



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

May 6, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 8.5

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 8.5 - Disciplinary Authority; Choice of Law. COPRAC supports the adoption of proposed Rule 8.5 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:	TITLE
RULE	
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4	Communication
Rule 1.4.1	Disclosure of Professional Liability Insurance *BATCH 6*
Rule 1.5	Fee for Legal Services
Rule 1.5.1	Financial Arrangements Among Lawyers
Rule 1.6	Confidential Information of a Client
Rule 1.7	Conflict of Interests: Current Clients
Rule 1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client
Rule 1.8.2	Use of a Current Client's Confidential Information
Rule 1.8.3	Gifts from Client
Rule 1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client
Rule 1.8.6	Payments Not From Client
Rule 1.8.7	Aggregate Settlements
Rule 1.8.8	Limiting Liability to Client
Rule 1.8.9	Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review
Rule 1.8.10	Sexual Relations with Client
Rule 1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)
Rule 1.9	Duties to Former Clients
Rule 1.11	Special Conflicts for Former and Current Government Officers and Employees *BATCH 6*
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13	Organization as Client
Rule 1.14	Client with Diminished Capacity
Rule 1.15	Handling Funds and Property of Clients and Other Persons
Rule 1.16	Declining or Terminating Representation
Rule 1.17	Purchase and Sale of a Law Practice *BATCH 6*
Rule 1.18	Duties to Prospective Clients *BATCH 6*
Rule 2.1	Advisor
Rule 2.4	Lawyer as a Third-Party Neutral
Rule 2.4.1	Lawyer as a Temporary Judge
Rule 3.1	Meritorious Claims
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer As A Witness

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Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,



Patrick L. Hosey, President
San Diego County Bar Association



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit
the attached comments to Batch 5 of the Proposed Amendments to the Rules of
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics
Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

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James W. Talley

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

- Rule 1.2 Scope of Representation [N/A]
APPROVE
- Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.8.2 Use of Confidential Information [3-100, 3-310]
APPROVE
- Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE
- Rule 1.9 Duties to Former Clients [3-310]
APPROVE
- Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
- Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE
- Rule 2.1 Advisor [N/A]
APPROVE
- Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments
- Rule 8.5 Choice of Law [1-100(D)] SIMMONS**
APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: CRPC 1-100(D) Geographic Scope of Rules

Proposed New Rule No./ Title: Rule 8.5 Disciplinary Authority; Choice of Law

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [X] No []

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

The essence of the Commission’s proposal is to retain the California rule, and yet modify it to fit the Model Rule format, minimizing disruption in modification. Succinctly stated, the California Rules apply to all lawyers licensed to practice in California, without regard to the situs of conduct, and can only be preempted where a lawyer is specifically required by a foreign jurisdiction to follow a different rule.

This differs from the Model Rule, which determines applicable rules by the jurisdiction of “predominant effect” of the lawyer’s conduct. As a safe harbor, it allows the lawyer to apply “the rules of the jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.” The “predominant effect” was removed as ambiguous and unnecessary.

CONCLUSIONS (pick one):

We approve the new rule in its entirety.

We approve the new rule with modifications.*

We disapprove the new rule and support keeping the old rule.

We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

* Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: [Rules Not Recommended Public Comment Form](#).

Rule 8.5 Disciplinary Authority; Choice of Law [1-100(D)]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please see attached 6 page .pdf.



LAW PRACTICE MANAGEMENT AND TECHNOLOGY SECTION

THE STATE BAR OF CALIFORNIA

PROPOSED RULE 8.5 [RPC 1-100(D)] "DISCIPLINARY AUTHORITY; CHOICE OF LAW" (DRAFT #4, 2/26/10)

INTRODUCTION

The Law Practice Management & Technology (LPMT) Section's comment on Proposed Rule 8.5 concerns paragraph (b):

(b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and

(2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required or permitted specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules."

LPMT should like to highlight a potential difficulty present in Proposed Rule 8.5, much like CRPC 1-100(D) before it -- yet a difficulty much less obvious than its analogue that existed in years past. That difficulty arises from the extraterritorial reach of the California Code of Professional Conduct. With the rise of multijurisdictional practice, such reach may easily put lawyers of good faith in a bind. (We shall set aside the conundrum of where one may be said to be "practicing" if physically present in one jurisdiction, lawfully advising a client in another jurisdiction, regarding a matter in a third jurisdiction.)

ANALYSIS

I. Diverse Types of Proscribed Conduct

It may be that the difficulty increases the more the Rules of Professional Conduct diverge from what may be called acts that are *malum in se* to those that are merely *malum prohibitum*. Of course, some of the latter are critical to protect clients from the former. For example, one method of accounting for client funds may not be inherently more ethical than certain others. Nonetheless, there is an inherent need for a uniform method to protect clients from acts that are clearly *malum prohibitum*. Lawyers must keep their books in a specified way to shield clients from acts of fraud and theft.

II. Tricky Conflicts Between Sister States' Respective Rules

A. Conflict # 1 – Permissive vs. Mandatory

The difficulty arises most prominently where one jurisdiction's rule is permissive but California's is mandatory. For example, consider Proposed Rule 4.4 [n/a] "Duties Concerning Inadvertently Transmitted Writings":

"A lawyer who receives a writing that obviously appears to be privileged or confidential or subject to the work product doctrine, and where it is reasonably apparent that the writing was inadvertently sent or produced, shall promptly notify the sender."

Using the conduct described in Proposed Rule 4.4 as an example, certain jurisdictions *allow* an attorney to notify the sender *but do not require it*. In faith to that jurisdiction's rule, notification is optional. A lawyer properly practicing in such a jurisdiction, whether or not also admitted in California, should not be disciplined for following the common, allowed practice of the jurisdiction. Proposed Rule 8.5, however, maintains that a member of the California State Bar, wherever she or he may be, can only practice as others do in that foreign jurisdiction if giving notice is *forbidden*.

For example, Maryland does not require the receiving attorney to notify the sending attorney in circumstances in which California would require it. See Maryland State Bar Association - Committee on Ethics Docket No. 2007-09:

Maryland's Rules of Professional Conduct "do not require the receiving attorney to notify the sending attorney that there may have been an inadvertent transmittal of privileged (or, for that matter, work product) materials." Nevertheless, the Committee stated that "the receiving attorney can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate."

Excerpted from the ABA Web page "*Metadata Ethics Opinions Around the U.S.*" (last updated September 29, 2009). Thus, Maryland's Rules do not "specifically require[] a different standard of conduct" (*quoting* Proposed Rule 8.5, Explanation of Changes to the ABA Model Rule at 5).

It is critical to emphasize that we do not speak of acts of moral turpitude or other egregious or dishonest conduct. Rather, our concern is with conduct perfectly acceptable and morally correct in one or more of our sister states.

