THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
January 13, 2021

In the Matters of:	:	
	:	
MARY CHRIS DOBBIE,	:	
	:	Board Docket No. 19-BD-018
	:	Disciplinary Docket No. 2014-D208
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 975939)	:	
	:	
REAGAN TAYLOR,	:	
	:	Board Docket No. 19-BD-018
Respondent.	:	Disciplinary Docket No. 2014-D209
	:	
An Attorney Licensed to Practice Law in the State of Tennessee	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

Prosecutors have ethical requirements that apply only to them. Important among these is a requirement – found in Rule 3.8(e) – to timely provide defense counsel information or evidence that tends to negate the guilt of the accused.

Respondents were prosecuting several inmates at the District of Columbia Jail for assault stemming from a fight in the jail. One important witness about the identity of the inmates was D.C. Jail correctional officer Lieutenant Angelo Childs. Roughly

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* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any prior or subsequent decisions in this case.

six weeks before trial, Respondents received a report that described several kinds of misconduct by Childs. The report was written by a Department of Corrections (DOC) Office of Internal Affairs (OIA) Investigator named Benjamin Collins. The Collins Report determined that Childs maced an inmate in the face who was handcuffed, then filed a false incident report about it and filed a false disciplinary charge against the inmate alleging the inmate assaulted an officer.

All of this information should have been disclosed to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). In a long line of cases under *Giglio v. United States*, 405 U.S. 150 (1972*)*, courts have held that a prosecutor has a duty to disclose information and evidence that could be used to impeach the credibility of a government witness, commonly called *Giglio* information. The Collins Report contained such information.

Instead of providing the report to the defense, however, Respondents filed it *ex parte* and under seal with the Court and filed a motion in limine that purported to describe the *Giglio* information in the Collins Report. The summary of the Collins Report in that motion was defective; while it did include some of the impeachment evidence, it did not include all of it. Specifically, the motion in limine did not disclose the determination that Childs filed a false disciplinary charge against the inmate alleging that he assaulted an officer and it dramatically misconstrued the adverse finding about Childs' credibility that was made in the report. The motion in limine said that the Collins Report "may have made potentially adverse credibility findings regarding Officer Child's [sic] statement regarding when Inmate A was

handcuffed," DX 17 at 4, when it should have disclosed that Officer Childs filed a false disciplinary charge saying Inmate A assaulted an officer.[1]

The record is clear that both Respondents read the Collins Report before writing the motion in limine and, while Dobbie wrote the motion, Taylor reviewed it before it was filed. The motion in limine includes a great deal of detail about the Collins Report, yet scrupulously avoids mention of the false disciplinary charge. Indeed, the motion includes a block quote from the Collins Report that ends right where the Report discusses the false disciplinary charge.

In drafting the motion, Respondent Dobbie testified that she "started with the findings" at the back of the Collins Report and then wrote the motion to include "the facts that pertain to those particular findings." HC Rpt. at 22. The false disciplinary charge was not included in the findings.[2]

Rule 3.8(e) states, in principal part, that it is a violation of the D.C. Rules of Professional Conduct for a prosecutor to:

> [i]ntentionally fail to disclose to the defense . . . any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused . . . .

Though a fuller discussion is set out below, we conclude that the elements of a Rule 3.8(e) violation have been proven. The Collins Report's conclusion that

[1] As discussed herein, correctional officer Childs was demoted from the rank of Lieutenant to Sergeant following his misconduct. Consistent with the Court's decision in *In re Vaughn*, 93 A.3d 1237, 1246 n.5 (D.C. 2014), we refer to him as "Officer Childs" throughout this Report and Recommendation.

[2] Whether the false disciplinary charge was included in the formal findings section of the Collins Report or not, that information was still required to be disclosed under Rule 3.8(e) and *Brady*.

Childs filed a false disciplinary charge was *Giglio* information and needed to be disclosed. While Respondents did not include it because it was not in the findings section of the Collins Report, a reasonable prosecutor would know that the false disciplinary charge was *Giglio* information. And Respondents intentionally made a disclosure, through the motion in limine, that did not include that *Giglio* information.

For the reasons set out below, we also find that Respondents violated Rule 8.4(c), by engaging in conduct involving dishonesty, and violated Rule 8.4(d) because their conduct seriously interfered with the administration of justice. We recommend a suspension of six months.

II. FACTUAL BACKGROUND

Neither Respondents nor Disciplinary Counsel has filed an exception to the Hearing Committee's factual findings; accordingly, unless otherwise specified, we adopt its factual findings.

When Respondents first learned of the Collins Report,[3] they asked their supervisor if they would still be able to call Sergeant Childs as a witness. Their supervisor, in turn, referred the issue to an internal committee at the U.S. Attorney's

[3] Collins emailed his Report to Respondent Taylor, who forwarded it to Respondent Dobbie, on September 15, 2009. FF 23. When Collins emailed his report to Respondent Taylor, he also advised her of Childs' demotion. The demotion was not addressed in the Collins Report itself because Collins had not learned about the demotion until months after his report was finalized. FF 21.

Office, the *Lewis* Committee, which resolved questions of when a law enforcement officer with a disciplinary history could still be sponsored as a government witness.[4]

The record is clear that their supervisors and the *Lewis* Committee did not respond promptly or appropriately to Respondents' request for guidance. Respondents needed to continually ask their supervisors for a response. Further, as the issue was framed for the *Lewis* Committee by Respondents, the only question was whether to call Childs, not whether Respondents were required to make a *Brady* disclosure, a different, but related, question. Regardless, Respondents repeatedly asked for an answer and did not receive one. Finally, just over a week before trial, Respondents were told to "disclose and litigate" – that is, disclose the information in the Collins Report to the defense, then litigate whether it would be admissible impeachment evidence. Respondents were never given specific instructions as to precisely what information to disclose. None of Respondents' supervisors identified the Collins Report as *Brady* material that was required to be disclosed, nor did Respondents' supervisors tell Respondents that Childs' subsequent demotion was *Brady* material. Respondents' supervisors were simply addressing – slowly – a separate issue: whether Childs could be called as a witness.

[4] The *Lewis* Committee consists of senior-level Assistant United States Attorneys who review questions of whether the government can sponsor the testimony of law enforcement witnesses who may have credibility issues. At the time, John Roth, the Executive Assistant United States Attorney, headed the Committee. At Mr. Roth's request, Respondents sent him a copy of the Collins Report. HC Rpt. at 58 n.44. Mr. Roth did not testify before the Hearing Committee. FF 26 n.15.

