Rule 3.8: The Not So Special Responsibilities Of Prosecutors

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Introduction

Prosecutors are obligated to fulfill responsibilities that stretch beyond the usual scope of duties retained by non-prosecuting attorneys.\(^1\) A broad generalization as to why such differences exist may be reasoned from the fact that a prosecutor is a government official, a position which necessarily carries a duty to “seek justice.”\(^2\) However, the differences may more specifically be categorized in four ways. First, because prosecutors are government officials, they are provided great access to government resources;\(^3\) second, prosecutors are subject to different legal obligations than any other type of attorney, such as being burdened by a reasonable doubt standard;\(^4\) third, the professional role of a prosecutor does not encompass fulfilling a specific client’s objectives;\(^5\) fourth, the role of a prosecutor is not to ‘win’ but to see that justice is done.\(^6\)

These four unique aspects of the prosecutorial profession suggest that a unique set of rules of professional ethics must also exist to specifically address the duties and responsibilities of a prosecutor. Yet, as the Discussion section of this paper will examine, the Model Rules of Professional Responsibilities (MRPR) creates only a limited expanse of regulations specifically addressing prosecutors. Model Rule 3.8 addresses the exercise of prosecutorial discretion,\(^7\) prosecutorial conduct affecting the defendant’s procedural rights,\(^8\) prosecutors’ disclosure obligations,\(^9\) the exercise of investigative authority, and public communication by prosecutors.\(^10\)

\(^1\) Model Rules of Prof’l Conduct R. 3.8 (2007).
\(^2\) See generally, Bruce A. Green, Why Should Prosecutors "Seek Justice"?, 26 FORDHAM URB. L. J. 607, 624 (1999).
\(^4\) Clark v. Arizona, 126 S. Ct. 2709, 2730 (2006) (noting that defendant is presumed innocent unless the government proves his guilt, for each element of the crime charged, “beyond a reasonable doubt”).
\(^5\) Bruce A. Green, Prosecutorial Ethics As Usual, U.Ill.L.Rev. 1573, 1577 (2003).
\(^6\) See Berger v. U.S., 295 U.S. 78, 88 (1935) (finding that a United States attorney has an interest in seeing that justice is done, not winning a case).
\(^7\) Model Rules of Prof’l Conduct R. 3.8(a).
\(^8\) Model Rules of Prof’l Conduct R. 3.8(b)-(c).
\(^9\) Model Rules of Prof’l Conduct R. 3.8(d).
\(^10\) Model Rules of Prof’l Conduct R. 3.8(f).
Each area of regulation covered by Rule 3.8 is incomplete, failing to fully comprehend the great expanse of characteristics unique to an attorney’s role as a prosecutor.

In 2000, the American Bar Association (ABA) followed the Ethics 2000 Commission’s recommendation to adopt two minor changes to the rules addressing prosecutors, thereby leaving intact the limited regulation of prosecutorial conduct.\(^\text{1}\) The reasons for continuing limited regulation are an important piece to analyzing whether the MRPR should more thoroughly regulate prosecutors and their conduct. The Analysis portion of this paper will seek to further understand these reasons along with the opposing reasons for why the MRPR should expand its regulation of prosecutors. In the Conclusion, I find that the MPRP contains a myriad of gaps when it comes to the special responsibilities of a prosecutor and that these gaps allow prosecutors the opportunity to interpret the rules in a fashion that allows them, not to seek justice, but to further other competing goals. Rule 3.8 at the very least requires an in depth review that should lead to amendments that will curb prosecutorial practices that work against justice.

**Background**

A prosecutor is unlike any other attorney. The differences can be classified by the following four distinct characteristics unique to a prosecutor:

1. **Prosecutors’ obligation to seek justice**

   Without question the greatest difference between prosecutors and all other attorneys is that it is the job of a prosecutor not to win, but to “do justice.”\(^\text{2}\) The Canons of Professional Ethics, adopted by the ABA specifically states “[t]he primary duty of a lawyer engaged in public prosecution is *not to convict*, but to see that justice is done” (emphasis added), though the MRPR

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\(^\text{1}\) See Green, *supra* note 5, at 1574.

\(^\text{2}\) See generally Green, *supra* note 2, at 608.
does not itself state that prosecutors have a duty to seek justice.\textsuperscript{13} A prosecutor’s primary duty is to serve the truth-seeking and fairness functions of trial and to pursue and present relevant evidence, whomever it may help.\textsuperscript{14} This is a major distinction between prosecutors and other types of attorneys. An attorney in nearly every other field of law is obligated to work towards a client-determined objective, zealously;\textsuperscript{15} the attorney’s responsibility is not to serve the truth-seeking and fairness function of trial, nor is it to pursue and present relevant evidence; the non-prosecuting attorney is not seeking to aid anyone except his or her client.

The obligation to seek justice saturates every aspect of the prosecutor’s professional conduct. A prosecutor’s access to government resources must be utilized in a manner that would further justice; the professional role and legal obligations must also be carried out with the intent to further justice.

2. Prosecutors’ access to government resources

Prosecutors employ the power of the police and other government investigative agencies, which are completely off-limits to defense counsel.\textsuperscript{16} A prosecutor’s power gained via government agencies is enormous when considering the long list of tools privy only to them. This list includes exclusive possession of case files, including: all information from the investigative stage during which the government has sole control of the crime scene;\textsuperscript{17} immediate, \textit{ex parte} access to police reports and statements of witnesses, all of which the defense counsel can access only through discovery and only after the prosecutor has seen these reports and statements;\textsuperscript{18} assistance of forensic facilities and expertise;\textsuperscript{19} grand jury investigation and

\textsuperscript{13} MODEL CODE OF PROF’L RESPONSIBILITY CANON 5 (1908).
\textsuperscript{14} See Green, \textit{supra} note 2, at 632.
\textsuperscript{15} MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (making it a duty for the lawyer to “abide by the client’s decisions concerning the objectives of the representation”).
\textsuperscript{16} See Green, \textit{supra} note 5, at 1576.
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.}
subpoena power;\textsuperscript{20} and the right to offer witnesses immunity and monetary rewards contingent upon cooperation, actions that would constitute ethical violations and criminal offenses if utilized by defense attorneys.\textsuperscript{21}

Given such power, it would be hard to argue against a need to regulate prosecutorial use of government resources. The question that arises, then, is whether the utilization of government resources is regulated by the MRPR and if so, to what degree? The Discussion section of this paper endeavors to answer these questions. Whether the MRPR should amend its current regulation of prosecutorial use of government resources is addressed in the Analysis portion of this paper.