B. Conflict # 2 – Express Prohibition vs. Silence

An even harder case is that in which the foreign jurisdiction is silent. Should California impose its rule on that jurisdiction, a rule to which other lawyers in that jurisdiction working on the same matter are not beholden?

Consider, for example, the Federal Rules of Civil Procedure and the Federal Rules of Evidence. One may say such rules do not conflict with 8.3(b) because they relate to "conduct in connection with a matter pending before a tribunal, [and, thus,] the rules of the jurisdiction in which the tribunal sits apply. . . ." Proposed CRPC 8.3(b)(1).

Nevertheless, the comparison is instructive. Unlike Proposed Rule 4.4, the federal rules place no notification requirement on a lawyer "who receives a writing that obviously appears to be privileged or confidential or subject to the work product doctrine" and inadvertently sent. Indeed, all the federal procedural rules provide is that the *sending* lawyer *may* notify the *recipient*. See F.R.C.P. 26(b)(5)(B), which allows *the disclosing party* to notify the recipient ("If information produced in

discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. . . .”).¹ See also Federal Rule of Evidence 502 (placing any obligation of notification on the holder of the privilege, *i.e.*, the sender, not the recipient).

Thus, the federal rules do not “specifically require[] a different standard of conduct.” Proposed Rule 8.5, Explanation of Changes to the ABA Model Rule. We offer this example solely to highlight that different jurisdictions may *reasonably* treat certain lawyer conduct as unobjectionable. Indeed, as the Commission itself has stated in Comment [2], “A lawyer may potentially be subject to more than one set of rules of professional conduct which impose different obligations.”

In addition, we agree with the Commission’s accompanying premise, as stated in Comment [3], namely that:

“minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.”

Where we part company with the Commission is in regard to those situations in which a lawyer may be *permitted* different conduct by another jurisdiction in which the lawyer is lawfully practicing. To be unable to practice as do other lawyers do in that other jurisdiction would cripple the lawyer’s fulfillment of his or her obligations to the client.

Perhaps, even at this late date, may we respectfully suggest the Commission consider an additional round of review of its excellent product? In so doing, the Commission could determine if it has included any proscriptions based more on California case law interpretations of what is mostly procedural law and less on the basic tenets and intent of a set of universal rules to govern a lawyer’s professional conduct?

¹ As to information produced by non-party subpoena recipients, F.R.C.P. Rule 45(d)(2)(B) provides equivalent language.

CONCLUSION – AND SUGGESTED EDITS TO THE PROPOSED RULE

For the foregoing reasons, we recommend that Proposed Rule 8.5(b)(2) be amended as follows:

(b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and

(2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required **or permitted** specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

Additionally, we recommend that Comment [4] be similarly amended, as shown below. Moreover, the last sentence of Comment [4] (italicized below) appears redundant and should thus be deleted. If the sentence expresses a nuance that has escaped our reading, we respectfully suggest that the nuance be made more explicit. Finally, if the last sentence of Comment [4] is retained, we recommend the additional insertion of “**or permits**” as shown.

Comment [4]:

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required **or permitted** specifically by a jurisdiction in which he or she is practicing to follow rules of

professional conduct different from these rules. *In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires or permits different conduct.*

Clean version of amended Proposed Rule 8.5(b) and Comments [4] (preferred edit):

(b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and

(2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required or permitted specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

Comment [4]

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required or permitted specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.



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Yes

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* Name

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Rule 8.5 Disciplinary Authority; Choice of Law [1-100(D)]

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

TO: Board of Governors
State Bar of California

FROM: André Birotte Jr.
United States Attorney
Central District of California

Laura E. Duffy
United States Attorney
Southern District of California

Joseph P. Russoniello
United States Attorney
Northern District of California

Benjamin B. Wagner
United States Attorney
Eastern District of California

RE: Proposed California Rules of Professional Conduct 1.11, 3.8(g) and (h), 8.4(c), and 8.5(b)

DATE: June 14, 2010

We want to thank the Rules Revision Commission (“the Commission”) and the Board of Governors for all the hard work that has been done on the proposed revisions to the California Rules of Professional Conduct; for the willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors; and, in a number of instances, for changes to the proposed rules based on consideration of these views. We believe the proposed rules that are before the Board of Governors include a number of modifications made during the revision process that address many of the concerns we have previously expressed. We write to provide comments on portions of four rules, Proposed Rules 1.11, 3.8(g) & (h), 8.4(c), and 8.5(b), that we continue to believe, in their current form, could have a substantial negative impact on the work of the prosecutors in our offices and the United States Department of Justice.

A. Proposed Rule 1.11

We appreciate the decision not to adopt the previously-proposed paragraph (e), which would have imputed conflicts within government agencies, and instead to recognize that both the imputation of conflicts within government agencies and the effectiveness of screening to avoid such imputation are matters better left to development by the case law. We are concerned, however, that the proposed comments addressing this topic, the last sentence of Proposed Comment [2] and new Proposed Comments [9B] and [9C], intermingle two distinct concepts, imputation and disqualification, and as a result create the impression that disqualification as the result of imputed conflicts is not unusual, when in fact it is only in extraordinary cases that imputation is

appropriate, and only in even more unusual circumstances that disqualification as the result of such imputation is found appropriate. Accordingly, we would suggest that the Proposed Comments be modified as follows.

First, we suggest that the text of Proposed Comment [9C], which addresses only imputation and screening for purposes of the Rule, and not disqualification, be modified to make more clear that the Rule does not itself impute conflicts within government agencies, and moved to replace the last sentence in Proposed Comment [2]. This would avoid an unnecessary cross-reference, and bring the Proposed Comments closer to the ABA Model Rule comments, which include in their Comment [2] the discussion of imputation and screening for current government lawyers. The resulting Proposed Comment [2] would read:

[2] Paragraphs (a)(1), and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. This Rule does not impute a current government lawyer's conflict under paragraph (d) to other lawyers serving in the same governmental agency; whether such imputation will occur and whether the use of a timely screen will avoid that imputation are matters of case law.

Second, we would suggest that proposed Comment [9B], which makes clear that this Rule does not govern disqualification, be modified to make more clear the distinction between criminal and civil cases, remove the citation to Younger (which applied to a criminal case a disqualification standard that has since been displaced by statute), and cite additional case law that has limited the circumstances in which disqualification on the basis of imputed conflicts may be appropriate. The resulting Proposed Comment [9B] would read:

This Rule Not Determinative Of Disqualification

[9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. The policies underlying discipline and disqualification are different. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *In re Charlisse C.*, 45 Cal. 4th 145 [84 Cal.Rptr.3d 597] (2008); *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006). Standards for disqualification of criminal prosecutors are set forth in Penal Code Section 1424.

