

**PROACTIVE REGULATION OF PROSECUTORS’  
OFFICES: STRENGTHENING DISCIPLINARY  
COMMITTEES’ OVERSIGHT OF PROSECUTORS’  
OFFICES ACROSS THE UNITED STATES WITH  
ABA MODEL RULE 5.1**

*Caitlyn B. Holuta\**

*In the United States, there are currently several mechanisms to deter prosecutorial misconduct, including judicial orders, civil litigation by defendants, enforcement actions by disciplinary authorities, and internal discipline within a prosecutor’s office. Despite these many avenues of oversight, none have successfully prevented misconduct to the degree society demands. Several international legal systems have adopted regulatory frameworks based on the theory of proactive management-based regulation, which mitigates against unethical conduct by requiring attorneys to self-assess their internal ethics policies against a rubric of ethics goals set by ethics and disciplinary authorities. While most U.S. jurisdictions have not adopted proactive management-based regulations, attorneys are required by state-enacted versions of American Bar Association (ABA) Model Rule of Professional Conduct 5.1 to maintain internal policies that guarantee ethical practices in their offices. This Note argues that disciplinary committees should meaningfully enforce ABA Model Rule 5.1 by utilizing a proactive regulatory approach. By requiring prosecutors to self-assess and report whether their office policies guarantee ethical prosecutions and prevent misconduct, disciplinary committees can safeguard against prosecutorial misconduct more than current efforts. Proactive enforcement of Model Rule 5.1 allows disciplinary committees to move beyond a defensive, ex post approach to misconduct and, instead, utilize preventative measures that would demand accountability from historically opaque prosecutors’ offices.*

---

\* J.D. Candidate, 2021, Fordham University School of Law; B.A., 2016, University of Notre Dame. I would like to thank both Professor Bruce Green for his guidance and expertise and the *Fordham Law Review* editors and staff for their encouragement, direction, and diligence. I would also like to thank my family, friends, and especially my husband, Nick, for your unending encouragement and support.

INTRODUCTION.....	696
I. CURRENT AVENUES OF OVERSIGHT AND RECOURSE FOR PROSECUTORIAL MISCONDUCT .....	699
A. <i>Prosecutorial Misconduct and Preventative Mechanisms in         the United States</i> .....	700
B. <i>Disciplinary Committees' Current Use of the Rules of         Professional Conduct to Regulate Prosecutors</i> .....	703
1. Model Rule 5.1: Current Use and Shortcomings .....	705
2. Internal Discipline as a Form of Redress for Prosecutorial Misconduct.....	706
II. PMBR AS A TOOL TO ESTABLISH ETHICAL INFRASTRUCTURE AND PREVENT ETHICAL VIOLATIONS AND MISCONDUCT .....	708
A. <i>PMBR Protects Ethical Obligations in the Face of         Divergent Practice Incentives</i> .....	709
B. <i>Development and Implementation of Proactive Regulatory         Measures</i> .....	710
III. LACK OF PMBR THEORY IN U.S. PROSECUTORS' OFFICES .....	713
A. <i>A PMBR-Style Application of Model Rule 5.1 in         Prosecutors' Offices</i> .....	713
1. Regulatory Benefits of Enforcing Model Rule 5.1 Through PMBR.....	714
2. Cost Savings of PMBR.....	715
B. <i>The Plausible Challenges of Applying a PMBR-Based         Model Rule 5.1</i> .....	716
1. The Cost of Compliance .....	716
2. Prosecutors' Resistance to Public Self-Reporting.....	716
3. Challenges Affecting Broad Implementation of PMBR.....	717
4. Regulation of Areas with High Prosecutorial Discretion .....	718
C. <i>Can Disciplinary Committees Use Model Rule 5.1 to         Integrate PMBR?</i> .....	718
IV. PMBR AS A SOLUTION TO PROACTIVELY REDUCE PROSECUTORIAL MISCONDUCT .....	723
CONCLUSION.....	728

#### INTRODUCTION

A 1999 study by the *Chicago Tribune* investigated whether prosecutors' offices disciplined their own line prosecutors for misconduct.<sup>1</sup> The study

---

1. Maurice Possley & Ken Armstrong, *Trial & Error Part 2: The Flip Side of a Fair Trial*, CHI. TRIB. (Jan. 11, 1999), <https://www.chicagotribune.com/investigations/chi->

found that of the 381 reversals on appeal in homicide cases in the prior thirty-seven years, of which sixty-seven were death penalty cases, only one prosecutor was disciplined for misconduct.<sup>2</sup> This prosecutor was reinstated with back pay after he appealed his firing.<sup>3</sup> Only one attorney received an in-house suspension, which only lasted thirty days.<sup>4</sup> A third attorney had his license suspended for fifty-nine days, but this was due to unrelated errors in the case.<sup>5</sup> None of these attorneys received public sanction.<sup>6</sup>

In the United States, the prosecutor's charge is "to see that justice is done,"<sup>7</sup> and it is as much a prosecutor's duty to "refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."<sup>8</sup> Prosecutors wield tremendous and unique power in our legal system. This power includes the ability to imprison people and deprive them of freedom and property, stigmatize people as criminals, and cause people to incur legal fees to defend themselves. However, the responsibility that comes with this power is not always appropriately managed.<sup>9</sup> Although most prosecutors likely aim to responsibly discharge their duties, when individual prosecutors practice without a clear understanding of the rules, negligently discharge their duties, or intentionally prioritize conviction rates over justice, they deprive defendants of their constitutional rights to due process.<sup>10</sup> When this power goes unchecked, violations can go unpunished and a culture of improper prosecutions inevitably persists, even when prosecutors are found guilty of flagrant misconduct.<sup>11</sup>

In one case study, attorney Joel Rudin uncovered a litany of misconduct during a series of § 1983 cases against various New York district attorneys' offices.<sup>12</sup> Discovery in a civil case against the Bronx County District Attorney's Office, in which Rudin sued over the office's "deliberate[] indifferen[ce] to its constitutional obligations," revealed the disciplinary

---

020103trial2-story.html [https://perma.cc/TY3W-KUBE]; see also Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 *FORDHAM L. REV.* 537, 546–54 (2011).

2. Possley & Armstrong, *supra* note 1.

3. Rudin, *supra* note 1, at 542.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Connick v. Thompson*, 563 U.S. 51, 71 (2011).

8. *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing a prosecutor's duties as "not [those duties] of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

9. See, e.g., Rudin, *supra* note 1.

10. See *id.* at 553.

11. See *id.*

12. See, e.g., *id.*

records, salaries, and evaluations of prosecutors involved in seventy-two misconduct cases.<sup>13</sup>

These records demonstrated that in the seventy-two cases of misconduct in the office's trials, only *one* prosecutor had been disciplined and only after he had been accused of prosecutorial misconduct in multiple trials.<sup>14</sup> Further, he and thirteen other prosecutors had been involved in more than one incident of misconduct. One other prosecutor, who was not disciplined, had been judicially reprimanded for misconduct in four trials, while a third prosecutor had been reprimanded in five trials.<sup>15</sup> The sole prosecutor who was disciplined received a deduction of four weeks of pay.<sup>16</sup> However, after his return, he promptly received a raise and a bonus, more than compensating for his lost wages.<sup>17</sup> Despite the prosecutor receiving two subsequent reprimands and referrals for disciplinary action, the Bronx District Attorney's Office doubled that prosecutor's salary over the next four years.<sup>18</sup> The only negative comment on his evaluation was related to repeated tardiness; however, he was simultaneously lauded for his "[t]remendous ability to plead def[endan]ts with the weakest proof."<sup>19</sup> The only mention of the judicial reprimand in his evaluation was as a justification for his decline in productivity.<sup>20</sup>

This case study illustrates the systemic inadequacies that allow prosecutorial misconduct to carry on without any serious oversight or reform.<sup>21</sup> Moreover, this case study is only one example among many that demonstrate how internal self-regulation by prosecutors' offices is largely discretionary.<sup>22</sup> Regulatory authorities likely permit prosecutors to self-regulate because: (1) they believe that prosecutors generally uphold a higher ethical standard than other attorneys, and (2) state ethics rules require law offices to maintain internal policies guaranteeing adequate training to prevent repeated misconduct.<sup>23</sup> However, all too frequent prosecutorial misconduct illuminates the problematic lack of oversight or enforcement of state ethics rules in prosecutors' offices.<sup>24</sup>

To that end, this Note suggests that disciplinary committees adopt a proactive approach to prosecutorial regulation and innovatively apply the American Bar Association's (ABA) Model Rules of Professional Conduct Rule 5.1. This proactive approach would utilize a self-reporting structure to

---

13. *Id.* at 538, 549–50.

14. *Id.* at 550.

15. *See id.*

16. *See id.* at 550–51.

17. *See id.* at 551.

18. *See id.* at 550–51.

19. *Id.* at 551–52 (second alteration in original) (quoting personnel records disclosed in discovery taken in *Ramos v. City of New York*, No. 21770/93, 1999 WL 35015447 (N.Y. Sup. Ct. Oct. 27, 1999)).

20. *Id.* at 551.

21. *See, e.g., id.*

22. *See infra* Part I.A.

23. *See infra* Part I.A.

24. *See infra* Part I.A.

guarantee that prosecutors' offices do in fact maintain "measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."<sup>25</sup>

Part I of this Note addresses the mechanisms that currently regulate prosecutors, such as judicial orders and sanctions, civil liability against prosecutors' offices with rampant misconduct, retroactive sanctioning by disciplinary committees, and internal reprimands and discipline according to an office's own policies.<sup>26</sup> Part I also explains what the universally adopted ABA Model Rule 5.1 demands of supervisory lawyers. Part II details the proactive management-based systems (PMBR) that have frequently been employed in international legal systems to promote attorney accountability.<sup>27</sup> Part III examines how increased active enforcement and oversight of state-adopted versions of Model Rule 5.1, through proactive regulation, might enable disciplinary authorities to successfully deter prosecutorial misconduct and examines the obstacles that could arise from this application.<sup>28</sup> Part III also urges the adoption of proactive regulation that would require prosecutors' offices to report their policies safeguarding against misconduct to disciplinary authorities.<sup>29</sup>

#### I. CURRENT AVENUES OF OVERSIGHT AND RECOURSE FOR PROSECUTORIAL MISCONDUCT

Recent court opinions and academic scholarship have found that prosecutorial misconduct is frequent enough to justify more oversight and regulation. Although to say that prosecutors need more oversight implies that prosecutorial misconduct is a systemic problem—which does not of course mean that every prosecutor's office around the country is rife with malicious prosecutions, *Brady* violations, and untruthful prosecution witnesses<sup>30</sup>—the easy answer to this misconduct is to say "regulate the lawyers," which, of course, already occurs.<sup>31</sup> Part I.A reviews how prosecutors are currently checked in several ways, including by judicial orders, disciplinary counsel, and § 1983 civil litigation brought by criminal defendants.<sup>32</sup> These types of regulations, however, are often either

---

25. MODEL RULES OF PRO. CONDUCT r. 5.1(a) (AM. BAR ASS'N 2018).

26. *See infra* Part I.

27. *See infra* Part II.

28. *See infra* Part III.

29. *See infra* Part III.

30. *See* David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. F. 203, 205 (2011) ("Our findings, based on an investigation into the professional conduct rules and attorney discipline procedures of all fifty states, suggest that disciplinary systems as they are currently constituted do a poor job of policing prosecutors."); Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, HUFFINGTON POST (Feb. 11, 2016), [https://www.huffpost.com/entry/prosecutor-misconduct-justice\\_n\\_56bce00fe4b0c3c55050748a](https://www.huffpost.com/entry/prosecutor-misconduct-justice_n_56bce00fe4b0c3c55050748a) [<https://perma.cc/2URU-Y2L7>].

