

# THE TRUTH MIGHT SET YOU FREE: HOW THE MICHAEL MORTON ACT COULD FUNDAMENTALLY CHANGE TEXAS CRIMINAL DISCOVERY, OR NOT

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## I. INTRODUCTION

Civil litigators in Texas would be completely baffled by the discovery phase in a criminal case. The contrast between discovery in civil and criminal litigation, until very recently, has been extraordinary. Civil litigation practice usually involves relatively little trial work and a great deal of discovery activity.<sup>1</sup> Discovery is not unknown in criminal litigation, but often has been

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1. All civil litigation cases must be governed by a discovery control plan, which allows for a continuous flow of evidence and information regarding the trial. TEX. R. CIV. P. 190.1. The openness between case materials, evidence, and information allows parties to acquire full knowledge of the facts involved in the dispute, which often leads parties to find a suitable compromise without trying the lawsuit. GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 315 (11th ed. 2013). Section 9 of the Texas Rules of Civil Procedure governs the rules pertaining to discovery in all civil cases. *See generally* TEX. R. CIV. P. 190–215.

defined more by investigation and the exploitation of procedures not designed for that purpose than by the variety of effective discovery tools available in any civil case.<sup>2</sup> Interrogatories and requests for admissions simply do not exist in criminal cases. Depositions are available only in theory.<sup>3</sup> The decision whether to disclose material favorable to the defendant, which is required by due process, lies with the prosecutor whose failure to comply may, but easily may not, be discovered after the fact.<sup>4</sup> And until very recently, so many limitations existed on the scope and timing of required disclosures that the information released to the defense was often too little, and came too late.<sup>5</sup>

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2. See REAMEY & BUBANY, *supra* note 1. The disparity between criminal and civil discovery is not apparent just by reading the rules. *Id.* Rather, the disparity can be seen from studying the cases that interpret the rules and realizing that discovery opportunities are very limited in scope. *Id.* As a result of the limited access to discovery, criminal practitioners have been forced to find other ways to discover the prosecution's case. *Id.*

3. In *James v. State*, the appellant sought depositions from various people involved in the case who had useful information. See *James v. State*, 563 S.W.2d 599, 602 (Tex. Crim. App. 1978). The appellant expressed his reasons for needing the depositions in an affidavit, which included the officers' refusal to discuss any facts of the case with the appellant's court-appointed private investigator or attorney; the fact that a complainant in one of the related cases was out of state; and that two complainants, one of whom was the victim, had moved since the initial investigation and the Assistant District Attorney would not disclose their addresses. *Id.* Despite the establishment of these facts, the court denied the appellant's request to take the depositions, stating that the appellant did not prove he had good reason to take their depositions and, therefore, that the denial was not harmful to him. *Id.* at 602–03. “The trial court has wide discretion in either granting or denying a motion for taking a deposition.” *McKinney v. State*, 505 S.W.2d 536, 540 (Tex. Crim. App. 1974), *abrogated by Henson v. State*, 407 S.W.3d 764 (Tex. Crim. App. 2013). “[T]he fact that witnesses of whom depositions are requested are adverse witnesses is not enough standing alone to show an abuse of discretion in denying the motion to take a deposition.” *Id.* In the event the motion requesting depositions is denied, the party must demonstrate harm to establish an abuse of discretion by the trial court. See *James*, 563 S.W.2d at 602.

Failure to request a deposition, however, may constitute ineffective assistance of counsel. See generally *Frangias v. State*, 450 S.W.3d 125 (Tex. Crim. App. 2013) (holding that defense representation was deficient because counsel did not seek to depose an unavailable witness who could have corroborated defendant's potentially exculpatory testimony). In holding that a failure to request a deposition was deficient representation in *Frangias*, the Texas Court of Criminal Appeals cited and distinguished numerous cases in which trial courts denied such requests, all affirmed on appeal. See *id.* at 141 n.43. The court's opinion impliedly condemns requests for depositions based on “a bald and belated attempt at discovery” without explaining why defense discovery by deposition is inappropriate, even if it comes shortly before trial. See *id.* at 141. The implication seems to be that depositions are for the purpose of perpetuating testimony due to witness unavailability and not for discovery generally.

4. See Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxii (2015), [http://georgetownlawjournal.org/files/2015/06/Kozinski\\_Preface.pdf](http://georgetownlawjournal.org/files/2015/06/Kozinski_Preface.pdf). Federal appellate Judge Alex Kozinski recently noted the difficulty in unearthing violations of the obligation to reveal exculpatory information to the defense:

Prosecutors and their investigators have unparalleled access to the evidence, both inculpatory and exculpatory, and while they are required to provide exculpatory evidence to the defense under *Brady*, *Giglio*, and *Kyles v. Whitley*, it is very difficult for the defense to find out whether the prosecution is complying with this obligation.

*Id.*

5. See Cynthia E. Hujar Orr & Robert G. Rodery, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 ST. MARY'S L.J. 407, 412 (2015) (“Texas has traditionally recognized only limited pretrial discovery.”).

Wide-open discovery in civil matters reflects the sensible view that resources should not be wasted on the litigation of issues about which the parties agree.<sup>6</sup> As often happens, parties in possession of complete information about the merits of a case are able to arrive at a reasonable settlement, confident that no important unknown evidence would significantly change the outcome.<sup>7</sup> Why, then, would criminal defendants not be entitled to the same access to information? Wouldn't that lead to more settlements, just as it does in civil cases?<sup>8</sup> And isn't it even more important, given the high stakes involved in a criminal prosecution, to arrive at an informed and fair resolution? Isn't that in the interest of everyone?<sup>9</sup>

Truth-finding is an important goal in every criminal justice system, but it is not always the highest value to be served.<sup>10</sup> In the United States, for example, exclusionary rules prevent fact-finders from learning of probative, even crucial, evidence regarding guilt or innocence.<sup>11</sup> Simple rules of evidence impede the jury's ability to judge on all the facts, facts that might better help it ascertain the truth. Hearsay is excluded because the jury might not appreciate its unreliability; significant documents go unseen because they cannot be properly authenticated.<sup>12</sup> Although these rules are intended to filter out what may be untrue, they cannot succeed without sometimes also filtering out what is true. This burden to the truth-finding function is deemed less harmful generally than the risk of admitting everything.<sup>13</sup>

Similarly, rules that prevent the accused from having access to all evidence collected by the prosecution may serve other values at the expense of truth-finding and justice. The arguments against criminal defendants having the wide-open discovery available to parties in a civil suit usually boil down to two: (1) giving a person accused of a crime full information about evidence, including witnesses, that will be used against him facilitates coercion, collusion, and evidence tampering;<sup>14</sup> and (2) due to constitutional

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6. See REAMEY & BUBANY, *supra* note 1.

7. See *id.*

8. S. COMM. ON CRIMINAL JUSTICE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013). As the authors of discovery reform noted in their Bill Analysis,

[Open file discovery] promotes efficiency in the criminal justice system. A defendant who understands the extent of the evidence against him can make an informed decision to plead. It also allows for a full defense, lessening the likelihood of an overturned verdict on appeal. The state saves thousands of dollars in appeals, incarceration, and potential compensation for wrongful convictions."

*Id.*

9. R. Marc Ranc, *Two Views of Morton*, 77 TEX. B.J. 964, 966 (2014) (stating that prosecutors and defense attorneys are all officers of the court and integral parts of the judicial system who want justice).

10. See Gerald S. Reamey, *The American Exclusionary Rule Experience*, in EXCLUSION OF EVIDENCE WITHIN THE EU AND BEYOND 191, 192 (1999).

11. See *id.*

12. See *id.* at 191.

13. See *id.*

14. See Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 221–22 (2005); see, e.g., Ranc, *supra*

guarantees afforded to the accused, it is impossible to have fully reciprocal discovery because it would give the defendant an unfair advantage in the adversarial contest.<sup>15</sup>

Regarding the first of these, the fear of witness intimidation or worse is not borne out by the experience in other countries.<sup>16</sup> In most advanced legal systems, the defense receives—often early in the process and without requesting it—all of the evidence collected by the police and prosecution.<sup>17</sup> Some cases of collusion, evidence tampering, and threatening witnesses must exist in these systems, but do not seem to be widespread or sufficient to restrict the flow of information to the defense.<sup>18</sup> And despite the limits on disclosure of prosecution evidence in the United States, such abuses have not been eliminated entirely.<sup>19</sup> While judges should be able to order suitable, tailored protections for witnesses and evidence in individual cases, a rule that blocks disclosure exacts a high cost from all defendants, especially in the absence of a legitimate cause for concern.

The reciprocity argument is one peculiar to adversarial systems.<sup>20</sup> Because the trial process is viewed as a competition, each side will seek an advantage.<sup>21</sup> An advantage to one party will often be a disadvantage to the other, making the process “unfair.”<sup>22</sup> In a non-adversarial system, the kind used in most developed countries, there is, in theory at least, only one “side,” represented by the truth.<sup>23</sup> Full disclosure in these systems is seen more as a

note 9, at 965. Mr. Ranc, a former prosecutor in Williamson County and now a criminal defense attorney, described this argument:

The district attorney would further assert the idea that if the prosecution gave the defense an open file, the information would prompt the defendant to concoct a story in defense of the accusations against him or her. I think most defense attorneys would agree that this idea is preposterous. . . . Until the very end, the belief was propounded that if the state’s files were completely open, then the state could never win a prosecution.

Ranc, *supra* note 9, at 965.

15. Ranc, *supra* note 9, at 965 (argument from former prosecutor); see 2 CHARLES ALAN WRIGHT & PETER J. HENNING, *FEDERAL PRACTICE AND PROCEDURE* § 260 (4th ed. 2009) (discussing the constitutionality of discovery by the government); W.C. Crais III, Annotation, *Right of Prosecution to Pretrial Discovery, Inspection, and Disclosure*, 96 A.L.R.2d 1224, 1226 (1964) (arguing that reciprocal discovery violates the right against self-incrimination).

16. Cerruti, *supra* note 14.

17. See *id.* at 214–15, 253–55 (discussing how the principle of transparency in criminal justice has entered an era of disclosure in foreign and international systems of law).

18. See *id.*

19. See, e.g., *Solomon v. State*, 830 S.W.2d 636, 636–37 (Tex. App.—Texarkana 1992, writ ref’d) (upholding the conviction of a defendant who threatened to kill a prospective witness in retaliation of her testifying); *Ex parte Welch*, 729 S.W.2d 306, 309 (Tex. App.—Dallas 1987, no writ) (upholding the bail amount of a defendant who solicited another to kill his wife to prevent her from testifying).

20. See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 439–40 (1992); Gerald S. Reamey, *Innovation or Renovation in Criminal Procedure: Is the World Moving Toward a New Model of Adjudication?*, 27 ARIZ. J. INT’L & COMP. L. 693, 708 (2010).

21. See Van Kessel, *supra* note 20, at 443–44.

22. See *id.* at 484–85.

23. See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 525 (1973) (stating that some sources of

means for facilitating a just result by arriving at the truth rather than as an advantage or disadvantage in a contest in which truth is revealed by the combat of competing champions.<sup>24</sup> In an adversarial environment, discovery rules that favor either party will be seen as unfair, and as possibly thwarting the ends of justice. Never mind that even the most rigorously adversarial system is inherently unbalanced and therefore always unfair in some sense, the appearance of an uneven playing field smacks of a poor design that leads to unreliable results.<sup>25</sup>

Rights guaranteed to the accused admittedly prevent any true reciprocity of discovery in criminal cases.<sup>26</sup> Taking the deposition of the accused, for example, could not meaningfully be required. The guarantee against compelled self-incrimination prevents it in a way that has no counterpart for a complaining witness.<sup>27</sup> Requiring production of correspondence between a defendant and her attorney would interfere with the constitutional right to counsel, but at least in that instance similar protections safeguard correspondence between prosecutor and witness, even if they do so less robustly.<sup>28</sup>

Impediments to full reciprocity of discovery do not necessarily produce a lopsided adversarial process. Laying aside the inherent advantages enjoyed by the prosecution through its unmatched access to investigative resources, an approximation of reciprocity can be achieved if discovery rules are crafted to preserve the adversarial balance (to the extent constitutionally permissible) while simultaneously extending the defendant's access to information.<sup>29</sup>

Prior to 2014, Texas discovery law provided safeguards against improper use of evidence and against the unbalanced access to that evidence by the parties, but it also inhibited the ability of the criminally accused to obtain useful material from the state in a timely fashion.<sup>30</sup> Capable defense lawyers were often required to find informal means of discovery to gather facts by requesting records pursuant to the Texas Open Records Act, filing applications for bail reduction, or filing petitions for habeas corpus relief.<sup>31</sup> Examining trials were used, not for their statutory purposes, but to substitute

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information are rejected in the American system due to fear of unreliability, while others are rejected to advance other values); Van Kessel, *supra* note 20, at 417 (arguing that so-called inquisitorial systems rely on neutral and detached judges rather than “upon presentation of evidence by interested ‘advocates’ to an unprepared fact finder”); Reamey, *supra* note 20, at 699 (stating that lawyers shape and control all aspects of trial in America, while Continental judges are active participants in their system).