B. Proposed Rule 3.8(g), (h)

As you know, our offices prosecute all federal crimes in California. As prosecutors, we support the goal of Proposed Rule 3.8(g), (h). We have always held our attorneys to the highest standard of professional conduct and expect, when exculpatory evidence is obtained by our prosecutors, that this evidence will be disclosed promptly after its discovery. Moreover, we would not countenance the continued incarceration of someone who was convicted but later found to be innocent. When confronted with credible evidence of a defendant's innocence, therefore, we expect our attorneys promptly to disclose this information to the defendant and/or the court, whether the information is obtained pre-trial, during trial, or after conviction.

Though we thus agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, and, accordingly, feel obligated to object to the Proposed Rule as drafted, for the following reasons:

1. **Few states have followed the ABA's lead in adopting Model Rule 3.8(g), (h).** Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of Rule 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases.

2. **There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger.** There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. The Department previously provided to the ABA and the Commission modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission has indicated that it believes the language of and comments to Proposed Rule 3.8(g) sufficiently address this issue. We respectfully disagree. If a prosecutor in jurisdiction A learns of evidence tending to show the innocence of a defendant previously convicted by a prosecutor's office in jurisdiction B, in which the prosecutor in jurisdiction A has never served, then the prosecutor in jurisdiction A is in the same position as any other lawyer who learns such information. As with any other lawyer who is a stranger to the case, the prosecutor in jurisdiction A will not know what evidence was presented at the trial in jurisdiction B, what credibility issues were posed by the witnesses who testified at that trial, or what issues have already been ruled on by the court in jurisdiction B. The prosecutor in jurisdiction A, therefore, will have no more meaningful basis than any other lawyer for

assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that the defendant convicted in jurisdiction B did not commit the offense of conviction. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on this prosecutor, and not on any other member of the bar who came to learn of the same evidence.

3. Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants. Because prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose. This poses two related issues. First, to the extent a chief prosecutor or court receiving such a disclosure recognizes this likelihood, the disclosure loses all signaling capacity it might have had – the disclosure will be interpreted not as representing a prosecutor’s judgment that the particular evidence is significant in any way, but rather as a rote step taken to avoid discipline without any independent assessment of the weight of the evidence. Second, to the extent a chief prosecutor or court receiving such a disclosure fails to recognize this likelihood, the disclosure will inappropriately be interpreted as signaling that a prosecutor has actually passed some judgment that the evidence is in fact credible and material, and puts in doubt the actual guilt of the convicted defendant when in fact this is not the case. The over breadth of the obligation imposed by Proposed Rule 3.8(g) thus threatens alternatively to under- or over- value the weight to be given a prosecutor’s decision to disclose, neither of which accomplishes what should be the goal of the rule, namely, focusing limited resources on those instances in which there is a real and meaningful possibility that a defendant has been wrongfully convicted.

4. Proposed Rule 3.8(g) is unclear in many respects that affect the obligations set forth therein. First, the term “knows” is undefined in the proposed rule. It is defined elsewhere in the Proposed Rules to mean “actual knowledge of the fact in question.” Proposed Rule 1.0.1(f). But this is singularly unhelpful in the context of Proposed Rule 3.8(g), (h). Does “knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted” require that the prosecutor know of the possible existence of such evidence or that she know that such evidence actually exist? This is not a meaningless distinction given the most common scenario in which we believe this proposed rule will come into play. Most often, prosecutors become aware of claims that such evidence exists through letters or other communications from incarcerated inmates. Often, these are letters addressed by an inmate convicted in one jurisdiction to a series of prosecutors in other jurisdictions complaining about the unfairness of the proceedings relating to the conviction and asserting prosecutorial misconduct, often based on claims that the prosecutor concealed clear exculpatory evidence of which the defendant has just become aware. For example, a common claim is that an inmate has told the defendant that yet another inmate has asserted that he told the police that he could corroborate the defendant’s asserted alibi for the time of the crime. Would a prosecutor receiving a letter making this claim “know” of evidence that could trigger an obligation within the scope of Proposed Rule 3.8(g)? The prosecutor would be on notice that if everything the defendant claims is true, another inmate has asserted that there is yet another inmate witness who would provide testimony that would be relevant to defendant’s asserted alibi.

But we submit that, without further investigation, the prosecutor simply cannot “know” whether there actually exists either the inmate who purportedly spoke to the defendant or the inmate witness who purportedly would corroborate the defendant’s alibi.

Second, we are concerned by the use of the term “material” without a correlating definition. While not defined in Proposed Rule 3.8 or its comments, or in the general terminology definitions in Proposed Rule 1.0.1, the term “material” or “materiality” is used elsewhere in the Proposed Rules and the ABA Model Rules and has been construed broadly to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Proposed Rules 1.7(a)(2), 3.3(a)(1); ABA Model Rules 1.7(a)(2), 3.3(a)(1), 4.1(a); Cohn v. Commission for Lawyer Discipline, 979 S.W. 2d 694, 698 (Tex. App. 1998) (in reference to lawyer’s duty to correct material false statements made to court, “materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of litigation.”). This meaning of “material” appears to be referenced in Proposed Comment [6A], which cross-references to Proposed Rule 3.3. In the criminal context, however, the term “material” is most often understood as defined in the Brady/Giglio jurisprudence, the case law incorporated by reference by paragraph (d) of the proposed rule. These cases define evidence as being “material” only “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985); see also Kyles v. Whitley, 514 U.S. 419, 434 (1995) (favorable evidence “material” if it “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict”). In the context of Rule 3.8(g), that “materiality” should be subject to this latter interpretation is reinforced by the further refinement “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]” We believe this is the proper interpretation of “material” for purposes of Proposed Rule 3.8(g). Neither the rule nor the comments, however, make this clear. Given that the term “material” is subject to differing interpretations, the use of the term in the proposed rule, without further definition, would leave a prosecutor uncertain about when disclosure would be required.

Third, we believe the proposed rule’s use of the term “promptly” is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation. The problem is compounded by the proposed rule’s ambiguity and lack of direction regarding how much, if any, inquiry or investigation is anticipated before a prosecutor makes the initial determination whether evidence is “new, credible, and material.” Particularly for a prosecutor unfamiliar with a case, the investigation necessary to make this determination could take substantial time. Moreover, for federal prosecutors, certain disclosures may require them to obtain various supervisory approvals within their own offices or from the Department of Justice in Washington, D.C., or may require them to seek a court order. Certain disclosures may also require a prosecutor to take steps related to the security of a witness or informant prior to disclosure. All of these steps can take time, time that may put a prosecutor at risk of being second guessed as to whether his or her disclosure has been made sufficiently “promptly.”