31. *See* Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 602–03 (2013).

32. *See infra* Part I.A.

inconsistently or rarely applied and, therefore, do not adequately prevent prosecutorial misconduct.<sup>33</sup> Part I.B reviews how state disciplinary committees serve an enforcement and investigatory function that monitors compliance with the ethics rules adopted in each state. Part I.B also discusses how ethics authorities in every state already have a tool in Model Rule 5.1 to hold managerial attorneys accountable for their offices' ethics compliance.<sup>34</sup>

*A. Prosecutorial Misconduct and Preventative Mechanisms in the United States*

The current *ex post* punitive and deterrent measures designed to prevent prosecutorial misconduct are insufficient.<sup>35</sup> These efforts include judicial oversight of attorneys who practice before the courts, civil rights litigation that criminal defendants can bring when prosecutors have violated their due process rights to a fair trial, and disciplinary actions by judicially created disciplinary committees that enforce state-adopted rules of professional conduct.

As judges are the agents of authority who most publicly regulate prosecutors, experts generally use judicial opinions to assess the frequency of prosecutorial misconduct.<sup>36</sup> Judges employ several tools to regulate lawyers and provide prosecutorial oversight.<sup>37</sup> One way that judges discipline attorneys is by admonishing or reprimanding them by name in judicial opinions.<sup>38</sup> Besides embarrassment before the bar and “public opprobrium for improper conduct,” however, this type of sanctioning cannot lead to professional discipline unless there is clear evidence that the conduct violated an ethics rule.<sup>39</sup> Judicial opinions usually do not result in any accompanying reform or guaranteed change in behavior.<sup>40</sup> Rather, this disciplinary tactic relies on the assumption that prosecutors will be shamed

---

33. See Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 156–57 (2016).

34. See *infra* Part I.B.

35. See, e.g., *Connick v. Thompson*, 563 U.S. 51 (2011) (reversing judgment and awarding fourteen million dollars to an innocent man on death row who was improperly found guilty after prosecutors withheld exculpatory evidence); *United States v. Peveto*, 881 F.2d 844, 862 (10th Cir. 1989) (“[T]here has over a substantial period of time . . . [been] a pattern of conduct or misconduct of not presenting evidence until very late, many times during the trial.” (third alteration in original) (quoting trial court record)); *United States v. Modica*, 663 F.2d 1173, 1182 (2d Cir. 1981) (per curiam) (“We thus find ourselves in a situation with which this Court is all too familiar: a prosecutor has delivered an improper summation, despite this Court’s oft-expressed concern over the frequency with which improper prosecution summations occur.”). See generally *State ex rel. Okla. Bar Ass’n v. Miller*, 309 P.3d 108 (Okla. 2013) (characterizing a series of prior violations by a prosecutor who committed *Brady* violations, elicited false testimony, and engaged in other unethical actions as “improper,” “inappropriate,” and “egregious”).

36. See Green & Levine, *supra* note 33, at 156–57.

37. See, e.g., *In re Riehlmann*, 891 So.2d 1239, 1241–42 (La. 2005); *In re Schuessler*, 578 S.W.3d 762, 775–76 (Mo. 2019) (en banc); see also Green & Levine, *supra* note 33, at 149.

38. See Green & Levine, *supra* note 33, at 149.

39. *Id.*

40. *Id.*

by courts into correcting their behavior, which may be undermined if supervising attorneys supported the sanctioned actions.<sup>41</sup> Further, appellate courts usually only investigate misconduct if the misconduct prejudiced a defendant.<sup>42</sup> If there was misconduct but no prejudice, courts uphold the trial court verdict and may not sanction the prosecutor's offense.<sup>43</sup> Alternatively, judges may refer an attorney to the disciplinary committee in a given jurisdiction to investigate the attorney and the extent of the misconduct.<sup>44</sup>

Still, judicial regulation is often inconsistent, both in severity and frequency, and therefore is not an effective deterrent.<sup>45</sup> Traditionally, courts have trusted prosecutors to act ethically so much so that prosecutorial integrity has sometimes been elevated "to the level of a legal presumption."<sup>46</sup> Recently, though, courts have been more willing to acknowledge prosecutorial misconduct than in previous decades, and today's judges are more likely to admonish attorneys in their opinions and refer prosecutors to disciplinary committees.<sup>47</sup> Even though courts now generally recognize the problem of misconduct, they are still reluctant to discipline prosecutors themselves.<sup>48</sup> Courts may be comfortable identifying misconduct but traditionally are not willing to regularly impose sanctions, despite acknowledging the significance of the prosecutor's role.<sup>49</sup> This may be because of the general respect courts have for prosecutors, as in *Imbler v. Pachtman*,<sup>50</sup> where the U.S. Supreme Court observed that a "prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an

---

41. *See id.*

42. *See* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 64 (2016).

43. *See id.*; *see, e.g.*, *United States v. Bermea*, 30 F.3d 1539, 1563, 1565 (5th Cir. 1994) ("Improper prosecutorial comments require reversal only if the comments substantially affected the defendant's right to a fair trial. . . . Taking the trial as a whole, we conclude that the prosecutor's closing argument does not cast 'serious doubt,' upon the correctness of the jury verdict or the fairness of the trial." (citation omitted) (quoting *United States v. Willis*, 6 F.3d 257, 263 (5th Cir. 1993))); *United States v. Rogers*, 751 F.2d 1074, 1076 (9th Cir. 1991) (observing that "dismissing an indictment is a disfavored remedy" unless the conduct was "patently egregious"); *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988) (stating that dismissal is only appropriate when prosecutorial misconduct is "flagrant").

44. *See, e.g.*, *In re Schuessler*, 578 S.W.3d 762, 775–76 (Mo. 2019) (en banc); *In re Rook*, 556 P.2d 1351, 1355–56 (Or. 1976) (en banc) (requesting that the disciplinary committee discipline an attorney for "animosity and a desire to punish").

45. *See* Green & Levine, *supra* note 33, at 149–50 ("[C]ourts have interpreted generally applicable ethics rules differently—sometimes more restrictively, and sometimes less so—in addressing prosecutors' conduct.").

46. Green & Yaroshefsky, *supra* note 42, at 54.

47. *Id.* at 73–75.

48. *See id.* at 62–63 (citing *Ramming v. United States*, 281 F.3d 158 (5th Cir. 2001) (per curiam), as failing to identify the prosecutor throughout the opinion); *see, e.g.*, *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993) (naming the prosecutor more than forty times in the initial opinion but withdrawing the name in the final opinion despite strongly condemning the prosecutor's actions); *United States v. Modica*, 663 F.2d 1173, 1185 n.7 (2d Cir. 1981) (per curiam).

49. *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Kojayan*, 8 F.3d at 1424–25.

50. 424 U.S. 409 (1976).

association of his peers.”<sup>51</sup> Alternatively, it may be because judges feel as though it is more appropriate to leave discipline to prosecutors’ offices to handle misconduct internally.<sup>52</sup> Judicial regulation of prosecutors, however, does not often require prosecutors’ offices or disciplinary committees to follow up with the court to report on what sanctioning they deemed appropriate. This allows prosecutors’ offices that do not agree with the courts to avoid enforcing the judiciary’s admonishments.<sup>53</sup>

When a court is not willing to undertake the task of disciplining attorneys on its own, criminal defendants can bring civil rights litigation for redress as another way to check prosecutors.<sup>54</sup> However, when defendants prejudiced by misconduct use the legal system to seek recourse or obtain financial remedies, their cases often fail because of absolute prosecutorial immunity.<sup>55</sup> Prosecutorial immunity protects an *individual* prosecutor’s acts performed within the scope of the prosecutor’s duties.<sup>56</sup> A prior criminal defendant who believes there was unethical misconduct in the prosecution, alternatively, can bring a § 1983 claim in federal court against the *municipality* or *government agency* (i.e., prosecutors’ offices) for deprivation of the constitutional right to due process.<sup>57</sup> However, defendants only prevail on § 1983 claims if they sue the municipality where the conviction occurred and prove that the prosecutor’s office was “deliberately indifferent”<sup>58</sup> to the “constitutional obligations” to train, supervise, or discipline its agents or employees.<sup>59</sup>

Furthermore, any finding of § 1983 liability only provides the criminal defendant remuneration or redress from the municipality and does not lead to any corrective or punitive action against the specific prosecutor whose error was at issue in the lawsuit.<sup>60</sup> This shift towards institutional liability properly places at least some degree of blame on upper-level management and its failure to train employees but often does not vindicate the criminal

---

51. *Id.* at 429.

52. Green & Yaroshefsky, *supra* note 42, at 73–74 (citing Jason Ryan, *Sen. Ted Stevens Prosecutors Hide Evidence, Report Concludes*, ABC NEWS (Mar. 16, 2012), <http://abcnews.go.com/blogs/politics/2012/03/sen-ted-stevens-prosecutors-hid-evidence-report-concludes> [<https://perma.cc/J4C5-Y6JD>]) (referring to Judge Emmet Sullivan’s decision to appoint special prosecutors to examine the conduct of the prosecutors who tried U.S. Senator Ted Stevens).

53. *See* Green & Levine, *supra* note 33, at 149.

54. *See generally* *Connick v. Thompson*, 563 U.S. 51, 56–57 (2011); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

55. Green & Yaroshefsky, *supra* note 42, at 64.

56. *See id.*; *see also* *Imbler*, 424 U.S. at 422–25.

57. 42 U.S.C. § 1983; *Connick*, 563 U.S. at 60; *Monell*, 436 U.S. at 692.

58. *Connick*, 563 U.S. at 61 (“[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” (alteration in original) (quoting *Bd. of the Cnty. Comm’rs v. Brown*, 520 U.S. 397, 410 (1997))).

59. *Id.* at 61 (“When city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens’ constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.”); *Walker v. City of New York*, 974 F.2d 293, 297–98, 300–01 (2d Cir. 1992).

60. *See* Green & Yaroshefsky, *supra* note 42, at 64.



defendant who was unfairly prosecuted.<sup>61</sup> Further, judicial determinations of liability are unlikely to lead to significant reform. A government agency will only make changes if it is sufficiently incentivized to implement reformatory measures instead of paying future damages for § 1983 claims. A government agency, therefore, will only make changes in policies if it determines that the risk of a future lawsuit and the resulting financial burden of § 1983 damages is greater than the cost of implementing training programs or hiring new management.

*B. Disciplinary Committees' Current Use of the Rules of Professional Conduct to Regulate Prosecutors*

In the United States, bar associations and state supreme courts adopt professional codes of ethics, usually titled “Rules of Professional Conduct.”<sup>62</sup> These rules outline ethical ideals and practices that all lawyers in the corresponding jurisdiction are legally obligated to follow.<sup>63</sup> Most state rules mirror the ABA Model Rules of Professional Conduct, which are developed and promulgated by the ABA.<sup>64</sup> Attorneys are instructed to treat this code as the bar’s ideals of “optimal professional norms” and to use the code, comments to the code, and ABA opinions as resources to help deal with ethical dilemmas and conflicting obligations.<sup>65</sup>

Codes of conduct are enforceable today through state court imprimaturs, which authorize state supreme courts to issue rules that set forth professional guidelines for lawyers practicing in a jurisdiction.<sup>66</sup> These codes are meant to reflect each court’s views on professional conduct but often are enacted verbatim from the ABA Model Rules.<sup>67</sup> These codes, therefore, are judicially created laws binding on attorneys who practice within a jurisdiction.<sup>68</sup> Despite the fact that the codes are adopted as mandatory rules and guidance for attorneys, court opinions offer conflicting conceptions of the purpose and force of state ethics rules. Some courts believe that ethics rules are binding, “reflect the public policy of the state,”<sup>69</sup> and “have the force and effect of substantive law, and ‘govern’ the conduct of lawyers who appear before them.”<sup>70</sup> However, others opine that, while ethics codes

---

61. *See id.*

62. *See Green, supra* note 31, at 602–06.