3. Prosecutors are subject to different legal obligations than any other attorney

Partly because of their status as government officials, prosecutors are required to follow a different set of legal obligations. As government officials, prosecutors must carry out their work in a manner that does not offend the Constitution. Thus, prosecutors are required to abide by a different disclosure obligation under the Due Process Clauses created by the 5\textsuperscript{th} and 14\textsuperscript{th} Amendments.\textsuperscript{22} Specifically, prosecutors are required to disclose exculpatory evidence and evidence that mitigates the charged offense as well as, if the defendant is convicted, unprivileged evidence that mitigates sentencing.\textsuperscript{23} Such obligations to disclose do not attach to an attorney in any other legal circumstance.

Perhaps the greatest difference between the legal obligations of a prosecutor and all other attorneys is in the standard by which a prosecutor must prove his or her case. Prosecutors must

\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{22} U.S. CONST. amend. IV; U.S. CONST. amend. XIV.
\textsuperscript{23} See \textit{supra} note 9.
prove beyond a reasonable doubt that the accused is guilty of the crime charged. Prosecutors are the only attorneys in the United States legal system burdened with the reasonable doubt standard.\textsuperscript{24} Indeed, defense counsel in criminal matters need only rebut the reasonable doubt standard and in general, are not charged with meeting a specific burden of proof.\textsuperscript{25} Attorneys for plaintiffs in civil matters must prove their cases by a preponderance of the evidence, a standard that is far less exacting than that of reasonable doubt.

4. Prosecutors have a professional role unique to them

The professional role of an attorney is to achieve the objectives determined by the private client, and so long as those objectives are lawful, the lawyer is obligated to zealously achieve them.\textsuperscript{26} A prosecutor is not only a lawyer for the government, but also a government official who makes the decisions that would ordinarily be made by a client.\textsuperscript{27} In doing so, the prosecutor is guided by general, broad-based goals which must be upheld, including assuring fair and proportional punishment, fair treatment of those affected by the criminal process, and assuring compliance with the Constitution.\textsuperscript{28} These goals are a result of prosecutors’ obligation to seek justice, which in and of itself, is a characteristic unique to the prosecutor\textsuperscript{29} and is discussed below.

\textbf{Discussion}\textsuperscript{30}

The rules contained within the MRPR provide limited guidance of professional responsibility for prosecutors and, for the most part, presumes that professional obligations are

\begin{itemize}
\item\textsuperscript{24} See Clark, \textit{supra} note 4, at 2730.
\item\textsuperscript{25} \textit{MODEL PENAL CODE} § 1.12(2)(a) (2006).
\item\textsuperscript{26} See \textit{supra} note 15.
\item\textsuperscript{27} See \textit{supra} note 5.
\item\textsuperscript{28} See \textit{supra} note 6.
\item\textsuperscript{29} See generally Green, \textit{supra} note 2.
\item\textsuperscript{30} This section looks into the MRPR and the statutes that regulate the special duties of prosecutors, as they presently are. In doing so, it is important to note that I do not seek to answer the question of whether the MRPR rules should remain as they are or should be amended. That is a question I seek to answer in the Analysis portion of this paper. This part of the paper simply endeavors to explain the law and to critique it from an objective standpoint.
\end{itemize}
generally the same for all lawyers. Still, the ABA has always recognized the difference between prosecutors and other attorneys, albeit in a limited manner. For example, the 1970 Model Code addressed only two areas of professional conduct. 31 Specifically, the 1970 Model Code focused on the initiation of criminal charges 32 and the disclosure of evidence to the defense. 33 In 1983 the ABA created Model Rule 3.8 which initially incorporated the 1970 provisions and added three additional provisions. 34 These three new provisions came in the form of Rules 3.8(b), (c), and (e). Rule 3.8(b) states that a prosecutor must “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel, and has been given reasonable opportunity to obtain counsel.” 35 Rule 3.8(c) prohibits a prosecutor from “seek[ing] to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.” 36 Finally, Rule 3.8(e) obligates prosecutors to “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6”. 37 Rule 3.8(e) was later taken out of the MRPR in 2002. 38 In 1994 the ABA added Rule 3.8(f), directed towards curbing a prosecutor’s statements through the media and to the public. 39

32 MODEL CODE OF PROF’L RESPONSIBILITY DR 7-103(a) (“A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause”).
33 MODEL CODE OF PROF’L RESPONSIBILITY DR 7-103(b) (“A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”)
34 See supra note 2.
35 See supra note 8.
36 MODEL RULES OF PROF’L CONDUCT R. 3.8(c).
37 MODEL RULES OF PROF’L CONDUCT R. 3.8(e) (repealed 2002).
39 See supra, note 10.
The MRPR currently contains only a few disciplinary provisions. These provisions are contained within Rule 3.8 and address five areas of prosecutorial conduct: 1. the exercise of prosecutorial discretion;\textsuperscript{40} 2. prosecutorial conduct affecting the waiver or exercise of procedural rights by the accused;\textsuperscript{41} 3. the prosecutor’s disclosure obligations;\textsuperscript{42} 4. the prosecutor’s exercise of investigative authority;\textsuperscript{43} 5. public communication by the prosecution team.\textsuperscript{44} Upon a cursory glance Rule 3.8 seems to address most of the areas of concern regarding the ethics of a prosecutor, but the rule does not, in fact, address the specific concerns that stem from the four unique prosecutorial characteristics discussed in the Background section of this paper. When considering the responsibilities unique to prosecutors, the lack of coverage of prosecutorial ethics under Rule 3.8 is exposed. The remainder of this portion of the paper will take a detailed look into Rule 3.8 and how it addresses the issues unique to prosecutors.