24. See Van Kessel, *supra* note 20, at 454–55.

25. See Reamey, *supra* note 20.

26. See sources cited *supra* note 15.

27. See Crais III, *supra* note 15.

28. See *id.* at n.12.

29. See S. COMM. ON CRIMINAL JUSTICE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013).

30. *Id.*

31. See REAMEY & BUBANY, *supra* note 1 (arguing that, due to limited criminal discovery, practitioners have been forced to use unconventional methods to discover the prosecution's case).

as a rough-and-ready, but very limited, kind of deposition.<sup>32</sup> Unimaginative, impatient, or lazy lawyers simply made no effort and negotiated guilty pleas for their clients based on no more than a short summary of the facts provided by the prosecutor or by their own partially informed client. In some counties, prosecutors adopted an “open-file” policy, but in others, defendants were dependent on the trial judge to order the production of evidence.<sup>33</sup> Unfortunately, Texas law gave a defendant the right to no more discovery than due process requires.<sup>34</sup>

The promise of an open-file policy, in those counties in which one existed, sometimes provided an illusory kind of disclosure.<sup>35</sup> Access to a so-called open file promised nothing beyond the minimal information to which the defendant is entitled under due process, and maybe not even that.<sup>36</sup> The file given to the defense counsel was almost certainly not the entire case file.<sup>37</sup> Even generous disclosures of information would not include work product. Would the file include everything else in the possession of the state? Would it include non-*Brady* materials in the hands of law enforcement or other state agencies? There simply was no way short of a court’s disclosure order to ensure that open access was full access.<sup>38</sup>

Even if complete prosecution files were made available to the defendant, access often was so restricted that it inhibited actual use of the materials.<sup>39</sup> For example, for a considerable time the Bexar County District Attorney’s Office, to its credit, maintained an open-file policy.<sup>40</sup> Defendants and their attorneys, however, were not allowed to photocopy, scan, or photograph

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32. See *id.* at 221 (stating that a suspect obtains “some discovery” in examining trial). The use of the examining trial as a discovery vehicle, however, is easily curtailed or eliminated by obtaining an indictment prior to arrest, or even prior to the time the examining trial can be scheduled and conducted. See generally *Brown v. State*, 475 S.W.2d 938 (Tex. Crim. App. 1972) (holding that the return of an indictment terminates the right to an examining trial), *overruled by Bradford v. State*, 608 S.W.2d 918 (Tex. Crim. App. 1980). Failing these measures, a prosecutor always retains the option of simply presenting no evidence at the examining trial, which results in the defendant’s release, only to be re-arrested when the indictment returns.

33. See *Ranc*, *supra* note 9, at 965 (stating that some district attorney’s offices had liberal open-file policies while others were much more restrictive).

34. See BILL ANALYSIS, Tex. S.B. 1611.

35. See *Ranc*, *supra* note 9, at 965.

36. See *id.*

37. Opening the file to defense counsel might be conditioned on an agreement not to share the information with the accused, and pro se defendants could be denied access altogether. This very kind of “conditional release” of information was considered in Opinion No. 646 of the State Bar of Texas Professional Ethics Committee, which determined that following enactment of the Michael Morton Act, prosecutors could not ethically require defense counsel to agree not to share information from the file with their clients. Tex. Comm. on Prof’l Ethics, Op. 646 (2014), 78 TEX. B.J. 78 (2014). Prior to the Act, this practice was not prohibited, and presumably, conditional release of material not covered by the Act remains an option. See *id.*

38. See *Ranc*, *supra* note 9, at 965.

39. See *id.*

40. See Elizabeth Allen, *Bexar DA’s Open File Policy Called “Inferior” by State’s Defense Lawyers*, SAN ANTONIO EXPRESS-NEWS (Sept. 30, 2007), [http://markstevenslaw.com/wp-content/uploads/2014/09/1328106896\\_174.news\\_1.pdf](http://markstevenslaw.com/wp-content/uploads/2014/09/1328106896_174.news_1.pdf).

pages within the files.<sup>41</sup> Attorneys of record could inspect the file, read it, and take notes of its contents, but not reproduce it.<sup>42</sup> This daunting task effectively discouraged even diligent lawyers, especially in cases with voluminous files like those often accompanying white-collar-crime prosecutions and other major cases.<sup>43</sup> Copying by hand, organizing, and indexing hundreds or thousands of pages was simply impractical. Even in less challenging cases, the chore required considerable time and expense.<sup>44</sup> Other conditions, like restricting the hours files were available for inspection, further impeded defendants in some counties with open-file policies.

The risk of wrongful conviction is high in an adversarial system in which defendants are systematically denied information about the state's case until it is revealed at trial. In the case of a Texas defendant named Michael Morton, this risk was realized.

## II. IMPETUS FOR CHANGE

Christine Morton was murdered in her home in 1986.<sup>45</sup> The crime was a grisly one with only one eyewitness—her three-year-old son.<sup>46</sup> Despite his insistence that his father, Michael Morton, had not committed the murder, investigators almost immediately suspected Michael of bludgeoning his wife to death.<sup>47</sup> None of the evidence that was gathered substantially supported this suspicion, and some of the evidence contradicted it, but Michael Morton was arrested, tried, and convicted of the crime.<sup>48</sup> Without belaboring the facts of this case, which have been extensively chronicled elsewhere, suffice it to say that the prosecuting district attorney allegedly ignored or deliberately withheld potentially exculpatory evidence that came to light during the

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41. *See id.* A similar policy existed in the Travis County District Attorney's Office. *See Ranc, supra* note 9. Some offices, including the Williamson County District Attorney's Office—the office that prosecuted Michael Morton—had an even more restrictive view of open-file policy. *See id.*

42. *See Ranc, supra* note 9. This procedure changed somewhat in Bexar County after the San Antonio Criminal Defense Lawyers Association negotiated an agreement with District Attorney Susan Reed that the Association would rent a copier and pay for its necessary supplies in exchange for being provided copies of certain information in the DA's file. *See Allen, supra* note 40.

43. *See Allen, supra* note 40. Bexar County District Attorney Susan Reed said in response to criticism of her office's no-copy policy, "What can I say? I don't make it as easy as everyone else." *See id.*

44. *See id.* Bexar County criminal defense attorney Mark Stevens was quoted about this process: "(Recently) I just spent an hour and a half in an office dictating a file. My secretary is probably going to have to spend seven or eight hours on that transcription." *Id.* Needless to say, the impact of this policy was to greatly increase defense costs to the individual defendant or to the county in cases in which counsel was appointed.

45. *See* Pamela Colloff, *The Innocent Man, Part One*, TEX. MONTHLY (Nov. 2012) [hereinafter Colloff, *Innocent Man, Part One*], <http://www.texasmonthly.com/politics/the-innocent-man-part-one>; Pamela Colloff, *The Innocent Man, Part Two*, TEX. MONTHLY (Dec. 2012) [hereinafter Colloff, *Innocent Man, Part Two*], <http://www.texasmonthly.com/articles/the-innocent-man-part-two>.

46. *See* Colloff, *Innocent Man, Part One, supra* note 45.

47. *See id.*

48. *See id.*

investigation.<sup>49</sup> After serving almost twenty-five years of a life sentence, Michael Morton was released from prison and exonerated once the undisclosed evidence came to light.<sup>50</sup> Subsequently, former District Attorney Ken Anderson, by then a sitting Texas District Court judge, was removed from the bench, forced to surrender his law license, and sentenced to serve ten days in jail as part of a settlement in a civil misconduct suit and contempt proceeding against him.<sup>51</sup>

The timing of Morton's release in October 2011 could not have been better for the purpose of provoking law reform. Publicity surrounding the case became unavoidable when *Texas Monthly* magazine ran a lengthy two-part article describing in great detail the failures of investigation and disclosure that led to Morton's wrongful conviction.<sup>52</sup> This was preceded in March by a *60 Minutes* interview on CBS that focused on prosecutorial misconduct and the devastating effect of the conviction on Michael Morton's life.<sup>53</sup> Efforts to amend Texas's general criminal discovery statute were fed by increasing interest in the compelling story of a man who suffered immeasurable loss by the murder of his wife, the alienation of his young son, and decades spent in a Texas prison, all due to apparent failures to recognize and disclose exonerating or mitigating evidence.<sup>54</sup> By the time the Texas Legislature convened in Spring 2013, calls for reform were impossible to ignore. Adding to the momentum was Michael Morton's demeanor. Quiet, respectful, forgiving, and never vindictive, he simply and persistently called for reforms that would prevent others from suffering his fate.<sup>55</sup> The conviction in March 2013 of Mark Allan Norwood for murdering Christine Morton set the stage for legislative action.<sup>56</sup> DNA evidence linking Norwood

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49. *See id.*

50. *See* Colloff, *Innocent Man, Part Two*, *supra* note 45.

51. Chuck Lindell, *Ken Anderson to Serve 10 Days in Jail*, AM.-STATESMAN (Nov. 8, 2013, 5:02 PM), <http://www.statesman.com/news/news/ken-anderson-to-serve-10-days-in-jail/nbmsH/>.

52. *See* Colloff, *Innocent Man, Part One*, *supra* note 45; Colloff, *Innocent Man, Part Two*, *supra* note 45.

53. *60 Minutes: Evidence of Innocence: The Case of Michael Morton* (CBS television broadcast Mar. 25, 2012).

54. *See* Lindell, *supra* note 51. Mr. Morton's release was delayed further by the refusal of Williamson County District Attorney John Bradley to agree to DNA testing. *See id.*; Kozinski, *supra* note 4, at xxxi (stating that many innocent defendants spend years fighting to obtain evidence that would exonerate them).

55. Opinion, *Morton Case Calls for System Reforms*, AM.-STATESMAN (Mar. 30, 2012, 7:06 PM), <http://www.statesman.com/news/news/opinion/morton-case-calls-for-system-reforms/nRmbm> ("My life is great," Michael Morton told the American-Statesman's [reporter] this week. "I have been blessed in a million ways, more than I can count."). Since his release, Morton has been on a mission to change the law, hold prosecutors accountable for their misconduct, and keep innocent people from suffering the same fate that he faced. *See* Brandi Grissom, *Senate Unanimously Approves Michael Morton Act*, TEX. TRIB. (Apr. 11, 2013), [www.texastribune.org/2013/04/11/senate-approves-michael-morton-act/](http://www.texastribune.org/2013/04/11/senate-approves-michael-morton-act/).