63. *See id.*; Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV. 233, 234 (2013).

64. *See Green, supra* note 31, at 603.

65. *Id.*

66. *See* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 92–91, 110 (2009); *see also* CHRISTOPHER REINHART & GEORGE COPPOLO, OFF. OF LEGIS. RSCH., CONN. GEN. ASSEMBLY, OLR RESEARCH REPORT: COURT RULES IN OTHER STATES—LEGISLATIVE APPROVAL (2008), <https://www.cga.ct.gov/2008/rpt/2008-R-0430.htm> [<https://perma.cc/BMW2-ZS43>].

67. Zacharias & Green, *supra* note 66, at 93.

68. *Id.* at 110.

69. RICHARD E. FLAMM, *LAWYERS DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES* § 1.3 (1st ed. 2003).

70. *Id.*; *see, e.g., In re Wallace*, 574 So.2d 348, 350 (La. 1991) (“The standards governing the conduct of attorneys by rules of this court unquestionably have the force and effect of

provide guidance, courts are not required to adjudicate as though ethics codes have the binding force of law.<sup>71</sup>

To help enforce these ethics rules, courts also have the authority to create disciplinary committees that implement and enforce the code.<sup>72</sup> While disciplinary committees have enforcement power, their actions are confined to ex post solutions that are designed to have deterrent effects.<sup>73</sup> Disciplinary committees usually hear a case after it has been referred to their offices by the courts or another attorney; disciplinary offices are usually not ferreting out misconduct to punish.<sup>74</sup> Instead, if misconduct is egregious enough and surfaces in court before a judge, then disciplinary counsel will investigate and take appropriate action.<sup>75</sup> Although disciplinary committees issue rules and opinions, most currently do not prevent misconduct or regulate prosecutors proactively.<sup>76</sup>

Even though they are given this authority to act, statistically, disciplinary committees rarely bring actions against prosecutors' offices.<sup>77</sup> They, like the courts, regularly rely on internal office disciplinary actions or resort to either private or public admonishments.<sup>78</sup> While these admonishments are a stain on a lawyer's reputation within the legal field, clients and other attorneys often do not learn about any individual attorney's sanctions. If the admonishing court elects to issue the admonishment privately, then not only are the sanctions concealed from other clients or attorneys but other courts or judges will not know about prior misconduct that could affect the severity of

substantive law."); *Post v. Bregman*, 707 A.2d 806, 816 (Md. 1998) ("[Maryland Lawyers' Rules of Professional Conduct] constitutes a statement of public policy by the only entity in this State having the Constitutional authority to make such a statement, and it has the force of law.").

71. *Katz v. Usdan (In re Est. of Weinstock)*, 351 N.E.2d 647, 649 (N.Y. 1976) (opining that ethics codes do not have "the status of decisional or statutory law").

72. See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §§ 2.2, 2.6, 3.2 (1986) (discussing the history and evolution of the disciplinary committee process and enforcement mechanisms). For a history of lawyer regulation in the United States, see Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

73. See Green & Yaroshefsky, *supra* note 42, at 81.

74. See *id.*

75. See *id.*

76. See *id.* But see Erika Kubik, *Illinois Becomes First Jurisdiction to Adopt PMBR*, 2CIVILITY (Jan. 30, 2017), <https://www.2civility.org/illinois-becomes-first-state-adopt-pmbr> [<https://perma.cc/N5R7-TPFP>].

77. See, e.g., Ferner, *supra* note 30; Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 444–45 (1992) (documenting the failure of disciplinary bodies to act against prosecutors and giving reasons); Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 81 (2012) (highlighting "the small number of sanctions against prosecutors, relative to lawyers as a whole"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725 (2001) (describing the "rarity" with which prosecutors are disciplined); Comm. on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century*, AM. BAR ASS'N (Sept. 18, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report](https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report) [<https://perma.cc/K437-PWUQ>] (commonly referred to as the "McKay Report") (documenting the inability of disciplinary authorities to respond to all meritorious claims that the codes have been violated and assuming a need for disciplinary authorities to set priorities).

78. See Green & Levine, *supra* note 33, at 149.

future sanctions. These verbal admonishments are often toothless and the recipient lawyer may not feel any consequences of their misconduct professionally.<sup>79</sup>

Disciplinary committees historically act retrospectively and respond to complaints by clients who believe their lawyers inadequately performed their jobs as attorneys. These clients often do not claim that their attorney's inadequacy was because of a lack of firm infrastructure or proactive policies, and therefore it is up to disciplinary committees to determine whether the complaint arose from individual negligence or a systemic failure.<sup>80</sup> However, disciplinary committees have not traditionally investigated firm-wide policies or taken enforcement action against managers, supervisors, or partners who violate Model Rules 5.1(a) or 5.3(a).<sup>81</sup> This is particularly problematic because the result is that there is no incentive for managerial lawyers to fulfil their ethical managerial obligations.<sup>82</sup>

### 1. Model Rule 5.1: Current Use and Shortcomings

The ABA, in developing the Model Rules of Professional Conduct, recognized that there were two types of rules that lawyers should follow: (1) "first-order duties" that run directly to clients, tribunals, the profession, certain third parties and the public; and (2) "second-order duties," which require lawyers to exert managerial authority and take measures against other lawyers in their practices and against nonlawyers who work alongside the attorneys.<sup>83</sup>

Every state, under constitutional or legislative authority, has adopted a version of Model Rule 5.1.<sup>84</sup> Model Rule 5.1(a) states that a lawyer who "possesses comparable managerial authority [to that of a partner] in a law firm, shall make reasonable efforts to ensure that the firm has in effect

---

79. *See id.*

80. *See* Schneyer, *supra* note 63, at 259 (stating that "[m]ost [complaints] are filed by unsophisticated clients against sole practitioners and small firm lawyers, complainants who are unlikely to specify any ethics rules as the basis for their allegations" and proposing that violations of Model Rules 5.1 and 5.3 are only brought to disciplinary committees' attention when one firm has several complaints filed against it).

81. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 874 (1992) (finding that a significant percentage of disciplinary complaints involved "low-level" agency problems and misconduct that could have been addressed with implemented and enforced office policies).

82. *See* Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119, 127 (2005).

83. Second-order rules promulgated by the ABA include Model Rules 5.1 and 5.3. Model Rule 5.1(a) states "a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2018). Model Rule 5.3(a) states "a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer." *Id.* r. 5.3; Schneyer, *supra* note 63, at 253.

84. *See* Zacharias & Green, *supra* note 66, at 92, 110.

measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”<sup>85</sup> Additionally, Model Rule 5.1(c)(2) states that a lawyer is responsible for another lawyer’s violation if the lawyer has sufficient managerial responsibility or direct supervisory authority over another lawyer who “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”<sup>86</sup>

There is no question that the Model Rules apply to prosecutors—in fact Model Rule 3.8 specifically spells out the special responsibilities of prosecutors.<sup>87</sup> Additionally, there is no carveout in Model Rule 5.1 that removes its application to prosecutors’ offices—in fact, the ABA has specifically issued a formal opinion on this topic.<sup>88</sup>

The ABA’s Standing Committee on Ethics and Professional Responsibility’s Formal Opinion 467 specifically outlines the “basic requirements” that the committee believes managers in prosecutors’ offices have as obligations.<sup>89</sup> These obligations include establishing office-wide policies regarding concerns about confidentiality, conflicts of interest, dates and deadlines in pending matters, and supervision of inexperienced lawyers.<sup>90</sup> The opinion treats Model Rule 3.8(d) and *Brady* obligations as interchangeable and specifically highlights that supervising attorneys must ensure that subordinate attorneys are sufficiently trained in this area.<sup>91</sup>

Most significantly, however, the opinion specifically says that internal office procedures *must* facilitate compliance with the state-adopted version of the Model Rules.<sup>92</sup> The ABA also asserts that, while these basic obligations are essential, because prosecutors must wrestle with “intensely difficult ethics issues,” offices may require more elaborate policies in order to comply with the obligations of Model Rules 5.1 and 5.3.<sup>93</sup>

The comments to Model Rule 5.1 also state that the rule universally applies to government agencies and offices, not just private law firms.<sup>94</sup> Even though there have not been any enforcement actions against prosecutors’ offices who fail to fulfill their Model Rule 5.1 obligations, historic nonenforcement does not bar enforcement today.

## 2. Internal Discipline as a Form of Redress for Prosecutorial Misconduct

As previously stated, when courts identify prosecutorial misconduct, they often request that the office discipline its own employees.<sup>95</sup> While in theory this may seem sufficient, investigations have proven that in many cases,

---

85. MODEL RULES OF PRO. CONDUCT r. 5.1(a).

86. *Id.* r. 5.1(c)(2).

87. *Id.* r. 3.8.

88. *Id.* r. 5.1; ABA Comm. on Ethics & Pro. Resp., Formal Op. 467, at 8–10 (2014).

89. ABA Comm. on Ethics & Pro. Resp., Formal Op. 467, at 8–10.

90. *Id.*

91. *See id.* at 1–2.

92. *Id.* at 8.

93. *Id.* (citing *In re Myers*, 584 S.E.2d 357, 360–61 (S.C. 2003)).

94. MODEL RULES OF PRO. CONDUCT r. 5.1, cmt. 1 (AM. BAR ASS’N 2018).

95. *See Green & Levine, supra* note 33, at 175–76.

prosecutors' offices do not create systematic and methodical disciplinary guides.<sup>96</sup>

Joel Rudin recounts what he learned about various New York district attorneys' offices as he brought civil § 1983 claims on behalf of criminal defendants who were convicted in cases where the prosecutors bringing the charges violated ethics rules.<sup>97</sup> In his review of cases in three New York City boroughs, he found that neither the Queens, Bronx, nor Kings County District Attorney's Office had consistent policies for reprimanding or disciplining attorneys in their offices who violated ethics obligations.<sup>98</sup> More significantly, the only available sources that documented which attorneys violated policies or engaged in misconduct were judicial opinions.<sup>99</sup> The offices themselves did not maintain any records of internal misconduct that monitored for minor policy infractions before the misconduct's ramifications were so great that it surfaced in a judicial opinion.<sup>100</sup> Further, in nearly all of the instances in which a prosecutor was reprimanded by the court, the office elected to defend the prosecutor, justify the misconduct, and appeal the case to a higher authority.<sup>101</sup> While this demonstrates a willingness among prosecutors to "defend their own," it also suggests a lack of accountability and a reluctance to acknowledge that there may be problematic prosecutors, training, or practices within an office.<sup>102</sup> This failure to publicly and internally discipline may give the impression to prosecutors that the office providing their salaries supports their actions, even when a judge does not.<sup>103</sup> Judicial reliance on internal discipline is, therefore, potentially undermined by this culture, where internal supervisors are reluctant to admit wrongdoing.<sup>104</sup>

Rudin's findings through discovery in his own cases led to two significant revelations about internal discipline. First, Rudin learned that none of these offices maintained a system for tracking attorneys who were informally or formally disciplined by the office or even which attorneys had been admonished or sanctioned by the judiciary.<sup>105</sup> Second, the district attorneys in each office testified in depositions that their offices did not utilize any objective rubrics or guidelines to make clear to supervisors and line attorneys what the consequences of various violations are.<sup>106</sup>

One significant consequence of failing to track when courts reprimand an attorney or when offices discipline their employees is that those offices are unable to appropriately discipline prosecutors after multiple infractions.<sup>107</sup>

---

96. *See generally* Rudin, *supra* note 1.