Respondents testified before the Hearing Committee that they had a concern about disclosing the entirety of the Collins Report to the defense, because, they asserted, it could reveal information that inmates at the D.C. Jail could use to threaten guards. Rather than redact the information that raised this concern and provide a redacted copy to the defense, or request a protective order so that defense counsel could have access to the information but the spread of it within the D.C. jail would be limited, Respondents decided to file the Collins Report *ex parte* and under seal so that only the presiding judge could see it. That judge, Judge Robert Morin, testified before the Hearing Committee that this was a frequent practice in D.C. Superior Court at that time.

Respondents' supervisor – Jeffrey Ragsdale – provided Respondents with a sample motion in limine from another case to argue that the Collins Report should not be admissible during the cross examination of Officer Childs. That sample assumed – as was the case in the other matter – that the underlying evidence had been disclosed to the defense. Respondents relied on the sample when preparing the motion in limine.

Dobbie testified that she thoroughly reviewed the Collins Report when drafting the motion in limine. FF 37. The report itself is only eight and a half pages long. The discussion of the false disciplinary charge totals more than half of a page of the Collins Report. Despite her thorough review, only the factual findings on the last page of the report are what Dobbie testified she felt she needed to disclose in the motion in limine. *Id.* Counsel for Respondent Taylor informed the Board at oral

argument that Taylor also studied the report and reviewed the motion in limine before it was filed. *See also* Tr. 250-51 (Taylor).

The motion in limine includes a two-page discussion of the eight-and-a-half-page Collins Report. While it does disclose that there was a determination that Childs made a false statement, the motion only describes the findings around whether Childs made a false statement about whether the inmate was in handcuffs – the kind of thing that could be an inaccurate detail in an otherwise honest report. The motion in limine contains no discussion of the conclusion in the Collins Report that Childs lied about the inmate assaulting an officer, which would be substantially more powerful evidence for the defense.

The motion in limine also downplays the conclusions of the Collins Report. In the argument section of the motion, Respondents wrote that the Report "may have made potentially adverse credibility findings" about whether the inmate was handcuffed, DX 17 at 4, but even undermined that claim, arguing that Childs' incident report, which was quoted in the Collins Report, was "ambiguous at best" on the restraints issue, *id.* at 8, and concluding with the statement that, based on the Report, "it is not apparent that [Childs] lied," *id.* The motion in limine does not discuss the Collins Report's much stronger statements about Childs' false disciplinary charge.

The motion in limine also did not disclose that Childs was demoted a full rank after the Collins Report, and that fact was not otherwise disclosed to the Court or defense before trial. Yet Respondents knew this well before the motion in limine

was filed. On the same day that Collins provided Respondent Taylor with the report, he also told her that Childs was demoted. FF 23. Respondent Taylor forwarded Collins' email to Respondent Dobbie. *Id.* In explaining her failure to disclose this information in the motion in limine, Respondent Dobbie testified that she simply "forgot" about the demotion. Tr. 504, 564-65; HC Rpt. at 53 n.41.

Respondents also filed the Collins Report under seal and *ex parte* at the same time they filed the motion in limine. Due to a faxing error, only the first five pages of the report were actually sent to the Court. The portions the Court did not receive included the pages discussing the false disciplinary charge that Childs filed against the inmate.

The defense made an oral motion to receive the report and to use the findings in it to cross examine Childs. The Court asked why the government had reservations about turning over the Collins Report with a restrictive order. *See* FF 49. Respondent Dobbie responded and stated that "the government doesn't believe that there is anything in the report that wasn't disclosed in the Motion in Limine that would be necessary for the defense counselors for the purposes that the Court has allowed the questioning." *Id*. The Court – which was unaware of the conclusion that Childs filed a false disciplinary charge because it wasn't in the motion in limine and wasn't included in what was filed before the Court – denied defense counsel's request for the full report.

At one point during the trial the Court asked if it had the full report, because the Court noticed that there were no findings of fact. Respondent Dobbie, reviewing

only her copy of what she faxed to the Court and not the full report itself, which was in her trial notebook, told the Court that it did have the full report.[5] Three of the men on trial were convicted. In post-trial proceedings, the defense received the full report, and its attachments. It was only at this very late stage in the process that defense counsel first learned that Childs – who testified accusing an inmate – had previously been found to have falsely accused another inmate. Defense counsel moved for a new trial, based on the government's violation of its *Brady* obligations. The trial court denied the motion.

On appeal the Court of Appeals reversed, and determined that:

> [T]he trial court was constrained in its ability to assess these documents by the government's late production and continued misrepresentation or nondisclosure of the information in its possession. Unlike the trial court, however, we have had, from the outset of our review, the entire [Collins] Report with its appendices. With these advantages that the trial court did not share, we conclude that the trial court was misled and that its adoptive fact-finding was clearly wrong. . . . .
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> Once we clarify the actual subject and the apparent outcome of the [Office of Internal Affairs] investigation, the determination that this information was favorable information subject to disclosure under *Brady* is not difficult. The OIA's determination of Officer Childs's false

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[5] Judge Morin and Respondents had the following exchange concerning the length of the Collins Report:

> THE COURT: Can I see the government on its ex parte filing?
> (Bench conference)
> THE COURT: I just want to make sure, Ms. Taylor. I have the entire filing, because mine stops at page 5, and there was no --
> MS. DOBBIE: Let me go grab what I have, just to make sure.
> . . . .
> MS. DOBBIE: Yeah, mine is five pages long,
> THE COURT: Okay. Thank you.

DX 22 at 15.

> reporting was clearly impeaching, and was the sort of information in which any competent defense lawyer would have been intensely interested.

Vaughn v. United States, 93 A.3d 1237, 1255 (D.C. 2014).

On the motion in limine's characterization of the Collins Report, the Court of Appeals observed that

> The government's motion in limine not only presented as true that which OIA had determined false, it used that false story as the backdrop for its account that the OIA investigation was simply an inquiry as to whether Officer Childs had used excessive force on a restrained Inmate A and whether Officer Childs had engaged in possibly sloppy report-writing to the extent he incorrectly "suggest[ed]" that Inmate A was unrestrained. The government disputed in its motion in limine that this suggestion was "evident" from Officer Childs's incident report, and it refused to "concede" that Officer Childs had "in fact" made false or misleading statements with respect to whether Inmate A was handcuffed, even though the OIA had determined that, as part of his fabricated story of inmate assault, Officer Childs *had* misleadingly indicated that Inmate A was unrestrained. The government's omission of the disciplinary consequences of the [Collins] Report bolstered the inaccurate account of the OIA investigation in the government's summary.[6]

Vaughn, 93 A.3d at 1259-1260.