1. Exercise of Prosecutorial Discretion

Prosecutorial discretion is every decision that must be made by a prosecutor. It entails a broad spectrum of decisions such as whether and whom to investigate, whom to charge and what to charge, whether to negotiate the terms of a guilty plea, whether to grant immunity from prosecution, whether to drop charges or continue a case to trial, what sentence to seek, and whether to move to vacate a conviction or sentence.\textsuperscript{45} The MRPR addresses prosecutorial discretion with Rule 3.8(a), which states: “[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”\textsuperscript{46}

\textsuperscript{40} See \textit{supra} note 7.
\textsuperscript{41} See \textit{supra} notes 8, 36.
\textsuperscript{42} See \textit{supra} note 9.
\textsuperscript{43} See \textit{supra} note 10.
\textsuperscript{44} Id.
\textsuperscript{45} Black’s Law Dictionary 479 (7th ed. 1999).
\textsuperscript{46} See \textit{supra} note 7.
The rule speaks to the “gate-keeping” function of a prosecutor. It ensures that the prosecutor carries out the duty to ensure justice by setting a standard by which prosecutors may decide whether to prosecute an individual and, in doing so, protects persons from being unfairly burdened with a criminal indictment. Furthermore, since trials are not perfect, this Rule protects innocent individuals from being convicted. However, because the Rule only requires probable cause, the prosecutor does not have to believe that the accused is “more likely than not” guilty, but must only have a “reasonable ground to suspect” that the accused is guilty. “Just to illustrate how minimal this standard is, it would allow a prosecutor to charge two individuals in two separate cases with the same criminal conduct even when the prosecutor knows that only one of the two could possibly have engaged in the alleged conduct.”

A further deficiency in Rule 3.8(a) was recently depicted in the now famous Duke University lacrosse case, in which the Durham County District Attorney, Michael Nifong who was up for re-election at the time, brought rape charges against three Duke lacrosse players despite the lack of evidence against the men. In fact there was DNA evidence which seemed to suggest that the men were more likely than not innocent of any rape charges. Yet, while Michael Nifong was disbarred for his actions and was charged with numerous violations of prosecutorial ethics laid out in Rule 3.8, he was not charged with violating Rule 3.8(a). Given his knowledge of the DNA evidence, the only possible explanation for not charging Mr. Nifong with a Rule 3.8(a) violation is the apparent leeway provided by the probable cause standard which allows for prosecutions merely on reasonable grounds for suspicion.

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47 See supra note 5, at 1589.
48 See supra note 45, at 1219.
49 See supra 5, at 1589.
51 Id.
The Department of Justice (DOJ) follows a policy, a bit more stringent than the one provided by Rule 3.8. The DOJ policy prevents prosecution unless the prosecutor reasonably believes that there is legally sufficient evidence for a jury to convict the accused of the crimes charged. Thus the DOJ policy requires that prosecutors decide whether to prosecute by measuring the likelihood of guilt derived from evidence within the context of a jury and not merely whether there is a mere possibility of guilt. It is not certain whether Mr. Nifong would have been charged with a Rule 3.8(a) violation had it been the same as the DOJ policy, but it would have certainly been more likely.

While Rule 3.8(a) addresses whether a prosecutor should bring charges against an individual, it fails to address any of the other concerns that arise with prosecutorial discretion. No guidance is provided for whether to conduct an investigation, nor does the Rule provide any guidance in identifying an improper motivation to investigate. In addition, it fails to address plea bargaining at all and thus fails to ensure that prosecutors do not forgo justice in favor of a competing interest. The Rule’s silence on plea bargaining also raises concerns that prosecutors may bring charges that are disproportionately harsh to extract a guilty plea and compel the defendant to give information or to testify. The case of the “Jena 6” provides a strong example of disproportionately harsh charges. In that instance, six African American high school students from Jena, Louisiana “were charged with attempted murder for beating up a white student who suffered no life-threatening injuries” and attended a social function only hours after the incident. The attack came after months of racially-motivated acts against the black students,

54 See supra note 7 (merely imposing a duty upon prosecutors to “refrain” from bringing a charge that the prosecutor “knows is not supported by probable cause.”).
55 Id.
56 See supra note 5, at 1590
including the hanging of three nooses from a tree that was traditionally viewed by Jena High School students as the tree that only white students sat under. 58 In response to District Attorney Reed Walters’ decision to prosecute the six students for attempted murder, 43 lawmakers from the Congressional Black Congress asked the Justice Department to probe the case, asserting that it is an example of “unequal justice.” 59

Finally, the Rule is silent about the prosecutor’s exercise of discretion after a conviction has been obtained. Particularly it is silent with regard to two vital issues: sentencing and a duty to confess error. 60 By remaining silent on the issue of sentencing, the Rule allows prosecutors to either be lenient or harsh and thus in opposition to the duty to seek justice. Rule 3.8(a) does not identify a duty to confess error when a conviction has been achieved through wrongful means or a duty to seek redress when post-trial evidence makes plain that an innocent person was convicted. Were a prosecutor aware that a conviction had been procured through error but did not disclose this knowledge, it would surely be an affront to justice.

2. Obligations to Preserve an Accused’s Procedural Rights

As a minister of justice a prosecutor is obligated to ensure the fairness of the investigative and adjudicative processes. Thus Rule 3.8(b) requires a prosecutor to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel.” 61 Yet in practice this requirement rarely becomes an issue because the court will generally raise the subject of representation on its own, when the accused is first brought to court. 62

58 Id.
60 See supra note 54.
61 See supra note 8.
62 See supra note 5, at 1591
Rule 3.8(b) creates an obligation with regard to a defendant’s knowledge of the right to obtain counsel and the defendant’s knowledge of the procedures to obtain counsel. The Rule completely ignores instances where a prosecutor’s actions serve to hinder the defendant from obtaining counsel, where knowledge of how to do so already exists. This point is best explained by In re Pautler, in which the chief prosecutor in Jefferson County, Colorado impersonated a public defender. In that case a suspect, who had murdered several individuals, took hostages and claimed he would not surrender until he gained legal representation from a public defender. Representing himself as a public defender, the chief prosecutor negotiated the terms of the surrender, thus acting exactly the opposite of what Rule 3.8(b) requires of a prosecutor. Two weeks after his surrender, the defendant finally learned of what had happened. Unable to trust the public defender’s office any longer, he fired the actual public defender that had been assigned to him and chose to represent himself. The defendant lost the case at trial and was sentenced to execution. The chief prosecutor, while charged with, and suspended for violating Rules 4.3 and 8.4(c), was never charged with violating any provision of Rule 3.8.

