

A PROSECUTOR'S DUTY TO DISCLOSE: BEYOND *BRADY*

BY GEORGE E. WEST II



BRADY, TEXAS RULE 3.09(D) (TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT), AND RULE 3.8(D) (MODEL RULES OF PROFESSIONAL CONDUCT)

The prosecutor's duty to disclose information favorable to the accused forms one of the central pillars in our criminal justice system. The Due Process Clause of the Fourteenth Amendment ensures that the accused receives a fair trial by requiring that the prosecution reveal to the accused evidence that is favorable to the accused.¹ In *Brady v. Maryland*, the U.S. Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused ... 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."² Only material, favorable evidence is subject to disclosure.³ Evidence is material under *Brady* "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would be different."⁴ The duty to disclose under the *Brady* standard extends to impeachment evidence as well as exculpatory evidence.⁵ Three components or essential elements are necessary to claim a *Brady* violation: (1) The prosecution actively suppressed or failed to disclose evidence; (2) that evidence was exculpatory, mitigating, or of impeachment value; and (3) the evidence was material.⁶

The prosecutor's duty to disclose favorable evidence has expanded beyond *Brady* at least in terms of the prosecutor's ethical duties. Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct provides that the 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 to the tribunal all unprivileged mitigating information known to the prosecutor.⁷

Similarly, Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "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, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."⁸

In July 2009, the American Bar Association's Standing Committee on Legal Ethics and Professional Responsibility issued Formal Opinion 09-454, which states that a prosecutor's ethical duty under Model Rule 3.8(d) is broader in scope than the constitutional requirements under *Brady v. Maryland*.⁹ The key difference, according to the Committee, is that Rule 3.8(d) "requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evi-

dence or information on the trial's outcome."¹⁰ In contrast, the constitutional standard is that the prosecutor only needs to turn over *material evidence*, which means that the trial's outcome would likely have been different had the disclosure been made. The Formal Opinion is important for Texas prosecutors because Texas Rule 3.09(d) with respect to a prosecutor's duty to disclose is similar to Model Rule 3.8(d). The Formal Opinion may serve as the basis for construing Texas Rule 3.09(d), which would expand, or at least clarify, the Texas prosecutor's duty to disclose evidence or information favorable to the defense.

**INTERPRETING TEXAS RULE 3.09(D)
BY USING ABA FORMAL OPINION 09-454**

Courts, prosecutors, and attorneys should consider using the ABA's Formal Opinion on Model Rule 3.8(d) to provide guidance in interpreting Rule 3.09(d). Although the Formal Opinion is not a paradigm of clarity, it does provide useful information on how Texas Rule 3.09(d) could be interpreted. Some issues that may be resolved by using the Formal Opinion are the following:



Our trust is your trust...

The State Bar of Texas Insurance Trust specializes in helping all Bar Members and their Eligible Employees obtain complete insurance coverage at any point in their lives. From Health Insurance to Long Term Disability Insurance, the Trust has you covered. Your personal quote is only a click or phone away.

Visit www.sbotit.com or call toll free: 800.460.7248

State Bar of Texas
Insurance Trust



Does Texas Rule 3.09(d) merely codify *Brady*?

No. Texas Rule 3.09(a) was modeled after Model Rule 3.8(d). The drafters of Rule 3.8(d) made no attempt to codify the evolving constitutional case law.¹¹ The ethical requirements of Model Rule 3.8(d) extend beyond the constitutional obligations of *Brady* and its progeny.¹² Consequently, Texas Rule 3.09(d) should be interpreted as requiring a duty to disclose beyond *Brady*.

When a line-up is shown, does a prosecutor have a duty to disclose the fact that other witnesses to the offense could not pick out the defendant?

Yes. The Formal Opinion recognizes the fact that other witnesses could not pick out the defendant would tend to negate the defendant's guilt, regardless of the strength of the remaining evidence and even if the prosecutor was persuaded that the witnesses did not get a good enough look at the assailant to make an accurate identification.¹³ The Formal Opinion explains that the defense might present the witnesses' testimony and argue why the jury should consider it exculpatory.