97. *Id.*

98. *Id.* at 572.

99. *See, e.g., id.*

100. *See id.* at 557.

101. *See id.*

102. *Id.*; *see also* Green & Yaroshefsky, *supra* note 42, at 70.

103. Rudin, *supra* note 1, at 544, 566–67.

104. *Id.*

105. *Id.*

106. *See id.* at 554, 557–58, 567, 570–72.

107. *Id.* at 565, 567.

Therefore, these offices are unable to recognize when prosecutors are not receptive to increased training or refuse to adhere to internal ethical practices. For example, in the Queens County District Attorney's Office, there was an ongoing illicit "Chinese wall" policy to shield prosecutors from knowing the existence or terms of any plea deals that their witnesses were guaranteed in exchange for testimony.<sup>108</sup> This policy was designed so that if a witness were to falsely testify about receiving a plea deal in exchange for testimony, the examining prosecutor would not be liable for failing to interject and correct the misstatement.<sup>109</sup> On at least one occasion, the chief of trials in the Queens District Attorney's Office deliberately arranged for a witness's attorney to be the party who conveyed a plea deal to the client so that the attorney-client privilege would shield that witness from testifying about the plea deal on cross-examination.<sup>110</sup> This conduct was met with a "scathing opinion by the trial judge" when the witness's attorney ultimately felt ethically compelled to reveal the scheme.<sup>111</sup> The offending attorney, Chief of Trials Daniel McCarthy, however, was not chastised for his behavior and was later promoted to director of trial training.<sup>112</sup>

In *Jenkins v. Artuz*,<sup>113</sup> a federal judge found that a prosecutor had "engaged in a pattern of misconduct that was designed to conceal the existence of [a witness's] cooperation agreement during [Jenkins's] trial" and that this misconduct was "improper and, when considered cumulatively, severe."<sup>114</sup> Ultimately, after the office appealed the judge's finding of prejudicial misconduct, the district attorney's office elected not to impose any internal discipline for this prosecutor but very shortly after promoted her.<sup>115</sup>

These examples demonstrate a few instances in which courts have relied on prosecutors' offices, as the vanguards of the profession, to take instances of misconduct seriously.<sup>116</sup> However, in these case studies, there is little evidence that the offices required increased training or corrective measures or took punitive action against the offending attorneys.<sup>117</sup>

## II. PMBR AS A TOOL TO ESTABLISH ETHICAL INFRASTRUCTURE AND PREVENT ETHICAL VIOLATIONS AND MISCONDUCT

In the early 2000s, scholars and bar associations began evaluating systems of regulation, known as "proactive management-based regulation," that prevent "ethical breaches." These regulatory systems target organizational controls and office policies instead of relying on the usual retroactive

---

108. *Id.* at 564–65.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. 294 F.3d 284 (2d Cir. 2002).

114. *Id.* at 290 (quoting Judgment at 27–28, *Jenkins v. Artuz*, No. 98-CV-00277 (E.D.N.Y. May 16, 2001)).

115. Rudin, *supra* note 1, at 566.

116. *See generally id.*

117. *See id.* at 572.

individual discipline that courts and state bar associations utilize.<sup>118</sup> Disciplinary boards under a PMBR system look at the “ethical infrastructure” of a firm and, if they find any deficiencies, discipline the law firm for failing to promote and demand ethical practices from its attorneys.<sup>119</sup>

Part II of this Note provides background detailing how PMBR is developed and subsequently implemented in various legal systems. This part also reviews the purposes of PMBR and how effective this style of regulation is at accomplishing its goals. Part II.A specifically focuses on the theories and practical concerns that led various legal systems to adopt PMBR. Part II.B then examines the processes that PMBR-based systems use to develop and implement their regulatory structures.

A. *PMBR Protects Ethical Obligations in the Face of Divergent Practice Incentives*

Disciplinary authorities that choose to regulate the ethical infrastructure of law offices do so under the theory that authorities can more effectively reduce harm from misconduct by preventing the misconduct than by retroactively punishing lawyers after they err.<sup>120</sup> The retroactive deterrent model is problematic because discipline only occurs after an attorney’s misconduct has caused noticeable harm, and it is only effective if punitive discipline is consistently and predictably enforced.<sup>121</sup> Alternatively, proactive regulation of office infrastructure allows disciplinary boards to ensure that internal policies within a legal office are consistently enforced.<sup>122</sup> Disciplinary authorities who utilize PMBR use this tool not to regulate individual attorneys but rather to mandate a hierarchical management structure that puts the onus on firms to promote ethical conduct in the office.<sup>123</sup>

The general theory of proactive regulation is to prevent misconduct and to deter attorneys from sacrificing their ethical obligations as they pursue other goals.<sup>124</sup> Most countries that have adopted proactive regulatory measures did so at the same time that their legal systems began allowing external, nonlawyer third parties to invest in law firms.<sup>125</sup> Disciplinary authorities were concerned that pressure from investors would cause lawyers to sacrifice their ethical commitments to clients and accordingly wanted to ensure that firms had measures in place to help lawyers balance these conflicting forces.<sup>126</sup> Disciplinary authorities were also concerned that investors might demand that firms behave in a certain way to increase profitability—for

---

118. Susan Saab Fortney, *The Role of Ethics Audits in Improving Ethical Conduct in Law Firms: An Empirical Examination*, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 112, 115 (2014).

119. *Id.*

120. *Id.*

121. See Green & Levine, *supra* note 33, at 156–57.

122. See Fortney, *supra* note 118, at 115.

123. Schneyer, *supra* note 63, at 240.

124. *Id.*

125. *Id.* at 238–41; see also Fortney, *supra* note 118, at 116.

126. Schneyer, *supra* note 63, at 239–40.

example, by asking firms to put forward false testimony to win a contingency case, overbill clients for work, or take on cases with a conflict of interest to secure the income from the work.<sup>127</sup> Even if there were no explicit requests for this behavior, authorities were concerned that the implicit pressure from third-party investors to increase revenue would cause attorneys to choose between two conflicting paths: profitability versus ethical lawyering.<sup>128</sup> While investors could monitor profitability and respond when they were not satisfied, the regulatory state did not give ethics authorities the same ability to monitor for ethics violations or provide oversight.<sup>129</sup> Disciplinary committees, in response, implemented proactive regulation and required firms to self-report on the policies their offices instituted that protected against unethical decision-making.<sup>130</sup>

### *B. Development and Implementation of Proactive Regulatory Measures*

Several international legal systems, including those of New South Wales, Australia; the United Kingdom; and Nova Scotia, Canada have used or are considering using PMBR in their ethics regulatory systems.<sup>131</sup> In the United Kingdom and Australia, disciplinary authorities and regulators implement PMBR by mandating that firms appoint an ethical compliance officer in the firm who oversees governance, risk, and adherence to ethical rules.<sup>132</sup> In the initial implementation, Australia required these ethics officers to complete a self-assessment process to evaluate their firms' compliance with ten objectives set out by the disciplinary authorities.<sup>133</sup> The Solicitors Regulation Authority (SRA) in the United Kingdom sets forth outcomes-based regulation that operates very similarly to the ten objectives utilized in Australia.<sup>134</sup> Other regulators, such as Nova Scotia's Director of Professional Responsibility for the Nova Scotia Barristers' Society, have recently recommended that their jurisdictions' disciplinary authorities implement policies that would mirror those traditionally used in PMBR.<sup>135</sup>

---

127. *See id.*

128. *See id.*

129. *See id.*

130. *Id.* at 242; *see also* Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & SOC'Y 466, 475 (2010) (stating that the purpose of requiring firms to implement ethics management systems was "to counter any increased commercial pressure on the ethics of legal practice within [incorporated legal practices]"). For more on how PMBR advances with consumer protection and improves avenues for recourse by clients who are unsatisfied by ethical conduct, *see* Susan Saab Fortney, *Tales of Two Regimes for Regulating Limited Liability Law Firms in the U.S. and Australia: Client Protection and Risk Management Lessons*, 11 LEGAL ETHICS 230, 233–34 (2008).

131. Schneyer, *supra* note 63, at 236; *see also* Fortney, *supra* note 118, at 116–17.

132. Fortney, *supra* note 118, at 116–17.

133. *See id.* at 116–18; *infra* Part II.C.

134. For a discussion on the United Kingdom's SRA Authorization Rules, *see* Fortney, *supra* note 118, at 116–21.

135. *Id.* at 126–27 (recommending the authority "adopt[] a proactive approach with lawyer [sic] and law firms through education, engagement, the creation of an appropriate management systems-based approach, and [adopt] the provision of tools and training to help firms of all



Scholarship about PMBR in the United States has led to changes in the Model Rules, such as the adoption of Model Rule 5.1, which requires partners in a law firm to make reasonable efforts to implement firm policies that ensure lawyers follow rules of professional conduct.<sup>136</sup>

In countries with PMBR, there are two main features that help the system effectuate its more collaborative and proactive goals.<sup>137</sup> First, these systems mandate that law practices appoint one internal attorney to be personally responsible for maintaining and assessing the firm's ethical policies and infrastructure.<sup>138</sup> Second, these systems create a collaborative environment for regulators and lawyers to help firms develop and maintain management systems that are more likely to help firms accomplish their ethical goals.<sup>139</sup> The "legal practitioner director" (LPD) ensures that the management systems are maintained and serve the firm's ethical goals.<sup>140</sup> The failure of these individuals to meet the specific duty of implementing the management systems is sanctionable and could potentially disqualify these individuals from serving as LPDs in the future.<sup>141</sup>

In New South Wales, the LPD works with the firm to accomplish goals set out by an independent agency, the Office of the Legal Services Commissioner (OLSC),<sup>142</sup> which is comprised of practitioners, the state malpractice insurer, and academics.<sup>143</sup> In New South Wales, this

---

sizes practice ethically and competently in the public interest and develop an embedded ethical infrastructure" (quoting Victoria Rees, *Transforming Regulation and Governance in the Public Interest* 51 (Oct. 28, 2013) (unpublished manuscript), <https://archives.nsb.org/unpublished/81563.pdf> [<https://perma.cc/T3WZ-M8J4>])).

136. *See id.* at 115 (referencing, as an example, the New York Court of Appeals' adoption of Model Rule 5.1).

137. Schneyer, *supra* note 63, at 236–37, 240–41.

138. *Id.*

139. *Id.* at 237.

140. *Id.* at 240.

141. Parker et al., *supra* note 130, at 471.

142. Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 *GEO. J. LEGAL ETHICS* 501, 507–10 (2009); *Welcome to the Office of the Legal Services Commissioner*, OFF. OF THE LEGAL SERVS. COMM'R, <http://www.olsc.nsw.gov.au> [<https://perma.cc/EWB6-RXUT>] (last visited Oct. 3, 2020) ("The Office of the Legal Services Commissioner (OLSC) is an independent statutory body that deals with complaints about lawyers under the *Legal Profession Uniform Law Application Act 2014*.").

