

E-mails,

July 26, 2010 KEM E-mail to Difuntorum, McCurdy & Lee:

I've attached revised draft 11 (7/25/10), in redline and clean versions, intended to implement the Board's decision to re-circulate Rule 3.8 with MR 3.8(d) substituted for proposed paragraph (d).

I haven't revised the other documents (Introduction, etc.) because I wanted to confirm w/ Randy that the changes I've made are the only changes necessary to the Rule. Note that I substituted "law" for "case law" in Comment [2A] to reflect the greater breadth of obligation in the Model Rule, which would include obligations under court rules and statutes.

I think we need to retain Comment [2A] because its statement on timing is still important. In addition, the second sentence, added at OCTC's request, is also important in stating the scope of the Rule's requirements.

Finally, my notes reflect that Jon Streeter requested that we include the ABA opinion, 09-454, in the documents circulated for public comment. However, that opinion is copyrighted by the ABA and, even if this is an official bar circulation, we would still need the ABA's permission to circulate the opinion (of particular concern to them would be the electronic circulation of the opinion). Typically, it takes a week to get copyright clearance from the ABA and we don't have the time. Perhaps John Holtaway can help us accelerate the process. Alternatively, we can simply quote in the Introduction that part of the opinion that the Los Angeles PD cited in his 7/22 letter. That would be fair use.

Attached:

RRC - 5-110 [3-8] - Rule - XDFT11 (07-25-10) - Cf. to XDFT10 (06-28-10).doc

RRC - 5-110 [3-8] - Rule - XDFT11 (07-25-10) - CLEAN-LAND.doc

July 26, 2010 Difuntorum E-mail to KEM, cc McCurdy & Lee:

Thanks Kevin. I believe the edits that you have made fully implement the Board's action on Rule 3.8. In particular, I agree that the change to Comment [2A] is a conforming change.

Regarding the "inclusion" of the ABA opinion, I believe we should: (1) use a quotation as you suggest; and (2) include the Westlaw citation format ("ABA Formal Op. 09-454") and the ABA CPR URL (<http://www.abanet.org/cpr/pubs/ethicopinions.html>) where information is posted about access to the opinions (i.e., ABA members can get complimentary copies but non-members must buy a downloadable version of 09-454 for \$20) and leave it at that given the press of time.

July 26, 2010 KEM E-mail to Difuntorum, cc McCurdy & Lee re 8.3 & 3.8:

I've quickly perused the public comment memo and there were no problems with what I could read (but see below re 3.8). However, I think you need to update the links on the last page because they have changed since the bar updated its web site. I tried clicking on several of the links and received a "404" error notice for each one I clicked on.

I agree with Harry on 8.3.

**RRC – Rule 3.8 [5-110]
E-mails, etc. – Revised (8/24/2010)**

Will we specify that 3.8 is being released only as to paragraph (d)? That was the specific motion that was made and which I clarified during the meeting. If you agree, then on page 3, I would state the following (or something similar):

Rule 3.8 Special Responsibilities of a Prosecutor [5-110] [At the direction of the Board of Governors, public comment is being solicited only as to paragraph (d)]

If the foregoing is not permitted under the Bar's procedural rules, then so be it. However, RAC so instructed us.

July 26, 2010 Difuntorum E-mail to RRC:

Attached are redline drafts of the following rules that were modified by the Board.

1) Rule 3.8 = in para. (d), substituted the ABA Model Rule language for the Commission's narrower language.

2) Rule 1.5 = deleted para. (e) and (f) and all related comment language to respond to the concerns raised by Barry Tarlow.

3) Rule 1.15 = revised Cmt. [8] which referenced Rule 1.5's "definition" of a "true retainer" fee.

Much thanks to Kevin for quickly generating the revised drafts that will be posted today to start the 30-day public comment period.

