase the likelihood that the defendant will benefit from the disclosure and not be convicted.

⁸⁶ The use of discovery checklists garnered considerable support from several of the other Working Groups. See *supra* Part II.A.2 to A.3 (Working Group on the Disclosure Process) (reaching consensus on prosecutors' use of checklists and agreeing on the advantages of police officers' use of investigative checklists); *supra* Part IV.B.3 (Working Group on Systems and Culture) (discussing the use of checklists in written guidance memoranda provided by prosecutors to promote a culture of better disclosure in their offices); *supra* Part V.A.3 (Working Group on Internal Regulation) (supporting the use of discovery checklists as a regulatory device).

⁸⁷ Members objected to the use of the term "prosecutorial misconduct" because it includes negligent and accidental error.

10. *Brady* Oversight Post-Trial

The group considered the question of what could be done to regulate the disclosure of newly discovered evidence after trial. The question was discussed but remained open at the end of the session.

11. Judicial Reporting and Naming Prosecutors

It was suggested that when a judge finds a *Brady* violation, that finding should be put on the record and the prosecutor reported to the state bar's disciplinary committee.

There was much discussion about whether it was helpful and/or appropriate to name prosecutors in judicial decisions. Opinions were decidedly mixed and concerns were raised about allowing those who acted intentionally to be anonymous when they should not be; the potential career-ending damage this could do to a prosecutor who erred unintentionally; and the importance of naming prosecutors so as to encourage greater compliance among other prosecutors who might be debating whether to disclose.

C. *Disciplinary Agencies*

The group recognized the special role and immense power prosecutors have in the criminal justice system and expressed concern that state disciplinary authorities should do more to deter abuse of discretion and *Brady* violations. While the majority of prosecutors abide by their obligations, action by disciplinary authorities is needed to catch the outliers.

D. *Deterring Nondisclosure*

A prosecutorial culture of nondisclosure in some offices was cited as a serious problem. To change this culture, individual prosecutors have to have a stake in the outcome. Some proposed that prosecutors' names be published in the opinions where misconduct is found to have occurred. Some group members disagreed. Others suggested that prosecutors' names be identified only in instances where there has been a *Brady* violation and cases of intentional misconduct. Some group members proposed criminal sanctions for prosecutors who willfully withhold exculpatory evidence. Some warned that more stringent

ethical enforcement may have the opposite effect of causing the most unethical prosecutor to act even more unethically, perhaps even destroying potentially exculpatory evidence.

E. *Promoting a Culture of Disclosure*

Promoting a culture of disclosure was a goal articulated by everyone in the group. This culture has to start in the prosecutor's office and be reinforced through external regulation. Prosecutors need a positive stake in promoting and exercising the highest ethical standards. Prosecutors pointed out that negligent and intentional "misconduct" should not be lumped together.

F. *Recommendations for Best Practices*

- *More judicial oversight:* Make judges active arbiters in resolving disclosure questions.
- *Checklists and privilege logs:* Create and maintain a record of what is turned over and what is not disclosed and the reasons.
- *Plea bargaining:* Discovery must be provided to the defense before a plea is offered.
- *Make pretrial conferences mandatory:* Issues concerning checklists and privilege logs should be resolved at the pretrial conference. Prosecutors should be required to certify that all known discovery has been turned over; although, everyone did not agree to whether an oral assertion can substitute for written certification. One member was hesitant about requiring discovery before any plea bargaining and mandatory pretrial conferencing.
- *Require judicial reporting:* Judicial reporting of attorney violations should be required to reinforce the culture of disclosure and deter noncompliance.
- *Vertical case assignments:* Assign one judge to a case provided resources are available.
- *Data collection is important and more needs to be done:* More data that can reveal how the criminal system is working and not working is needed.