143. In 2015, New South Wales took a "backward step" and discarded the requirement that incorporated legal practices (ILP) submit self-assessments. Regulatory authorities may still ensure that appropriate ethics systems are "implemented and maintained;" however, the OLSC has decided that firms no longer need to demonstrate the existence of appropriate policies through self-assessment since the initial purpose was to help firms develop compliant policies. Because that goal was met through years of self-assessments, firms no longer need to self-report. This 2015 shift was condemned by two former commissioners of the Queensland Legal Services Commission, who called for a return to self-assessment submissions and proactive review. Still, this new policy in New South Wales does not diminish the argument for PMBR-style self-assessments in the United States. At a minimum, disciplinary committees need a mechanism to ensure that prosecutors' offices have or develop compliant policies. Vivien Holmes et al., *Australian Legal Practice: Ethical Climate and Ethical Climate Change*, in *NEW DIRECTIONS FOR LAW IN AUSTRALIA: ESSAYS IN CONTEMPORARY LAW REFORM* 461, 471 (Ron Levy et al. eds., 2017); *Practice Management*, OFF. OF THE LEGAL SERVS. COMM'R,

collaboration has led to ten priority areas for firms to address in their policies, which include: (1) negligence; (2) communication; (3) delay; (4) liens and file transfers; (5) cost disclosure, billing practices, and termination of retainer; (6) conflicts of interest; (7) records management; (8) undertakings; (9) supervision of practice and staff; and (10) trust account regulations.<sup>144</sup> All firms must address these priority areas in their firm policies, but the OLSC allows each firm to tailor their policies so that they address these areas with procedures that make sense logistically for the needs of their offices.<sup>145</sup>

The proactive nature of PMBR is reflected in requiring law firms and LPDs to report on the success of their firms' management systems by completing self-assessments.<sup>146</sup> These self-assessments require the firm to evaluate and lay out example scenarios to demonstrate what accomplishing each goal looks like at the firm.<sup>147</sup> The LPD then measures whether the firm is compliant according to a five-degree scale: (1) noncompliant, which means "[n]ot all Objectives have not been addressed"; (2) partially compliant, which means "[a]ll Objectives have been addressed but the management systems . . . are not fully functional"; (3) compliant, which means "[m]anagement systems for all Objectives exist and are fully functional"; (4) fully compliant, which means "[m]anagement systems exist for all Objectives and all are fully functional and all are regularly assessed for effectiveness"; and (5) fully compliant plus, which means "[a]ll Objectives have been addressed, all management systems are documented and all are fully functional and . . . assessed regularly for effectiveness plus improvements are made when needed."<sup>148</sup> While this process was in place, the OLSC received 294 of 300 self-assessment packages in the first year with overwhelmingly positive responses from firms, many of which found the assessment experience to have been "a valuable one."<sup>149</sup>

If a firm is not satisfactorily compliant,<sup>150</sup> then the OLSC may audit the firm and provide the necessary tools to help the firm prepare for the audit

---

[https://www.olsc.nsw.gov.au/Pages/lsc\\_practice\\_management/lsc\\_practice\\_management.aspx](https://www.olsc.nsw.gov.au/Pages/lsc_practice_management/lsc_practice_management.aspx) [<https://perma.cc/JTS7-EP2Y>] (last visited Oct. 3, 2020) ("As the self-assessment process was developed to assist [ILP] to demonstrate that they had implemented appropriate management systems under the old legislation, the requirement for authorised principals to complete the self-assessment process under [the Legal Profession Uniform Law] is removed."); *see also* Parker et al., *supra* note 130, at 471.

144. QUEENSLAND L. SOC'Y, GUIDE TO APPROPRIATE MANAGEMENT SYSTEMS: PRACTICE SUPPORT 12–16 (2017), [https://www.qls.com.au/files/bce407d5-756f-4444-8515-a74600a7a081/doc20170320\\_QLS\\_Guide\\_to\\_ApprManagement\\_Syst\\_FNL.pdf](https://www.qls.com.au/files/bce407d5-756f-4444-8515-a74600a7a081/doc20170320_QLS_Guide_to_ApprManagement_Syst_FNL.pdf) [<https://perma.cc/9GMY-8UBM>].

145. Schneyer, *supra* note 63, at 236, 241–42.

146. *Id.* at 242; *see also* Mark & Gordon, *supra* note 142, at 507–08.

147. Mark & Gordon, *supra* note 142, at 507–08.

148. Schneyer, *supra* note 63, at 243 n.63.

149. Mark & Gordon, *supra* note 142, at 512.

150. *Id.* at 513–14 (citing "a returned self assessment form with seven of the ten objectives rated as partially compliant," "a returned self-assessment form with all of the ten objectives rated as non-compliant," "a trust account inspection report which raised major issues with respect to supervision of employees and the veracity of the legal practitioner director's certification," and "sixty-five complaints made against an ILP with forty-nine complaints being made since incorporation in 2003" as reasons warranting an audit (footnotes omitted)).

process.<sup>151</sup> These audits take a “positive, non-adversarial approach” and are designed so that the auditing agency assists firms rather than taking punitive measures.<sup>152</sup>

### III. LACK OF PMBR THEORY IN U.S. PROSECUTORS’ OFFICES

Current methods of prosecutorial regulation in the United States certainly have some positive effect on regulating against prosecutorial misconduct.<sup>153</sup> However, these regulatory methods are primarily retroactive and do not have enough of a deterrent effect because courts and disciplinary authorities inconsistently and infrequently impose punitive sanctions.<sup>154</sup> Proactive measures have historically reduced the amount of attorney misconduct in private practice by punishing policy failures and ensuring that offices have prophylactic policies that safeguard against misconduct before it affects clients.<sup>155</sup> It is similarly problematic that these same measures are not used to safeguard against prosecutorial misconduct in our legal system. It is probable that implementing PMBR-style measures in the United States would create a more satisfactory check on prosecutors.

Part III.A of this Note examines what benefits PMBR might add to the existing regulatory and disciplinary structure for prosecutors. Part III.B examines the practical challenges that may arise that would discourage the application of PMBR to prosecutors’ offices. Part III.C of this Note reviews whether the U.S. legal system is structured in a way that gives judicially established disciplinary committees the authority to implement PMBR-style self-reporting requirements for prosecutors.<sup>156</sup>

#### A. A PMBR-Style Application of Model Rule 5.1 in Prosecutors’ Offices

PMBR is not a novel idea in the United States.<sup>157</sup> In 1992, the ABA’s Commission on Evaluation of Disciplinary Enforcement wrote a report, dedicated to former ABA president Robert McKay, which recommended that disciplinary committees create separate committees to help lawyers seeking assistance in ethical practices or law firm management without penalty.<sup>158</sup> Additionally, at least two states, Illinois and Colorado, have begun using PMBR for firms in private practice. Illinois’s PMBR structure has been mandatory for attorneys in private practice since 2017.<sup>159</sup> Colorado’s PMBR framework is a voluntary resource that is designed to help firms avoid

---

151. *Id.* at 514.

152. *Id.*

153. *See supra* Part I.

154. *See supra* Part I.B.

155. *See supra* Part II.A.

156. *See infra* Part III.A.

157. Fortney, *supra* note 118, at 128–30 (detailing the McKay Report’s guidance to institute collaborative and nondisciplinary actions); *see also* Comm. on Evaluation of Disciplinary Enf’t, *supra* note 77.

158. Fortney, *supra* note 118, at 128–30.

159. Kubik, *supra* note 76.

discipline and prevent misconduct.<sup>160</sup> The ABA has also sought comments on a draft proposal to study and implement PMBR in the United States.<sup>161</sup>

Proactive management-based efforts, at a minimum, would encourage the development of ethics policies that have thus far been missing from prosecutors' offices.<sup>162</sup> In cases where offices have been required to actively reflect on their internal policies and articulate how these policies accomplished preset goals, they were statistically more likely to initiate internal reform that helped their offices move closer to ethical compliance.<sup>163</sup> Alternatively, if offices found that they did not document guidance or policies in their offices, this requirement alerted the office to its failure to follow Model Rule 5.1, which had previously established managerial attorneys' obligation to create policies.<sup>164</sup>

### 1. Regulatory Benefits of Enforcing Model Rule 5.1 Through PMBR

PMBR has been a productive regulatory framework in the international private practice context. Since the implementation of PMBR in New South Wales alone, complaints in relation to all legal practices fell about 5 percent annually according to at least one study.<sup>165</sup> The same study demonstrated that complaint rates for lawyers dropped two-thirds after firms completed their initial self-assessments.<sup>166</sup>

Results, however, were not limited to just the decrease in complaints. In another evaluation conducted by Susan Fortney and Thalia Gordon, 84 percent of respondent attorneys who had participated in the PMBR program in New South Wales reported that their offices had elected to revise their policies or procedures pertaining to delivery of legal services.<sup>167</sup> Seventy-one percent stated explicitly that they had done so in connection with the completion of the self-assessment process.<sup>168</sup> Additionally, 47 percent of the respondents reported that their firms adopted entirely new systems, policies, and procedures in response to the self-assessments.<sup>169</sup>

---

160. *Lawyer Self-Assessment Program*, COLO. SUP. CT. OFF. OF ATT'Y REGUL. COUNS., <http://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp> [<https://perma.cc/PE5D-SPJC>] (last visited Oct. 3, 2020).

161. ABA STANDING COMM. ON PRO. REGUL. YOUNG LAWS. DIV., COMMENT DRAFT PROPOSAL (2019), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/20190306-scpr-comment-draft-proposed-pmbr-resolution-and-report.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20190306-scpr-comment-draft-proposed-pmbr-resolution-and-report.pdf) [<https://perma.cc/B7AB-643C>].

162. Susan Fortney & Thalia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152, 172 (2012).

163. *Id.*

164. MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2018).

165. Results are calculated based on a July 2006 study conducted by the OLSC in collaboration with the Centre for Applied Philosophy and Public Ethics, which analyzed complaint data and returned self-assessment forms for 184 ILP. For more information on this study, see Mark & Gordon, *supra* note 142, at 514.

166. Schneyer, *supra* note 63, at 236, 246.

167. Fortney & Gordon, *supra* note 162, at 172.

168. *Id.*

169. Fortney, *supra* note 118, at 122.

Results from Professor Fortney's study not only analyzed what actions firms took after their self-assessments but also examined the impact that the assessments had on firms' management, professional concerns, ethics concerns, and morale.<sup>170</sup> In this study, which examined PMBR results in Australia, the self-assessments demonstrated that proactive regulation had the greatest impact on "Firm Management," "Risk Management," and "Supervision"—the three metrics studied that related to managerial oversight.<sup>171</sup>

In another evaluation of firms that underwent the PMBR self-evaluation process in New South Wales, the complaint rate for self-assessed firms dropped two-thirds compared to pre-assessment rates.<sup>172</sup> These complaint rates decreased regardless of how the firm scored itself on its compliance ratings.<sup>173</sup> The authors of this study inferred that the self-assessment process was the cause of the decrease in complaints, not the actual compliance levels.<sup>174</sup>

While these international results may not entirely predict how PMBR would be received in the United States in prosecutorial work, the overall statistical evidence demonstrates that attorneys and offices are willing to reexamine policies or even entirely overhaul old protocols in exchange for new systems.<sup>175</sup>

## 2. Cost Savings of PMBR

While PMBR would require the review of new material and an initial development stage where disciplinary committees establish a self-reporting program, proactive regulatory efforts have historically been less expensive than formal hearings and reviews.<sup>176</sup> Long-term efforts to reduce misconduct, such as diversion programs in the United States, have historically saved disciplinary committees time and money so long as they effectively helped deter future misconduct.<sup>177</sup> In the short term, these programs cost less than processing complaints and conducting formal disciplinary procedures.<sup>178</sup> It is likely that long-term proactive efforts would have the same effect on cost.<sup>179</sup>

---

170. *Id.* at 122–23.