63 See supra note 8.
64 See supra note 8 (merely imposing a duty to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel.”).
65 In re Pautler, 47 P.3d 1175, 1177 (Colo.2002).
66 Id.
67 Id.
68 Id at 1178.
69 Id.
70 Pautler, 47 P.3d 1175, 1178.
71 Model Rule 4.3 sets forth that “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.” MODEL RULES OF PROF’L. CONDUCT R. 4.3.
72 Model Rule 8.4(c) asserts that “It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” MODEL RULES OF PROF’L. CONDUCT R. 8.4(c).
73 See generally supra note 65.
Rule 3.8(c) also speaks to the preservation of an accused’s procedural rights. It forbids prosecutors from seeking “from an unrepresented accused a waiver of important pretrial rights such as the right to a preliminary hearing.”\textsuperscript{74} It, nonetheless, provides an almost unnecessary prohibition of prosecutorial actions that would harm an accused’s procedural rights. Prosecutors rarely attempt to have an accused waive pretrial rights and it would be extremely unlikely that a waiver of preliminary rights would be accepted by a court before the accused is appointed counsel.\textsuperscript{75} Thus, Rule 3.8(c) is merely a reaffirmation of an already prevailing norm.

While 3.8(c) looks to protect the accused from being manipulated into waiving pretrial rights, it overlooks the preservation of the more important constitutional rights. There is nothing in Rule 3.8(c) or anywhere in the rest of Rule 3.8 that prohibits prosecutors from seeking to induce arrested defendants to waive their constitutional rights.\textsuperscript{76} Unlike the inducement to waive pretrial rights, prosecutors often seek to induce a defendant into waiving his rights to remain silent and to counsel in the interrogation context.\textsuperscript{77} There has also been a trend toward inducing represented defendants to waive rights to discovery of exculpatory evidence or the right to appeal, as a condition of receiving a favorable guilty plea offer.\textsuperscript{78} Also as part of plea deals, prosecutors have at times compelled defendants to forego any civil rights claims where such a right has been violated. Such prosecutorial actions may need to be regulated, but Rule 3.8 does not seek to do so.\textsuperscript{79}

\textsuperscript{74} See supra note 36.
\textsuperscript{75} See supra note 5, at 1591-2.
\textsuperscript{76} See supra note 72.
\textsuperscript{77} See supra note 5, at 1591-2.
\textsuperscript{78} Id.
\textsuperscript{79} See supra note 72.
3. Prosecutor’s Disclosure Obligations

Rule 3.8(d) addresses the disclosure obligations of prosecutors, requiring prosecutors to disclose exculpatory evidence and evidence that mitigates the charged offense as well as, if the defendant is convicted, unprivileged evidence that mitigates the sentence. Specifically it states:

A prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and of the tribunal unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.\(^80\)

This is different from what the Due Process Clause requires of prosecutors. Courts have stated that pursuant to the Due Process Clause exculpatory evidence must be disclosed when it is “material” to the defense.\(^81\) Rule 3.8(d) goes beyond the Due Process obligation and courts have stretched the scope beyond the Due Process requirements so that any exculpatory evidence must be disclosed without regard to its materiality.\(^82\)

Michael Nifong’s action in the Duke lacrosse team case violated this part of Rule 3.8. At his ethics hearing “Nifong acknowledged he knew there was no DNA evidence connecting [defendants] to the 28-year-old accuser when he indicted them on charges of rape, sexual offense and kidnapping.”\(^83\) By failing to disclose the results of DNA evidence in a complete manner, Mr. Nifong essentially withheld evidence that would likely have exonerated the accused.

Rule 3.8(d) is silent when it comes to several issues regarding what a prosecutor may or may not disclose. It is not certain if questions such as whether a prosecutor should correct

\(^{80}\) See supra note 9.

\(^{81}\) Brady v. Maryland., 373 U.S. 83, 87 (1963) (holding that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

\(^{82}\) See supra note 9.

testimony of a prosecution witness if the prosecutor knows or should reasonably know that it is false, or call the court’s attention to legal or procedural errors are covered by the provisions of candor and confidentiality generally applicable to all lawyers.\textsuperscript{84}

4. Prosecutors Exercise of Authority to Compel Testimony

Rule 3.8(e) forbids prosecutors from issuing subpoenas to attorneys to obtain evidence concerning past or present clients unless the prosecutor believes it is essential to the prosecution, is not privileged, and is unavailable from other sources.\textsuperscript{85} Yet like many of the provisions directed at prosecutors, the rule is both rarely invoked and overlooks some of the issues raised when it comes to a prosecutor’s exercise of authority to compel testimony. Attorney-client privilege limits the amount of useful information that may be obtained from opposing counsel.\textsuperscript{86} Thus it is rare for a prosecutor to seek information from opposing counsel regarding a client. Additionally, there are many possible uses of a prosecutor’s investigative power that are not addressed by Rule 3.8. These uses include failure to disclose to grand jury witnesses that they are targets of the grand jury investigation or inducing witnesses to commit perjury.\textsuperscript{87} Concerns have also been raised when prosecutors seek out evidence from family members and others who are in confidential or intimate relationships with the person under investigation.\textsuperscript{88}

5. Public Communications

Quite possibly the most extensive regulations of prosecutorial conduct comes from Rule 3.8(f), which seeks to limit extrajudicial comments to the media.\textsuperscript{89} While Rule 3.6 seeks to preserve the fairness of trials by restricting all attorneys with regard to their communication with