56. Pamela Colloff, *Mark Alan Norwood Found Guilty of Christine Morton's Murder*, TEX. MONTHLY (Mar. 27, 2013), <http://www.texasmonthly.com/articles/mark-alan-norwood-found-guilty-of-christine-mortons-murder>.



to another woman's murder *after* Michael Morton's wrongful conviction made that action irresistible.<sup>57</sup>

### III. THE FOCUS OF REFORM

The Morton case highlighted a systemic failure, but what would fix it? An obvious answer seemed to be to give defendants more access to evidence gathered by the state.<sup>58</sup> If Michael Morton's trial lawyer had known that a suspicious green van was seen parked behind the house when the crime occurred, that a blood-stained bandana was found where the van was parked, or that Morton's son described a "monster"—not his father—in the house when his mother was killed, the result might have been different.<sup>59</sup> Prosecutors have always had a duty to disclose exculpatory material and impeachment evidence; however, much of the information in the state's possession that could be useful to the defense—but not exculpatory or *potentially* exculpatory, or exculpatory but not "material" to the issue of guilt—could be withheld.<sup>60</sup> Even if evidence is clearly exculpatory and material, its disclosure may be delayed until the trial is actually underway.<sup>61</sup> Clearly, disclosure satisfying the minimal due process standard does not guarantee that defendants have everything necessary to mount an effective defense against the state's case or that they will receive information in time to make best use of it.<sup>62</sup>

To supplement the disclosure requirement of *Brady v. Maryland*,<sup>63</sup> Texas criminal procedure law includes a general discovery provision.<sup>64</sup> Until 2005, that provision, article 39.14, permitted, but did not require, a trial judge to order the state to produce certain items in its possession.<sup>65</sup> The discretionary nature of article 39.14 assured that application of the law was uneven.<sup>66</sup> Some trial judges ordered extensive disclosure of prosecution materials, while others routinely denied requests for production of anything

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57. *See id.*

58. *See* S. COMM. ON CRIMINAL JUSTICE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013) ("Recent high profile cases in Texas show that with open file discovery, the likelihood that evidence relevant to the defendant's innocence would have been revealed is increased.").

59. *See* Colloff, *Innocent Man, Part One*, *supra* note 45; Colloff, *Innocent Man, Part Two*, *supra* note 45.

60. *See* Randall Sims, *Two Views of Morton*, 77 TEX. B.J. 964, 965 (2014).

61. *See* Losoya v. State, 636 S.W.2d 566, 571 (Tex. App.—San Antonio 1982, no writ) (citing Juarez v. State, 439 S.W.2d 346 (Tex. Crim. App. 1969)).

62. *See* BILL ANALYSIS, Tex. S.B. 1611 ("*Brady* is vague and open to interpretation, resulting in different levels of discovery across different counties in Texas.").

63. *See* *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

64. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14 (West, Westlaw through 2015 84th Reg. Legis. Sess.).

65. *See* Kinnamon v. State, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990), *overruled on other grounds* by Cook v. State, 884 S.W.2d 485, 488–90 (Tex. Crim. App. 1994).

66. *See* BILL ANALYSIS, Tex. S.B. 1611 ("A defendant's chances to a fair trial often vary according to jurisdiction, because of the lack of a uniform discovery law.").

beyond the constitutionally mandated minimum.<sup>67</sup> In response to calls from the Texas defense bar for strengthened discovery options, the Texas Legislature amended article 39.14 in 2005 to include mandatory language:

Upon motion of the defendant showing good cause therefor and upon notice to the other parties, the court in which an action is pending *shall order* the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies.<sup>68</sup>

As well-intentioned as this amendment may have been, it remained easy to circumvent. Couched in terms reminiscent of *Brady*, the mandate applied to production in a “pending” action *or* when a defendant was “on trial.”<sup>69</sup> The trial judge could comply with article 39.14 by allowing the state to defer production until the trial was actually in progress. Making the best use of exculpatory material or valuable impeachment facts in the midst of trial is difficult and often impossible, and a request for trial delay to develop newly discovered evidence or prepare effective cross-examination is rarely met with enthusiasm and generosity by the trial court. Further, the statute was limited to “material” evidence that was in possession of the state or its agencies.<sup>70</sup> Often, facts that may not by themselves be material will nevertheless be important to the defense. In this sense, article 39.14 never functioned as a true discovery statute, but only as a kind of safety net to prevent the worst kinds of unfairness to the accused.

The most significant deficiency of the 2005 version of article 39.14, however, was the preliminary requirement of a showing of “good cause” by the defendant.<sup>71</sup> This placed the burden of requesting production, along with a burden of showing good cause (a term undefined by the statute), squarely on the defense.<sup>72</sup> Trial judges, who were reluctant to order disclosure of the state’s case, could rely on an abuse of discretion standard to protect the denial of a production order based on the defendant’s failure to show good cause.<sup>73</sup> To make matters worse, if the trial judge granted the defense’s request, the

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67. *See id.*

68. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West 2005) (emphasis added).

69. *Id.*

70. *See id.*

71. *See id.*; Orr & Rodery, *supra* note 5 (noting that a defendant could inspect limited discoverable items only on a showing of sufficient good cause).

72. *See* CRIM. PROC. ANN. art. 39.14(a); Orr & Rodery, *supra* note 5.

73. *See* Walker v. State, 321 S.W.3d 18, 22 (Tex. App.—Houston [1st Dist.] 2009, pet. dismiss’d).

state's failure to comply with a production order was also reviewed for abuse of discretion.<sup>74</sup> In short, it was entirely possible following the 2005 amendment of article 39.14 for a criminal defendant to receive no more than the minimum disclosures required by *Brady v. Maryland*.<sup>75</sup> Even if this iteration of the statute had been in effect when Michael Morton was prosecuted, he might have been no better off.

#### IV. THE FIX: A NEW AND IMPROVED DISCOVERY STATUTE

If “the truth shall set you free,” or better, if the truth has the power to prevent the accused from being wrongfully imprisoned, then more disclosure of information in the possession of the state better serves the interest of justice than less disclosure. In essence, this simple argument motivated the 2013 amendment to article 39.14, known as the Michael Morton Act (the Act).<sup>76</sup> Responding to apparently well-founded claims that vital information was withheld from Michael Morton, the 83rd Texas Legislature approved a broad mandate requiring the state's production of material in its possession upon the request of a defendant.<sup>77</sup>

#### V. ITEMS SUBJECT TO THE ACT

The kinds of items and information to be produced under the Act are far more varied than the disclosure required by *Brady*. Without regard for whether this material exculpates or casts doubt on other anticipated trial evidence, amended article 39.14 includes “offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, . . . books, accounts, letters, photographs, or objects or other tangible things” that are not privileged, as long as these items are “in the possession, custody, or control of the state or any person under contract with the state.”<sup>78</sup>

As extensive as this list is, it failed to include the names of any expert witnesses that either side may use at trial.<sup>79</sup> The Texas Legislature provided for those disclosures in the next regular session following the enactment of

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74. See *id.* at 22–23.

75. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

76. See TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2013). Michael Morton prefers that the amendments to article 39.14 of the Texas Code of Criminal Procedure embodied in Texas Senate Bill 1611 of the 83rd Texas Legislature be referred to as “SB 1611” rather than “the Michael Morton Act.” Interview with Michael Morton (May 14, 2015). The bill, however, specifies that the provision be known as the Michael Morton Act, so that is the way in which it is referred to in this Article. See Michael Morton Act, 83d Leg., R.S., ch. 49, § 1, 2013 Tex. Gen. Laws 106–08 (codified at TEX. CODE CRIM. PROC. ANN. art. 39.14).

77. See CRIM. PROC. ANN. art. 39.14(a); see also Orr & Rodery, *supra* note 5, at 413–19 (describing characteristics of the Michael Morton Act).

78. See CRIM. PROC. ANN. art. 39.14(a). Note that the requirement extends to agents of the state and not only to persons working as full-time employees of the state. See *id.*

79. See *id.* art. 39.14(b).

the Michael Morton Act.<sup>80</sup> Effective September 1, 2015, upon request of a party “made not later than the 30th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin,” the party to whom the request is made must disclose the name of any expert witness that may be used at trial.<sup>81</sup>

Not included in the Act’s original laundry list is “work product of counsel for the state in the case and their investigators and their notes or report.”<sup>82</sup> More broadly than for work product, the Act exempts “written communications between the state and an agent, representative, or employee of the state.”<sup>83</sup> Notwithstanding these limitations, the sweep of the disclosure requirement is breathtaking in comparison with what previously existed.<sup>84</sup>

To be fair, remember that prior to passage of the Act, some prosecuting offices, particularly but not exclusively in larger cities, maintained an open-file policy that simultaneously provided extensive discovery opportunities for defendants and protection from *Brady* violation claims for those offices.<sup>85</sup> Recall that, because open-file policies were largely gratuitous, their scope and the operational procedures by which they were implemented varied greatly.<sup>86</sup> Even for those defendants fortunate enough to be prosecuted in a county with such a policy, there was no guarantee that everything in the file would be made available, or that the defense would know what had been withheld.<sup>87</sup> Since no right existed to see material not covered by *Brady*, an open-file policy was only as useful as the willingness of the prosecution to make full disclosure.<sup>88</sup>

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80. See TEX. CODE CRIM. PROC. ANN. art. 39.14(b) (West, Westlaw through 2015 84th Reg. Legis. Sess.).

81. *Id.*

82. Compare TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West 2013), with TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West, Westlaw through 2015 84th Reg. Legis. Sess.). It may be significant that the exception extends only to state’s counsel involved “in the case.” A reasonable implication is that the work product of counsel for the state may be subject to production if that lawyer is not involved in the defendant’s case. A related question concerns whether the requirement of amended article 39.14 trumps any general work-product privilege.

83. See TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West, Westlaw through 2015 84th Reg. Legis. Sess.).

84. See TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West 2005). Note that under the prior version of article 39.14, a trial judge could exercise discretion in favor of disclosure and order the same kinds of materials covered by the amendment. See *supra* notes 71–75 and accompanying text (explaining the Texas Legislature’s amendment to article 39.14 and its shortcomings). While some judges may have done this in some cases, the Author is unaware of any evidence that this practice was prevalent.

85. See, e.g., Ranc, *supra* note 9, at 965–66 (discussing the impact of open-file policies before the Act was passed).

86. See *supra* notes 35–44 and accompanying text (discussing how practitioners approach the open-file policy). For example, the Bexar County District Attorney’s Office maintained an open-file policy for a considerable period of time, but would not allow defense counsel to photocopy or photograph any materials in the often-voluminous files. See Allen, *supra* note 40.

87. See Allen, *supra* note 40.

88. See Ranc, *supra* note 9. No doubt, in some cases an open-file policy allowed a defendant access to more than she was entitled to receive under *Brady* or more than a trial judge could order under the existing statute. See Allen, *supra* note 40.

The Act goes beyond creation of a mandatory open-file policy for prosecutors.<sup>89</sup> It redistributes the burden of discovery.<sup>90</sup> While the state's attorneys have long had the duty to produce *Brady* material, discovery of other information in the possession of the state or its agents required the defendant to request its production, and then to show good cause for the trial court to order its release.<sup>91</sup> A simple request from the defendant for material covered by article 39.14 now activates the prosecutor's duty to produce the requested items, assuming of course that those items are ones for which production is required.<sup>92</sup>

## VI. THE REQUEST

Unlike the procedure previously in place, the current statute creates a virtually automatic disclosure duty.<sup>93</sup> The defense need not show cause for production because, for the most part, the trial judge has no decisions to make once disclosure is requested.<sup>94</sup> Article 39.14 does not specify whether the defense request be written, but only that it be "timely."<sup>95</sup> Presumably, a request is timely if it is made sufficiently before trial to allow the prosecutor to respond. Failure to expressly request material under article 39.14 amounts to relying on *Brady* and its due process minimum disclosures, and may be seen as a tacit waiver of the right to production of non-*Brady* material.<sup>96</sup>

Relying on an open-file policy in lieu of making a 39.14 request also may be ineffective, and even dangerous, for the defense. An open-file policy is, by its nature, a voluntary and discretionary policy in which no one is accountable for incomplete disclosure.<sup>97</sup> The Michael Morton Act has been characterized as creating mandatory open-file discovery.<sup>98</sup> That characterization, however, is misleading. The Act specifies the objects and materials that *must* be disclosed upon request by the defense, while the traditional open-file policy maintained by many prosecutors' offices prior to passage of the Act was as broad or narrow and as inclusive or exclusive as

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89. See *supra* Part IV.