The Court observed that its decision did not address bad faith by the prosecutors. But it did say that the conduct by Respondents here raised serious questions.

> Indeed, we are left with many questions about the government's behavior in this case, including: (1) How could the government have so misconstrued the findings of the OIA investigation as memorialized in the full [Collins] Report as ultimately unrevealing regarding Officer

[6] Collins submitted an affidavit during the *Vaughn* post-trial proceedings concerning his earlier investigation of Childs' conduct. *See* FF 63; DX 36.

> Childs [sic] credibility? (2) How could the government have failed to realize at trial that it had not given the court the full [Collins] [R]eport, particularly when the trial court specifically asked if the five-page copy it had in hand was the complete report? (3) How could the government have made the representations it did about the consequences of the Inmate A incident or have allowed Officer Childs to testify without qualification about his lack of notice or understanding of those consequences, in light of the information contained in OIA Investigator Collins's sworn affidavit? . . . . *See Brady*, 373 U.S. at 87, 83 S.Ct. 1194; *Miller* [*v. United States*], 14 A.3d [1094,] 1107 [(D.C. 2011)].

Vaughn, 93 A.3d at 1266 n.34 (D.C. 2014).

Ultimately, the Court of Appeals reversed both convictions for one of the defendants in the underlying case on grounds that the government violated its *Brady* obligations and remanded the case for a new trial.[7] *Vaughn*, 93 A.3d at 1244. On remand, the government dismissed the charges.

III. PROCEDURAL HISTORY

Based on the *Vaughn* opinion, Disciplinary Counsel opened an investigation. A Specification of Charges charged Respondents with violations of Rules 3.3(a)(1), 3.3(a)(4), 3.4(d), 3.8(e), 8.4(c), and 8.4(d).

An Ad Hoc Hearing Committee determined that Respondents violated Rules 3.4(d), 3.8(e), and 8.4(d), and a majority of the Hearing Committee also determined Respondents violated 8.4(c). A majority of the Hearing Committee recommends that

[7] The Court reversed one of two convictions in the case of the second defendant on other grounds. *Vaughn*, 93 A.3d at 1273.

Respondents be suspended for thirty days, and the dissenting member of the Hearing Committee, finding no 8.4(c) violation, recommends an informal admonition.[8]

Respondents have taken exception to each of the conclusions of law in Hearing Committee Report and Recommendation, arguing that they lacked the requisite intent to violate any of the Rules at issue and that, even if they violated a Rule, the Board should not recommend that they serve a period of suspension. With the exception of its Rule 8.4(d) analysis and its sanction recommendation, Disciplinary Counsel asks that the Board adopt the Hearing Committee Report. The Board finds that Respondents violated Rules 3.8(e), 8.4(c) and 8.4(d), but not Rule 3.4(d). We recommend that Respondents be suspended for six months.

IV. STANDARD OF REVIEW

Disciplinary Counsel bears the burden of proving the alleged Rule violations by clear and convincing evidence, which is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005). In deciding whether Disciplinary Counsel has carried this burden, we are required to accept the Hearing Committee's factual findings that are supported by substantial evidence in the record as a whole, even

[8] The Chair of the Ad Hoc Hearing Committee appended a Separate Statement of the Committee Chair Regarding Procedural Matters suggesting to the Board that (i) it "consider a Rule amendment that would more forcefully 'encourage' prehearing fact stipulations," Sep. Statement at 7, and (ii) in matters where the facts or legal issues are complicated, that Hearing Committees be encouraged to have the parties present closing arguments, *see* Sep. Statement at 8-9. Since the issuance of the Hearing Committee's Report, Board Rule 7.20 has been amended to encourage the use of opening statements and closing arguments during hearings. Nonetheless, the Board very much appreciates the Chair's thoughtful submission and shall refer his proposals to the Rules Committee for further consideration.

where the evidence may support a contrary view as well. *In re Robbins*, 192 A.3d 558, 564 (D.C. 2018) (per curiam); *In re Martin*, 67 A.3d 1032, 1039 (D.C. 2013). "Substantial evidence means enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam). We review *de novo* the Hearing Committee's legal conclusions and its determination of "ultimate facts," that is, those facts that have "a clear legal consequence." *In re Micheel*, 610 A.2d 231, 234-35 (D.C. 1992) (internal quotations omitted). When making our own findings of fact, the Board employs a "clear and convincing evidence" standard. Board Rule 13.7.

V. CONCLUSIONS OF LAW

A. Rule 3.8(e) (Special Responsibilities of a Prosecutor)

The Hearing Committee determined that Respondents violated Rule 3.8(e) because they intentionally failed to timely disclose to the defense the impeaching information concerning Officer Childs. The Hearing Committee did not separate out which information or evidence – specifically – was the basis of the Rule 3.8(e) violation.

Consistent with the relevant precedent, the *Vaughn* opinion clearly found that the government violated *Brady* and *Giglio* by failing to timely disclose the Collins Report and summarizing it in a way that was inaccurate.[9] Of course, a finding that

[9] *See Vaughn*, 93 A.3d at 1257-58 (citing *Miller v. United States*, 14 A.3d 1094, 1108 (D.C. 2011) (explaining that "a strategy of delay and conquer . . . is not acceptable"); *Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010); *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009) (finding that *Brady* requires "timely, pretrial disclosure"); *Boyd v. United States*, 908 A.2d 39, 57 (D.C. 2006)

the government violated *Brady* in this prosecution does not automatically mean that Respondents violated Rule 3.8(e). A *Brady* violation is a violation by the government as a whole – the entire prosecution team. If exculpatory information is in the possession of a law enforcement agent, but the prosecutor is not made aware of it, for example, that would very likely be a *Brady* violation but not a violation of Rule 3.8(e). Only an individual prosecutor is subject to discipline under Rule 3.8, and only for her actions.

On the record before us, as to these Respondents, we conclude that the plain language of Rule 3.8(e) compels the conclusion that Respondents' failure to disclose the false disciplinary charge and Officer Childs' demotion in the motion in limine was a violation of Rule 3.8(e). We discuss how we reach this conclusion in the course of our discussion below.

Respondents raise two arguments asserting that there was not a Rule 3.8(e) violation: (1) that Respondents did not have the requisite intent to violate Rule 3.8(e) and (2) that Respondents could reasonably take refuge in the last sentence of Rule 3.8(e) that says a prosecutor can rely on a protective order from the Court. We do not agree with Respondents' reading of the intent requirements in Rule 3.8(e), nor do we think they can avail themselves of the protections of the "protective order" clause of Rule 3.8(e) on these facts.