Attached:

RRC - 5-110 [3-8] - Rule - XDFT11 (07-25-10) - Cf. to XDFT10 (06-28-10).doc
RRC - 4-200 [1-5] - Rule - XDFT15 (07-25-10) - Cf. to XDFT14.1 (06-28-10).doc
RRC - 4-100 [1-15] - Rule - XDFT19 (07-25-10) - Cf. to XDFT18 (06-30-10).doc

July 26, 2010 Difuntorum E-mail to KEM, cc McCurdy & Lee:

Using your new draft, we have updated the Rule 3.8 Rule Comparison explanation and Comment Comparison explanation charts. See highlighted text. Please make any edits that you deem appropriate.

Attached:

RRC - 5-110 [3-8] - Compare - Rule Explanation - XDFT6 (07-25-10)-LM-ML-RD-KEM.doc
RRC - 5-110 [3-8] - Compare - Comment Explanation - XDFT6 (07-25-10)-LM-ML-RD-RD-KEM.doc

July 26, 2010 Difuntorum E-mail to KEM, cc McCurdy & Lee:

Here is the XDFT5.2 draft for the Compare Comment Explanation dated 7-09-10.

Attached:

RRC - 5-110 3-8 - Compare - Comment Explanation - XDFT5.2 (07-09-10)-LM-ML-RD-RD.doc

July 26, 2010 KEM E-mail to McCurdy, Difuntorum & Lee:

I've made the conforming changes to the 3.8 documents and have attached them, as well as the documents I sent earlier this morning. Attached are:

RRC - 5-110 [3-8] - Dashboard - XDFT4 (07-26-10)KEM.doc
RRC - 5-110 [3-8] - Compare - Introduction - XDFT6 (07-26-10)KEM.doc
RRC - 5-110 [3-8] - Compare - Comment Explanation - XDFT6 (07-26-10)KEM.doc
RRC - 5-110 [3-8] - Compare - Rule Explanation - XDFT6 (07-26-10)KEM.doc
RRC - 5-110 [3-8] - Rule - XDFT11 (07-25-10) - CLEAN-LAND.doc
RRC - 5-110 [3-8] - Rule - XDFT11 (07-25-10) - Cf. to XDFT10 (06-28-10).doc

Please note that in the Introduction, I left in place item #2 in the second paragraph ("(2) clarifying the prosecutor's duties to disclose exculpatory information during a proceeding;") because, even though we have substituted the Model Rule language in the black letter, we do clarify those duties in the Comment.

In addition, Randy might want to review what I've written in the Explanation for paragraph (d) in the Rule Explanation Chart, attached.

Please let me know if you have any questions.

P.S. Because 1.5 isn't going out today, I won't get to those until later this evening.

July 26, 2010 KEM E-mail to McCurdy, Difuntorum & Lee:

In consideration of Randy's discussion w/ Harry, I've revised the Introduction and Rule Comparison Charts and attach the following:

RRC - 5-110 [3-8] - Compare - Introduction - XDFT6.1 (07-26-10)KEM-RD.doc
RRC - 5-110 [3-8] - Compare - Rule Explanation - XDFT6.1 (07-26-10)KEM-RD.doc

You should substitute these for the Draft 6 versions I sent earlier. All the remaining documents can remain the same.

August 4, 2010 McCurdy E-mail to RRC:

To date, we have received 3 public comments for the rules currently circulating for public comment. Given the extremely short turn-around time between now and the next meeting, it is important that all members read all comments as they are received. I have attached copies of the following comments on the following rules, along with public commenter charts providing a synopsis of these comments:

Rule 1.0.1 – Peter Liederman
Rule 3.8 – Ventura DA – Michael Schwartz
Rule 5.4 – Thomas Quinn

The public comments will be sent out to the entire Commission as they are received, and will also be available at the Google site under the heading “COMMENTS BATCH Y”:

<http://Sites.google.com>

IMPORTANT: Please be advised that the assignments deadline is **Thursday, August 26th at 9:00 am**, due to the August 25th public comment deadline. This means that the usual opportunity for sending e-mail comments after receipt of the agenda materials will not be possible. Instead, all Commission members are asked to send e-mails responding to the public comment letters as they are distributed. Please send e-mail comments to the entire Commission to assure that leadership and the drafting teams can account for e-mail comments in preparing assignments.