171. *Id.*

172. Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 624–25 (2011).

173. *Id.*

174. *Id.*

175. *See id.*

176. Fortney, *supra* note 118, at 133 (citing Jennifer Gerarda Brown & Liana G. T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 273 (2012)).

177. *Id.*

178. *Id.*

179. *See id.*

*B. The Plausible Challenges of Applying a PMBR-Based Model Rule 5.1*

There are also potential hindrances to implementing PMBR, specifically as a system for regulating prosecutors. Most saliently, these obstacles include increased time requirements and cost requirements associated with new regulation, prosecutors' own resistance to regulation that may alter their legal practices, the difficulties in adapting PMBR to the varied types of prosecutors' offices, and potential infringement on separation of powers.

1. The Cost of Compliance

One concern with a PMBR-based approach to Model Rule 5.1 is that it would increase the ethical burden on prosecutors' offices and divert resources from prosecution to "red tape" ethical checks on conduct. Compliance with Model Rule 5.1 would require first the appointment of a senior, supervisory attorney who would be responsible for developing, drafting, promulgating, and reporting on the office's self-reporting measures.<sup>180</sup> This would require the office to expend resources annually to redevelop policies and complete ethics compliance paperwork.<sup>181</sup>

It is possible, however, that efforts to self-report on these measures would be minimal, so long as prosecutors comply with the preexisting Model Rule 5.1.<sup>182</sup> The increased cost or effort involved in developing new policies would stem from their preexisting Model Rule 5.1 burdens and not from any new obligation to create policies.<sup>183</sup> There would also be increased burdens that result from the process of conforming documented infractions and policies to match self-reporting forms.

2. Prosecutors' Resistance to Public Self-Reporting

For any self-review mechanism and regulation to be effective, lawyers need to be motivated to fully utilize them. Empirical studies by Susan Fortney have demonstrated that one concern lawyers have with conducting internal reviews of policies for disciplinary committees are that these reviews could be used as evidence in malpractice claims against private firm attorneys.<sup>184</sup> For prosecutors, the parallel concern would be that criminal

---

180. This attorney would take on a role similar to that of the LPD in the New South Wales PMBR system. See Parker et al., *supra* note 130, at 471.

181. See *id.*

182. These costs would be minimal because offices would not need to invest in the labor and resources required when directing staff attorneys to develop policies or hiring ethics experts to assist in developing compliant policies.

183. See Parker et al., *supra* note 130, at 471.

184. In one study, 7 percent of respondents indicated that their firms did not conduct peer review because of concerns about the results being discoverable. Thirty-six percent of respondents said their firms would be more likely to conduct a review if the review was protected against discovery. Eighty-six percent agreed with the statement that "peer review should be afforded confidentiality so that third parties cannot discover the results of peer review." Fortney, *supra* note 118, at 141 (quoting Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves?: An Empirical Study on Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 274 (1996)).

defendants would use these reviews as evidence in § 1983 claims or in conviction appeals when the basis for the appeal is some form of prosecutorial misconduct.<sup>185</sup> Therefore, prosecutors' offices may adamantly oppose or lobby against making such disclosures in order to shield themselves from liability. While the primary goal of a PMBR-style enforcement of Model Rule 5.1 would be to improve internal compliance and advise offices, if prosecutors' offices refused to make fulsome disclosures or repeatedly failed to produce complaint reports, then disciplinary committees could leverage their enforcement arms to demand compliance or sanction the supervisory attorneys.

### 3. Challenges Affecting Broad Implementation of PMBR

Beyond the hurdle of implementing the infrastructure in disciplinary committees, any steps taken to implement PMBR should account for the nuances and idiosyncratic characteristics of various types of prosecutors' offices. For example, prosecutors' offices have varying concerns depending on the populations they serve, the type of prosecutors they employ, and the activities of each office.<sup>186</sup>

For example, rural prosecutors' offices that only employ one attorney as the prosecutor, or employ part-time prosecutors, will not have the same record-keeping techniques as a larger office that may employ hundreds of attorneys.<sup>187</sup> Alternatively, the hierarchical supervision that larger offices may require to support junior attorneys is certainly not useful in offices with only one prosecutor.<sup>188</sup> However, these smaller offices still require that prosecutors be methodical and systematic in approaching prosecutions, especially since they do not have colleagues who can provide feedback on their work or check any biases they have.<sup>189</sup> In these offices, sole practitioners are simultaneously subject to any policies they have mandated and must also self-regulate in the truest sense, as their own compliance officers. It is not unrealistic or unduly burdensome to require individuals to assess their own policies and procedures against objective criteria so that an individual can assess whether the practices advance goals set out by the state disciplinary committee.

Contrastingly, in urban areas, internal policies that require hierarchical oversight are likely too large to adopt cumbersome, individualized reviews that may be implemented in smaller offices with flat structures or single prosecutors. Because of the variety among prosecutors' offices, disciplinary committees would need to ensure that the requirements for management

---

185. *See supra* Part I.A.

186. *See* Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 165–66 (2017).

187. *See id.*

188. *See id.*

189. *See id.*

policies “allow[] firms the room to establish appropriate management systems that suit the nature of their clientele.”<sup>190</sup>

#### 4. Regulation of Areas with High Prosecutorial Discretion

There is a clear tradition of separation of powers between the judiciary and executive branch, and prosecutors function within the executive branch’s law enforcement powers.<sup>191</sup> Implementation of a self-reporting system in which prosecutors must submit a report of their internal policies to the judiciary may edge close to blurring the line of this separation of powers.<sup>192</sup> Prosecutors are granted the authority to make discretionary decisions and are immune from liability and oversight for those discretionary decisions.<sup>193</sup> Because prosecutors regularly face complex ethical dilemmas, courts often defer to their prosecutorial judgment and decline to sanction all but the most flagrant violations and misconduct.<sup>194</sup> If prosecutors were required to report to judicially created disciplinary committees and required to obtain approval before implementing office policies guiding when to charge a defendant or when to offer a plea deal, the judicial branch might well be infringing on prosecutors’ exclusively executive decision-making power.<sup>195</sup>

Model Rule 5.1, however, does not mandate what policies or what specific decisions prosecutors ultimately make in carrying out their duties.<sup>196</sup> Rather, Model Rule 5.1 specifies only that prosecutors “ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”<sup>197</sup> Disciplinary committees, under this Model Rule 5.1 framework, would need to ensure that prosecutors explicitly report the policies they have in place and that offices have a systematic way to evaluate whether their policies ensure that lawyers conform to rules of professional conduct. However, committees would not need to demand that prosecutors implement any specific policies or specific language in order to ensure compliance.<sup>198</sup>

#### C. Can Disciplinary Committees Use Model Rule 5.1 to Integrate PMBR?

Prosecutors today, as previously stated, are primarily regulated through judicial orders or disciplinary committee sanctions that demand deterrent punitive action.<sup>199</sup> However, authorities rarely impose disciplinary measures, and when authorities do order sanctions, those sanctions rarely

---

190. Fortney, *supra* note 118, at 126 (citing Victoria Rees, Transforming Regulation and Governance in the Public Interest 51 (Oct. 28, 2013) (unpublished manuscript), <https://archives.nsb.org/unpublished/81563.pdf> [<https://perma.cc/T3WZ-M8J4>]).

191. *See* Green & Levine, *supra* note 33, at 166–70.

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.*

196. MODEL RULES OF PRO. CONDUCT r. 5.1(a) (AM. BAR ASS’N 2018).

197. *Id.*

198. *Id.*

199. *See supra* Parts I.A–B.



have substantive consequences.<sup>200</sup> The Model Rules, which explicitly detail ethics rules for all lawyers, are a clear and readily accessible articulation of conduct policies that have been widely implemented and accepted, with variations, in each jurisdiction.<sup>201</sup> These rules all include a version of Model Rule 5.1, which demands that managerial attorneys guarantee that their offices adopt measures that ensure compliance with the rules of professional conduct and ethical obligations.<sup>202</sup>

The universally adopted Model Rule 5.1 gives disciplinary committees the authority to evaluate a supervisory attorney's Model Rule 5.1 obligations.<sup>203</sup> This authority specifically measures whether the managerial attorney has guaranteed that the office has adopted measures that ensure compliance with the professional rules.<sup>204</sup> In the nearly universally incorporated comments to Model Rule 5.1, managerial lawyers must make reasonable efforts to establish internal policies and procedures that meet certain basic ethics standards.<sup>205</sup> The comments specifically say that all legal offices should have policies that "detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."<sup>206</sup>

However, there is still a cloud of uncertainty around certain aspects of the implementation and enforcement of Model Rule 5.1 and the Model Rules of Professional Conduct generally. For example, while it is broadly accepted that the rules are grounded in legitimate authority, it is unclear what degree of authority judiciary committees have in guaranteeing that their rules are being adhered to.<sup>207</sup> Additionally, although Model Rule 5.1 clearly states what a managerial lawyer's obligations are, it is unclear how these rules have affected management efforts or prevented lawyers' misconduct in practice.<sup>208</sup> Furthermore, while disciplinary committees have rules in place that permit them to file disciplinary actions against attorneys who fail in their obligations under Model Rules 5.1(a) and 5.3(a), it is not apparent that disciplinary committees have the procedures, resources, or mechanisms to discover these violations in practice.<sup>209</sup> It is possible that disciplinary committees could begin taking proactive measures by enforcing Model Rule 5.1 for prosecutors' offices, particularly in light of comments to Model Rule 5.1, by requiring a proactive assessment of internal policies.

Disciplinary committees could provide oversight by establishing new committees or tasking existing committees, such as the ABA Criminal

---

200. *See supra* Parts I.A–B.

201. *See supra* Part I.B.

202. MODEL RULES OF PRO. CONDUCT r. 5.1(a).

203. *Id.*

204. *Id.*

205. *Id.* r. 5.1 cmt. 2.

206. *Id.*

207. REINHART & COPPOLO, *supra* note 66 (outlining each state's source of authority for judicial rulemaking).

208. Schneyer, *supra* note 63, at 254.

209. *See id.* at 259.

Justice Standards Committee,<sup>210</sup> to help develop goals for prosecutors' offices generally. This process would function similarly to how New South Wales's OLSC coordinated with practitioners, academics, and prosecutors to identify problem areas for the field and then set out goals that prosecutors' offices should seek to accomplish.<sup>211</sup>

As discussed in Part I.C, for PMBR to be effectively implemented in prosecutors' offices, the judiciary would need to guarantee that a neutral committee with varied perspectives could collectively outline goals for prosecutors' offices. This committee could operate as a branch of the ABA, which already utilizes collective groups of various legal professionals to develop rulemaking ideas and assess the legal ethical landscape, as a unique committee established by state supreme courts or by each disciplinary counsel.<sup>212</sup>

Before evaluating the mechanisms that offices have to guarantee ethical compliance, the bar must determine what types of misconduct it wants to remedy in order to protect constitutional due process for criminal defendants and ensure ethical legal practice by prosecutors.<sup>213</sup> Historically, prosecutors have strongly argued that only flagrant and intentional misconduct by individual prosecutors should be sanctioned and that this misconduct is too infrequent to warrant reform efforts.<sup>214</sup> The prosecutor's perspective is that negligence is mere "error"<sup>215</sup> and that prosecutors who are not "adept as a result of [their] inexperience" and who "inadvertently" commit professional misconduct should not be subject to punitive treatment.<sup>216</sup> This perspective suggests that negligent action should be corrected through rehabilitative measures, such as increased training and oversight.