90. Compare TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West 2005), with TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West, Westlaw through 2015 84th Reg. Legis. Sess.).

91. See *supra* notes 63–69 and accompanying text (explaining the Texas Legislature's effort to strengthen the discovery rules).

92. See TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West, Westlaw through 2015 84th Reg. Legis. Sess.).

93. See *supra* Parts III–IV.

94. See CRIM. PROC. ANN. art. 39.14(a); Ranc, *supra* note 9, at 965.

95. See CRIM. PROC. ANN. art. 39.14(a).

96. See *id.* (stating that the duty arises "as soon as practicable after receiving a timely request from the defendant").

97. See Ranc, *supra* note 9, at 965; Allen, *supra* note 40.

98. See Ranc, *supra* note 9; see also Tex. Comm. on Prof'l Ethics, *supra* note 37 ("article 39.14 requires an 'open-file' policy by prosecutors").

the office wished it to be within the confines of due process.<sup>99</sup> The mandate of article 39.14 is not merely a command to open the prosecutor's file; it is a structured command to be applied in a uniform manner, requiring disclosure of many items while protecting the confidentiality of others.<sup>100</sup> In this way, disclosure is not dependent on a local prosecutor's policy concerning the contents or definition of the file; it is access that is statutorily required and clearly defined.<sup>101</sup>

A request might be made by the defense in a variety of ways.<sup>102</sup> It could be delivered orally—say by phone call or a passing comment in a courthouse hallway—but doing so is fraught with the usual possibilities that drive lawyers to memorialize in writing virtually everything. Making the request in a letter avoids many misunderstandings and miscommunications, but a careful lawyer might choose instead to continue the practice that existed before the Michael Morton Act by filing a motion for production.

Although filing a motion seemingly defeats the goal of extricating the trial judge from routine discovery requests, it is unlikely to increase the court's burden. In addition to requesting material available under article 39.14, the production motion will undoubtedly request the court to order the state to disclose anything material to the case that is exculpatory—that is, information to which the defendant is entitled under *Brady v. Maryland*.<sup>103</sup> While *Brady* material need not be requested specifically, careful defense lawyers always do.<sup>104</sup>

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99. See Ranc, *supra* note 9, at 965; Allen, *supra* note 40.

100. See CRIM. PROC. ANN. art. 39.14(a). One of the shortcomings of an open-file policy is that the lawyer making the materials available can determine, without any more guidance than conscience and the due process floor, what is to be included within the file. See Nathaniel Burney, *Is Open File Discovery a Cure for Brady Violations?*, CRIM. LAW. (Feb. 28, 2012, 8:45 AM), <http://burneylawfirm.com/blog/2012/02/28/is-open-file-discovery-a-cure-for-brady-violations/>.

A prosecutor could, for example, maintain a separate file of witness statements or forensic reports, which would not be available to defendants despite the availability of an apparently complete file containing offense reports and other materials. See Brian Rogers, *New Law Forces Prosecutors to Turn Over Evidence Against Suspects*, HOUS. CHRON. (May 17, 2013, 9:04 AM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/New-law-forces-prosecutors-to-turn-over-evidence-4522558.php>.

This disclosure of the state's file would not necessarily be incomplete in any obvious way, but it would not include items any criminal defense attorney would think were important for trial. Selection of items to omit might also be entirely ad hoc, further masking the incompleteness of the file that was "open" to the defense. Few prosecutors acting in good faith would fail to disclose these limitations to defendants viewing the file except in cases of innocent or inadvertent mistakes, but in the absence of a more stringent guiding principle than generosity, no consequences or remedies exist for such a failure.

101. See CRIM. PROC. ANN. art. 39.14(a). Compliance with the defense's request cannot ethically be conditioned with an agreement from the criminal defense attorney that information produced will not be disclosed to the defendant or that a blanket waiver be made of court-ordered discovery in any of their client's cases. See Tex. Comm. on Prof'l Ethics, *supra* note 37. Prosecutors are required to comply with the Michael Morton Act. See *id.*

102. In this context, "the defense" actually refers to the attorney representing the accused. Pro se defendants are subject to somewhat different rules and limitations.

103. See *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

104. In the past, defense lawyers developed the habit of requesting *Brady* material to fall under the "request" standard, which resulted in a somewhat more lenient review in cases of alleged failure to

In addition to asking for *Brady* material and information discoverable under article 39.14, the motion is often used to request production of evidence in the state's possession that is neither obviously exculpatory nor obviously included within the scope of 39.14.<sup>105</sup> For example, certain tangible objects like drugs or pieces of physical evidence may be subject to inspection under the long-standing rule of *Detmering v. State*.<sup>106</sup> Some of those items might be within the language of article 39.14 relating to "any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state."<sup>107</sup> Until it is clear that "material to any matter involved in the action" includes evidence subject to *Detmering*, prudence dictates making a specific request.<sup>108</sup>

Finally, a motion filed in the trial court is usually the best evidence that the defense actually made a request. It is unclear from the Act whether the defendant may waive production, or if so, whether that waiver must be explicit and what form the waiver should take.<sup>109</sup> Lest a claim the defense made no request results in a later allegation of ineffective assistance of counsel, the prudent defense attorney will hesitate to rely on less definitive methods of communicating a request. For the prosecution, too, an explicit written request—by a motion for production—eliminates ambiguity and clearly defines its obligations.<sup>110</sup>

In most cases, trial judges are unlikely to labor over routine 39.14 requests. Their decision-making burden is usually eliminated by the

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disclose than the "non-request" standard. *See* *United States v. Bagley*, 473 U.S. 667, 680 (1985); *United States v. Agurs*, 427 U.S. 97, 106–07 (1976). When that distinction ended, lawyers may have continued the practice of requesting *Brady* material due to force of habit, a lack of awareness that the standard had changed, or simply a desire to have the trial court rule favorably on at least one part of the motion for production. A motion and order to produce *Brady* material also has the salutary effect of forcing the prosecution to consider, hopefully for the second time, whether the material exists and previously has been disclosed.

In addition to the constitutional requirement, the defendant is entitled to *Brady* material under subsection (h) of article 39.14:

Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

CRIM. PROC. ANN. art. 39.14(h).

105. CRIM. PROC. ANN. art. 39.14(a).

106. *See* *Detmering v. State*, 481 S.W.2d 863, 864 (Tex. Crim. App. 1972).

107. CRIM. PROC. ANN. art. 39.14(a).

108. *See id.*

109. *See, e.g.,* *Sims*, *supra* note 60, at 966. If waivers are permitted, as seems likely, they cannot be compelled by the state in exchange for the prosecution's compliance with the disclosure mandate of the Michael Morton Act. *See* Tex. Comm. on Prof'l Ethics, *supra* note 37.

110. *See* *Sims*, *supra* note 60, at 966.

mandatory nature of the Act.<sup>111</sup> No determination of good cause is required; the order of production should become routine in the ordinary case.<sup>112</sup>

## VII. PRODUCTION

Once a request is made, it is incumbent on the prosecutor to produce the requested materials “as soon as practicable.”<sup>113</sup> In a simpler case, compliance might be possible in a very short period of time, but in other cases the prosecution requires an extended period in which to gather and transmit the information.<sup>114</sup> The Act provides no further guidance on the timing of the request or the time within which the state must respond.<sup>115</sup> Nor does it require the trial court to allow the defendant any particular amount of time (or even a “reasonable” amount of time) prior to trial to read, consider, and react to what he or she has learned.<sup>116</sup>

For a prosecutor receiving a request under 39.14, compliance can be challenging and time-consuming. One prosecutor described the situation this way:

[A]lready overloaded prosecutors’ offices must put together discovery on each case, provide it to the defense, and document which items were provided and when—all with the same number of employees. Many offices are also filing with the district clerk a 39.14 Notice of Discovery, which enumerates the items given to the defense, as well as keeping a copy for their case file and providing a copy to the defense attorney at the same time they convey the discovery it documents.

Making this trickier, a few offices are paperless, so discovery (both in the state providing it and in the defense receiving it) occurs electronically. But the vast majority of prosecutors’ offices still use paper, at least to some extent, and the task of duplicating case files, video recordings, audio clips, and other evidence has burdened stretched-thin staff, budgets, and equipment. Such paper-pushing offices have a couple of choices. The first is to make paper copies of everything for the clerk and defense counsel. The second is to go electronic by scanning the discovery items and report and then providing an electronic copy to the defense by email, cloud storage, thumb drives, or something similar while retaining the electronic file. The majority of district clerks in Texas are already mandated to be fully paperless on civil matters, and it is coming soon for criminal cases. Perhaps prosecutors should start moving that way with discovery.<sup>117</sup>

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111. See CRIM. PROC. ANN. art. 39.14(a).

112. See *id.*

113. See *id.*

114. See Sims, *supra* note 60.

115. See CRIM. PROC. ANN. art. 39.14(a).

116. See *id.*

117. See Sims, *supra* note 60, at 965–66.



The absence of language in the Act requiring a response to a request for production within a certain time creates the possibility that a prosecutor, perhaps for understandable reasons, will delay production of the material for an unreasonably long period. Agreeing to a continuance or resetting of the case, however, does not cure the harm done to the defendant in this circumstance. While many criminal defendants are in no rush to resolve the charges against them, many others are sitting in jail cells, unable to make bail and unwilling to plead guilty or demand trial without having had access to the state's evidence against them. The hydraulic pressures of this situation all work against the goals of a more expansive discovery regime. Without invoking the intervention of the trial court—the very thing the Act was intended to reduce or eliminate—the defendant is left to wheedle, beg, and threaten to obtain what the Act ostensibly guarantees.<sup>118</sup> Delay in the production of information also necessarily delays the preparation of the defense case for trial. Minimally, the statute should require, as other similar provisions do, that the defendant have a reasonable period in which to digest the material, and sanctions should be available for flagrant abuses of the production requirement.<sup>119</sup>

Even after the state discloses everything in its possession that must be disclosed, its duty is not satisfied. The Act creates a continuing duty of disclosure that requires the prosecution to “promptly disclose the existence of the document[s], item[s], or information” to the court or defendant if any of these are discovered at “any time before, during, or after trial.”<sup>120</sup> Materials discovered even years after the conclusion of a trial must be disclosed, something that potentially facilitates the discovery and advancement of both claims of actual innocence and claims of *Brady* or 39.14 violations.<sup>121</sup>

But what about a witness statement that is unknown to the prosecutor, such as a discoverable document found languishing in the file cabinet of a suburban police department because it was overlooked or because an investigator decided without consultation that it was unimportant to the case? The answer to this question is clear under *Brady v. Maryland*.<sup>122</sup> Material that is favorable to the defendant and in possession of the government or those acting on its behalf must be disclosed.<sup>123</sup> In essence, this rule creates a prosecutorial duty to find and disclose such information.<sup>124</sup> Texas law now appears to impose the same duty on prosecutors with respect to article 39.14 materials.<sup>125</sup>

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118. S. COMM. ON CRIMINAL JUSTICE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013).