Below is a list of the drafting teams assigned to each rule under consideration at the August meeting. Folders for each rule with the assignment background materials are available at the Google site under the heading “RULES BATCH Y.” As updated public commenter charts become available we will send them to you by e-mail and post them at the Google site.

- III.A. Rule 1.0.1 - Terminology [1-100(B)] – KEHR, Julien, Sapiro
- III.B. Rule 2.1 - Advisor [N/A] – LAMPORT, Vapnek
- III.C. Rule 3.3 - Candor Toward the Tribunal [5-200] – TUFT, Peck, Ruvolo, Sapiro
- III.D. Rule 3.8 - Special Responsibilities of a Prosecutor [5-110] (At the direction of the Board of Governors, public comment is being solicited only as to paragraph (d).) – FOY, Peck, Tuft
- III.E. Rule 4.2 - Communications with a Represented Person [2-100] – MARTINEZ/TUFT
- III.F. Rule 5.4 - Financial and Similar Arrangements with Nonlawyers [1-310, 1-320, 1-600] – MOHR, Martinez, Peck, Tuft
- III.G. Rule 8.4 - Misconduct [1-120] – VAPNEK/PECK, Tuft

We're in the home stretch!

Attached:

- RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
- RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
- RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
- RRC - [3-8] - Public Comment Complete - REV (08-04-10).pdf
- RRC - [5-4] - Public Comment Complete - REV (08-04-10).pdf
- RRC - [1-0-1] - Public Comment Complete - REV (08-04-10).pdf

August 17, 2010 Sondheim E-mail to RRC re 3.8:

Regardless of what you may think of the comments from the Ventura District Attorney's office, subdivision (d) of the ABA rule as sent out for public comment by RAC should not be adopted because it conflicts with a statute added to the Penal Code by the enactment of Proposition 115 on June 5, 1990, which sets forth the disclosure duties of a prosecuting attorney as follows:

Penal Code section 1054.1 :

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

- (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
- (b) Statements of all defendants.
- (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
- (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
- (e) Any exculpatory evidence.
- (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

While these provisions certainly can encompass the materials referenced in the ABA rule, they are not nearly as broad. The only qualification of Penal Code section 1054.1 is provided in Penal Code section 1054, subdivision (e) as follows:

This chapter shall be interpreted to give effect to all of the following purposes:

- (e) To provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.

THEREFORE IF SUBDIVISION (D) OF THE ABA RULE WERE TO BE ADOPTED, IT WOULD BE CONTRARY TO CALIFORNIA LAW. OUR ORIGINAL PROPOSAL COULD BE MODIFIED TO ADD "AND STATUTORY" BEFORE THE WORD "CONSTITUTIONAL" AND IT WOULD THEREBY BE IN ACCORD WITH CALIFORNIA LAW.

It seems to me that this is an example of the need to adopt a provision which, in accordance with the explanation given by Bob Kehr in his recent Daily Journal articles, is "rule-based" as distinguished from the ABA's "principle-based" rule.

August 18, 2010 Difuntorum E-mail to RRC re 3.8:

As Harry points out, proposed Rule 3.8(d) would conflict with existing statutory law. This means that if the Board decides to adopt Rule 3.8(d) in its current form (which tracks the Model Rule counterpart), then the State Bar likely would engage in a coordinated policy discussion with the relevant law makers (Supreme Court, Legislature, Governor) in order to implement this change in the law.

However, it is important to note that the Supreme Court retains the inherent authority to approve Rule 3.8(d) notwithstanding any statutory conflict. See *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 603 ["Although we consistently have recognized and valued the role of legislative regulation of the practice of law and appropriately deferred to the Legislature's

judgment on many subjects, on rare occasions we have invalidated legislative enactments that materially impaired our inherent power over admission and discipline."].