Fourth, we are concerned with the mandate that a prosecutor “undertake further investigation” or “make reasonable efforts to cause an investigation.” Prosecutors do not have general investigative powers (such as the power to issue subpoenas post-trial) nor do they have the staff or monetary resources to investigate thousands of claims of “new, credible and material” evidence. Moreover, in the federal system, prosecuting offices generally do not have access to their own investigators, and would have the ability only to request that a federal investigatory agency (for example, the FBI) undertake an investigation. And, again in the federal system, mandating that prosecutors expend, or request that an investigatory agency expend, available resources in this fashion, may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources. Generally, we believe that production to the court and the defendant with notice that a prosecutor in the jurisdiction of conviction has determined that disclosure is required under the standards set forth in this proposed rule should satisfy a prosecutor’s obligations, as the defendant and the court are then in position, by appointing counsel and permitting the retention of investigators, to ensure that appropriate investigation, if any, is undertaken.

5. Proposed Rule 3.8(h) is also unclear in many respects that affect the obligations set forth therein. First, similar concerns regarding the use of “knows” in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h). Though Proposed Rule 3.8(h) applies only to prosecutors in the jurisdiction of the case of conviction, even these prosecutors, when confronted with a claim by a defendant that evidence satisfying the standard set forth in this proposed rule exists, cannot “know” whether that claim is valid without engaging in further investigation, yet run the risk of running afoul of this proposed rule if they, for what they perceive to be valid reasons (which may include factoring the costs of engaging in such investigation), reject the defendant’s assertion and elect not to pursue such investigation.

Second, and perhaps most troubling, is Proposed Rule 3.8(h)’s mandate that a prosecutor “shall seek to remedy the conviction.” This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment 8 (which is taken verbatim from ABA Comment 8) attempts to clarify this mandate but falls short. Proposed Comment 8 states that “[n]ecessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.” The use of the phrase “may include” renders the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant’s innocence will in some circumstances be required to do more, with no guidance as to what this more is. We are particularly troubled because the suggestion that a prosecutor must do more fails to respect the balance struck by existing law regarding post-conviction challenges. Both California and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence, and to the court the burden of crafting an appropriate remedy for such a claim that is found to have merit. In light of this law, it is unclear to us what more a prosecutor can do to “remedy” a conviction beyond making the required disclosures. For these reasons in particular, we continue to believe that Proposed Rule 3.8(h) is unnecessary if Proposed Rule 3.8(g) is appropriately drafted to require disclosures to the defendant and the court, disclosures

that will provide those parties with the information necessary to invoke recognized and existing procedures intended to ensure that any wrongful conviction is promptly corrected.

6. Proposed Comment [9]’s “good faith” exception. We appreciate the inclusion of a good faith exception, and we appreciate the modification to Proposed Comment [9] to attempt to define the standard under which this good faith exception will apply. We agree with the standard chosen, that is, a quasi-subjective standard that looks to the individual prosecutor’s belief, but asks whether that belief is “reasonable” (“judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted”), but believe that application of this standard remains problematic given the ambiguities, discussed above, as to what it means to “know” of evidence triggering obligations under the proposed rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not “know” of such evidence. Without some guidance on these points, it will be impossible for a prosecutor to determine whether his actions in evaluating evidence will be deemed sufficiently “reasonable” to bring the good faith exception into play should the prosecutor’s judgment subsequently be second guessed.

7. Potential conflict with other Rules of Professional Conduct and other applicable laws.

The duties imposed by Proposed Rule 3.8(g), (h) may also conflict with prosecutors’ obligations under other rules and, for federal prosecutors, under other federal laws. For example, Business & Professions Code § 6068(e) and Proposed Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client’s confidential information. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. Alternatively, if the obligations under Proposed Rule 3.8(g), (h) are not intended to override this duty, the proposed rule should make this clear. In response to our earlier comment on this point, the Commission has suggested that conflicts of this type are not uncommon, noting in particular that “conflicts between a duty of confidentiality and a duty of candor can implicate the conduct of any lawyer,” and stating that “[a] one-size fits all resolution of all possible inconsistent duties tailored for this rule is not practical and is not done in other rules.” We note, however, that other proposed rules do in fact resolve disputes between specific duties of disclosure and the general duty of confidentiality. Thus, for example, Rule 3.3 (b) makes clear that a lawyer is required to take “reasonable remedial measures” only “to the extent permitted by Business and Professions Code 6068(e).” See also Rule 3.3, Comment 10 (required remedial measures “do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code Section 6068(e)”).

Federal prosecutors are also governed by a host of other confidentiality requirements imposed by federal rules and statutes that may limit, or at least require that prosecutors obtain agency approvals or court orders authorizing, disclosures of information required by Proposed Rule 3.8(g), (h). See, e.g., 5 U.S.C. § 552 (Privacy Act); Fed. R. Crim. P. 6(e) (grand jury secrecy); 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure could subject an AUSA to criminal penalties, 5 U.S.C. § 552a(i)(1), and the Department of Justice to civil liability, 5 U.S.C. §

552(g)(1). Similarly, Rule 6(e) mandates non-disclosure of grand jury information absent review and approval by a federal court. And, 5 U.S.C. § 301 provides that federal agency records are owned by the agency and cannot be disclosed without agency approval. See Touhy v. Ragan, 340 U.S. 462 (1951); United States v. Williams, 170 F.3d 431 (4th Cir. 1999) (defendant in state murder prosecution required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Proposed Rule 3.8(g), (h) cannot override these federal laws. Accordingly, we suggest that, if these subsections are adopted, the comments should make clear that the obligations they impose are subject to a prosecutor's compliance with the steps required to authorize disclosures under these federal laws, or similar laws that may apply to state and local prosecutors.

8. Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors. Prosecutors and their limited resources (particularly those in jurisdictions outside the jurisdiction of the case of conviction) will be diverted from prosecuting crime to investigating convicts' claims of "new" evidence in order to ensure that they do not run afoul of this rule. The Board of Governors should understand that within both state and federal prisons, there is a substantial cottage industry devoted to generating all manner of post-conviction claims of innocence in the form of "new" evidence claims, including in particular claims of perjured testimony and claims of ineffective assistance of counsel premised on the discovery of asserted "new" witnesses. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, defense attorneys, and judges and their staffs see this cottage industry in action. Despite the good intentions that underlie it, the proposed rule as drafted will hand prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Board of Governors should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert limited prosecutorial and law enforcement resources from the investigation and prosecution of ongoing criminal conduct to responding to a potential flood of frivolous claims.