\textsuperscript{84} See \textit{supra} note 5, at 1594.
\textsuperscript{85} \textsc{Model Rules of Prof'L Conduct} R. 3.8(e).
\textsuperscript{87} \textit{See e.g.}, United States v. Regan, 103 F.3d 1072, 1079 (2d Cir. 1997); Wheel v. Robinson, 34 F.3d 60, 67-8 (2d Cir. 1994); United States v. Babb, 807 F.2d 272 (1st Cir. 1986); \textit{see generally} Peter J. Henning, \textit{Prosecutorial Misconduct in Grand Jury Investigations}, 51 S.C.L.Rev. 1 (1999).
\textsuperscript{88} \textit{Id}.
\textsuperscript{89} See \textit{supra} note 10.
the media.\(^\text{90}\) Rule 3.8(f) specifically addresses a prosecutor’s communications with the media.\(^\text{91}\)

There is an additional interest to protect presumptively innocent defendants from “public opprobrium.” Thus Rule 3.8(f) prohibits prosecutors from making “extrajudicial comments that have substantial likelihood of heightening public condemnation of the accused” except for those “statements that are necessary to inform the public” of what the prosecutor is doing and “that serve a legitimate law enforcement purpose.”\(^\text{92}\)

This provision of the MRPR is usually put into play in high-profile cases, when such public comments on the part of a prosecutor are more likely to harm the defendant’s right to a fair trial. The provision also serves as an obstacle to prosecutors seeking to elevate a case to high-profile status through comments to media. Michael Nifong, who was seeking re-election to his post as District Attorney attempted to do just that in the Duke case.\(^\text{93}\) In fact, of all the ethics violations, the violation of public communications was most often and most blatantly violated by Michael Nifong. Of the 181 claims filed in the charge against Mr. Nifong, 165 dealt solely with public statements he made to the media.\(^\text{94}\) The disciplinary committee that disbarred Mr. Nifong specifically pointed out Nifong’s statement to the media that he would not allow Durham to become known for “a bunch of lacrosse players from Duke raping a black girl” as a violation of Rule 3.8(f), committed to boost the publicity around the case and increase his chances at re-election.\(^\text{95}\)

\(^{90}\) Model Rules of Prof’l. Conduct R. 3.6(a) (preventing the lawyer from making an “extrajudicial statement” that “the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing” a matter).

\(^{91}\) See supra note 10.

\(^{92}\) Id.

\(^{93}\) Id.


\(^{95}\) See supra note 83.
Analysis

Though the MRPR provides an incomplete set of prosecutorial regulations, the question still remains whether an incomplete set of regulations is in fact the best type of regulation or alternatively whether a more complete set of regulations is the best option for ensuring that prosecutors do not use their power objectionably. In this section, I present the prevailing arguments on both sides of the issue and explore the strength of the ideas they espouse from both the theoretical and the practical perspective.

1. Theoretical Perspective

The American legal system is based on the basic presumption that the most accurate means of arriving at the truth is through legal combat. By including government attorneys within the general adversarial framework, the MRPR signal that prosecutors can achieve justice while operating within the adversary system’s rules, which include the obligation to represent one’s client zealously. The obligation to represent one’s client zealously thus, also applies to prosecutors. Two attorneys opposing one another, who represent their clients zealously, will in theory lead to the truth and consequently a reliable result of whether or not to convict a defendant. As a result the prosecutor’s duty to seek justice would be fulfilled. The question raised is whether Rule 3.8 permits prosecutors to represent their client zealously and whether more extensive regulations would inhibit prosecutors from performing zealously thereby hindering the “to seek justice” obligation. I will look into each of the subsections of Rule 3.8 in this context.

96 See supra note 15.
97 See Green, supra note 2, at 624 (analyzing how prosecutors zealously seek justice).
a. **Rule 3.8(a) and Prosecutorial Discretion**

Those in favor of retaining the incomplete regulatory provisions of Rule 3.8(a) claim that the MRPR permits prosecutors to work zealously and that any extensive set of regulations would impede that requirement and thus impede the chances at a reliable form of legal combat.\(^9\) Rule 3.8(a) requires that a prosecutor have probable cause before prosecuting.\(^9\) As a result the prosecutor need not believe that the accused is guilty and, while some may argue that the requirement should be a “more likely than not” standard, others argue that such a high standard would essentially eviscerate the “seek justice” requirement.\(^1\) The decision as to whether an accused is guilty of a crime is not the decision of the prosecutor but rather that of the fact-finder. By raising the standard to one of “more likely than not” the legal system would require prosecutors to make the decision as to whether the accused had or had not committed the crime. It would create situations where one prosecutor observing a set of facts would come to a different conclusion than another prosecutor looking at the same set of facts. Inevitably there would be instances where a prosecutor would not prosecute despite the obvious presence of probable cause and therefore take the decision-making process away from the fact-finder. Additionally, prosecutors would tend to not prosecute in instances where the determination as to whether the accused committed a crime “more likely than not” was debatable, for fear of ethical violations. Rule 3.8(a)’s requirement that there be probable cause, on the other hand, strikes a balance between unnecessarily burdening someone with a prosecution that is not based on any justifiable basis and foregoing prosecution simply because it is uncertain whether the accused had committed an alleged act “more likely than not.”

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\(^9\) See *supra* note 5.
\(^9\) See *supra* note 7.
\(^1\) *Id.*
Still there is something to be said of the DOJ policy not to prosecute unless there is a reasonable belief that legally sufficient evidence exists for a jury to convict the accused of the crime charged. The DOJ policy seems to be the best policy. It strikes the best balance between the competing interests. The DOJ policy requires prosecutors to decide whether to prosecute by measuring the likelihood of guilt derived from evidence within the context of a jury and not whether there is a mere possibility of guilt as seemingly provided by Rule 3.8(a). The policy increases the standard from something more than reasonable suspicion to a standard of reasonable suspicion supported by at least the minimal amount of evidence legally required to find guilt.