While not at the same level of controversy, proposed Rule 3.8(d) falls into the same category as the Commission's proposed Rule 7.1 with regard to the Commission's decision to recommend abandonment of the existing requirement to retain copies of advertisements. Here is an excerpt from the Commission's Rule 7.1 Introduction:

"Retention of Marketing Materials. Both current rule 1-400(F) and previous versions of the Model Rules contain a requirement that a lawyer retain, for two years, a copy of any communication the lawyer had made in electronic or written media. The Commission agrees with the ABA Ethics 2000 Commission that the requirement "has become increasingly burdensome, and such records are seldom used for disciplinary purposes," (ABA Ethics 2000 Reporters Explanation of Changes, Rule 7.2), and so recommends that the retention requirement not be retained. However, the Commission notes that if this recommendation is accepted, Bus. & Prof. Code § 6159.1, which requires the retention of advertisements for a period of one year, should be repealed. Because it is necessary for Rule 7.1 and Bus. & Prof. Code § 6159.1 to be consistent, the potential alternative to a change in the statute would be for Rule 7.1 to require a one-year period of retention, but the Commission does not favor that alternative."

If, as a policy matter, the Commission agrees that proposed Rule 3.8(d) in its current form is desirable notwithstanding the conflict with statute, then the Commission's materials should identify the conflict in law and articulate a specific rationale just as the Commission has done with Rule 7.1.

August 18, 2010 Sondheim E-mail to Difuntorum, cc RRC re 3.8:

Note that Proposition 115 was not only passed by the voters, but was part of a comprehensive act entitled "Crime Victim's Justice Reform Act" which was put on the ballot by a voter initiative. Thus the policy issue is much broader than whether the Court will defer to the legislature with regard to, for example, a 7.1 retention policy. The broader issue is whether the Legislature, Governor and/or Supreme Court will override the will of the voters of California in order to adopt an ABA policy. I suspect that if the ABA policy is recommended to the Court, this will open up a hornet's nest because it puts the Court in a different position from what it often considers in deciding whether a law enacted as a result of a voter's initiative is constitutional. In the past, the Court has shown a reluctance to impose burdens on the prosecution regarding the disclosure of information. See *In re Steele*, 32 C.4th 682, 699-700. Needless to say, I do not think the Commission or the Board of Governors should stir up this hornet's nest since there are already enough issues which have been stirred up. I find it hard to justify a position that, in essence, requires the Commission and the Board to say that their judgment is better than the electorate.

August 18, 2010 Tuft E-mail to RRC re 3.8:

Another example of a proposed rule that conflicts with existing statutory law than the Commission's recommendation to adopt Model Rule 1.8(j) despite Business & Profession code section 6106.9. I agree with Randy and see no reason to revisit the commission's decision to recommend Rule 3.8(d). Identify the conflict with the existing statute and point out the need for a change in the law.

August 19, 2010 McCurdy E-mail to RRC re 3.8 & 4.2:

Commission Members:

Please review the attached comment from Santa Cruz County District Attorney Bob Lee on Rules 3.8(d) and 4.2. Updated public commenter charts adding a synopsis for each rule comment is also attached.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [4-2] - Public Comment - Y-2010-535b Bob Lee Santa Cruz DA.pdf

RRC - [3-8] - Public Comment - Y-2010-535a Bob Lee Santa Cruz DA.pdf

RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.1 (08-19-10).doc

RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.1 (08-19-10).doc

August 20, 2010 Difuntorum E-mail to RRC re SUPPORT for Santa Cruz DA Comment:

Commission Members:

To facilitate your response to the Lauren's message below as it pertains to proposed Rule 3.8, if you [agree in concept with the Santa Cruz County DA's and Ventura County DA's](#) recommendation to reject the ABA Model Rule language presently used in paragraph (d) , then you may use this message to REPLY TO ALL. (Note: Supporting the DA's comment letters means *disagreement* with COPRAC's comment letter in support of proposed Rule 3.8 as presently drafted.)

Of course, you are free to send your own personal e-mail (with "Rule 3.8" in the subject line) analyzing these public comments, but I am providing this as a convenient option for those members who simply wish to express their support for the position taken by the District Attorney commenters. (The Santa Cruz DA, Ventura County DA, and COPRAC comment letters are attached.)