C. Proposed Rule 8.4(c)

As drafted, Proposed Rule 8.4(c) defines it to be professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation." There is no comment discussing or limiting this prohibition. It is well established, however, that government attorneys may supervise investigations that require informants and agents to engage in deceit and misrepresentation in order to infiltrate criminal organizations or uncover criminal activity. See, e.g., United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) (permissible for undercover agents to deny they are police officers). A standard Ninth Circuit jury instruction advises juries of the propriety of such conduct. See Ninth Circuit Model Criminal Jury Instruction 4.13 (Government's Use of Undercover Agents And Informants). Government attorneys engaged in civil enforcement investigations involving consumer frauds or civil rights violations also may use individuals who misrepresent themselves to be customers or renters to uncover evidence of violations of law. Oregon has adopted a rule specifically stating that such activity by attorneys will not be deemed misconduct:

. . . it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor of supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Oregon Rule of Professional Conduct 8.4(b).

We believe that guidance along the lines of the Oregon model would be appropriate to ensure that government attorneys overseeing these types of investigations do not run the risk of discipline based on conduct recognized to be appropriate that serves valid public interests. To accomplish this, we propose that the following new comment be added in connection with Proposed Rule 8.4(c):

[#] Paragraph (c) of this Rule does not apply, and it shall not be professional misconduct, where a lawyer advises clients or others about or assists or supervises lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. This comment is not intended to broaden the areas in which covert activity by non-government lawyers is recognized as lawful.

We recommend the addition of the last sentence above to ensure that private attorneys are not misled by the balance of the comment into believing they are permitted to authorize or engage in misrepresentation and deception as "covert activities" in instances beyond the narrow range of circumstances in which courts have found it legally permissible, such as compliance testing. See Apple Corps Ltd., v. International Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998) (plaintiffs' attorneys did not violate rules of professional responsibility in supervising investigators who misrepresented their identities and purpose of their contacts with defendant's sales personnel to determine whether defendants had failed to comply with consent decree). Government lawyers who supervise investigations of criminal and fraudulent enterprises and activities are subject to restraints on their conduct imposed by the 4th, 5th, 6th and 14th Amendments to the Constitution, as well as statutes, regulations and agency practices and supervision that have developed over an extensive period of time. It is in part because of these restraints, which can in many instances be cited as a basis for relief by individuals who are the

subjects of a government supervised investigation, and in part because of the public interest in detecting and deterring criminal wrongdoing, that courts have liberally authorized the use in government supervised investigations, by both law enforcement agents and informants, of misrepresentations and deceptions. Courts have more severely limited the areas in which private attorneys may authorize or engage in similar misrepresentations and deceptions in part because these Constitutional, statutory, and regulatory limitations do not apply to private attorneys. Instead, the primary sources of restraint on such parties are the rules of professional conduct. The last sentence of this proposed comment will avoid any suggestion that it is intended to broaden the areas in which private attorneys may authorize or engage in misrepresentations and deceptions.

D. Proposed Rule 8.5(b)(2).

Proposed Rule 8.5(a) establishes California disciplinary authority over lawyers admitted to practice in California, regardless of where their conduct occurs, and over lawyers not admitted to practice in California if they “provide[] or offer to provide any legal services in California.” As a result, lawyers in our offices, who are virtually all members of the California bar, and any Department of Justice attorney who is admitted in California, will be subject to discipline in California not only for the cases and investigations they work in California but for the investigations and cases they work in other jurisdictions. And, Department of Justice lawyers, or lawyers from other United States Attorney’s Offices, even if not admitted in California, may be subject to discipline in California even if only a small part of the case or investigation on which they are working requires them to take action in California (for example, by serving a subpoena on or interviewing an employee of an internet service provider based in California). We understand this broad extension of disciplinary authority, which mirrors the ABA Model Rule, but we think it makes sense only if the choice of law rule and safe harbor set forth in ABA Model Rule 8.5(b)(2), or some similar provision, are also adopted as a means of avoiding potential conflicts between differing rules of professional conduct. Otherwise, lawyers working multi-jurisdictional investigations will be put in the often impossible position of reconciling different rules of professional conduct that may apply depending on whether their conduct occurs before or after the investigation coalesces into a case pending before a tribunal. By rejecting ABA Model Rule 8.5(b)(2)’s choice of law rule and safe harbor provision, Proposed Rule 8.5(b)(2) puts Department of Justice and other attorneys working multi-jurisdictional investigations in the potentially impossible position of having to comply with two different sets of rules that may, particularly given differences between key California Proposed Rules and the ABA Model Rules, be irreconcilable. We urge the Commission to adopt ABA Model Rule 8.5(b)(2), or a similarly-worded provision, to provide consistency and predicability in the choice of law rules so that lawyers working multi-jurisdictional investigations may reasonably determine what rules will apply and conform their conduct to those rules.

Although Proposed Rule 8.5(b)(1) follows ABA Model Rule 8.5(b)(1) to provide a consistent choice of law rule when a multi-jurisdictional matter is pending before a tribunal – the rules of the jurisdiction in which the tribunal sits apply, unless that tribunal’s own rules provide otherwise – there is no similarly consistency in the choice of law rule applied when a lawyer is involved in a multi-jurisdictional investigation that is not yet pending before a tribunal, that is, before the filing of a civil complaint or criminal charge. This is because Proposed Rule 8.5(b)(2) rejects the

“predominant effect of the conduct” standard and the “safe harbor” provision of the Model Rule, substituting instead a rule that, for matters not yet before a tribunal, a lawyer is subject to the California rules unless “specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from” the California rules. See also Proposed Comment [4] (explaining that this rule is intended to apply even to those cases in which lawyer’s conduct is in anticipation of proceeding that is likely to be, but not yet before a tribunal). If this rule is adopted, it will mean that a Department of Justice lawyer, who is licensed in California, but based in Washington, D.C., and who is engaged in a pre-indictment or pre-complaint investigation in Pennsylvania, will be subject to the California Rules of Professional Conduct during the investigation, even though the case has no nexus to California and no California resident’s interests are at stake. As soon as an indictment or complaint is filed in Pennsylvania, however, the Pennsylvania Rules will apply to that same lawyer’s conduct. In contrast, this lawyer’s colleague, licensed in a state (such as Pennsylvania) that has adopted the ABA Model Rule “predominant effect” test, will likely be bound by the Pennsylvania rules during the investigation. The California-admitted federal government lawyer, practicing outside California, therefore, would have to tailor her investigation, including the supervision of law enforcement officers or investigators, differently than her non-California licensed colleagues in the same case, merely because she is licensed in California.¹ Moreover, the lawyer may have to change her conduct during the investigation, merely because an indictment or complaint has been filed. The opportunities for confusion and litigation are limited only by the imagination. For example, what rules will govern the lawyer’s conduct if a complaint is filed that names only some, but not all of the potential defendants? If the lawyer continues her investigation, should she follow the Pennsylvania Rules only as to the named defendants while continuing to follow the California Rules as to the unnamed defendants? What rules will govern her conduct with respect to witnesses who may provide information relating to both named and unnamed defendants? It is difficult to understand how the interests of either California or its residents are served by subjecting lawyers overseeing multi-jurisdictional investigations to the confusion resulting from different choice of law rules that may render applicable different rules of professional conduct, if California’s interests are not at issue.²