Rule 3.8(a) essentially addresses prosecutorial discretion but as noted in the Discussion, it fails to address anything other than the “gate-keeping” function of whether or not to prosecute. It overlooks prosecutorial discretion when it comes to investigations and plea bargaining. The Rule does not provide any guidance in identifying improper motivation to investigate and that raises concern that prosecutors will be able to use their position of power for purposes other than to seek justice. Any concern that such a rule would inhibit an attorney’s ability to prosecute zealously is unfounded, because of the very fact that any improper motivations that would be considered are not those that exist for purposes of seeking justice. When it comes to guidance to determine when a prosecutor has improper motivations to investigate there can be no theoretical debate. The same is seemingly true when it comes to plea bargaining. The Rule’s silence on plea bargaining raises fears that prosecutors are allowed to bring charges that are disproportionately

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101 See *supra* note 53
102 *Id.*
103 See *supra* note 45-60 and accompanying text (discussing what is and is not regulated under Rule 3.8(a)).
104 *Id.*
105 *Id.*
harsh to extract a guilty plea and compel the defendant to give information or to testify.\textsuperscript{106} While such practice may seem unfair, it is not an impediment to seeking justice. In fact, there is an argument that as zealous attorneys, prosecutors should be permitted to bring disproportionate charges as a tool by which to get facts and information that would aid in reaching the ultimate truth.

Finally, Rule 3.8(a)’s lack of regulation of a prosecutor’s exercise of discretion after a conviction has been obtained is possibly the greatest problem with the Rule. Particularly it is silent with regard to sentencing and a duty to confess error.\textsuperscript{107} A rule requiring prosecutors to seek punishment that fits the crime would not in any way impede a prosecutor from acting zealously but would instead further codify the duty to “seek justice.” Furthermore, a rule requiring prosecutors to confess error would also not impede a prosecutor from acting zealously. Rather, it would provide further safety measures to ensure criminal proceedings are conducted with the purpose of reaching a just and fair resolution.

b. Rules 3.8(b), (c) and the Obligation to Preserve an Accused’s Procedural Rights

Rule 3.8(b) requires a prosecutor to make reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel but does not prohibit a prosecutor from impeding the accused from obtaining counsel, once the accused is advised of the right.\textsuperscript{108} There is almost no logical argument that may be made against the inclusion of such a provision, for while the prosecutor has a right to perform his or her duties zealously the prosecutor does not have a right to impede justice. The presumption that an adversarial system is the best way to reach the truth and a just resolution requires that an accused have access to an attorney. A prosecutor who attempts to hinder a defendant from obtaining counsel or acting as

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} See supra notes 61-73 and accompanying text (discussing what is and is not regulated under Rule 3.6(b)).
the defense counsel, such as in *In re Pautler*, in essence would be tinkering with the structure of the system as opposed to working within it. Consequently, the absence of such a provision from the MRPR has allowed prosecutors such as the one in *In re Pautler* to obstruct justice.

Rule 3.8(c) attempts to protect the accused from being manipulated into waiving pretrial rights.109 However, it does not prohibit prosecutors from attempting to manipulate an accused into waiving his constitutional rights.110 While there are criminal procedure laws that serve to discourage such actions,111 the Rules would not punish an attorney since, according to the rules, it would not be ethically reprehensible. Whether or not it should be ethically reprehensible takes us to determining whether overzealousness has led to an obstacle in the adversarial process that presumptively results in a just outcome. The answer in this case is yes. If a prosecutor has manipulated a defendant into waiving certain constitutional rights such as the right to an attorney or the right to remain silent, then the prosecutor has used some form of trickery in the inducement and as a result, the adversarial process has been sullied from the very start. Furthermore, where a defendant would not have otherwise waived his constitutional rights but has done so only after a prosecutor’s manipulation, it is logical to state that the prosecutor has provided a form of legal advice. Rule 4.3 prohibits all lawyers from giving legal advice to an unrepresented person.112 There should however be recognition of the special duty of a prosecutor not to impede the adversarial system within Rule 3.8 since only prosecutors are required to ensure that justice is done.113

109 See *supra* notes 74-79 and accompanying text (discussing what is and is not regulated under Rule 3.6(c)).  
110 *Id.*  
111 *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "all evidence obtained by searches and seizures" which violates the Constitution is inadmissible in state court).  
112 MODEL RULES OF PROF’L CONDUCT R. 4.3.  
113 Such an emphasis would be similar to the apparent emphasis that limits a Prosecutor’s statements to the media in Rule 3.8(f) despite a similar limitation in Rule 3.6, which applies to all lawyers, in general. MODEL RULES OF PROF’L CONDUCT R. 3.6 (applying the rule to “a lawyer”).
c. Rule 3.8(d) and a Prosecutor’s Disclosure Obligations

A prosecutor’s disclosure obligations are addressed in Rule 3.8(d), which requires prosecutors to disclose exculpatory evidence that mitigates the charged offense, without regard for the materiality of that evidence.\footnote{114 See supra notes 80-84 and accompanying text (discussing what is and is not regulated under Rule 3.6(d)).} It also requires disclosure of unprivileged evidence that mitigates sentencing once the defendant has been found guilty.\footnote{115 Id.} The necessity of the rule is best displayed from the Duke case. As examined in the Discussion, Michael Nifong failed to disclose the results of DNA evidence that would have exonerated the accused in that case.\footnote{116 See supra notes 83 and accompanying text (discussing Michael Nifong’s knowledge that DNA evidence failed to connect defendants to crime of rape).} The failure to disclose such valuable evidence for the mere purpose of gaining a wrongful conviction is an obvious affront to justice. Yet Rule 3.8(d) does not cover all the topics of prosecutorial disclosure and it is not as obvious whether these topics should in fact be included within the MRPR. It is not certain whether a prosecutor should be obligated to correct testimony of a prosecution witness when it is known or should reasonably be known that it is false.\footnote{117 See supra note 113.} The answer may depend on the effect of the false testimony. Were the effect of the false testimony one that would reasonably lead to a distortion of material facts, then the possibility of a wrongful conviction based on false material facts would be an affront to justice and the prosecutor should be obligated to correct the testimony. On the other hand, where the false testimony is of little significance, in terms of its effect on the outcome of the case, the prosecutor should not be obligated to correct the testimony. Prosecutors, however, cannot always determine what the effect of false testimony may be. The inclusion of a rule requiring prosecutors to make such a determination would impose a difficult duty, and would likely result in prosecutor’s correcting every bit of false testimony for fear of ethic violations. Upon closer scrutiny, however, the
inclusion of a provision that required prosecutors to correct false testimony, no matter the effects, would simply ensure that the fact finder has the most truthful set of facts upon which to base their decision.