The more contemporary push toward criminal justice reform and research has highlighted, however, that negligent or reckless prosecutions have the same effect on the wronged criminal defendants.<sup>217</sup> While this may not necessitate individual reprimands and sanctioning for entry-level attorneys who misstep, it does require more broadly that prosecutors' offices take ownership of their training and infrastructure to safeguard against negligent prosecutorial action.<sup>218</sup> More significantly, because prosecutors' offices historically lack consistent internal discipline and training,<sup>219</sup> bar

---

210. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS'N 2017).

211. See *supra* Part II.B.

212. See, e.g., *Committees & Task Forces*, AM. BAR ASS'N, [https://www.americanbar.org/groups/criminal\\_justice/committees](https://www.americanbar.org/groups/criminal_justice/committees) [<https://perma.cc/5KLA-SSG3>] (last visited Oct. 3, 2020).

213. See Green & Yaroshefsky, *supra* note 42, at 58–59.

214. *Id.* at 58.

215. Steve Weinburg, *A Question of Integrity: Prosecutors Dispute the Significance of 'Prosecutorial Misconduct,'* CTR. FOR PUB. INTEGRITY (June 26, 2003), <http://www.publicintegrity.org/2003/06/26/5525/question-integrity> [<https://perma.cc/Q5J8-P6QT>].

216. See Rudin, *supra* note 1, at 561.

217. Green & Yaroshefsky, *supra* note 42, at 59, 101.

218. *Id.* at 58.

219. See, e.g., Rudin, *supra* note 1, at 543–44, 563, 569 (citing admissions by district attorneys in three New York district attorneys' offices of a lack of disciplinary guidelines and minimal disciplinary action).

associations that mandate ethical infrastructure in prosecutors' offices may create broadly applied and consistently implemented safeguards against negligent prosecutions or negligent decisions.

PMBR provides disciplinary authorities and law offices with an additional tool to help prevent negligent misconduct because it targets higher-level negligence in training and inadequate policies. In offices where supervisors overlook repeat errors, attorneys have historically continued to practice without correction or consequences. Proactive policies that require offices to keep records and track sanctions or judicial reprimands would help supervising attorneys identify which attorneys need more training and in which areas. This increased training and record-keeping could help mitigate future misconduct or errors by those attorneys or, if attorneys are resistant to correcting their errors, reduce firm liability. PMBR measures that examine and evaluate whether office policies reduce negligent behavior may reduce the tension between concerns that individual prosecutors should not be punished for negligence with the reality that negligent prosecutions still result in unjust outcomes.

This Note proposes that disciplinary committees identify three categories of compliance goals: (1) prosecutor-specific rules, (2) general ethics rules, and (3) appropriate internal management policies. Disciplinary committee goals must be clearly written but must also be general enough to give each office the resources to craft its own policies that accomplish the goals in a way that corresponds with its preexisting office management policies.<sup>220</sup>

Goals for prosecutor-specific rules should aim to prevent issues including, but not limited to, incomplete discovery disclosures and *Brady* violations, constitutionally impermissible and unfair plea deals for witnesses and defendants, improper summations at trial, and improper charging decisions. These goals may also include measures that ensure general guidance, training, and oversight of the exercise of discretion. Measures within this category are only relevant or applicable to attorneys who work in the prosecutorial role, and often these rules are defined through precedential case law.

The general ethics rules should encompass policies that apply to all lawyers in the office's jurisdiction, such as those specifically commented on in Model Rule 5.1.<sup>221</sup> These goals include protecting client confidentiality, establishing proper record maintenance, avoiding conflicts of interest, candor toward tribunals, and avoiding false testimony, among others.<sup>222</sup> Many of these rules are formalized in each state's code of ethics, and since they apply to all attorneys, they must also apply to those attorneys who serve as prosecutors.

Finally, disciplinary committees should also set out goals that relate to internal management. Due to the lack of consistent policies and failures to correct, retrain, or censure prosecutors internally, disciplinary committees

---

220. See Romero, *supra* note 186, at 165–66.

221. MODEL RULES OF PRO. CONDUCT r. 5.1 cmt. 2 (AM. BAR ASS'N 2018).

222. *Id.*

must demand that submissions reflect the importance of internal record-keeping and objective internal disciplinary procedures. There are rarely policies in place that track misconduct, public censure by the judiciary, reprimands by disciplinary committees, or internally discovered misconduct.<sup>223</sup> Disciplinary committees must require that offices ferret out persistently negligent or egregiously errant prosecutors by tracking misconduct—whether it is uncovered by judges or internal investigations. Offices must also have policies in place to either discipline, retrain, or terminate prosecutors who fail to conform to compliance policies. Additionally, offices should create internal incentives, whether compensation-based or otherwise, that promote justice-seeking prosecutions as opposed to conviction-seeking ones.<sup>224</sup>

After setting out these goals, disciplinary committees could move forward to have the local prosecutors' offices in their jurisdictions appoint attorneys to have the compliance-related role of developing and implementing ethics infrastructure in their offices. Their ethics responsibility would be, primarily, to ensure that each office has compliant policies that are reported to disciplinary counsel, but the mechanisms that their offices utilize would consider the size, resources, and preexisting policies of each office.<sup>225</sup> Disciplinary committees could then require those offices to report with a self-assessment annually on an objective scale to denote their compliance with policies on a form modeled after those used abroad.<sup>226</sup> Disciplinary committees could also use this self-assessment process as an opportunity to provide guidance to offices who are developing newly compliant policies. This collaborative, advisory function would allow for a dialogue and investigation into best practices and would allow prosecutors to receive tailored advice on how to ensure compliance in their offices.

The obvious next concern is: what if a prosecutor's office produces noncompliant results and fails to meet these preset goals in its self-reported assessment? Preliminarily, if an office fails to report that the office complied with the ethics obligations under Model Rule 5.1, the consequence would be that the supervising attorney would be personally disciplined for failure to abide by Model Rules 5.1(a)–(c). According to Model Rule 5.1(c), a lawyer is responsible for another lawyer's violations if “the lawyer . . . ratifies the conduct involved”<sup>227</sup> or “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”<sup>228</sup> However, Model Rule 5.1(a) most clearly establishes

---

223. See *supra* Part I.B.2.

224. MODEL RULES OF PRO. CONDUCT r. 3.8(a) (stating that prosecutors must “refrain from prosecuting a charge that [they know] is not supported by probable cause”); see also ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 467 (2014).

225. See Romero, *supra* note 186, at 165–66.

226. QUEENSLAND LEGAL SERVS. COMM'N, INCORPORATED LEGAL PRACTICES SELF ASSESSMENT AUDIT, (2012), [https://www.lsc.qld.gov.au/\\_data/assets/pdf\\_file/0005/97781/ILP-Self-Assessment-Audit-Form-Version-4.pdf](https://www.lsc.qld.gov.au/_data/assets/pdf_file/0005/97781/ILP-Self-Assessment-Audit-Form-Version-4.pdf) [<https://perma.cc/XEN6-Q23W>].

227. MODEL RULES OF PRO. CONDUCT r. 5.1(c)(1).

228. *Id.* r. 5.1(c)(2).

the liability of the lawyer who has “comparable managerial authority [to a partner in a firm]” if the firm fails to establish reasonable measures ensuring compliance with rules of professional conduct.<sup>229</sup> In a prosecutor’s office, the managerial lawyer is the chief prosecutor and all other prosecutors who hold “managerial or executive functions in the office.”<sup>230</sup> This allocation of liability is appropriate given that the highest-ranking person also has the greatest ability to establish custom and policy.

Alternatively, disciplinary committees may elect to audit offices that have failed to comply or have consistently demonstrated in self-reports that their policies did not successfully advance ethics goals.<sup>231</sup> These audits, in the international context, examined the existence of policies and the success of those policies in deterring misconduct.<sup>232</sup> The audits did not second-guess attorney decision-making for trial or counseling strategy.<sup>233</sup> Rather, the audits would monitor whether lawyers adhere to their internal policies, whether the policies are consistently implemented, and whether the policies effectively target the ethics goals set out by the disciplinary committees.

#### IV. PMBR AS A SOLUTION TO PROACTIVELY REDUCE PROSECUTORIAL MISCONDUCT

As a solution, this Note proposes that disciplinary committees enforce Model Rule 5.1 in a proactive manner by implementing PMBR regulatory schemes. Model Rule 5.1 already requires that managerial attorneys ensure their offices have policies in place that reasonably guarantee compliance with the rules; however, few disciplinary committees leverage Model Rule 5.1 as a way to improve ethical infrastructure or take disciplinary action for Model Rule 5.1 violations. Additionally, various legal systems have adopted PMBR systems that require attorneys to self-assess their internal ethics policies against a rubric of ethics goals and report to local authorities whether their policies advance those goals. This Note suggests a disciplinary approach in which disciplinary committees meaningfully enforce Model Rule 5.1 by requiring prosecutors to demonstrate that their offices have established policies guaranteeing compliance with various ethics obligations. I propose these obligations include prosecutor-specific regulations, general ethics obligations, and internal management requirements. However, this Note recommends that disciplinary committees begin using and enforcing Model

---

229. *Id.* r. 5.1(a).

230. Depending on the jurisdiction and office, this group of “top prosecutors” includes the district, county, or U.S. attorney, as well as “executive staff, bureau or unit heads” and other individuals who have the authority to set policies and procedures for the office. ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 467, at 3 (2014).

231. This process would likely mimic the process developed in New South Wales. In New South Wales, the disciplinary authority may audit the firm if subsequent complaints, adverse publicity, or other events arise that give the authorities reason for concern. This auditing process was relatively rare, and in New South Wales the disciplinary office only performed seven to eight formal audits annually. *See* Schneyer, *supra* note 172, at 622–23, 625.

232. *See id.*

233. *See id.*

Rule 5.1 through a proactive framework, rather than offering specific policies that offices should adopt. This decision stems from an acknowledgement of the complexities involved in choosing precise preventative measures that work effectively. Expert research and collaborative committees that unify interested parties and comprehensively evaluate specific policies are necessary to develop a system that works. Best practices may also arise after an advisory trial and error period after disciplinary committees begin to adopt Model Rule 5.1 PMBR-style regulation and evaluate the success of their systems.

The U.S. legal system already has in place an underutilized infrastructure demanding that managerial attorneys establish internal protocols guaranteeing lawyers will follow the rules.<sup>234</sup> This obligation, established under Model Rule 5.1, requires that attorneys, including prosecutors, guarantee that lawyers create policies that ensure compliance with various ethical obligations, such as confidentiality concerns, conflict of interest issues, disclosing exculpatory evidence in discovery, among others.<sup>235</sup>

As previously discussed, ethical infrastructure has been implemented in one of two ways.<sup>236</sup> In some countries, disciplinary committees emphasize ethical infrastructure as a precatory and optional tool for law firms to voluntarily adopt. In these frameworks, disciplinary committees essentially exist with open-door policies so that lawyers can go to disciplinary counsel for practice management guidance.<sup>237</sup> Alternatively, PMBR is implemented so that disciplinary authorities require attorneys to appoint compliance counsel, evaluate their offices' policies against disciplinary bodies' goals, and conduct self-assessments that they submit to disciplinary authorities.<sup>238</sup> Similarly, Model Rule 5.1 requires, first, that managers have in place some internal policies regarding ethics but second, that managers must ensure the policies reasonably guarantee compliance with ethical obligations.<sup>239</sup> Disciplinary committees could meaningfully enforce Model Rule 5.1 with a PMBR application that would theoretically only add a requirement that prosecutors' offices submit the policies that they have already established.