("[T]imely disclosure . . . can never be overemphasized."); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (explaining the goal of ensuring that our "adversary system of prosecution [does not] descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth"); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (finding that *Brady* does not tolerate the "government['s] failure to turn over an easily turned rock")).

We do not conclude, however, that Disciplinary Counsel has proven by clear and convincing evidence that Respondents violated Rule 3.8(e) by failing to timely make a disclosure or by not giving the Collins Report itself to the defense.

We discuss each of these points in turn.

B. Respondents Violated Rule 3.8(e) By Not Disclosing Childs' False Disciplinary Charge or His Demotion

We begin with a discussion of the Rule's language.

Rule 3.8 provides that

> The prosecutor in a criminal case shall not: . . . (e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Leaving aside the protective order exception, which we discuss below, Rule 3.8(e)'s elements, under the plain language of the Rule, are:

(1) There is evidence or information that tends to negate the guilt of the accused that the prosecutor knows about;

(2) The prosecutor either knows or reasonably should know that the evidence tends to negate the guilt of the accused; and

(3) The prosecutor intentionally fails to timely disclose the evidence or information to the defense upon request.

Failure to Disclose the False Disciplinary Charge

Here, there is no question that the determination in the Collins Report that Officer Childs filed a false disciplinary charge was *Giglio* information.[10] As the *Vaughn* Court said "the determination that this information was favorable information subject to disclosure under *Brady* is not difficult. The OIA's determination of Officer Childs' false reporting was clearly impeaching, and was the sort of information in which any competent defense lawyer would have been intensely interested." 93 A.3d at 1255. Thus, the first element is met.

Moreover, a reasonable prosecutor would have known that Childs' fabrication of a disciplinary charge was *Giglio* information. Regardless of whether Respondents were laboring under the misapprehension that only the findings section of the Collins Report could be *Giglio* material, *see* FF 37, 43, or just failed to focus on the half of a page describing Childs' false disciplinary charge in the eight and a half page report, Respondents reasonably should have known that an official determination that a corrections officer lied to get an inmate in trouble would be powerful impeachment evidence in a case where that corrections officer is going to testify against an inmate defendant at trial.[11] The second element is met.

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[10] Respondents do not contend that they were unaware of, or forgot about, the false disciplinary charge in drafting the motion in limine. *See* Tr. 252-54 (Taylor), 482-84 (Dobbie). Indeed, Respondent Taylor admitted that they did not report to the defense that Childs "falsely accused another inmate of assaultive behavior" and testified that "to be clear, we recognized that this was Brady material." Tr. 252-54.

[11] That Respondents argued exactly the opposite in their motion in limine – that "cross-examination regarding the potentially false or misleading statement in [sic] Internal Affairs

Finally, we determine that Respondents intentionally filed the motion in limine that did not contain the disclosure. The intent required is not the intent to violate the Rule; it's the intent to withhold information that a reasonable prosecutor would have understood tended to negate the guilt of the accused. If a prosecutor determined that 100 pages of material needed to be disclosed as *Brady* but, due to a copying error, only produced fifty of those pages, that prosecutor would not violate Rule 3.8(e); her failure to disclose was accidental, not intentional.[12] Here, though, Respondents disclosed everything they intended to. They were wrong about what should be disclosed – they should have known that the finding that Childs lied in the disciplinary charge tended to negate the defendant's guilt because a reasonable prosecutor would. Instead, Respondents included everything in the motion in limine that they intended to include. As a result, they intentionally failed to include facts that a reasonable prosecutor would have known were required to be disclosed.

Failure to Disclose Officer Childs' Demotion

Whether Respondents violated Rule 3.8(e) by failing to disclose Officer Childs' demotion is a much more complicated issue. Respondent Dobbie testified that she "forgot" that Childs was demoted and did not disclose the demotion for that reason, rather than as the result of a conscious decision not to disclose the demotion.

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investigation in the present case does not bear 'directly' upon the issues in this trial," DX 17 at 7 – is troubling. This argument displays a dramatic failure to understand the nature of *Brady* and *Giglio*.

[12] As we read *In re Kline*, 113 A.3d 202 (D.C. 2015), as discussed below, a prosecutor can also meet the "intent" standard through "aggravated neglect."

Tr. 564-65. The Hearing Committee credited this testimony, and Disciplinary Counsel did not undermine it at the hearing. Nonetheless, we determine that this is a Rule 3.8(e) violation.

The Court of Appeals, in *Kline*, said that only evidence that a prosecutor has actual knowledge of can be the basis of a Rule 3.8(e) violation. *In re Kline*, 113 A.2d 202, 212 (D.C. 2015). We understand this requirement in *Kline* as one way of articulating, with a limitation, the scope of Rule 3.8(e): if someone on the prosecution team knows of a piece of evidence that would be *Brady* material, but the prosecutor herself doesn't know about it, a failure to turn over that evidence would be a *Brady* violation but not a Rule 3.8(e) violation. We do not read the language in *Kline* requiring actual knowledge as anything more than that.

Disciplinary Counsel argues that *Vaughn* reaffirmed the proposition that a prosecutor has a duty to "turn over an easily turned rock," 93 A.3d at 1258 (quoting *Brooks*, 966 F.2d at 1503), so that even if there is no actual knowledge of the evidence under the easily turned rock, it is a violation of *Brady* to fail to find and disclose that information. As a matter of black-letter *Brady* law that is correct. However, *Vaughn* is a case about the scope of *Brady*, not the scope of Rule 3.8(e). As we read the Court of Appeals cases, whether a *Brady* violation for failure to "turn over an easily turned rock" would also be a violation of Rule 3.8(e) is an open question.

However, we do not think we need to reach that issue to resolve whether the failure to disclose the demotion was a violation of Rule 3.8(e). Respondent Dobbie

testified that she "forgot" about the demotion even though she knew that it was related to the incident described in the Collins Report, and she was aware "it ha[d] to be disclosed." Tr. 565; *see* Tr. 491-92. A person can only forget something that she knows. By testifying that she forgot about the demotion, Respondent admitted that she knew about the demotion. Because she had actual knowledge of the demotion, the test set out in *Kline* is met.