Another issue absent from Rule 3.8(d) is whether a prosecutor is obligated to call the court’s attention to legal or procedural errors. The answer to this question is a bit clearer than the issue of false testimony. The presence of a legal and/or procedural error in a trial will likely be the basis of any appeal. Upon appeal the error would be argued, discussed and the court would take the appropriate steps to correct the error. Consequently, justice would be reached, regardless of whether the prosecutor pointed out the error at trial. Concerns of judicial economy would suggest that a rule requiring prosecutors to point out the error earlier would be prudent. After all, the time, effort, and money it would take to carry out an appeals proceeding are great, and would be avoided if the error were taken into account early on so that the appropriate remedy could be administered. However, concerns of judicial economy do not compel ethics concerns and as such do not compel the inclusion of such a rule within the MRPR.

On the other hand, not every convicted defendant possesses the resources for effective counsel in taking advantage of the appeals, and instead are dependant upon public defenders, who are usually overworked and underpaid. A defendant convicted based on an improper application of the law or an error in procedure and who lacks resources to hire a private attorney could conceivably never have his or her chance at a just proceeding. An outcome of this sort would render an unjust conviction based on an unjust process. Yet, the solution to problems within the legal system with regard to ineffective public defenders is not the domain of the MRPR. In fact,

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119 *Id.* (“... [A]n appeal is an expensive, time consuming, technical process involving review of the lower court records ...”).
121 *Id.*
a rule meant to adjust for the ineffectiveness of opposing counsel would seemingly avoid a true solution to the problem, in favor of unfairly burdening prosecutors.

d. Rule 3.8(e) and the Use of Authority

Rule 3.8(e) though rarely invoked addresses what a prosecutor may subpoena from other attorneys. It does not address failure to disclose to grand jury witnesses that they are targets\(^\text{122}\) of the grand jury investigation. The practical necessity of such requirement however is not great. Although the Court in \textit{U.S. v. Washington},\(^\text{123}\) held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant(s)," the Department of Justice has had a longstanding policy of advising witnesses who are known "targets" of an investigation that their conduct is being investigated for possible violation of Federal criminal law.\(^\text{124}\) The policy also advises that the status of the witness as a target be repeated on the record when the target witness is advised of the matter for which he is testifying.\(^\text{125}\)

The Rule’s silence on a prosecutor’s actions inducing witnesses to commit perjury is a greater problem.\(^\text{126}\) Commonly termed the “perjury tap,” “prosecutors frustrated with the inability to indict a suspect for substantive crime,” will intentionally seek to induce the suspect to testify in a manner that could be contradicted by sufficient independent evidence.\(^\text{127}\) The Prosecutor is thus afforded with the opportunity to bring perjury charges against the suspect.\(^\text{128}\) A “prosecutor's use of the grand jury, not to uncover antecedent crime, but to cause perjury to be

\(^{122}\) A “target” is defined as a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. U.S.A.M. 9-11.150, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm#9-11.150


\(^{125}\) Id.

\(^{126}\) See supra notes 85-88, and accompanying text (discussing what is and is not regulated under Rule 3.6(e)).


\(^{128}\) Id.
committed, implicates fundamental notions of fairness.”\textsuperscript{129} The need for a restriction on a prosecutor’s action’s inducing perjury is apparent in the fact that the incentive to use the “perjury trap” is great, especially since it seems that proving perjury has become easier under the Organized Crime Control Act.\textsuperscript{130} The Act does not require any particular number of witnesses or special kinds of proof for a perjury conviction,\textsuperscript{131} which is in contrast to the traditional requirements of two witnesses or one witness plus corroboration of the allegation of perjury.\textsuperscript{132} While defendants in perjury cases may claim the affirmative defense of “perjury trap”, The defense is available when the grand jury calls a defendant simply to obtain perjurous testimony unrelated to the investigation,\textsuperscript{133} but it is precluded when the grand jury's investigation of crimes related to the testimony is pending,\textsuperscript{134} and more dangerous when the witness was subpoenaed for legitimate purposes.\textsuperscript{135} Thus prosecutors are allowed to use the “perjury trap” to convict defendants so long as just one of the purposes of subpoenaing the witness was for legitimate purposes.

\textsuperscript{129} Id.
\textsuperscript{131} Id.
\textsuperscript{133} See United States v. McKenna, 327 F.3d 830, 837 (9th Cir. 2003) (stating that the government violates due process when it calls a witness before the grand jury with the primary purpose of obtaining testimony in order to prosecute later for perjury); see also United States v. Shotts, 145 F.3d 1289, 1299 (11th Cir. 1998) (noting prosecutor's purpose must be to obtain truth); United States v. Doss, 563 F.2d 265, 274 (6th Cir. 1977) (stating if grand jury is without authority to inquire about certain offenses, false answers of the defendant are not perjurious)
\textsuperscript{134} See e.g., United States v. Regan, 103 F.3d 1072, 1079 (2d Cir. 1997) (holding legitimate basis for investigation precludes application of perjury trap doctrine and declining to decide availability of the defense in Second Circuit); United States v. Chen, 933 F.2d 793, 798 (9th Cir. 1991) (holding the possibility that government anticipated defendant would give false testimony before grand jury was insufficient to bar perjury prosecution where defendant had knowledge of facts material to pending investigation);
\textsuperscript{135} See e.g., LaRocca v. United States, 337 F.2d 39, 42-43 (8th Cir. 1964) (finding that perjury trap defense is unavailable when government can reasonably believe defendant knows information relevant to grand jury's inquiry); United States v. Bin Laden, 2001 WL 30061, 8 (S.D.N.Y. 2001) (stating that a perjury trap had not been created when government subpoenaed witness to testify before the grand jury despite the fact that it had already gained information on what the witness was to testify about by means of electronic surveillance and physical searches).
e. Rule 3.8(f) and Public Communication