This solution would help prevent misconduct because disciplinary committees, which are tasked with enforcing compliance with disciplinary rules, often do not have the information needed to unearth misconduct absent a complaint.<sup>240</sup> Unsophisticated criminal defendants do not traditionally seek information about formal or informal internal policies during discovery

---

234. Fortney, *supra* note 118, at 116.

235. MODEL RULES OF PRO. CONDUCT r. 5.1 cmt. 2 (AM. BAR ASS'N 2018); *see also* ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 467.

236. *See supra* Part II.A.

237. *See generally* Comm. on Evaluation of Disciplinary Enf't, *supra* note 77.

238. This model is more similar to those systems in Australia, Canada, and the United Kingdom. *See supra* Part II.A.

239. MODEL RULES OF PRO. CONDUCT r. 5.1.

240. Schneyer, *supra* note 63, at 259 (stating that most complaints are filed by "unsophisticated clients" who are "unlikely to specify any ethics rules as the basis for their allegations" and suggesting that ethics rule violations are only investigated when one firm has several complaints filed against it).

in § 1983 claims against prosecutors' offices. When defendants do move forward in these cases, they are met with the nearly insurmountable task of proving that the prosecutor's office was "deliberately indifferent" to its need to train prosecutors.<sup>241</sup> In several cases, discovery in § 1983 claims did uncover the failure of the office to keep records or establish policies that would educate attorneys about their ethical duties.<sup>242</sup> However, there were no § 1983 claims or other civil liability claims brought against any of these offices that implicated Model Rule 5.1 violations.<sup>243</sup>

Disciplinary committees, therefore, should proactively seek out offices that do not adequately train their prosecutors, do not supervise their prosecutors, or do not know what their prosecutors are doing. By adopting pieces of PMBR, disciplinary committees could proactively safeguard against misconduct and improve the criminal justice system.<sup>244</sup> Disciplinary committees could employ a self-reporting system requiring prosecutors' offices to assess the degree to which their internal protocols guarantee that their line attorneys comply with their obligations. Then, if policies do not adequately safeguard against misconduct, disciplinary committees would not mandate that the office adopt certain protocols. Instead, per each court's rules,<sup>245</sup> disciplinary committees would sanction the top supervisory prosecutors and require that the office adopt *some* rule that more effectively guarantees that lawyers are both aware of and act according to their responsibilities.

PMBR has historically been implemented internationally to overcome the possible pressures from third-party investors for firms to behave in ways that increase profitability at the expense of client care.<sup>246</sup> The empirical success of PMBR in legal practices where lawyers have internally divergent interests demonstrates that PMBR may also be a tool that safeguards against prosecutorial misconduct.<sup>247</sup> Prosecutors face similar contradicting pressures and are simultaneously asked to be zealous advocates that seek convictions and guilty pleas but who must also be fair-minded agents of justice.<sup>248</sup> PMBR, as a proactive tool, would likely help prosecutors' offices balance these conflicting pressures and ensure that, despite any internal pressure to seek convictions, there are still safeguards that protect ethics in prosecutions.

This system would need to overcome the hurdle of clearly identifying which goals prosecutors must use to evaluate their policies.<sup>249</sup> As noted above, research has demonstrated that prosecutors are typically bound by

---

241. *Connick v. Thompson*, 563 U.S. 51, 59 (2011).

242. *See generally* Rudin, *supra* note 1.

243. *Id.*

244. *See supra* Part II.A.

245. MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2018).

246. *See* Schneyer, *supra* note 63, at 235.

247. *See* Schneyer, *supra* note 172, at 624–25.

248. *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction" but also "use every legitimate means to bring about a just one").

249. *See supra* Part II.A.

three types of rules, and disciplinary committees should mandate that prosecutors' offices abide by: (1) prosecutor-specific rules, (2) general ethical rules, and (3) appropriate internal management policies and rules.<sup>250</sup> Prosecutor-specific goals are codified in the widely adopted ABA Model Rule 3.8 but also could be more clearly articulated by a committee that reviews case law and public policy to more clearly delineate the basic obligations that internal policies must address. Additionally, because the current disciplinary landscape often relies on an assumption that prosecutors' offices will discipline prosecutors who violate the rules,<sup>251</sup> disciplinary committees should also require management policies so that prosecutors develop clear, systematic, and consistently applied internal policies for punishing infractions.<sup>252</sup>

When developing the goals that prosecutors' offices must strive to achieve, disciplinary committees should not require specific policies. Demanding specific policies would prevent prosecutors' offices from tailoring their policies to the needs of their jurisdictions or offices. This type of micromanagement would likely defeat the purpose of self-improvement and organic growth in the office.<sup>253</sup> Furthermore, overregulating prosecutors with specific policy requirements may also raise concerns of breaching the separation of powers since disciplinary committees are agents of the judiciary and prescribing certain policies would dictate how prosecutors perform their duties. Instead, disciplinary committees would need to allow prosecutors' offices to develop individualized implementation of the objective criteria.

To address another concern, authorities should not decline to employ PMBR because of a concern that prosecutors would fail to report on internal policies honestly. Prosecutors' offices are government agencies and there is a strong public interest in government transparency.<sup>254</sup> The disclosure of internal policies and record-keeping practices would further this interest of transparency,<sup>255</sup> but this disclosure would simultaneously force prosecutors to honestly self-report. Judges in practice could see if prosecutors are complying with their policies where relevant, but more significantly, internal employees of the office would know whether the reporting was truthful or not. These employees would have a duty to correct any dishonest reporting and hold their own offices accountable.

Additionally, disclosure of prosecutorial misconduct records and the consequent measures that prosecutors' offices take to safeguard against misconduct is in the public interest of transparency.<sup>256</sup> The public should be informed about these issues, because if it is unsatisfied with a prosecutor's office's protocols, then it should have the opportunity to express this

---

250. *See supra* Part II.A.

251. *See supra* Part I.B.2.

252. *See supra* Part II.A.

253. Fortney & Gordon, *supra* note 162, at 172.

254. Jamie Connolly, *Prosecutorial Discretion and Collateral Consequences: Rethinking the Alabama Rules of Professional Conduct*, 43 J. LEGAL PRO. 269, 273 (2019).

255. *See id.*

256. *See supra* Part II.B.



dissatisfaction at the polls by voting for new elected officials—either elected prosecutors or legislators—who can effectuate change in prosecutorial conduct. The purpose of publicly disclosing policies and misconduct records is not necessarily to put the public on notice about which attorneys are “bad prosecutors” but rather to provide the public with the assurance that prosecutors’ offices have systematic policies that track and punish various types of misconduct and that these policies are effective. Therefore, disclosure and self-reporting should not require prosecutors’ offices to specifically state who received discipline or demerits but, instead, to report on the number of incidents of misconduct and noncompliance and the responses that their offices had to those instances.

The benefits of a PMBR program, including, first and foremost, a revision and reestablishment of internal policies in prosecutors’ offices, outweigh the potential challenges that regulators may face when implementing PMBR.<sup>257</sup> Even if managerial prosecutors, through the self-evaluation process, learn that their offices are not fully compliant, the reflection on and review of policies may lead to greater efforts to move towards compliance.<sup>258</sup> Furthermore, evaluation of office policies allows disciplinary authorities to address internal protocols that permit negligent prosecutions.<sup>259</sup> While negligent actions by prosecutors are regularly not punished by courts or disciplinary committees, these actions still have serious ramifications for innocent criminal defendants.<sup>260</sup> By allowing disciplinary committees to assess the extent to which internal policies permit negligence, regulatory authorities can reduce the consequences of negligent trial tactics while not individually attacking the errant attorney.<sup>261</sup>

Even though there are concerns about judicial overreach into a primarily executive branch law enforcement function, PMBR is a tool that allows for judicial committees to merely inquire into the existence and efficacy of internal policies. Disciplinary committees should not have the opportunity to second-guess prosecutorial decision-making.<sup>262</sup> For example, there is a clear distinction between a disciplinary committee ensuring that discretionary decisions like plea bargains are made with oversight, justification, and training and a disciplinary committee forbidding a prosecutor’s office from offering pleas to certain individuals.<sup>263</sup>

Additionally, implementation of this self-reporting under Model Rule 5.1 should not be a significant enough burden to prevent a PMBR approach. While there may be initial costs involved in adapting policies to a self-reporting form and a reevaluation of policies in light of specific ethics goals, most offices should not have to undertake the process of developing

---

257. *See supra* Part II.B.

258. Fortney & Gordon, *supra* note 162, at 172.

259. Weinburg, *supra* note 215, at 172.

260. Green & Yaroshefsky, *supra* note 42, at 58–59, 101.

261. *See id.*

262. *See supra* Part II.B.

263. *See supra* Part II.B.

guidebooks and policies.<sup>264</sup> These processes should already be established per Model Rule 5.1. If an office does not have these policies in place, the benefit of establishing consistent, promulgated guidance and training to attorneys outweighs the burdens of any time or cost required to develop these policies.

Overall, this is a suggestion that disciplinary committees could import PMBR to U.S. legal practice to provide more oversight of prosecutorial conduct. It is clear that, while many prosecutors execute their jobs without issue, the consequences of misconduct are so substantial and misconduct happens with enough frequency that increased regulatory efforts are necessary.<sup>265</sup> In an ideal scenario, implementation of proactive regulation and self-reporting on internal policies would provide another check to assist prosecutors' offices in developing management techniques that sufficiently train their employees on how to be agents of justice. If, however, issues arise in the implementation and integration of this proactive technique, this practice is not irreversible. This Note submits that the adoption of proactive regulation and self-reporting in accordance with Model Rule 5.1 is a worthwhile endeavor that would, at minimum, increase prosecutors' reflections on their own legal practices, help prevent misconduct, and help facilitate an equitable legal system that protects the constitutional right of due process.

#### CONCLUSION

There are currently several mechanisms to combat and deter prosecutorial misconduct in our legal system, including judicial orders, civil litigation by defendants, disciplinary committee actions, and internal discipline. However, these regulatory mechanisms all approach the issue of prosecutorial misconduct with a retrospective, deterrence approach, which has thus far been successfully countered and undermined by various external factors. Ultimately, none of these avenues has successfully prevented misconduct to the degree that society demands.

If disciplinary committees began enforcing Model Rule 5.1 proactively, case studies in other jurisdictions suggest that offices would reevaluate their policies with a more pointed and rigorous review of ethical compliance. This approach does not create new ethical obligations for prosecutors, since Model Rule 5.1 already demands that supervising attorneys guarantee compliance with the rule. Additionally, because the proposed style of PMBR does not require a submission of which attorneys committed misconduct but, rather, a report of the office policies that are in place and a summary of their efficacy, this regulatory reporting would not infringe on prosecutors' discretionary decision-making in the office. Instead, prosecutors merely need to confirm for disciplinary authorities that their offices have in place a system to ensure compliance with prosecutorial obligations, general ethics

---

264. *See supra* Part II.C.1.

265. *See supra* Part I.A.

obligations, and a recording system that internally tracks misconduct, sanctions, discipline, and education for attorneys who violate rules.

Ultimately, by rereading Model Rule 5.1 as an enforcement tool for disciplinary committees by adopting proactive management-based self-reporting requirements, these judicial committees may help prevent serious prosecutorial misconduct instead of merely punishing prosecutors only after their misconduct has already deprived some person of protected rights.