As to Respondent Taylor, there is no similar testimony that she forgot about Childs' demotion or the reason for that demotion. She did know of the demotion, but the record is unclear what she understood the reason for that demotion to be. Childs told her that he was demoted for the use of excessive force and "because he made errors in cutting and pasting in a report." Tr. 210 (Taylor). She testified at the hearing that she understood that Collins believed it was because of the conclusions in the Collins Report, including the false disciplinary charge. *See* Tr. 271 (Taylor). She was also copied on an email among her supervisors that said Childs was demoted for lying. *See* DX 13. Ultimately, she was aware both of the demotion and of the Collins Report, which concluded that Childs submitted a false disciplinary charge and incident report.

As the Court noted in *Vaughn*:

> The government has never denied that Officer Childs was demoted in connection with the Inmate A incident detailed in the [Collins] Report; it simply presented the contents of that report as something other than they are. One might try to argue that Officer Childs's demotion may have been related to only some but not all of the misconduct actually found by the OIA (e.g., the improper use of force but not the false reporting). But such an argument would be

> unpersuasive as Officer Childs had already been disciplined (via the Letter of Direction) for his improper use of force, and the submission of false reports—in particular reports falsely accusing an inmate of criminal conduct—are hardly insignificant.

93 A.3d at 1255 n.20.

Respondent Taylor knew that Childs was demoted, knew that the demotion came after the Collins Report, knew the contents of the Collins Report included the false disciplinary charge, and knew that Collins believed the reason for the demotion included the false disciplinary charge. This knowledge, coupled with the Court's observation that an inference that Childs was demoted because of excessive force is untenable, leads us to make the factual finding that Respondent Taylor knew Childs was demoted because of the conclusions in the Collins Report, including the false disciplinary charge.[13]

The second element is also met; a reasonable prosecutor would know that the demotion had to be disclosed. *See id.* at 1255. This much is not meaningfully in dispute. It may be that Respondents did not connect the dots between the information in the Collins Report and the demotion to fully appreciate its importance, but a reasonable prosecutor would have.

[13] If this factual finding is incorrect, we would arrive at the same result through a different method. Respondent Taylor knew each of the facts about the demotion laid out here. They were not disclosed. A reasonable prosecutor would have known they should have been. We would, therefore, arrive at the same conclusion on elements (1) and (2) of the Rule 3.8(e) violation as a result of the failure to disclose the demotion as if we had not reached the factual finding described above. Our discussion of the aggravated neglect of the duty to disclose these facts, set out below, would still apply to Respondent Taylor.

Whether Respondents meet the third element, that they intentionally failed to disclose the demotion, involves a different analysis than we discussed with the failure to disclose the false disciplinary charge. Because Dobbie forgot about the demotion, it appears that she did not make a conscious decision to not disclose the demotion. This presents a more challenging question of whether she "intentionally failed" to disclose the demotion.

In *Kline*, the Court of Appeals provided an alternative method to determine if a prosecutor met the intent standard in Rule 3.8(e): aggravated neglect.[14] There, the Court held that when the "entire mosaic of conduct" supports a finding that the prosecutor acted with aggravated neglect, that can be sufficient to meet the intent requirement of Rule 3.8(e). 113 A.3d at 213. The Court cited *In re Ukwu* for a similar proposition in the context of neglect of a client's case: "intentional neglect of client's case 'does not require proof of intent in the usual sense of the word. Rather, neglect ripens into an intentional violation when the lawyer is aware of his neglect of the client matter.'" *Id.* (quoting *In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007)).

Applying this standard, we conclude that the third element is also met as to Respondents' failure to disclose Officer Childs' demotion. When we look at the mosaic of conduct here, and Respondents' treatment of their obligations to disclose to the defense and comply with *Brady*, we find that Respondents meet the aggravated neglect standard. Respondents were aware that they had an obligation to disclose

[14] Respondent Dobbie asks us to reject the Court of Appeals' clear language in *Kline* as not supported by the cases cited for the aggravated neglect standard there. We simply cannot do that. The Court of Appeals articulates the law and we are bound to follow its precedents.

exculpatory information. They made a decision to craft the motion in limine as an advocacy piece and not as a straightforward disclosure.[15] Thus, in light of the way Respondents characterized what happened with Officer Childs in the motion in limine, we conclude that the entire mosaic of facts supports the finding, by clear and convincing evidence, that Respondents acted with aggravated neglect of their duty to disclose Officer Childs' demotion to the defense.

Perhaps if we were to only consider the narrow facts surrounding the nondisclosure of the demotion, we would reach a different result. But that is not the test that the Court of Appeals set out. Looking at Respondents' conduct as a whole – as we must – we determine there was aggravated neglect.

At its core, Rule 3.8(e) recognizes that prosecutors have two roles: they are advocates to be sure, but at the same time they must play straight with the defense and the Court. *Vaughn*, 93 A.3d at 1253 ("Prosecutors have a critical role in ensuring the fairness of criminal trials. They are the representative of the sovereign, whose 'interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'") (ellipsis in original) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). As the Court of Appeals recognized, and we agree, the motion in limine was an advocacy piece that abandoned Respondents' responsibility to disclose the

[15] Notably, Respondents did not follow the sample they were given that assumed the Collins Report itself would be disclosed. Instead, they choose to serve two ends in one document: making a disclosure and also arguing that a full disclosure isn't necessary and that the cross-examination of Officer Childs should be limited. As the *Vaughn* Court observed, "the government's motion in limine to preclude impeachment of Officer Childs cannot be construed as a *Brady* disclosure because it worked—the government's motion prevented an effective cross-examination of Officer Childs on the subject of his prior false reporting." *Vaughn*, 93 A.3d at 1262.

facts in the Collins Report. Viewed in conjunction with that conduct, the conclusion that Respondents acted with aggravated neglect in failing to disclose Officer Childs' demotion is not difficult to reach.

Respondents' Intent Arguments

Respondents have two related arguments about why the Board should conclude that they do not have the requisite intent.

First, Respondents argue that the intent requirement in Rule 3.8(e) requires a showing that they intended to hold something back that they knew should be disclosed. Because Disciplinary Counsel hasn't made the showing that they were motivated by bad faith, they argue, there cannot be a Rule 3.8(e) violation in this case.

We do not agree with Respondents' arguments about the plain language of Rule 3.8(e). The challenge for Respondents' reading of Rule 3.8(e) is the "reasonably should know" part of Rule 3.8(e). Under the Rule, a prosecutor can violate Rule 3.8(e) by intentionally failing to disclose something that she does not believe "tends to negate the guilt of the accused" if a reasonable prosecutor should know that the withheld information "tends to negate the guilt of the accused." Put another way, the Rule does not require actual knowledge by a prosecutor that evidence is exculpatory for a prosecutor to violate the Rule by failing to disclose it. To read Rule 3.8(e) to require a showing of bad faith or nefarious purpose would read the "reasonably should have known" language out of the Rule. We do not think that the intent required by this Rule is an intent to do wrong; "intentionally" merely

precludes liability where the disclosure is intended to be made, but that disclosure is unsuccessful by accident. Respondents make much of the first word of the Rule: "intentionally." But each of the other words matters too, and there is no way to square the "reasonably should have known" portion of Rule 3.8(e) with a requirement that a prosecutor acted in bad faith.