Please note that the Chair sent an e-mail on 8/17/10 expressing his personal view that the Model Rule language should be rejected and that consideration should be given to adding "and statutory" after the word "constitutional" in substituting the Commission's prior language, as this would conform paragraph (d) to existing California law (Penal Code section 1054.1). The Chair's view is consistent with the District Attorney commenters in rejecting the Model Rule language. –Randy D.

Concept of the District Attorney's Recommendation (in paragraph (d) to substitute the Commission's prior language for the Model Rule language):

“(d) [make-comply with all constitutional obligations, as defined by relevant case law, regarding the](#) timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all

unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;”

Attached:

RRC - [3-8] - Public Comment - Y-2010-533 Michael Schwartz Ventura DA.pdf
RRC - [3-8] - Public Comment - Y-2010-535a Bob Lee Santa Cruz DA.pdf
RRC - [3-8] - Public Comment - Y-2010-534c COPRAC.pdf

August 20, 2010 Difuntorum E-mail to RRC re SUPPORT for COPRAC Comment:

Commission Members:

To facilitate your response to the Lauren’s message below as it pertains to proposed Rule 3.8, if you [agree with the COPRAC comment letter](#) that supports proposed Rule 3.8 as presently drafted, then you may use this message to REPLY TO ALL. (Note: Agreeing with COPRAC means *disagreement* with the Santa Cruz County DA’s and Ventura County DA’s recommendation to reject the ABA Model Rule language presently used in paragraph (d).)

Of course, you are free to send your own personal e-mail (with “Rule 3.8” in the subject line) analyzing these public comments, but I am providing this as a convenient option for those members who simply wish to express their support for the position taken by COPRAC. (The Santa Cruz DA, Ventura County DA, and COPRAC comment letters are attached.)

Please note that the Chair sent an e-mail on 8/17/10 expressing his personal view that the Model Rule language should be rejected and that consideration should be given to adding “and statutory” after the word “constitutional” in substituting the Commission’s prior language, as this would conform paragraph (d) to existing California law (Penal Code section 1054.1). The Chair’s view disagrees with COPRAC’s support of the rule as presently drafted. –Randy D.

Rule 3.8(d) in its Current Form as Supported by COPRAC (uses ABA Model Rule language which conflicts with existing California law):

“(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;”

Attached:

RRC - [3-8] - Public Comment - Y-2010-533 Michael Schwartz Ventura DA.pdf
RRC - [3-8] - Public Comment - Y-2010-535a Bob Lee Santa Cruz DA.pdf
RRC - [3-8] - Public Comment - Y-2010-534c COPRAC.pdf

August 20, 2010 Julien E-mail to RRC re Santa Cruz DA’s Comment re 3.8 and 4.2:

I can see why each side might view materiality of the case differently. Then, I ask, why not get the necessary court order/permission to make clean moves in terms of the investigation. Therefore I oppose the suggested changes.

August 22, 2010 Sondheim E-mail to RRC:

For the reasons set forth below I have previously dissented to the inclusion of the following words in 3.8(c) because they are contrary to California law:

"such as the right to a preliminary hearing...."

I believe we can still fix this by simply deleting these words which would not require further public comment, just as public comment was not asked on 8.3 after RAC rejected that rule.

The reasons for the deletion are the following:

Although this portion of the Model Rule may be appropriate for other jurisdictions, it conflicts with Penal Code section 860, as interpreted in *In re Jones*, 265 CA2d 376, 381. The court in the Jones case held that an accused can only waive a preliminary hearing if represented by counsel. Yet paragraph (c) allows a prosecutor to obtain a waiver of a preliminary hearing if the accused has been permitted to appear in propria persona. Comment [2] correctly states "prosecutors should not seek to obtain waivers of preliminary hearings...from unrepresented accused persons" since California law would not permit them to do this, while the text of 3.8(c) would allow this if the court permits the defendant to appear in propria persona.

I hope other members of the Commission will agree to this proposal and I would appreciate your reaction to the proposal. If enough members agree and no reasonable arguments are set forth in opposition, we will not have to consume precious time on this matter. Otherwise, it will be part of the discussion regarding 3.8(d).