Should a prosecutor reveal information from a confidential informant who attributes the commission of the crime to someone other than the defendant when the police do not believe the informant is credible?

Yes. The Formal Opinion states:

[T]he mere fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.¹⁴

Does a prosecutor have a duty to disclose exculpatory material prior to an examining trial?

Possibly Yes. Although the Formal Opinion does not directly address disclosure prior to an examining trial, its language may be construed to require disclosure if the opinion is read in conjunction with the Colorado Supreme Court case of *In re Attorney C.*¹⁵ In *Attorney C.*, the Colorado Supreme Court held that under Colorado Rule of Professional Conduct 3.8(d) [identical to Model Rule 3.08(d) and Tex. Rule 3.09(d)] a prosecutor is required to disclose exculpatory evidence to the defense in advance of any critical stage of the proceeding. The court reasoned that a critical stage includes Colorado's preliminary hearing.¹⁶ A preliminary hearing in Colorado is similar to an examining trial in Texas. An examining trial in Texas is a critical stage of the proceedings.¹⁷ Consequently, a Texas prosecutor may be required to disclose exculpatory evidence prior to an examining trial.

Does a prosecutor's private belief that information has only a minimal tendency to negate defendant's guilt or that the information is highly unreliable relieve the prosecutor of his duty to disclose under Texas Rule 3.09(d)?

Qualified No. The Formal Opinion states "[n]othing in the rule [3.08(d)] suggests a *de minimis* exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable."¹⁸ However, under the Formal Opinion, a prosecutor's erroneous judgment that the evidence was not favorable to the defense may not constitute an ethical violation if the prosecutor's judgment was made in good faith.¹⁹

Prosecutors, however, should keep in mind that *Brady* and the cases that follow it do not have a good faith exception.

Would a prosecutor, prior to a plea, be required by Tex. Rule 3.09(d) to review voluminous files or obtain all police files to determine whether favorable evidence exists?

Qualified No. The Formal Opinion specifically addresses this issue. The Formal Opinion says "[i]f the prosecutor has not yet reviewed voluminous files or obtained all police files ... Rule 3.8 [identical to Tex. Rule 3.09(d)] does not require the prosecutor to review or request such files *unless* the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contains favorable evidence or information."²⁰ The Formal Opinion also states that "[a]lthough the rule requires prosecutors to disclose *known* evidence or information that is favorable to the accused, it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but which they are unaware."²¹

Great caution should be taken before prosecutors decide to avoid going through their files or obtaining police files. The opinion does not relieve the prosecutor of the duty to review his file or request police files if it can be inferred from the circumstances, or it is obvious, that the files contain favorable evidence or information. Actual knowledge can be inferred from the circumstances and a prosecutor "may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."²² Additionally, constitutional law, statutes, and court rules may require prosecutors to seek evidence and information not within their knowledge or possession.²³

Will a violation of Texas Rule 3.09(d) entitle a defendant to a reversal of his conviction?

Qualified No. Violations of ethical rules alone will not entitle a defendant to a reversal of his conviction absent a showing of prejudice.²⁴ However, if a defendant can establish that an alleged disciplinary rule violation affected his or her substantial rights or deprived him or her of a fair trial, the defendant will be entitled to a reversal of his or her conviction and a new trial.²⁵

Can there be an ethical violation of Rule 3.09(d) and no Brady violation?

Yes. An ethical violation can occur even when due process is not violated.²⁶

Will the failure of a prosecutor to disclose favorable evidence or information under Rule 3.09(d) subject the prosecutor to other ethical violations?