The Board's rationale in this case is consistent with the Court's decision in *Kline*, 113 A.3d at 213. There, the prosecutor argued that he had not *intentionally* failed to disclose exculpatory evidence to the defense because, among other things, he did not believe that the information was exculpatory at that time. *Id*. at 214. The Court determined that the respondent had acted with the requisite deliberateness, for purposes of Rule 3.8(e), because he consciously decided that the exculpatory evidence did not have to be produced – even though he was misguided in his calculus that it was not exculpatory – and, as such, intentionally withheld it. *Id*. at 214.

Next, Respondents argue that, in essence, they did their best. To be sure, there are some facts in the record that establish that Respondents tried to do some things right. They did raise the Collins Report with their supervisors. They did disclose the Collins Report, imperfectly, to the Court. But they acted alone in drafting the motion in limine's summary of the Collins Report. No supervisor told them that it was acceptable to only summarize part of the Report, or to omit the finding that Childs was found to have falsely accused an inmate of assaulting a guard. Moreover, to the extent that the U.S. Attorney's Office as a whole failed these Respondents – and there is reason to think that is a fair characterization of what happened here – this is

the kind of decision that line prosecutors are called upon to make routinely; those prosecutors simply must know and follow *Brady*.

Moreover, "doing your best" is not a defense to a Rule 3.8(e) charge. Rule 3.8(e) required the production of this information because a reasonable prosecutor would have known that an official finding that a corrections officer lied to get an inmate in trouble would be very helpful to a defense attorney trying to argue that the corrections officer is lying to get an inmate in trouble in a criminal prosecution.[16]

There Was No "Protective Order" Exemption for the Disclosure of the Information in the Collins Report

Respondents also argue that the "protective order" exception to Rule 3.8(e) applies here and absolves them of any liability under Rule 3.8(e). We disagree.

The last clause of Rule 3.8(e) says that the Rule's disclosure requirements apply "except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

Respondents argue that by filing the Collins Report with the Court, and having the Court deny defense counsel's request to get a copy of the Collins Report, that was the functional equivalent of a protective order that did not require them to disclose the information in the Collins Report to the defense.

As we discuss below, we do not find that Disciplinary Counsel has proven a Rule 3.8(e) violation with respect to the Collins Report itself because Respondents

[16] Similarly, we do not find merit in Respondents' arguments that we are applying law from 2012 or 2014 to conduct that took place in 2009. The Collins Report should have been disclosed under any legal regime; Childs' false disciplinary charge against an inmate was *Giglio* material in 2009.

disclosed the Report and filed it with the Court. However, Respondents had a duty to disclose both the Report and the information in it to the defense; Rule 3.8(e) requires disclosure of both the information and the evidence. Obviously, the easiest way to accomplish that would be to provide the defense with the Collins Report, thereby providing the information within it and the Report itself.

However, because the motion in limine so inadequately and inaccurately summarized the information in the Collins Report, Respondents failed to provide the information in the Report to the defense. Respondents also failed to adequately provide the information in the Report to the Court by submitting the inadequate and inaccurate motion in limine, and by only providing a partial copy of the Report itself, and failing to correct the error when the Court noted that its copy ended on page five and did not contain any findings. Moreover, the Court was able to deny defense counsel's request for the Report because Respondents represented that they had already provided the information to the defense. Respondents' failure to include essential parts of the Collins Report means the Court denied defense counsel's request based on a serious misunderstanding of what had been disclosed to the defense. *See Vaughn*, 93 A.3d at 1254-55 ("We recognize that the trial court was constrained in its ability to assess [the Collins Report and Collins' Affidavit] by the government's late production and continued misrepresentation or nondisclosure of the information in its possession . . . . [W]e conclude that the trial court was misled and that its adoptive fact-finding was clearly wrong.").

In short, Respondents' motion and the Court's order covered the disclosure of the Collins Report, not the information within it. The easiest way to see that this is the scope of Respondents' request is that they also purported to summarize the information in the Collins Report in the motion in limine. The scope of their request to protect the Report, and the Court's protection of the Report, stops at the Report itself.

No Finding of a 3.8(e) Violation for Untimely Disclosure

The Court of Appeals found that the disclosures made in the motion in limine in this case were untimely. As the Court opined,

> By no means can the government's motion in limine constitute a timely pretrial disclosure of the information it possessed about Officer Childs's discipline as a result of the OIA investigation. The motion in limine provided no information on this subject although—according to the affidavit from OIA Investigator Collins that the government filed with the court—the "U.S. Attorney's Office" was informed of the OIA Final Report "concerning Lieutenant Childs and his subsequent demotion" nearly two months before the government filed this motion. The government did not reveal that Officer Childs had been demoted until the first day of trial, when it briefly noted that Officer Childs was demoted "related to" the April 2009 incident that it had incompletely summarized in its motion in limine.

Vaughn, 93 A.3d at 1257.

> But the government's disclosure obligations were triggered well before the DOC decided to demote Officer Childs. The government had an obligation to notify the defense that Officer Childs was under investigation by the DOC OIA. *See United States v. Bowie*, 198 F.3d 905, 908 (D.C. Cir. 1999) (determining that the prosecution had a duty to disclose the fact that one of its police officer witnesses had become "the subject of an investigation into the truthfulness of his testimony" in another case); *see also Bullock v. United States*, 709 A.2d 87, 92-93 (D.C. 1998) (remanding to trial court to develop record on whether

> government should have disclosed that testifying law enforcement officer was under investigation). As to the OIA investigation, which began in April 2009 and concluded in June 2009, the government's motion in limine, filed a week before the November 2009 trial, was not an "as soon as practicable" *Brady* disclosure.

Vaughn, 93 A.3d at 1257-58.

Here, there is not clear and convincing evidence that these Respondents violated Rule 3.8(e) by failing to disclose timely. On this record, given the substantial delays and poor supervision in the U.S. Attorney's Office, it is hard to fault these Respondents with the delay. Within fourteen days of receipt of the Collins Report, they identified the issues associated with sponsoring Officer Childs' testimony and escalated the issue to their supervisor, who in turn promptly escalated the issue to the *Lewis* Committee. After their repeated requests for the *Lewis* Committee's determination, Respondents finally received a response almost one month later and approximately eleven days prior to the first day of trial. Within six days of receipt of the *Lewis* Committee's response that they could call Childs to testify – and six days before the start of trial – Respondents drafted and filed their motion in limine and motion to file under seal.