¹ The difficulties posed may be particularly significant in those instances where California’s Proposed Rules of Professional Conduct and related rules governing the conduct of lawyers in California differ significantly from the rules of the jurisdiction in which the case is likely filed. For example, the permissible exceptions to non-disclosure of client confidences under California’s Proposed Rule 1.6 (interpreted to be consistent with California Business and Professions Code § 6068) are substantially narrower than those exceptions recognized in Pennsylvania, which has adopted Model Rule 1.6 (b)(2) (“to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another”) and 1.6(b)(3) (“to prevent, mitigate or rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services are being or had been used”) or where an issue concerning the lawyer’s implied authority for disclosure is at issue, a concept that has also been rejected in California’s Proposed Rule 1.6.

² The Commission rejected our previous comment along these same lines based on its conclusion that, “The detailed explanation provided in support of this Comment argues, in effect,

For these reasons, we request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.

Conclusion

For the foregoing reasons, we request a modification of the comments to Proposed Rule 1.11 to make more clear that the rule does not impute conflicts within government agencies. We also oppose the adoption of Proposed Rule 3.8(g), (h); if the Board of Governors ultimately concludes that adoption of some variation of these provisions is warranted, we believe that they should be substantially redrafted along the lines we previously proposed. In addition, we propose the addition of a comment to Proposed Rule 8.4(c) to make clear that it is not misconduct for government lawyers to advise about or assist or supervise lawful covert activity that may involve misrepresentations or other subterfuge. Finally, we oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Board of Governors either adopt ABA Model Rule 8.5(b)(2) and its accompanying comments or modify Proposed Rule 8.5(b)(2) to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California.

Thank you for this opportunity to comment.

that more uncertainty is better because it allows a clearer excuse for noncompliance in certain extremely rare situations where the actor initially has a choice between compliance with the rules of two different jurisdictions.” Respectfully, we disagree. We do not believe the situations posed by the discussion above will be so rare given the growing frequency of multi-jurisdictional investigations conducted by DOJ attorneys, and we see no reason why the choice of law rules applicable to attorneys conducting such investigations should apply completely differently based solely on the timing of the filing that puts a case before a particular tribunal when it is known all along where that filing will ultimately occur. We seek not uncertainty, but the certainty that will come with a lawyer’s ability to know which set of rules will apply, to know that those rules will apply both pre- and post-filing, and to conform conduct to those rules.

Exhibit A

Department of Justice
Proposal to Amend ABA Model Rule 3.8(g) and (h)

DRAFT July 16, 2008

- (g) upon receipt of evidence that purportedly shows a defendant did not commit an offense of which the defendant was convicted:
- (1) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and knows that the evidence is new and credible and creates a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:
- (i) the prosecutor shall disclose that evidence to the defendant and an appropriate court or other authority, or
- (ii) undertake further investigation or review, or make reasonable efforts to cause an investigation to occur. If the prosecutor determines, after investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in subpart (g)(1)(i).
- (2) if the prosecutor did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction, the prosecutor shall disclose the evidence to the chief prosecutor for the jurisdiction where the conviction occurred. Any chief prosecutor who receives the evidence shall undertake, or ensure that a subordinate prosecutor undertakes, the steps set forth above in subpart (g)(1).

* * * *

Comments

* * * *

[7] When a prosecutor who prosecuted a case and is still employed by the prosecuting jurisdiction receives evidence the prosecutor knows is new and credible and creates a reasonable probability that a person the prosecutor

prosecuted was convicted of a crime he did not commit, paragraph (g)(1)(i) requires disclosure to the defendant and the appropriate court. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel if the defendant is represented. If the defendant is no longer represented, disclosure may be made directly to defendant and may be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. In the first instance, the prosecutor may elect to undertake further investigation or review in lieu of disclosure under paragraph (g)(1)(ii). However, if the prosecutor determines or confirms after that further investigation or review that the evidence is indeed new and credible and creates a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, the prosecutor must undertake the notifications set forth in paragraph (g)(1)(i). If the prosecutor concludes after the investigation or review that the evidence either is not new, not credible or does not create a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, no further action is required under this Rule.

[8] If a prosecutor receives evidence that is purported to show that a defendant was convicted of a crime the defendant did not commit, and the prosecutor did not prosecute the defendant or prosecuted the defendant but is no longer employed by the prosecuting jurisdiction, the prosecutor must disclose the evidence to the chief prosecutor of the jurisdiction where the conviction occurred if the jurisdiction is known or readily ascertainable. The chief prosecutor must undertake the steps set forth in paragraph (g)(1).

[9] A prosecutor's independent judgment about whether evidence is new, credible and creates a reasonable probability that defendant did not commit a crime for which defendant was convicted shall be reviewed based upon the prosecutor's subjective knowledge and intent, including all the information known to the prosecutor at the time the judgment is made. A prosecutor shall not be deemed to have violated this Rule in the absence of a showing that the violation was willful and intentional.



U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

February 7, 2008

Laurel G. Bellows
Chair, House of Delegates
American Bar Association
321 North Clark Street
Chicago, Illinois 60610

Dear Ms. Bellows:

This letter is sent to comment on the proposal by the Criminal Justice Section of the American Bar Association (ABA) to add two provisions to Rule 3.8 of the Model Rules of Professional Conduct. These two new provisions, Model Rule 3.8(g) and (h), would impose additional duties on prosecutors who receive information post-conviction that suggests that a convicted person did not commit a crime of which he or she was convicted. The Department is very supportive of the goals behind this proposed Rule. It has always held its attorneys to the highest standards of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that information is disclosed as soon as possible. We take to heart Justice Sutherland's admonition in Berger v. United States:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Indeed, recent revisions to the United States Attorneys' Manual in connection with our disclosure obligations make that abundantly clear. The Department of Justice would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained -- pre-trial, during trial, or after conviction. However, while we embrace the spirit of the rule, the Department has some concerns, as set forth below, regarding application of the rule as written, and would urge the House of Delegates to delay adoption while those final details are worked out.