Yes. Depending on the facts, failure to fulfill the prosecutor's duties to disclose may violate other ethical rules. For example, Rule 3.04(a) bars counsel from "unlawfully" obstructing another party's access to evidence.²⁷ Rule 3.04(e) admonishes a lawyer not to request a person to refrain from voluntarily giving relevant information to another party.²⁸ Rule 4.01(a), which prohibits an attorney from knowingly making false statements of material fact or law to a third person.²⁹ Rule 8.04(a) prohibits a lawyer from violating any of the State Bar rules and prohibits him or her from engaging in conduct constituting the obstruction of justice or engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.³⁰

CONCLUSION

Constitutionally and ethically, a prosecutor owes a duty of scrupulous honesty, forthrightness, and the highest degree of ethical conduct, and inherent in these duties is compliance with both the spirit and the express terms of established rules of conduct and procedure.³¹ Winning should not be the goal, but the result of hard work and ethical conduct. Following constitutional duties will preserve the integrity of the case; following ethical duties will preserve the integrity of our criminal justice system. Using ABA Formal Opinion 09-454 will increase the prosecutor's ethical duties beyond what is required under *Brady*.

NOTES

1. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
2. *Id.*
3. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).
4. *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).
5. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006).
6. *Strickler*, 527 U.S. at 281-82 (1999); *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000).
7. Tex. Disciplinary R. Prof'l Conduct 3.09(d) (2009), *reprinted* in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon Supp. 2009) (State Bar Rules art. X, 9).
8. Model Rules of Prof'l Conduct R. 3.8(d).
9. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).
10. *Id.* (emphasis added).
11. *Id.* at 3.
12. *Id.* at 4.
13. *Id.* at 5.
14. *Id.*

15. 47 P.3d 1167 (Colo. 2002) (en banc).
16. *Id.* at 1172.
17. *Coleman v. Alabama*, 399 U.S. 1 (1970); *Branch v. Beto*, 364 F. Supp. 938 (S.D. Tex.1973).
18. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454, at 5 (2009); *see also Colorado v. Mucklow*, 35 P.3d 527, 539 (Office of Presiding Disciplinary Judge of the Supreme Court of Colo. 2000) (A prosecutor's belief that the information would not change the outcome of the proceedings is not a valid reason to circumvent Colo. RPC 3.8(d)), *rev'd sub nom. In re Attorney C.*, 47 P.3d 1167 (Colo. 2002) (en banc).
19. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454, at n.27 (2009) (citing Rule 3.8 cmt. [9]: "A prosecutor's independent judgment, made in good faith, that the new evidence is not of such a nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.>").
20. *Id.* at 6 (emphasis added).
21. *Id.* (emphasis in original, citations omitted).
22. *Id.* n.25 (citing ABA Formal Opinion 95-396).
23. *Id.* n.27.
24. *See Brown v. State*, 921 S.W.2d 227, 230 (Keller, J., concurring in the judgment) (mere violation of a disciplinary rule is not a ground for reversal); *see also House v. State*, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997); *Stanley v. State*, 880 S.W.2d 219, 221-22 (Tex. App. — Fort Worth 1994, no pet.) (Defendant failed to show actual prejudice when one lawyer from the district attorney's office prosecuted a criminal case in which another lawyer from the same district attorney's office testified as a fact witness).
25. *Brown*, 921 S.W.2d at 229-30.
26. *Id.* *See generally* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833 (1997); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 714 n.115 (1987).
27. Tex. Disciplinary R. Prof'l Conduct 3.04(a).
28. *Id.* 3.04(e).
29. *Id.* 4.01(a).
30. *Id.* 8.04(a).
31. *See In re J.B.K.*, 931 S.W.2d 581, 583 (Tex. App. — El Paso 1996, no writ).

GEORGE E. WEST II

is an attorney in Dallas.

Federal & Texas Appeals

- Appellate representation in Texas and federal courts
- Freelance trial briefs, motions, and pleadings
- Summary judgment defense

Peter Smythe, P.C.
211 N. Record Street
Suite 400
Dallas, Texas 75202
214.697.4811



www.appeals.me