For that reason, we do not think there is clear and convincing evidence that the delay in producing information from the Collins Report or the Report itself violated Rule 3.8(e).

No Finding of a 3.8(e) Violation for Filing the Collins Report with the Court

Disciplinary Counsel contends that "Rule 3.8(e) requires disclosure to the defense, not to the court." ODC Br. to Board at 33. The Collins Report was not

disclosed to the defense; instead, it was filed with the Court under seal. When defense counsel asked the Court for the report, the Court denied the request.

Respondents argue that by filing the Report under seal, and having the Court tell defense counsel that it would not order it disclosed to the defense, Respondents had the functional equivalent of a protective order such that the protective order exception should apply.

We have reservations about that argument. Rule 3.8(e), as well as *Brady* and *Giglio* do not support outsourcing a prosecutor's obligations to the Court. However, Judge Morin did testify that this process was commonly in place at the time. We are reluctant to reach a conclusion that if the Court adopts a practice where the Court takes on the obligations of the prosecutors before it, those prosecutors should be faulted for following the Court's practice.

Moreover, apparently as a result of a faxing error, Respondents only provided the Court with half of the report – the first five pages. But this failure to provide the entire report to the Court is exactly what the word "intentionally" in Rule 3.8(e) is meant to shield from disciplinary liability. Respondents intended to provide the entire report; they didn't but only because of an accident. Unlike Respondents' decision to exclude clear *Brady* evidence from the motion in limine, the failure to provide the entire report to the Court was not intentional; it was an accident.

As a result, we do not reach a finding that there is proof by clear and convincing evidence that Respondents violated Rule 3.8(e) by failing to give the Collins Report to the defense when they filed it with the Court.[17]

C. Rule 8.4(c) (Dishonesty)

The *Vaughn* Court determined the motion in limine "presented as true that which [the Collins Report] had determined false." 93 A.3d at 1259. A majority of the Hearing Committee found that Respondents made recklessly false statements when they "attempted to muddy" Mr. Collins' clear finding that Officer Childs had lied about his involvement in an unrelated excessive use of force case; did not concede that "Childs had made a false and/or misleading statement"; and omitted key details of the facts surrounding the Collins Report to "portray the motion to be a complete and fulsome summary" contrary to their assertions that the motion in limine contained the "essential facts" from the Collins Report. HC Rpt. at 74.

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Court has emphasized that "[l]awyers have a greater duty than ordinary citizens to

[17] Similarly, we do not address whether there would be a Rule 3.8(e) violation in a case where a prosecutor only filed potential Brady evidence with the Court *ex parte* that was not accompanied by representations like those made by Respondents in the motion in limine. Such a fact pattern is not before us in this case.

be scrupulously honest at all times, for honesty is 'basic' to the practice of law." *In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) (per curiam).

Dishonesty, under Rule 8.4(c), is defined as:

> fraudulent, deceitful, or misrepresentative behavior [and] conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness . . . . Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.

In re Shorter, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (internal quotation marks and citation omitted); *see also In re Scanio*, 919 A.2d 1137, 1142-43 (D.C. 2007). Dishonesty in violation of Rule 8.4(c) does not require proof of deceptive or fraudulent intent. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Thus, when the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *Id.* Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.* A violation of Rule 8.4(c) may also be established by sufficient proof of recklessness. *See id*. at 317. To prove recklessness, Disciplinary Counsel must prove by clear and convincing evidence that the respondent "consciously disregarded the risk" created by her actions. *Id.*

We do not think that there is sufficient evidence in the record to establish that Respondents knew they were misrepresenting the Collins Report when they wrote the motion in limine. Yet, the record evidence that they did so recklessly fully supports the *Vaughn* Court's assessment of the motion in limine, namely that it was

a pattern of "continued misrepresentation" and that the motion "presented as true that which [the Collins Report] had determined false" including that "the OIA had determined that, as part of his fabricated story of inmate assault, Officer Childs *had* misleadingly indicated that Inmate A was unrestrained." 93 A.3d at 1255, 1259-1260. The Collins Report is so short, and the conclusion that Childs lied when he falsely charged an inmate with assault is so clear, that one can scarcely reach any conclusion but that the motion in limine was written with a reckless disregard for the truth of what was in the Collins Report.

For that reason, we agree that Respondents violated Rule 8.4(c).

D. Rule 3.4(d) (Fairness to Opposing Party and Counsel)

Rule 3.4(d) sets out standards for any lawyer with respect to her discovery obligations. It says that "[a] lawyer shall not . . . [i]n pretrial procedure, . . . fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party."

The Hearing Committee's determination that Respondents violated Rule 3.8(e) "necessarily" included a conclusion that Respondents violated Rule 3.4(d) because "the substance and adequacy of their [discovery] response was woefully inadequate." HC Rpt. at 64-65.

Respondents argue that the Hearing Committee misapplied the standard under the Rule and that, as the Rule with the "more specific obligation and one that adopts an intent requirement, Rule 3.8(e) should be understood to supplant Rule 3.4(d) as to discovery requests for *Brady* information." Dobbie Br. to Board at 57-58.

Disciplinary Counsel agrees with the Hearing Committee's analysis and adds that Respondents' misconduct may violate more than one disciplinary Rule. ODC Br. at 39-40.

This issue matters not one whit to the sanction or any other issue before the Board or, later, the Court. The Court has said that we decide sanction based on the underlying conduct, not the number of Rule violations. *See In re Guberman*, 978 A.2d 200, 206 n.5 (D.C. 2009) (stating that the Court employs a "fact-specific approach in determining sanctions for misconduct [that] requir[es] [consideration of a] [r]espondent's particular misconduct, and not simply the rules that he [or she] violated" (quoting *In re Guberman*, Bar Docket No. 311-06 (BPR Nov. 6, 2007))). *But see Cater*, 887 A.2d at 16 n.14 ("There is no preemption [issue], however, where, as here, the lawyer is found to have violated the more specific Rule. In that case it remains appropriate to determine whether the lawyer also transgressed the more general Rule.").

