Exonations in Texas have skyrocketed in recent years, which is simultaneously promising and troubling. Promising because wrongful convictions are being overturned at an unprecedented rate. In 2013, there were 13 exonerations in Texas, compared with 39 in 2014 and 54 in 2015, according to the National Registry of Exonerations. What’s more, while innocence advocacy groups have been instrumental in securing many of these results, much of the progress is due to prosecutors’ offices taking the initiative to ensure the validity of their convictions through the work of conviction integrity units.

At the same time, however, the sheer number of overturned convictions—coupled with revelations of official misconduct in some cases—illustrates ongoing, serious problems in our criminal justice system. To be sure, many wrongful convictions are not the result of misconduct by prosecuting authorities, but rather stem from factors such as faulty forensic evidence, eyewitness misidentification, and perjury or false accusation. But a disturbing subset of exoneration cases do involve misconduct—most notably some prosecutors’ conscious decisions to suppress exculpatory evidence. The results, as we have seen in cases where an actually innocent person spends years imprisoned or even on death row, can be catastrophic. Michael Morton spent almost 25 years in prison for the murder of his wife, a crime he did not commit. Anthony Graves spent 18 years behind bars—12 on death row—before his capital murder conviction was overturned for prosecutorial misconduct and charges were later dismissed for lack of evidence.

Cases like these and the recent surge in exonerations have put a spotlight on the issue of prosecutorial misconduct in recent years, raising some inevitable questions: What is being done to address and deter such conduct, and is it enough? How do we best resolve the problem? Despite numerous articles, studies, and laws targeting the issue, the answers are complicated and, in the process, much has been lost in translation. Misperceptions abound regarding what actually constitutes an ethical violation by a prosecutor, the extent to which such violations are occurring, and the role of the discipline system in addressing the problem. This article examines three contributing factors: (1) a failure to distinguish between a Brady violation or other prosecutorial “error” and a prosecutor’s ethical obligations under Texas Disciplinary Rule of Professional Conduct 3.09; (2) the difficulty in generating valid statistics regarding the prevalence of prosecutorial misconduct and the responsiveness of the discipline system; and (3) confusion surrounding the function of the disciplinary process.

**ETHICAL MISCONDUCT V. BRADY ERROR**

Despite the overlap between a prosecutor’s Brady requirements and their ethical obligations under Rule 3.09(d), there are significant distinctions between the two legal constructs in both purpose and application.

In *Brady v. Maryland*, the U.S. Supreme Court held that a prosecutor’s suppression of favorable evidence “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.” Evidence is “material” if there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different. The purpose of the Brady decision was the “avoidance of an unfair trial to the accused,” not punishment for the misdeeds of a prosecutor.

The aim of attorney discipline is inherently different. Whereas Brady is primarily focused on the potential harm to the defendant resulting from nondisclosure, Rule 3.09(d) considers the prosecutor’s behavior and intentions—whether he or she is abiding by his or her duty to seek justice and protect the integrity of the process. The ethics rules set a higher level of conduct to which a prosecutor must adhere, not the minimal acceptable standard of behavior necessary to avoid a due process violation. Therefore, Rule 3.09(d) requires disclosure of all favorable evidence, not just that which might later result in reversal of the case. In addition, there is no materiality element in Rule 3.09(d); rather, any evidence that “tends to negate the guilt of the accused” must be disclosed, regardless of its perceived credibility or ultimate value.

Conversely, Rule 3.09(d) requires a showing that *Brady* does not include—namely, that the prosecutor had actual knowledge of the evidence that was suppressed. Unlike *Brady*, which imputes to the prosecutor constructive knowledge of evidence known to anyone on the prosecution team, an ethical violation requires actual knowledge of the evidence in question. In this way, discipline is reserved for those who consciously choose to suppress known, favorable evidence.

**DECIPHERING THE DATA**

Studies attempting to measure the prevalence of prosecutorial misconduct and efforts to address it frequently conflate the legal concepts of *Brady* or other prosecutorial “error” with *prosecutorial ethics*, producing data that those not familiar with the relevant distinctions can misinterpret. For example, a 2012 study reported that 91 Texas cases involving “prosecutorial error/misconduct” resulted in only one public disciplinary sanction of a prosecutor, the implication being that discipline was potentially warranted in all 91 cases. However, when examined individually, the vast majority of referenced cases did not involve ethics violations. As mentioned, not all *Brady* “error” equates to a 3.09(d) violation. Similarly, other instances of prosecutorial error may or may not rise to the level of an ethical violation, depending on the circumstances.
surrounding the conduct and the information known to the prosecutor. Determinations of this kind typically require a detailed factual analysis, something not possible from the limited information available publicly, such as in court opinions.