119. See TEX. R. EVID. 615(d)–(e).

120. See CRIM. PROC. ANN. art. 39.14(k).

121. See *id.*

122. See *Brady v. Maryland*, 373 U.S. 83, 94–95 (1963).

123. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

124. See *id.*

125. See CRIM. PROC. ANN. art. 39.14 (k).

Subsection (a) of article 39.14, which creates the request and disclosure doctrine, extends to documents, papers, statements, and objects “that are in the possession, custody, or control of the state or any person under contract with the state.”<sup>126</sup> Given that “the state” is not defined within the Act, and that prior versions of article 39.14 did not overlap with *Brady v. Maryland*, the reach of the prosecutorial duty to find and disclose non-*Brady* material remains somewhat unclear, but the requirement of disclosure of *Brady* material in subsection (h) certainly suggests that adherence to the constitutional understanding of “possession” should control in some cases.<sup>127</sup> Consistency in this regard would create a better integrated duty to disclose, and, in a practical sense, the prosecutor is always burdened with ensuring that items in the “possession, custody, or control of the state or any person under contract with the state” are made available to the defendant.<sup>128</sup>

Some material in the possession of the state need not be produced in response to an article 39.14 request. For example, inspection and copying of designated documents, papers, and written or recorded statements of the defendant or a witness is permitted, but that right does not extend to “the work product of counsel for the state in the case and their investigators and their notes or report.”<sup>129</sup> In another provision, the statute provides, “The rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the state.”<sup>130</sup> The latter exclusion of written communications is quite broad, but presumably does not extend to offense reports, which are specifically listed among those items to be made available to the defense.<sup>131</sup> To exclude offense reports or witness statements of law enforcement officers—also expressly discoverable—would defeat much of the purpose of the Act and would violate the general principle of statutory construction regarding the primacy of the specific provision over the general.<sup>132</sup>

Unsurprisingly, if a prosecutor decides that information may be withheld, that decision must be revealed to the defense.<sup>133</sup> “The state shall inform the defendant” if the state has withheld or redacted some portion of an item, giving the defense an opportunity to challenge the omission.<sup>134</sup> A defense request initiates that challenge, which, in turn, requires the trial court to conduct a hearing to determine whether the failure to disclose was

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126. *See id.*

127. *See id.* art. 39.14(h).

128. *See id.* art. 39.14(a) (emphasis added).

129. *See id.*

130. *See id.*

131. *See id.*

132. *See* TEX. GOV'T CODE ANN. § 311.026 (West, Westlaw through 2015 84th Reg. Legis. Sess.).

133. *See* CRIM. PROC. ANN. art. 39.14(c).

134. *See id.*

justified.<sup>135</sup> The language of the Act is mandatory in this regard, specifying that “the court *shall conduct* a hearing” on the issue once it is raised, but it does not indicate how quickly the hearing must be held.<sup>136</sup>

Requiring the prosecution to reveal incomplete disclosures serves the interest of the state in protecting privileged or otherwise protected information, while giving the defense notice that something is missing.<sup>137</sup> Rather than burdening the state and courts with the filing of a request for a protective order in advance of any disclosure, the procedure permits the defense access to material that clearly must be disclosed, leaving the validity of a claimed exception to disclosure for a later hearing.<sup>138</sup> The disadvantage of this procedure, from the defendant’s point of view, is that in the absence of a request for a hearing to review the prosecution’s decision to withhold, the justification for the omission or deletion is tacitly conceded. It is incumbent on defense attorneys, therefore, to either obtain a satisfactory explanation for nondisclosure from the state’s attorney or test the action by requesting review in the trial court.<sup>139</sup>

#### VIII. WHEN COUNSEL’S ACCESS EXCEEDS A DEFENDANT’S—THE PRO SE DICHOTOMY

One of the peculiarities of the amended language of article 39.14 is that the word “defendant” apparently means “defendant’s lawyer” rather than the actual accused person. Subsection (a) requires the state to produce documents, papers, statements, or objects upon “request from *the defendant*.”<sup>140</sup> Ordinarily, a reference to “the defendant” includes both the accused and the defense attorney; in the case of subsection (a), it appears that either may request disclosure.<sup>141</sup> Indeed, the statute provides that “after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, *by or on behalf of the defendant*, of [any discoverable materials].”<sup>142</sup> Although subsection (a) does not differentiate between lawyer and client, other portions of the Act clearly do, often in a manner seemingly at odds with the initial command.

The thrust of these distinctions is to give the defendant’s attorney access to all of the material proffered by the state but to deny the actual defendant

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135. *See id.*

136. *See id.* (emphasis added).

137. S. COMM. ON CRIMINAL JUSTICE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013).

138. *See* CRIM. PROC. ANN. art. 39.14(c).

139. *See id.*

140. *See* CRIM. PROC. ANN. art. 39.14(a) (emphasis added).

141. *See id.* No distinction is drawn in subsection (a) between the accused and defense counsel, and there is no hint in the general command of that provision that access differs according to the status of the person requesting it, as long as that person is legally identified as “the defendant.” *See id.*

142. *See id.* (emphasis added).

the same access. Nothing in subsection (a) suggests that the defendant should not receive materials upon request without the involvement of the court.<sup>143</sup> Indeed, the plain words of that provision clearly name the defendant as the requesting party, and require the state to produce reports, documents, papers, and statements and “permit the inspection . . . by . . . *the defendant*.”<sup>144</sup>

In subsection (d), however, the following appears:

In the case of a pro se defendant, if the court orders the state to produce and permit the inspection of a document, item, or information under this subsection, the state shall permit the pro se defendant to inspect and review the document, item, or information but is not required to allow electronic duplication as described by Subsection (a).<sup>145</sup>

Without prior mention or explanation, the quoted language raises two inferences: (1) a pro se defendant, unlike one represented by counsel, must move for production of article 39.14 materials; and (2) production, inspection, or review is required *only if* it is ordered by the trial court.<sup>146</sup> Nothing is said about the standard by which the court will decide a production motion filed by a defendant, and nothing seems to prevent the state from allowing that defendant access to an open file containing the same materials even without a court order.<sup>147</sup>

In the absence of statutory guidance, is production for a pro se defendant left entirely to the whim of the court? Is the decision subject to review for abuse of discretion? How would that discretion be limited? How should the trial judge decide a motion? Drawing a distinction between pro se defendants and defense counsel is an obvious attempt to address the concern that has constricted the flow of information in the past: the fear that someone accused of a crime will misuse it.<sup>148</sup> This conclusion is supported by the creation within the Act of a duty of confidentiality for defense lawyers.<sup>149</sup> The tension between this fear and the desire to put useful information in the hands of the defendant’s attorney creates, in the newest version of article 39.14, an uneasy balance that disadvantages the accused who wishes to act pro se.<sup>150</sup>

Also puzzling is the limitation in subsection (d), disallowing a pro se defendant to electronically duplicate produced materials.<sup>151</sup> Does the possible ban on electronic duplication effectively reduce the unrepresented

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143. *See id.*

144. *See id.* (emphasis added).

145. *See id.* art. 39.14(d).

146. *Id.*

147. *See id.*

148. *See* cases cited *supra* note 19.

149. *See* CRIM. PROC. ANN. art. 39.14(e)–(f).

150. *See id.*

151. *See id.* art. 39.14(d).

to looking and writing notes?<sup>152</sup> If so, it must be because a greater potential for misuse was imagined when materials were electronically duplicated, but the distinction is unexplained, and the term “electronic duplication” is undefined.<sup>153</sup> Since the language is only permissive, allowing, but not requiring the prosecution to deny electronic duplication, the Texas Legislature must not have thought the potential for misuse was especially strong.

The division between defendants and their lawyers is also reflected in subsection (f) of article 39.14.<sup>154</sup> An attorney representing the accused is permitted to view, copy, store, and otherwise use materials produced by the state, but the defendant and witnesses may only see the information, not have copies of anything other than his or her own statement.<sup>155</sup> Information relating to “the address, telephone number, driver’s license number, social security number, date of birth, and any bank account or other identifying numbers” must be redacted before a defendant or witness is allowed to view a document or item.<sup>156</sup>

It is the duty of the person who allows the defendant to see the produced material to redact the proscribed information.<sup>157</sup> That person may be the defendant’s lawyer, an investigator, expert, consulting legal counsel, or agent for the defendant’s lawyer.<sup>158</sup> Interestingly, any of these people, and not only the defense counsel, apparently may see the information that the defendant cannot.<sup>159</sup> If they do so, however, they and the defendant cannot share what they learn outside this defense inner circle.<sup>160</sup>

## IX. THE DUTY NOT TO DISCLOSE

Generally, material produced for defense use under the Act cannot be disclosed by the recipients to a third party.<sup>161</sup> This prohibition applies to “the defendant, the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or other agent of the attorney representing the defendant.”<sup>162</sup> The ban is not absolute; a court may conduct a hearing and order disclosure if “good cause” is shown and “the security and privacy

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152. See Ranc, *supra* note 9, at 965–66. Photocopying, scanning, and photographing almost universally involve electronic duplication in the sense that the images are captured and stored electronically. See *id.* Could a pro se defendant use a film camera to record images of the produced materials as a matter of statutory right if the court ordered production?

153. See CRIM. PROC. ANN. art. 39.14(d).

154. See *id.* art. 39.14(f).

155. See *id.*

156. See *id.*

157. See *id.*

158. See *id.*

159. See *id.*

160. See *id.* art. 39.14(e).

161. See *id.*

162. See *id.*

interests of any victim or witness” have been considered.<sup>163</sup> Again, the fear of coercion, intimidation, or worse is the concern driving this policy.<sup>164</sup> Revealing materials to third parties is also permitted in cases in which those materials were previously disclosed to the public.<sup>165</sup>

Beneath this precautionary policy lurks a more problematic reality for defense lawyers and their clients. In an effort to protect victims and witnesses, the Act creates not only a duty of nondisclosure for criminal law practitioners but also a duty of security and confidentiality.<sup>166</sup> To be sure, lawyers are accustomed to dealing with confidential materials and information, and in many respects, the duty created by the Act imposes no additional burden on the attorney who is already required to keep the secrets of clients.<sup>167</sup> It does create, though, the potential for this duty, which is shared with the client, to become a source of conflict in the attorney–client relationship.

For example, if a violation of the nondisclosure rule were to be claimed by the state, the court surely would consider whether the breach occurred by the actions of the accused, the defendant’s attorney, or an agent of the attorney. For the lawyer to dispute or defend against a claimed violation presents the real possibility that he or she will be forced to point an accusing finger at the lawyer’s own client. The lawyer’s defense might require disclosure of otherwise privileged attorney–client communications, but even if it did not, vigorously defending against an allegation of wrongful disclosure would likely put the attorney’s interests in conflict with those of the client.<sup>168</sup>

Adding to the dilemma for the attorney are the uncertain consequences of a violation. No crime was created by the Act to complement the nondisclosure requirement, and the violation of the statutory duty might not even constitute a disciplinary infraction by the lawyer.<sup>169</sup> Contempt would not be available to punish the errant defense lawyer unless a nondisclosure

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163. See *id.* art. 39.14(e)(1).

164. See cases cited *supra* note 19.

165. See CRIM. PROC. ANN. art. 39.14(e)(2).

166. See *id.* art. 39.14(e)–(f).

167. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.05, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G., app. A (West 2013) (Tex. State Bar R. art. X, § 9).

168. See *id.* (describing privileged attorney–client communication). If the defendant told her attorney after the fact that she had mentioned information obtained through discovery to a friend or family member and asked whether that revelation was improper, it seems the *fact* that the disclosure was made would be privileged because it constitutes an admission of legal wrongdoing made to the attorney to obtain legal advice or counsel. See TEX. R. EVID. 503. Similarly, if defense counsel asks the client, “Now, you didn’t tell anyone any of those things we got from the prosecution, did you?” and the client responds, “Well, I showed that witness statement to my brother so he could see what X was saying about me,” isn’t that statement by the defendant privileged? *Id.* Or may the defense attorney reveal the statement to establish that she did not disclose the witness statement, but rather that her client did? See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.05(c). And if she does disclose what she’s been told, perhaps because any privilege has been waived, isn’t she still in a conflict with her own client? See *id.* R. 1.06.

169. See CRIM. PROC. ANN. art. 39.14(e)–(f).

order had been entered, and it is hard to see how the court's inherent supervisory powers could be used to address the breach in a way that is appropriate. Perhaps a trial court could bar the attorney from appearing before that court in the future, or in a case in which wrongful disclosure harmed some third party, the lawyer could be subject to tort liability. Ironically, the defense lawyer who violates the nondisclosure provisions of article 39.14 might be better off offering no defense to a claim by the state than risking discipline by disclosing privileged information.<sup>170</sup>

The client, on the other hand, would face possible contempt proceedings for the same violation if a nondisclosure order had been issued, but would probably not face prosecution unless actual witness tampering occurred. Should the attorney who is falsely accused of disclosing privileged information gained through discovery be precluded from revealing that her or his own client is the real culprit? Or should the lawyer risk a disciplinary action or being held in contempt by defending herself without regard for the consequences to the client?