In the first instance, the Rule would require a prosecutor to take action when he knows¹ “new, credible and material” exculpatory evidence. It is unclear how a prosecutor who receives information about a case he or she did not prosecute can determine whether the information is “new, credible and material.” Yet, the proposed Rule seems to require a prosecutor to make this determination even if the prosecutor is not aware of the evidence presented in the case, the legal issues that had been raised or the credibility of the witnesses who testified at trial. Perhaps, in some instances, the newness, credibility, or materiality of the information would be easier to ascertain. For example, perhaps the new evidence would consist of DNA test results reached by using methods that did not exist at the time of the conviction. However, it would be even more difficult for a prosecutor who did not prosecute a case to determine whether non-DNA evidence is “new, credible and material.” We would expect a prosecutor to engage in her best efforts in determining materiality, but there must be recognition that such an analysis, perhaps years after the fact, is difficult. For that reason, we would prefer language, as we note below, clarifying that a prosecutor’s subjective intent should be used in determining adherence to this rule.

“Material”

Secondly, we are concerned with the use of the term “material” in the rule. . Neither the proposed Rule nor the Comments defines the term “material.” In a criminal context, the term “material” is usually defined in the Brady/Giglio jurisprudence. These cases define evidence as material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985). In the context of this Rule, that interpretation is reinforced by the further refinement “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.”

However, the term “material” or “materially” is used elsewhere in the Model Rules and has not been given the same construction. See, e.g., ABA Model Rules of Prof’l Conduct R. 1.7(a)(2) (2007) (prohibiting a lawyer from representing a client if there is a significant risk that the representation may be “materially limited” by the lawyer’s own interests or the interests of a third person); ABA Model Rules of Prof’l Conduct 3.3(a)(1) (2007) (imposing upon a lawyer a duty to correct “material” false statements made to a court); ABA Model Rules of Prof’l Conduct R. 4.1(a) (2007) (prohibiting a lawyer from knowingly making a “material” false statement of law or fact to a third person). Often, in professional responsibility jurisprudence, the term “material” may be construed to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Cohn v. Comm’n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App. 1998) (stating in reference to a lawyer’s duty to correct material false statements made to a court, “materiality encompasses matters represented to a tribunal that the judge would

¹ The term “know” is defined in the Model Rules to mean “actual knowledge of the fact in question[.]” Model Rule 1.0(f), and, as a result, we read the proposed Rule change would to apply only when a prosecutor actually knows of exculpatory evidence, and actually knows that the evidence is new, credible, and material.

attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the costs of litigation.”).

We would believe that this confusion could be remedied by making clear that the term “material” is used in the Brady sense of the term.

“Promptly”

If the evidence establishes a reasonable likelihood that the defendant did not commit a crime for which he was convicted, the prosecutor must “promptly” disclose the evidence to an appropriate court or authority and, if the conviction was obtained in the prosecutor’s jurisdiction, the prosecutor must “promptly” disclose the evidence to the defendant and undertake further investigation. Although the term “promptly” is not defined in the Model Rules, it does appear in several rules. See, e.g., ABA Model Rules of Prof’l Conduct R. 1.4(a) (2007) (requiring a lawyer to “promptly” consult with clients about certain matters and “promptly” comply with a client’s reasonable request for information); ABA Model Rules of Prof’l Conduct R. 1.11(b)(2) (2007) (requiring the law firm of a former government attorney to “promptly” notify the government agency if the firm intends to represent a client in a matter in which the former government lawyer participated personally and substantially); ABA Model Rules of Prof’l Conduct R. 4.4(b) (2007) (requiring a lawyer who receives privileged information of an opponent that was sent inadvertently to “promptly” notify the sender). Based upon the construction of the term “promptly” when it is used in other Model Rules, we believe that a court would construe the term to mean with some dispatch. Cf. Cobb Publ’g, Inc. v. Hearst Corp., 907 F. Supp. 1038, (E.D. Mich. 1995) (where court held that private firm failed to institute screening of lawyer hired from opposing counsel’s firm “promptly”; the attorney was not screened until ten days after he started working at the new firm; court discounted firm’s description of administrative delays in light of the fact that the firm knew prior to the attorney’s arrival that he was working as opposing counsel on the case).

When the term “promptly” is used elsewhere in the Model Rules, it imposes a duty upon a lawyer to act with dispatch when the lawyer already knows the information that triggers the duty. Under proposed Model Rule 3.8(g), however, it is exceedingly unlikely that a prosecutor would know immediately upon receipt of the alleged exculpatory information that it is “new, credible and material,” particularly if the prosecutor had not handled the case.

It would not be fair for a court or bar authority to sanction a prosecutor for taking the time to review the record of the conviction before acting on the information received. Accordingly, it would be more appropriate if the term “promptly” was removed from the proposed Rule or the Comment is amended to explain that the duty to take action is not triggered until the lawyer has had a reasonable amount of time to make an appropriate inquiry into the facts of the conviction so as to be able to determine and “know” that the evidence is “new, credible and material.”

“Seek to remedy the conviction”

Under proposed Model Rule 3.8(h), if the prosecutor concludes that there is clear and convincing exculpatory evidence, the prosecutor “shall seek to remedy the conviction.” Proposed Comment [8] states,

Necessary steps [to remedy the conviction] *may* include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

(Emphasis added.) Thus, the Comment suggests that the duty to “seek to remedy the conviction” may be met by disclosure, notice and, at most, a motion to the court for appointment of counsel for an indigent defendant. Thus, the unworkably vague instruction in subsection (h), is appropriately modified by the commentary. However, reliance on this Comment raises several concerns.

As an initial matter, some states that may consider adopting proposed Model Rule 3.8(g) and (h) do not have comments that accompany their rules of professional conduct or may choose to develop their own comments. *See, e.g.*, Alaska Rules of Prof'l Conduct R. 3.8 (2007) (adopting its own comments rather than the ABA comments); N.Y. Lawyer's Code of Prof'l Responsibility DR 7-103 (2007) (adopting its own ethical cannons rather than the ABA comments);¹ Ill. Rules of Prof'l Conduct R. 3.8 (2007) (no comments adopted); La. Rules of Prof'l Conduct R. 3.8 (2006) (same); Nev. Rules of Prof'l Conduct R. 3.8 (2006) (same); Or. Rules of Prof'l Conduct R. 3.8 (2005) (same); R.I. Rules of Prof'l Conduct R. 3.8 (2007) (same); W. Va. Rules of Prof'l Conduct R. 3.8 (2005) (same). In those jurisdictions, a court or bar authority may or may not choose to construe the rule based upon the comments to the Model Rule.

Even in jurisdictions where the court decides to adopt Comment [8], it is not clear that notice, disclosure and a motion for appointment of counsel is all that is required to “remedy” a conviction. Indeed, in its report accompanying the recommendation to amend Model Rule 3.8, even the Criminal Justice Section acknowledges that the list in Comment [8] is not exhaustive.

Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate steps may be to make, or join in, an application for executive clemency.