As with our conclusion in *Johnson* that a lawyer who does not put a contingent fee agreement in writing violates only Rule 1.5(c) and not Rule 1.5(b), here, we conclude that Rule 3.8(e)'s application should apply and not Rule 3.4(d). *See In re Johnson*, Board Docket No. 18-BD-058, at 33 (BPR Oct. 13, 2020), *review pending*, D.C. App. No. 20-BG-0600. That said, prosecutors, of course, have discovery obligations beyond those found in *Brady*. If a prosecutor were to violate another kind of discovery obligation that is not at issue in Rule 3.8(e), such a violation could implicate Rule 3.4(d). But that is not this case. Here, when the discovery violation

at issue is exclusively a *Brady* issue, and dealt with by Rule 3.8(e), we agree with Respondents that the specific Rule – 3.8(e) – should govern, and not Rule 3.4(d).

E. Rule 8.4(d) (Serious Interference with the Administration of Justice)

The Hearing Committee found that Respondents violated this Rule because their misconduct required the expenditure of significant judicial resources, including months of additional pleadings and hearings and the reversal of a criminal conviction. Respondents argue that the Rule 8.4(d) violation cannot stand because they did not reasonably know that they needed to disclose the facts identified as *Brady* material. Disciplinary Counsel advocates the position that a failure to disclose exculpatory information is so improper that any Rule 3.8(e) violation should also constitute a violation of Rule 8.4(d). In the alternative, Disciplinary Counsel asks that the Board adopt the Hearing Committee's position.

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e*., that Respondent either acted or failed to act when she should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). Rule 8.4(d) is violated if the attorney's conduct causes the unnecessary expenditure of

time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009).

In light of our conclusion that Respondents violated Rule 3.8(e) and Rule 8.4(c), and the colossal expenditure of resources cleaning up Respondents' failure to accurately or adequately summarize the Collins Report in their motion in limine, we agree with the Hearing Committee that Respondents violated Rule 8.4(d).

VI. SANCTION

The Hearing Committee recommended that Respondents be suspended for thirty days. Respondents argue that any sanction under these circumstances would be "needlessly punitive" and that, if any sanction is recommended, the Board should, instead, announce what sanction *might* be appropriate if the issues here were not novel, without *imposing* it. Disciplinary Counsel argues in favor of a suspension period of at least sixty days.

We disagree with Respondents that a sanction here would be "needlessly punitive" or that the issues here are so novel that a sanction is unwarranted. As to the core violations here – failing to disclose the false disciplinary charge and dishonestly construing the Collins Report in the motion in limine – we break no new ground. We agree with Disciplinary Counsel that the sanction should be at least a sixty-day suspension. Accordingly, we determine that a six-month suspension is appropriate, in large part because Respondents' conduct involved dishonesty to the Court and defense counsel. We are aware that the Court has said that imposing a greater sentence than the one recommended by Disciplinary Counsel "is and surely

should be the exception, not the norm, in a jurisdiction, like ours, in which [Disciplinary] Counsel conscientiously and vigorously enforces the Rules of Professional Conduct." *Cleaver-Bascombe*, 892 A.2d at 412 n.14. We, of course, follow the precedents of the Court and would recommend a sanction greater than that suggested by Disciplinary Counsel only rarely. However, where, as here, Disciplinary Counsel's recommendation is not a firm sixty-day suspension but, rather, is couched as a floor on the sanction – the sanction should be "at least" sixty days – we believe our recommendation is consistent with Disciplinary Counsel's recommendation.

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *Martin*, 67 A.3d at 1053; *Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a

number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)). "'[T]he imposition of sanction in bar discipline cases is not an exact science' . . . and 'within the limits of the mandate to achieve consistency, each case must be decided on its particular facts.'" *Cater*, 887 A.2d at 27 (citations omitted).

The Rule 3.8(e) violation is the central violation in this case; however, the determination that Respondents violated Rule 8.4(c) is a substantial aggravating factor. As Disciplinary Counsel acknowledged at oral argument, with respect to sanction on the Rule 3.8(e) violation, there is little to guide us; there is limited caselaw concerning the appropriate sanction in matters involving prosecutorial misconduct in violation of Rule 3.8(e).

Disciplinary Counsel is surely right that, as a general matter, a violation of Rule 3.8(e) undermines our entire system of criminal justice. Prosecutors are not merely advocates; they are called upon to make sure that criminal trials are fair to

the accused and that the machinery of prosecution is credible. At its most severe, a violation of Rule 3.8(e) can mean that an innocent person languishes in prison – which would surely be an aggravating factor.

In *Kline*, the Court stated that it would have imposed a thirty-day suspension but for the uncertain state of the law concerning whether Rule 3.8(e) applied to non-disclosures that did not meet the materiality element of *Brady*. 113 A.3d at 215-16. Distinguishable from the instant matter, however, *Kline* did not involve dishonesty to the Court.

In *Howes*, 52 A.3d at 5-7, however, a respondent federal prosecutor was disbarred for failing to disclose witness voucher payments to trial court judges. He was also knowingly dishonest and took advantage of a system that made his dishonesty hard to detect, an aggravating factor. Though *Howes* involved a pattern of conduct, not one case as here.

On the one hand, Respondents have expressed remorse concerning their misconduct and there is no evidence that either Respondent was previously or subsequently disciplined. And, while the failures of the U.S. Attorney's Office to appropriately supervise these attorneys do not absolve them of a rule violation, they are relevant to sanction.

On the other hand, this case presents the significantly aggravating factor found in *Howes* and *Cleaver-Bascombe* – dishonesty to the Court that is difficult to detect. *See Howes*, 52 A.3d at 22 ("Where misconduct is particularly difficult to discover and involves direct exploitation of government resources, as with government

voucher fraud, a greater penalty is warranted in the interest of both deterrence and protection of the public."); *Cleaver-Bascombe*, 986 A.2d at 1199-1200 ("Importantly, too, for this case, we keep in mind that one purpose of discipline is to deter other attorneys from engaging in similar misconduct . . . . In the interest of effective general deterrence, the severity of a sanction should take into account the difficulty of detecting and proving the misconduct at issue." (internal citation and quotations omitted)). The need for general deterrence in matters where otherwise difficult to detect dishonesty is found is a strong reason for a greater sanction than if this were merely a Rule 3.8(e) violation.

Accordingly, we conclude that a sanction much more significant than that in *Kline* is warranted. We believe that a six-month suspension is the appropriate sanction.

VII. CONCLUSION

For the foregoing reasons, the Board recommends that the Court conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondents violated Rules 3.8(e), 8.4(c), and 8.4(d) and should be suspended for a period of six months.

BOARD ON PROFESSIONAL RESPONSIBILITY

Matthew G. Kaiser, Chair

All Members of the Board concur in this Report and Recommendation.