Analysis is further complicated when considering that some instances of prosecutorial misconduct never surface at all or that their discovery is long delayed. In most exoneration cases involving suppression of exculpatory evidence, the misconduct is not discovered for many years after the trial, as was the case with both Graves and Morton. The very nature of a 3.09(d) violation is concealment, which makes attempts to quantify the problem particularly troublesome.

Finally, because grievance information is confidential, there is no way to reliably determine whether a grievance was filed in relation to a particular act of misconduct unless and until a public sanction is issued. Yet, without this information, it is impossible to draw accurate conclusions about how the discipline system is responding to particular matters or the issue as a whole.

In the end, attempts to quantify these matters are likely to be flawed or, at best, incomplete. Nonetheless, much good has resulted from raising awareness of the problem, including new laws, improved training for prosecutors, and increased reliance on the discipline system.

THE ROLE OF DISCIPLINE

The Texas disciplinary system is grievance-driven, meaning that people outside of the system initiate over 99 percent of the approximately 7,500 annual grievances. The system is neither designed for nor capable of independently monitoring the conduct of attorneys statewide in order to initiate potential investigations. Thus, for the process to work properly, those with knowledge of misconduct must report it to the State Bar of Texas Office of Chief Disciplinary Counsel.

Until recently, complaints against prosecutors were fairly uncommon. Studies indicate this is because those in the best position to report misconduct—namely, judges, other prosecutors, defense attorneys, and defendants—have strategic and political disincentives to do so. Underreporting leads to a lack of appropriate discipline for prosecutors, and yet this factor is frequently overlooked in articles and studies examining the issue.

This historical “underreporting” of prosecutorial misconduct is a trend that appears to have reversed itself, at least in Texas. Grievances against prosecutors are now common. Many seek relief for issues not governed by the disciplinary rules and are dismissed. But when the allegations do implicate the disciplinary rules, they are investigated and prosecuted like any other case.

This surge in grievances against prosecutors in recent years is undeniably correlated with the increase in sanctions, indicating that the system works as it should when all participants do their part, starting with the initial reporting of misconduct.

The passage of the Michael Morton Act in 2013 eliminated some of the guesswork for prosecutors who are contemplating what must be disclosed. Now, upon request, the state must turn over all material evidence that is in their possession, custody, or control and that is not work product or otherwise privileged. Additionally, to the credit of various prosecuting agencies and organizations such as the Texas District and County Attorneys Association, there has been a significant increase in training efforts to ensure prosecutors understand their disclosure obligations under Brady and the ethics rules.

In the wake of these efforts, we will likely see a decline in violations of Rule 3.09(d) in the coming years. At the same time, as with any profession, there are those who will intentionally thwart the rules in order to gain an advantage. It is those lawyers that the discipline system is uniquely designed to deal with and why everyone must continue to do their part to address this important issue.

NOTES

4. A conviction integrity unit is a division of a prosecutorial office that works to prevent, identify, and remedy false convictions. Id. at 11. Of the 34 Texas exonerations in 2015, 43 were the result of work by a CIU. Id. at Appendix Table A.
6. Actual innocence is defined as “circumstances in which an accused did not, in fact, commit the charged offense or any of the lesser-included offenses.” Ex parte Fournier, 473 S.W.3d 789, 792 (Tex. Crim. App. 2015).
11. Id.
12. Kuczars, supra at 1224.
13. Id. at 1210.
14. Schultz v. Comm’n for Lawyer Discipline, 2015 WL 9855916 (Texas Bd. Disp. App. 2015). Although some states have construed their equivalent of Rule 3.09(d) to include this materiality requirement, Texas recently joined several other states in rejecting this analysis and holding that materiality is not an element of a 3.09(d) analysis.
15. Tex. Disciplinary Rule Prof’l Conduct 3.09(d).
16. Id.
22. David Keenan et al., The Myth of Prosecutorial Accountability After Connnick v. 株洲, 373 U.S. 83 (1963). This historical “underreporting” of prosecutorial misconduct is a trend that appears to have reversed itself, at least in Texas. Grievances against prosecutors are now common. Many seek relief for issues not governed by the disciplinary rules and are dismissed. But when the allegations do implicate the disciplinary rules, they are investigated and prosecuted like any other case. This surge in grievances against prosecutors in recent years is undeniably correlated with the increase in sanctions, indicating that the system works as it should when all participants do their part, starting with the initial reporting of misconduct.
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