The Texas Disciplinary Rules of Professional Conduct define "confidential information" to include both privileged and unprivileged information, so the consideration is not simply one of determining whether the client's statement is privileged as an evidentiary matter.<sup>171</sup> Information "acquired by the lawyer during the course of or by reason of the representation of the client" may not be revealed or used to the disadvantage of the client unless the client consents.<sup>172</sup> Nor may the lawyer reveal confidential information "for the advantage of the lawyer" without a client's consent.<sup>173</sup>

This general prohibition is tempered by permission to reveal confidential information "[t]o the extent reasonably necessary to . . . establish a defense on behalf of the lawyer in a controversy between the lawyer and the client," or "[t]o establish a defense to a . . . disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client."<sup>174</sup> Unprivileged information may be revealed "[w]hen the lawyer has reason to believe it is necessary to do so in order to . . . defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct"<sup>175</sup> or to "respond to allegations in any proceeding concerning the lawyer's representation of the client."<sup>176</sup> These exceptions to the general prohibition against the revelation of confidential information may provide a partial answer to the lawyer's dilemma when a

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170. See *infra* Part X.A. (explaining the prohibition on revealing privileged information).

171. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a); TEX. R. EVID. 503.

172. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a)–(b).

173. See *id.* R. 1.05(b)(4).

174. See *id.* R. 1.05(c)(6)–(7).

175. See *id.* R. 1.05(d)(2)(ii)–(iii).

176. See *id.* R. 1.05(d)(2)(iii).

client has wrongfully disclosed materials produced by the state, but the Preamble to the Texas Disciplinary Rules includes a reminder that the lawyer's duty of confidentiality is not lightly abandoned:

[T]hese rules are not intended to govern or affect judicial application of either the attorney–client or work product privilege. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney–client and work product privileges.<sup>177</sup>

Under the confidentiality rules, even if defense counsel may reveal that the client violated the provisions of article 39.14 by disclosing produced materials, doing so places the lawyer in the uncomfortable, and perhaps prohibited, position of becoming the accuser of, and chief witness against, the client.<sup>178</sup> As the commentary to the rule regarding conflicts of interests reminds members of the bar, “Loyalty is an essential element in the lawyer’s relationship to a client.”<sup>179</sup> The commentary also admonishes that “the lawyer’s own interests should not be permitted to have adverse effect on representation of a client,”<sup>180</sup> and that a conflict exists “when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer’s own interests.”<sup>181</sup> Obviously, a lawyer who asserts that his or her client has violated the nondisclosure rule of article 39.14 to save herself from disciplinary action or sanction by the trial court, places her own interests above those of the client.

Curiously, the Act fails to create a crime or other sanction for violation of its nondisclosure requirement.<sup>182</sup> The absence of a prescribed enforcement mechanism presents a challenge for the trial judge. If an attorney before the court misbehaves by improperly disclosing information obtained from the state, the court might refer the matter for possible attorney discipline or hold the lawyer in contempt if the court’s order was violated.<sup>183</sup> Presumably, a sanction might issue using the court’s general supervisory powers.<sup>184</sup> Unfortunately, violation of a statutory duty in the course of legal representation is not a per se disciplinary violation. And as previously noted,

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177. *See id.* preamble ¶ 16.

178. *See* TEX. R. EVID. 503(b).

179. *See* TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.06 cmt. 1.

180. *See id.* cmt. 5.

181. *See id.* cmt. 4.

182. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14(g) (West, Westlaw through 2015 84th Reg. Legis. Sess.).

183. *See id.*

184. *See* TEX. GOV’T CODE ANN. § 21.001(a) (West, Westlaw through 2015 84th Reg. Legis. Sess.).



the Act—by design—eliminates the need for a production order, thereby reducing the opportunities to employ contempt as a sanction.<sup>185</sup>

## X. ENFORCEMENT OPTIONS: WHEN GOOD PROSECUTORS GO BAD

### A. Professional Discipline

Just as the Act is silent regarding the remedies for violation of the nondisclosure requirement by a defendant or his attorney, there is no remedy provision in cases of prosecutorial misconduct. Moreover, while article 39.14(g) refers to the Texas Disciplinary Rules of Professional Conduct, implying those rules apply to lawyers employing the Act, that subsection is clearly addressed to attorneys for criminal defendants, and not to prosecutors.<sup>186</sup> Subsection (h), elaborated in subsection (k) of article 39.14, codifies the requirement that prosecutors comply with *Brady v. Maryland*, but even those provisions include no mention of an enforcement mechanism to use in the event of a violation.<sup>187</sup>

Despite the absence of enforcement language within the Act, remedies for misconduct exist. Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct contains several applicable provisions:

1. A lawyer shall not violate the Disciplinary Rules;
2. A lawyer shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”; and
3. A lawyer shall not “engage in conduct constituting obstruction of justice.”<sup>188</sup>

A prosecutor who violates a requirement of article 39.14 by, for example, failing to comply with an order of a court to produce certain evidence or failing to meet his or her statutory obligation to produce items discoverable

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185. See *supra* Part VI.

186. See CRIM. PROC. ANN. art. 39.14(g). Subsection (g) begins by stating, “Nothing in this article shall be interpreted to limit an attorney’s ability to communicate regarding his or her case within the Texas Disciplinary Rules of Professional Conduct, except for the communication of information identifying any victim or witness, including name, . . . address, telephone number, driver’s license number, social security number, date of birth, and bank account information or any information that by reference would make it possible to identify a victim or a witness.”

*Id.* This language reminds the reader that the disciplinary rules apply and implies that communication of specified information would violate those rules. See *id.*

187. See *id.* art. 39.14(h)–(k). The state has a duty to supplement disclosure of *Brady* material “at any time before, during, or after trial.” *Id.* art. 39.14(k). Article 39.14 does not directly provide for violations of *Brady*, but Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct does. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.09(d), reprinted in TEX. GOV’T CODE ANN. tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9).

188. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.09(d).

under the Act when a timely defense request has been made has obstructed justice.<sup>189</sup> That violation of Rule 8.04(a)(4) simultaneously violates the prohibition on violations in the disciplinary rules.<sup>190</sup>

Lawyers also are not allowed to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>191</sup> While a prosecutor’s straightforward failure to comply with the requirements of article 39.14 is only arguably dishonest and fraudulent because the conduct implies that no discoverable material is in the possession of the state, an outright misrepresentation of the existence of such material clearly violates Rule 8.04(a)(3).<sup>192</sup> And it obstructs justice by denying the defendant and the court access to evidence that may bear on the guilt or innocence of the accused or impair the fairness of the proceedings.<sup>193</sup>

Although the preamble to the Texas Disciplinary Rules of Professional Conduct is hortatory, and not mandatory, § 4 admonishes lawyers: “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”<sup>194</sup> Failure to comply with a legally established duty of production obviously constitutes a failure to conform to the requirements of the law. If done to “harass or intimidate” a defendant, the prosecutor acts contrary to the legislative intent, spirit, and letter of article 39.14.<sup>195</sup>

More specific commands reside in Rules 3.04(a) and 3.09(d) of the Texas Disciplinary Rules of Professional Conduct. Rule 3.09(d) specifies that a prosecutor shall

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.<sup>196</sup>

Somewhat more broadly, Rule 3.04(a) commands that any lawyer, and not only a prosecutor, shall not “unlawfully obstruct another party’s access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has

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189. See CRIM. PROC. ANN. art. 39.14(a)–(c).

190. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 8.04(a).

191. See *id.* R. 8.04(a)(3).

192. See *id.*

193. See *id.* R. 8.04(a)(4).

194. See *id.* preamble ¶ 4.

195. See S. COMM. ON CRIMINAL JUSTICE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013).

196. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.09(d).

potential or actual evidentiary value; or counsel or assist another person to do any such act.”<sup>197</sup> In a case of first impression, the Texas Board of Disciplinary Appeals recently held that these provisions impose a broad ethical duty on prosecutors to provide defendants with evidence in their possession that may not qualify as “material” under the *Brady* standard.<sup>198</sup> The prosecutor in that case, William Allen Schultz, was found to have known that the key witness for the State could not identify the defendant directly as the man who had attacked her, but Schultz failed to disclose that fact to the defense.<sup>199</sup> Schultz’s partially probated suspension for violation of these standards was affirmed.<sup>200</sup>

All prosecuting attorneys are required, and not merely exhorted, to observe their “primary duty”: “[N]ot to convict, but to see that justice is done.”<sup>201</sup> In some cases, this universally recognized duty may obligate a public prosecutor to exceed the disclosure mandates of *Brady* and article 39.14, but it leaves no room for falling short. Yet in many cases that have come to light, and others that continue to plague the fair administration of justice in the United States, prosecutors have failed to comply with even the minimal due process requirements of *Brady*.<sup>202</sup> These failures led to wrongful convictions in some cases, but in all cases the failures deprived the defendants of the fair process to which every accused person is entitled.<sup>203</sup>

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197. *Id.* R. 3.04(a).

198. See *Schultz v. Comm. for Lawyer Discipline*, No. 55649, Tex. Bd. of Disp. App. (Dec. 17, 2015) (noting that Rule 3.09(d) is broader than *Brady*).

199. See *id.* at 21.

200. See *id.*

201. See TEX. CODE CRIM. PROC. ANN. art. 2.01 (West, Westlaw through 2015 84th Reg. Legis. Sess.); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that the United States Attorney is a representative of a sovereignty whose interest is not in winning a case but in seeing that justice is done).

202. See Kozinski, *supra* note 4. Consider U.S. Circuit Court Judge Alex Kozinski’s observation that “there are disturbing indications that a non-trivial number of prosecutors—and sometimes entire prosecutorial offices—engage in misconduct that seriously undermines the fairness of criminal trials.” See *id.* Judge Kozinski described these failings as “an epidemic of *Brady* violations abroad in the land.” See *id.* at xiii (quoting *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc)). In the recent Texas prosecution of David Temple for killing his wife, a state district judge heard the defendant’s habeas petition based on undisclosed exculpatory evidence and found that the results would have been different had the State observed its obligation to reveal favorable evidence to the defense. See Brian Rogers, *Judge Upbraids Legendary Prosecutor in Katy Murder Case*, HOUS. CHRON. (July 8, 2015, 5:50 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Judge-upbraids-legendary-prosecutor-in-Katy-6374049.php>. In an article reporting on that finding, Joanne Musick, President of the Harris County Criminal Lawyers Association, was quoted as saying, “Whether it’s Morton or Graves or whoever, we see prosecutors who want to win, so they don’t want to disclose everything . . . . If they’re hiding things or playing games, that’s not upholding their duty to do justice. That’s trying to win.” See *id.*

203. See Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403. The prosecution, conviction, and incarceration of Michael Morton is but one example of this kind of misconduct resulting in wrongful conviction. See Colloff, *Innocent Man, Part One*, *supra* note 45; Colloff, *Innocent Man, Part Two*, *supra* note 45. Unfortunately, there are many others. See Joy, *supra*.

Professional discipline has occasionally been imposed on errant prosecutors<sup>204</sup> but is so sporadic and uneven that the possibility of sanction is unlikely to effectively deter this type of misconduct.<sup>205</sup> If not discipline, then what? Accustomed as American lawyers are to considering money damages as an effective deterrent and enforcement tool, civil liability for disclosure violations naturally comes to mind. The availability of this remedy, however, is more limited than might be expected.