Rule 3.8(f) prohibits prosecutors from manipulating the public perception of an accused thereby protecting the accused from unfair public contempt. Because concern over comments to the public through the media typically come into play in high profile cases, such communications would be more likely to create an aura of contempt against the accused that may seep into the trial. The result is an unfair proceeding. Michael Nifong nearly succeeded in doing just this, in the Duke case. Initially, Mr. Nifong’s comments to the media, which expressed his confidence that the accused were guilty of rape, served to propagate contempt of the entire Duke lacrosse team, including amongst many commentators in the sports media. Rule 3.8(f) is a necessary prohibition on actions such as those committed by Mr. Nifong.

2. Practical Issues:

As a practical matter Rule 3.8’s characteristic of selective regulation does have its advantages. As a primary matter, the current regulations do not burden the model code with superfluous or unimportant provisions that would simply restate the current law, would address problems that rarely arise, would “protect against trivial harms” and so on. Furthermore, the current selective regulations preclude enforcement programs. “Many conceivable provisions on prosecutorial ethics” may be difficult to enforce practically. For example, “provisions that forbid prosecutors from acting upon impermissible motivations rather than proscribing particular

136 See supra notes 89-95 and accompanying text (discussing what is and is not covered under Rule 3.8(f).
137 Id.
139 See supra note 5, at 1601.
140 Id.
conduct, or that addresses conduct that would be difficult to discover and prove.” Finally, the current Rule with its selective regulations avoids the complexity of drafting provisions that properly express what courts expect of prosecutors, which arguably varies from court to court. The standard that best encompasses the courts’ expectations is likely one that merely requires prosecutors to conduct themselves reasonably under all circumstances and not to abuse their broad discretion. Such a standard, however, would provide prosecutors with little direction, permit arbitrary decision-making on behalf of the courts and prosecutors, “call for intrusive factual determinations,” curb proper conductive, and may be either too harsh or lenient. As a result, courts might simply determine that it may be better at times to have no enforceable restriction than to have one that causes so many problems.

While the current selective regulations appear to espouse legitimate advantages over an extensive list of regulations, the absence of such a list leaves prosecutors in the dark as to the normative expectations with regard to prosecutors. “The boundaries of proper professional conduct for prosecutors can be debated, and in the absence of judicial pronouncements, prosecutors acting in good faith can contravene whatever standards the courts would have chosen.” In fact, it would not be illogical for a prosecutor to believe that since there are only certain limited duties regulated by the MRPR, that a particular conduct not addressed must be handled in a manner conforming to the rules governing lawyers generally. Moreover, when neither a relevant rule applicable to lawyers generally nor special rules for prosecutors exist, a prosecutor may believe that they have uninhibited discretion on the matter, which could lead to

141 Id.
142 Id.
143 Id.
144 See supra note 5, at 1601.
145 Id. at 1597.
146 Id.
conduct directly in apposition to the duty to seek justice, such as in the cases of the Duke lacrosse team\textsuperscript{147} or the “Jena 6”.\textsuperscript{148}

Even if prosecutors were to understand what the ethical norms of the prosecutorial profession are, many would chose to ignore them in the absence of any codified regulations that were not legally enforceable.\textsuperscript{149} Unwritten rules of professional conduct understandably lack the power of those rules which have been codified. As a result, prosecutors attempting to conduct effective investigations or convict someone who is believed to be guilty of a crime will chose to ignore relevant ethical norms that may impede their objectives.\textsuperscript{150} The compulsion to adhere to norms that are not enforceable disappears in the face of other competing demands.

Additionally, those who believe that the current regulations are sufficient to guide a prosecutor’s role may be in support of self-regulation as an alternative to the addition of extensive regulations.\textsuperscript{151} Prosecutors have greater experience, expertise, and knowledge with the issues they might deal with and thus should regulate themselves.\textsuperscript{152} In general, however, self-regulation is not an acceptable alternative. There would be great risk in permitting prosecutors with sole discretion over their own actions especially when considering the fact that they are one side of an adversarial system endeavoring to achieve a just outcome.\textsuperscript{153} An objective third party regulator would be more apt to ensure the validity of the process. In fact, courts have generally

\textsuperscript{147} See supra note 83, and accompanying text (discussing the ethical questions raised from actions on the part of Michael Nifong with regard to the prosecution of three Duke Lacrosse players).

\textsuperscript{148} See supra notes 57-59, and accompanying text (discussing the ethical questions raised from actions on the part of the prosecution with regard to the prosecution of an African American juvenile).

\textsuperscript{149} See supra note 144.

\textsuperscript{150} Id.

\textsuperscript{151} See supra note 5, at 1599.

\textsuperscript{152} Id.

\textsuperscript{153} Id.
expected that the ethical regulations of prosecutors should primarily be achieved through adoption and enforcement of disciplinary rules.\textsuperscript{154}

\textbf{Conclusion}

Rule 3.8 needs to be expanded to include all the special duties of a prosecutor and prevent the kind of prosecutorial misconduct teaming from the Duke Lacrosse and the “Jena 6” cases. Rules that promote the fundamental fairness of the adversarial system need to be added to the special obligations of a Prosecutor. In its present form the Rules leave too many gaps that permit prosecutors to interpret their duties and obligations in a manner that will further their own interests while discrediting the truth seeking process that is presumed to exist inherently within the “legal combat” theory of the U.S. legal system. The recent lessons learned from the “Duke Lacrosse” and the “Jena Six” cases, at the very least, compel a truly in-depth look into Rule 3.8.

\textsuperscript{154} \textit{Id.}