¹Proposed New York Rule 3.8 would include comments. However, the comments in the draft pending before the Court of Appeals do not include a comment similar to Comment [8].

Criminal Justice Section, Report to the House of Delegates, at 5 n.10. See Report appended hereto as Attachment 1. Thus, even in jurisdictions that adopt Comment [8], a defendant or bar counsel may argue that a prosecutor faced with clear and convincing evidence of a defendant's innocence is ethically required to do more.

Finally, if the proposed revision could be construed to require prosecutors to do more than disclose, notify and move the court for appointment of counsel, this could be problematic because federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction. Rather, that responsibility lies with the defendant. See, e.g., Fed. Rule Crim. P. 33(a) ("Upon a defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.>").

"Good faith" of the prosecutor

The proposed Comment [9] to the Model Rule 3.8 states that a prosecutor will not run afoul of the Rule if he determines in "good faith" that the new evidence does not trigger the duty to notify and disclose under proposed subparts (g) and (h). Usually, the term "good faith" is used to describe a "state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." Efron v. Kalmanovitz, 57 Cal. Rptr. 248 (Cal. Ct. App. 1967). We read the Comment to require that a bar authority or a court determine whether a prosecutor has run afoul of the rule by examining the prosecutor's subjective intent. We believe that is the appropriate standard to use.

However, the term "good faith" is used elsewhere in the Model Rules and is not always interpreted in this way. For example, ABA Model Rules of Prof'l Conduct R. 3.1 (2007) provides, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Under Model Rule, courts have analyzed an attorney's behavior using an objective standard – a standard dependent on what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. In re Disciplinary Action Against Graham, 453 N.W.2d 313, 322 (Minn. 1990).

We believe that the subjective standard of intent should be explicitly stated in the rules.

"Remedy the conviction"

Proposed Model Rule 3.8(h) requires a prosecutor to "seek to remedy the conviction" if there is clear and convincing evidence that a defendant in the prosecutor's jurisdiction did not commit a crime for which he was convicted. As discussed above, one could argue that, under proposed Comment [8], the phrase "remedy the conviction" should be construed as requiring no more than notice, disclosure, and a motion to the court seeking appointment of counsel for indigent defendants. But, the phrase "remedy the conviction" on its face is very broad, not all jurisdictions that might adopt the proposed Rule would also adopt the proposed comments, and even the Criminal Justice Section concedes the list in the proposed Comment is not exhaustive. Accordingly, a prosecutor could be required to do more to "remedy the conviction."

A federal prosecutor is limited in what he may do in the face of after-acquired exculpatory evidence. As a matter of substantive law, when a federal prosecutor receives information that exculpates a convicted defendant, there are no specific statutory or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Fed. R. Crim. P. 33 (a) (2007), a defendant may move to vacate a judgment and for the grant of a new trial “if the interests of justice so require.” There are time limits on such a motion. A defendant basing his motion for a new trial on the ground of newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within seven days of the verdict. Fed. R. Crim. P. 33(b) (2007). Under 28 U.S.C. § 2255 (Supp. 2007), a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right or the date that new facts would be discoverable.² Thus, even if a court or bar authority were to construe proposed Model Rule 3.8(h) to require a federal prosecutor to do more than the disclosure, notice, and investigation he has undertaken under proposed Model Rule 3.8(g), there would be no rule of criminal procedure and no statutory basis by which a prosecutor could move the court to take any action to “remedy” a conviction.

The legitimate desire by the courts and congress for finality of judgment have led them to adopt mechanisms like Section 2255 and Rule 33 in order to strike an appropriate balance between the principle of finality of judgment and the desire to have assurance that the innocent are not convicted of crimes they did not commit. To be sure, ensuring that the innocent are not convicted is a fundamental goal of our criminal justice system and the principle underlying many of the constitutional, statutory, and procedural protections presently in place. However, it is also certain that the government and the people’s desire for finality of criminal convictions is an equally compelling interest to be served. “[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.” Teague v. Lane, 489 U.S. 288, 309 (1989). Moreover, as aptly stated by Justice Harlan, “No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.” Mackey v. United States, 401 U.S. 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men

²Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. See 18 U.S.C. § 3600 (Supp. 2007). If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion “[n]otwithstanding any law that would bar a motion under this paragraph as untimely.” 18 U.S.C. § 3600(g)(1) (Supp. 2007).

linguish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. . . . This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id. (citations omitted).

By developing Section 2255 and Rule 33, Congress and the courts have, after considered review, reflection and debate, struck the balance they deem to be appropriate between finality and innocence. The Criminal Justice Section's proposed revision to Model Rule 3.8 may be construed to alter this balance without being subject the rigors or accountability of a formal legislative process or judicial rule making. Such process would attempt to balance the costs and benefits to the government, society and the individual. However, it does not appear from the text of the proposed revisions or the Section Report that the Section gave sufficient weight to the costs to the government or society that may arise if the proposed revisions are adopted. Bar rules of professional conduct should not try to address matters of substantive or procedural law. Indeed, the regulations interpreting 28 U.S.C. 530B, the statute that makes state rules of professional conduct applicable to federal government attorneys, clearly state that the statute "should not be construed in any way to alter federal substantive, procedural or evidentiary law." 28 C.F.R. § 77.1(b) (2007). Accord Stern v. United States District Court for the District of Mass., 214 F.3d 4, 20 (1st Cir. 2000).

Application to all counsel

We would also suggest that the provisions be applied to all attorneys. While the prosecutor, by nature of his position has a unique role and special obligations, the intent of the proposed revisions is to rectify the conviction of the innocent. As such, a duty to disclose exculpatory evidence acquired post-conviction should apply to all attorneys, not only to prosecutors. . Although there could be various constitutional or client confidentiality concerns that may weigh in the balance of whether a private attorney should disclose such information, the Criminal Justice Section undermines its goal of rectifying the conviction of the innocent by failing to impose a duty to disclose exculpatory information on all attorneys.

For all of the foregoing reasons, we believe the passage of Rule 3.8 is premature and we would welcome the opportunity for further discussion.

Sincerely,

A handwritten signature in black ink, appearing to read "David Margolis", with a long horizontal flourish extending to the right.

David Margolis
Associate Deputy Attorney General



**THE STATE BAR OF
CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning &
Development
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,¹ we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.² We hope you find our thoughts helpful.

SUMMARY

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

¹ OCTC refers the Commission to its previous comments and recommendations.

² We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).³

GENERAL COMMENTS

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.⁴

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.⁵ The 1974 rules were 13 pages; contained 25 rules; and 6 comments.⁶ The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

³ Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

⁴ See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

⁵ The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

⁶ The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.⁷

⁷ There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

Rule 8.5. Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but still has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.
2. OCTC finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We would recommend striking all the comments except for the last two sentences of Comment 1.