### B. Civil Liability

The Preamble to the Texas Disciplinary Rules of Professional Conduct makes clear that a violation of the Rules is not necessarily grounds for liability: “These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.”<sup>206</sup> If violation of a disciplinary rule does not constitute a basis for civil liability by itself, a wrongfully convicted defendant may conceivably have no recourse to attain damages from the attorney who contributed to or caused that miscarriage of justice but may seek reparations

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204. See Molly Hennessy-Fiske, *Woman on Texas Death Row to be Re-sentenced; Life Term Expected*, L.A. TIMES (Nov. 3, 2011, 1:39 PM), <http://latimesblogs.latimes.com/nationnow/2011/11/woman-on-texas-death-row-granted-new-hearing.html> (describing how one prosecutor, under current investigation for misconduct, was privately reprimanded for withholding evidence in the death penalty case of Michael Roy Toney); see also Fla. Bar v. Cox, 794 So. 2d 1278, 1285–87 (Fla. 2001) (imposing a one-year suspension against a prosecutor for withholding the name of the informant); *In re Kevin Carroll Kakac*, No. 6211262, IL Disp. Op. 07 SH 86 (Ill. Atty. Reg. Disp. Com.), 2010 WL 5624454 (imposing a thirty-day suspension against a prosecutor for improperly withholding evidence); Brian Rogers, *Prosecutor in Anthony Graves Case Disbarred*, HOUS. CHRON. (June 12, 2015, 1:33 PM), <http://www.chron.com/news/houston-texas/houston/article/Prosecutor-in-Anthony-Graves-case-disbarred-6323681.php> (discussing a prosecutor who was disbarred for failing to disclose exculpatory evidence).

205. See Kozinski, *supra* note 4, at xxiii; see also Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3441–42 (1999) (arguing that professional discipline, as applied, is insufficient to compensate for the broad grant of immunity from civil rights actions). In part, this failure to discipline is due to the difficulty inherent in discovering the violations for reasons described in the following passage:

Prosecutorial misconduct is a particularly difficult problem to deal with because so much of what prosecutors do is secret. If a prosecutor fails to disclose exculpatory evidence to the defense, who is to know? Or if a prosecutor delays disclosure of evidence helpful to the defense until the defendant has accepted an unfavorable plea bargain, no one will be the wiser. Or if prosecutors rely on the testimony of cops they know to be liars, or if they acquiesce in a police scheme to create inculpatory evidence, it will take an extraordinary degree of luck and persistence to discover it—and in most cases it will never be discovered.

Kozinski, *supra* note 4, at xxiii. If discipline is rarely imposed on *known* instances of prosecutorial misconduct, imagine the larger number of unknown cases that go unpunished. It is small wonder that close adherence to discovery obligations may not be seen as a high priority by some prosecutors. Those who do take great pains to follow the law of disclosure do so primarily for the right reasons and contribute to the fair administration of justice in a way that may never be fully appreciated.

206. See TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 15, *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9).

from the State of Texas instead.<sup>207</sup> As helpful as such an award could be to the wrongfully convicted, it has no punitive effect—and therefore is unlikely to have much deterrent value—with respect to the individual most likely to have caused the harm.

Ordinarily, damages could be pursued against someone who, acting under color of state law, deprives another of a right, privilege, or immunity guaranteed by the Constitution or laws of the United States.<sup>208</sup> When a prosecutor denies a criminal defendant due process by withholding mitigating or potentially exculpatory evidence, he or she deprives that defendant of such a right, but the remedies usually available under § 1983 offer no relief.

Prosecutors enjoy absolute immunity for activities “intimately associated with the judicial phase of the criminal process.”<sup>209</sup> Qualified immunity, a powerful defense in its own right, was initially recognized for conduct by prosecutors acting in an administrative or investigative capacity.<sup>210</sup> In *Imbler v. Pachtman*, the Supreme Court of the United States explained:

The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.<sup>211</sup>

The Court continued to explain why qualified immunity would ordinarily be insufficient to protect the public prosecutor from fear of frivolous and vexatious litigation, and impede the pursuit of criminal justice.<sup>212</sup> Subsequently, in *Van de Kamp v. Goldstein*, the Court extended absolute immunity to a district attorney and his chief deputy for clearly administrative duties: the failure to establish an information-sharing system on jailhouse

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207. See generally TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001–.054 (West 2011).

208. See 42 U.S.C. § 1983 (2012); West v. Atkins, 487 U.S. 42, 49–50 (1988) (discussing what constitutes acting under color of state law).

209. See *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); see also Williams, *supra* note 205, at 3452–53 (discussing when absolute immunity applies).

210. See *Imbler*, 424 U.S. at 430–31; see also Williams, *supra* note 205, at 3454 (defining qualified immunity and discussing when it applies).

211. *Imbler*, 424 U.S. at 422–23.

212. See *id.* at 424–27. This holding has had its detractors. Among them is Judge Alex Kozinski, who observed that the ruling was neither a constitutional ruling nor one “compelled by the language of the statute.” Kozinski, *supra* note 4, at xxxix. It was, Judge Kozinski wrote, “a pure policy judgment.” *Id.*; see also Williams, *supra* note 205, at 3479–80 (arguing that qualified immunity is sufficient to protect prosecutors and that absolute immunity should be abolished).

informants within their office and the failure to train prosecutors properly regarding their disclosure obligations under *Giglio v. United States*.<sup>213</sup>

Absolute immunity from § 1983 liability strips the criminally accused, as well as the wrongfully convicted, of the only remedy that is likely to be effective,<sup>214</sup> a point the *Imbler* court acknowledged:

To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would dissuade the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice.<sup>215</sup>

This observation, whatever its merits, focused on acts and omissions respecting an attorney's conduct in a particular prosecution. The question left unanswered was whether a district attorney and his or her employing governmental entity might be liable for § 1983 damages due to failure to train prosecutors about their duty to disclose. That issue came to the fore in *Connick v. Thompson*.<sup>216</sup> Notwithstanding a record of providing prosecutors within his office inadequate, and sometimes incorrect, information about the requirements of *Brady* and the absence of a single case in his office in which a prosecutor was disciplined for a violation, the Supreme Court refused to find sufficient evidence that the district attorney was "deliberately indifferent" to the rights of the defendant.<sup>217</sup> In the absence of a pattern of indifference toward the due process rights *Brady* sought to guarantee, as opposed to a single instance, the case for § 1983 liability is not established,

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213. See *Van de Kamp v. Goldstein*, 555 U.S. 335, 338 (2009); see also *Giglio v. United States*, 405 U.S. 150, 154 (1972) (discussing an obligation to disclose relevant information).

214. See *Williams*, *supra* note 205, at 3455–56 (arguing that professional discipline does not adequately compensate for broad prosecutorial immunity); see also George A. Weiss, *Prosecutorial Accountability After Connick v. Thompson*, 60 *DRAKE L. REV.* 199, 231 (2011) (stating that absolute immunity, which almost always applies, is the "main reason the threat of civil liability is not an adequate deterrent to prosecutorial misconduct").

215. *Imbler*, 424 U.S. at 427–28. This last observation regarding possible "skewing" of post-conviction decisions suggests, with surprising candor, that appellate judges might ignore or undervalue meritorious claims of prosecutorial misconduct resulting in a denial of due process because the reviewing judges would wish to spare the trial prosecutor the burden of liability for damages. See *id.*

216. See generally *Connick v. Thompson*, 563 U.S. 51 (2011).

217. See *id.* at 98–100 (Ginsburg, J., dissenting). The record in *Connick* established an appalling and dangerous misunderstanding and neglect of the prosecutor's ethical obligation to produce exculpatory and mitigating evidence. Justice Ginsburg's dissenting opinion describes in detail the environment leading to the wrongful conviction in this case. See *id.* at 79–109.

barring a wrongfully convicted plaintiff from recovering damages even from the governmental entity responsible for the violation.<sup>218</sup>

The limitations on civil liability, particularly a prosecutor's immunity, effectively remove damages as an enforcement tool for violations—a point not lost on the Supreme Court.<sup>219</sup> Writing for the majority in *Imbler*, Justice Powell noted that alternatives to the civil remedy exist: criminal prosecution and professional discipline.<sup>220</sup> The latter option was accompanied by the following observation from the *Imbler* majority:

[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks [(criminal prosecution and professional discipline)] undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.<sup>221</sup>

The optimism of this passage has been questioned, and with good reason.<sup>222</sup> In an empirical study conducted by Professor Fred Zacharias, the evidence suggested that prosecutors not only were less likely to be disciplined than attorneys handling civil matters, but that even when they are disciplined, it is rarely for conduct resulting from excessive zeal.<sup>223</sup> A survey of cases reported in news accounts, and in opinions by courts and disciplinary entities, reveals that prosecutors rarely suffer professional discipline, even in cases including wrongful conviction.<sup>224</sup>

In his review of enforcement alternatives for prosecutorial misconduct, George Weiss summarized the effectiveness of professional discipline as a curb on rule violations by noting, “Whether on the logical or empirical side, it seems bar sanctions are unlikely to restrain misconduct due to their low probability of occurring and because lighter sanctions are often imposed

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218. See *id.* at 69–72 (majority opinion).

219. See generally Martin A. Schwartz, *The Supreme Court's Unfortunate Narrowing of the Section 1983 Remedy for Brady Violations*, CHAMPION, May 2013, at 58, <http://www.nacdl.org/Champion.Aspx?id=28482> (discussing how the *Imbler*, *Goldstein*, and *Connick* immunity grants effectively eliminate consequences for prosecutorial misconduct).

220. See *Imbler*, 424 U.S. at 428–29.

221. See *id.* at 429.

222. See Weiss, *supra* note 214, at 223–25 (attorney-discipline authorities are less likely to bring charges or successfully inflict sanctions against prosecutors for prosecutorial misconduct). Judge Alex Kozinski characterized the argument as “dubious in 1976” and “absurd” today. See Kozinski, *supra* note 4, at xxxix.

223. See Weiss, *supra* note 214, at 223–25; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 754–57 (2001).

224. In reported claims of prosecutorial misconduct by sixty prosecutors in wrongful conviction cases reviewed by myself and my research assistant, Sarah Bassler, only eight resulted in disciplinary action. This low discipline rate exists despite the fact that in virtually every instance, the prosecution withheld exculpatory or mitigating evidence. An investigation was still pending in only one of these cases. It is noteworthy that thirty-three of the claims were from Texas, and only three of those resulted in discipline.

when they do occur.<sup>225</sup> Other enforcement mechanisms seem not to fare any better.

### C. Criminal Prosecution

The federal criminal analog to § 1983 is 18 U.S.C. § 242.<sup>226</sup> Like its civil counterpart, § 242 provides a criminal sanction for persons acting under color of law who deprive another of a right, privilege, or immunity guaranteed by the Constitution or laws.<sup>227</sup> Similarly, Texas criminal law punishes public servants and others for various kinds of conduct that may be involved in hiding or failing to divulge to a defendant information to which the accused is entitled.<sup>228</sup>

One need not be cynical to believe that criminal prosecution is unlikely to be an effective deterrent to *Brady* or Michael Morton Act violations. George Weiss asserted in his 2011 article on enforcement mechanisms that only one conviction of a prosecutor for violating § 242 has been secured since the enactment of the statute.<sup>229</sup> In that case, *In re Brophy*, the sentence was a \$500 fine with no jail time, and the errant prosecutor received only a censure from the New York Bar's disciplinary authority.<sup>230</sup>

The reticence to prosecute, whether in federal or state court, is perhaps understandable given that the authorities who exercise prosecutorial discretion would be similarly jeopardized by widespread use of the sanction.<sup>231</sup> It also has been suggested that prosecution of a public servant might be overkill if the defendant who was denied access to materials to which she was entitled was subsequently convicted in a new trial.<sup>232</sup> But this argument misses the point that the intentional withholding of *Brady* material or information covered by article 39.14 harms the accused in a very real way, and that harm is unlikely to be undone merely because the injured party eventually obtains what she was entitled to receive in the first place. Refusal

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225. See Weiss, *supra* note 214, at 225; see also Williams, *supra* note 205, at 3441 (arguing that case law after *Imbler* suggests professional discipline does not sufficiently compensate for immunity from civil rights actions).

226. See 18 U.S.C. § 242 (2012).

227. See *id.*

228. See, e.g., TEX. PENAL CODE ANN. § 37.10 (West, Westlaw through 2015 84th Reg. Legis. Sess.) (tampering with governmental records); *id.* § 37.09 (tampering with or fabricating physical evidence); *id.* § 39.03(a)(2) (abuse of official capacity); *id.* § 39.04(a)(1) (violations of the civil rights of a person in custody).

229. See Weiss, *supra* note 214, at 220.

230. See *In re Brophy*, 442 N.Y.S.2d 818, 819 (N.Y. App. Div. 1981) (deeming censure adequate in light of an “unblemished record” and the stigma of criminal conviction).

231. See Weiss, *supra* note 214, at 221. No instance of criminal conviction for prosecutorial misconduct has been found in Texas. See Brandi Grissom, *Study: Prosecutors Not Disciplined for Misconduct*, TEX. TRIB. (Mar. 29, 2012), <http://www.texastribune.org/2012/03/29/study-prosecutors-not-disciplined-misconduct/>.

232. See Weiss, *supra* note 214, at 220.



to prosecute also removes, even in egregious cases, the deterrent value that might otherwise exist.<sup>233</sup>

#### D. Other Means of Enforcement

If criminal prosecution is essentially nonexistent, why did prosecutor Michael Nifong serve one day in jail and former Williamson County District Attorney Ken Anderson serve five days jail time?<sup>234</sup> In both cases, the short jail stay was for criminal contempt, and not as a punishment following conviction of a crime.<sup>235</sup> Although contempt seems scarcely more available than prosecution for violations of disclosure requirements, it may take on some life in the age of mandatory disclosure ushered in by the Michael Morton Act.

If contempt is to gain relevance in the post-Morton world, it will be because defendants seek and obtain from trial courts orders to produce evidence, and because judges enforce those orders. Although, as previously described, article 39.14 is designed to avoid the involvement of the trial judge in the initial discovery process, routine motions and orders to produce discoverable materials may facilitate enforcement against willful breaches of the statutory duty.<sup>236</sup> This point is reflected in a passage by United States Circuit Judge Alex Kozinski regarding *Brady* violations in the case against former Alaska Senator Ted Stevens:

*Brady* is not self-enforcing; failure to comply with *Brady* does not expose the prosecutor to any personal risk. When Judge Sullivan discovered that the prosecutors in the [*United States v.*] *Stevens* case had obtained their conviction after failing to disclose exculpatory evidence, he appointed a special counsel, DC attorney Henry Schuelke III, to independently investigate the prosecutors' conduct. Schuelke determined that the lawyers had committed willful *Brady* violations but that the court lacked the power to sanction the wrongdoers because they had not violated any court-imposed obligations.

The solution to this problem is for judges to routinely enter *Brady* compliance orders, and many judges do so already.<sup>237</sup>

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233. *Id.* at 221.

234. See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 308 (2008). Michael Nifong was the prosecutor in the notorious Duke University Lacrosse case in which players were falsely accused of rape. *Id.* at 257. Mr. Nifong, disbarred for his misconduct, was found to have withheld potentially exculpatory DNA evidence. *Id.* at 317–18. The publicity this case received, not unlike that of the Michael Morton case, resulted in North Carolina's adoption of a mandatory open-file policy. *Id.* at 272.

235. See Kozinski, *supra* note 4, at xxxix n.211.

236. See *supra* Part IV.

237. See Kozinski, *supra* note 4, at xxxiii (footnotes omitted).

Courts also are free to promulgate local rules under their supervisory powers. Violations of these rules may be punished in a variety of ways,<sup>238</sup> and although they lack the uniformity of state or federal rules, they are potentially useful in addressing and deterring prosecutorial misconduct.<sup>239</sup>

Other disincentives to violate article 39.14 are somewhat less formal but could be equally effective if applied consistently and appropriately. These include the prospect of public disclosure of the violation, especially in instances of wrongful conviction; internal disciplinary measures within the prosecuting office or by county, state, or municipal officials; and loss of reputation within the legal community.<sup>240</sup>

Without effective enforcement measures for violations of *Brady* and article 39.14, compliance will be a low priority for some prosecutors, and an invitation to cheat for others. As Judge Alex Kozinski observed, “Prosecutors need to know that someone is watching over their shoulders—someone who doesn’t share their values and eat lunch in the same cafeteria.”<sup>241</sup> If prosecutors, judges, and the public view the actions of criminal defense lawyers with too much suspicion, actions of prosecutors may be viewed with too little. No profession fares well on naked assumptions of competence and good faith, and no rule has life and vitality without enforcement.

## XI. REALIZING THE PROMISE

The 2013 amendments to article 39.14 significantly and substantially changed both the law and practice of criminal discovery in Texas. Like all reform efforts, however, work remains to be done if the Act is to fulfill its promise to Michael Morton and the citizens of Texas. The legislature should, for example, carefully reconsider the disparate ways in which represented defendants, pro se defendants, and lawyers for defendants are treated. The statute must more clearly delineate when the discovery right of a defendant differs from that of a defendant’s lawyer.

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238. See Williams, *supra* note 205, at 3446. Sanctions might include dismissal of a prosecution or the exclusion of evidence. *Id.* at 3447; see also *State v. Sanchez*, No. 08-13-00010-CR, 2014 WL 2090546 at \*12 (Tex. App.—El Paso May 16, 2014, pet. ref’d) (not designated for publication) (illustrating how the trial court ordered suppression of evidence for failure of prosecution to disclose *Brady* material; the appellate court reversed after finding that the failure to comply with the court’s discovery order was not willful).

239. See Williams, *supra* note 205, at 3444 (discussing how rules adopted under the supervisory power of courts have sometimes been promulgated in response to violations by prosecutors).

240. See *id.* at 3445 (explaining that federal prosecutors are subject to internal regulations and ethical standards). But Williams also notes that prosecutors “may be inherently too biased to ensure fair disciplinary review.” *Id.* at 3478.

241. See Kozinski, *supra* note 4, at xxxii.

The restrictive approach taken in the statute toward pro se defendants must be clarified. If the ban on “electronic duplication” is maintained, the scope of that limitation must be defined.<sup>242</sup>

Requiring production not less than ten days before the beginning of the trial would ensure that defendants at least have time to see and use the information that is provided. And perhaps defendants and their lawyers should be obliged to expressly waive discovery in writing if no request has been made because they are not seeking production.

What Judge Kozinski has said of *Brady* applies with equal force to the reforms undertaken in the Michael Morton Act:

[T]hree ingredients must be present before we can be sure that the prosecution has met its *Brady* obligations under the law applicable in most jurisdictions. First, you must have a highly committed defense lawyer with significant resources at his disposal. Second, you must have a judge who cares and who has the gumption to hold the prosecutor’s feet to the fire when a credible claim of misconduct has been presented. And, third, you need a great deal of luck, or the truth may never come out.<sup>243</sup>

The same may be said of article 39.14’s obligations of confidentiality imposed on defendants and their attorneys. As is true generally in the criminal justice system, if—and only if—all of the principles in the administration of justice perform in ways consistent with the letter and spirit of this reform measure, Texas will enjoy a more open, transparent, and fair process. Texas will not eliminate wrongful convictions merely by valuing truth-finding more highly than it has been in the past. There are many other ways in which we arrive at unjust prosecutions, convictions, and punishments. But we must not sacrifice the good because we are unable to achieve the perfect.

Even highly committed defense lawyers without significant resources can better protect their clients and create a remedial opportunity for the trial judge by filing a motion for production under article 39.14 and *Brady*. Trial judges are free, of course, to routinely order such disclosure in cases before them.<sup>244</sup> Specifying what must be disclosed simultaneously documents the

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242. See TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West, Westlaw through 2015 84th Reg. Legis. Sess.).

243. See Kozinski, *supra* note 4, at xxvi. My St. Mary’s colleague, Professor John Schmolesky, would simplify and strengthen the enforcement of *Brady* by removing materiality as a predicate to a due process claim. He suggests that (1) if the government has *Brady* material that (2) is in its possession, a per se violation should be established. Appellate or habeas review of the violation then should proceed on the basis of whether the failure to disclose was harmless error. The implementation and enforcement advantages gained by this approach rest in eliminating the decision by local prosecutors whether a piece of information is “material” within the meaning of *Brady*. This approach would streamline the processing of *Brady* disclosure requests, and prosecutors seemingly would be more inclined to produce materials if doubt about the need to do so existed.

244. See CRIM. PROC. ANN. art. 39.14(e)(1).

request and affords the court the option to punish noncompliance by contempt. Alternatively, the legislature could amend article 39.14 to provide that failure to comply with its provisions subjects the violator to contempt. Defense lawyers and defendants would thereby also be accountable for violations of the nondisclosure duty created by the Act.

Courts must use the tools currently available to enforce compliance with article 39.14 more vigorously, if not expand them. Professional discipline holds potential as an effective deterrent, but only if it is applied uniformly, certainly, and swiftly. It has been suggested that existing disciplinary rules are inadequate to address prosecutorial misconduct, both because they fail to directly address the kinds of misconduct that may lead to wrongful convictions<sup>245</sup> and because they usually do not apply to prosecutors.<sup>246</sup> Rules designed specifically to address violations of *Brady* and article 39.14 disclosure obligations could significantly increase the likelihood that courts will impose professional discipline, especially if they are accompanied by reporting requirements imposed on trial and appellate courts encountering such a breach.<sup>247</sup>

It is also time to rethink immunity from civil liability for blatant misconduct. Whether this recalibration is achieved by qualifying immunity for prosecutors instead of maintaining an absolute shield, or by modulating the degree of immunity depending on the errant official's bad faith and culpability, the potential and actual harm that results from a conviction at any price is simply too great to disallow accountability altogether.<sup>248</sup> If the Supreme Court of the United States is not yet satisfied that *Imbler* created too strong a defense for ethical lapses, the State of Texas could, and should, consider whether the state government's reparations to the wrongfully convicted would be more fairly imposed on the offices and individuals who ignore the legal duties created by the state legislature, the Constitution, and notions of fundamental fairness.

Even criminal prosecution should be available for egregious violations.<sup>249</sup> If the state prosecutes other public officials for breaches of duty and ethical failings with far less serious consequences, prosecution for violations of the very laws prosecutors are sworn to uphold—violations for

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245. See Williams, *supra* note 205, at 3464–67 (describing the variety of prosecutorial misconduct that is subject to neither professional discipline nor criminal prosecution).

246. See *id.* at 3464–76 (explaining how and why ethics violations are not enforced against prosecutors).

247. See *id.* at 3477–80 (discussing the reluctance of professional bodies to discipline prosecutors for unethical conduct and giving recommendations, including specific rules and mandatory reporting, to counter violations of *Brady* and other kinds of misconduct).

248. See *id.* at 3479–80 (arguing that only qualified immunity should be available for prosecutorial misconduct).

249. See *id.* at 3476 (“Even when a prosecutor’s misconduct is arguably a criminal act such as suborning perjury or obstructing justice, enforcement against prosecutors is rare.”).

which they prosecute others every day—must also be an option in practice, and not only in theory.

In criminal cases, it is time to temper adversarial habits with the recognition on both sides that nothing is of more importance to the credibility of the American criminal justice system than rigorously hewing to the rule of law—not even doing justice in the individual case. Every wrongful conviction, every subversion of the search for truth, undermines society’s confidence that criminal justice in Texas is not just a rigged lottery in which the stakes are incredibly high. The Michael Morton Act is not a panacea for these ills, but it has the potential to instill a heightened reliability into a system damaged by its revealed flaws.<sup>250</sup>

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250. The National Registry of Exonerations recently reported that in 2015, Texas led the nation in exonerations by a wide margin. See NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015 5 (2016), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2015.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf). Of the 54 Texas exonerations studied by the National Registry, 6 were attributed to “official misconduct.” Other bases for exoneration also surely included incomplete or nonexistent disclosure of potentially exculpatory evidence. *Id.* Three-fourths of exonerations in homicide cases nationwide in 2015 were attributed to official misconduct. See Editorial, *Wrongful Convictions Point to Flaws*, MYSA (Feb. 20, 2016, 12:00 AM), <http://www.mysanantonio.com/opinion/editorials/article/Wrongful-convictions-point-to-flaws-6843098.php>.