August 22, 2010 McCurdy E-mail to RRC:

For ease of reference, here's a copy of the LA Public Defender's letter referred to in the letter from Bob Lee, the Santa Cruz County DA. The letter from LA Public Defender Michael Judge was sent to the attention of the Board of Governors prior to their consideration of the entire set of rules at their July 23 & 24 meeting.

Attached:

RRC - 5-110 [3-8] - 07-22-10 LA Pub Def (Michael Judge) Letter to BOG.pdf

August 23, 2010 McCurdy E-mail to RRC:

Please review the attached comment from Steve Cooley of the Los Angeles District Attorney's Office on Rule 3.8.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [3-8] - Public Comment - Y-2010-537 Steve Cooley LA DA.pdf

August 23, 2010 Lee E-mail to RRC re 3.8 & 4.2:

Attached you will find updated Public Commenter Tables for Rules 3.8 and 4.2.

Attached:

RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.2 (08-23-10).doc

RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.2 (08-23-10).doc

August 23, 2010 Sondheim E-mail to RRC:

Since the time I previously sent out my views regarding 3.8(d), we have received additional comments regarding this provision. I have therefore given further thought to this matter and, in an effort to save some of our precious time at the meeting, have attached an updated version of my views in accordance with the request that we lodge e-mail comments "concerning the attached public comment as soon as possible." These views are an attempt to amplify my earlier views and provide some refinement of arguments made by District Attorneys.

Needless to say, I still believe ABA 3.8(d) should not be adopted. Indeed, as explained in the attachment, there would appear to be no need to adopt any version of 3.8(d) in light of another rule that has already been approved by the Board, although, as a fall back position, consideration could be given to resubmitting, with the new amendment I previously suggested, the version of 3.8(d) which was rejected by RAC. Given the late hour proposal by the Los Angeles Public Defender and PREC, I do not believe RAC had the opportunity to fully consider the ramifications of this proposal.

Attached:

RRC - 5-110 [3-8] - 08-23-10 Sondheim Memo re 3.8(d) Discovery.doc

The ABA version of subdivision (d) of this rule should not be adopted for three reasons which are explained below in greater detail: (1) It conflicts with a statutory scheme for criminal discovery enacted by a voter initiative designed to set forth the discovery obligations of prosecutors and defense attorneys in an even-handed way, taking into account the differing principles applicable to each. (2) The proposed policy is not good policy. (3) It conflicts with policies considered when adopting other rules.

1. The Statutory Scheme

In 1990, pursuant to a voter initiative, the California Constitution was amended to state:

“In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process.”

Section 1 of this initiative made it clear that one of its purposes was to provide “balance” to the criminal justice system.

As part of this initiative, Penal Sections 1054.1 and 1054.3 were enacted setting forth in detail the reciprocal discovery prosecutors and defense attorneys must provide. By virtue of the precise language in each of these statutes it is clear to the attorneys

representing each side in a criminal case exactly what must be disclosed. Indeed, Penal Code section 1054, subdivision (e) provides:

“This chapter shall be interpreted to give effect to all of the following purposes:

(e) To provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.”

The ABA rule however has a more amorphous standard in subdivision (d) which requires the prosecutor to disclose “all evidence or information known to the prosecutor that tends to negate...or mitigate” without providing guidance to the prosecutor as to what must be considered in determining whether evidence or information “tends to negate...or mitigate.”

In order to provide that guidance, subdivision (d) of the rule previously recommended by the Commission should simply be amended to add the words “statutory or” before the word “constitutional” so that the rule would read:

“comply with all statutory or constitutional obligations....”

2. The ABA’s subdivision (d) is not good policy

As noted above, subdivision (d) of the ABA’s rule provides no guidance as to what “tends to negate...or mitigate.” As a consequence of this a prosecutor could be disciplined for nondisclosure of an item of evidence which someone, in second guessing the prosecutor, believes had a tendency to assist the defendant, even though that item of evidence is immaterial to the guilt of the defendant. If it were material to guilt, Penal Code section 1054.1 and the United States Constitution would encompass it. Thus the prosecutor is at risk for discipline even if he or she has complied with Penal Code section 1054.1 and mandates of the United States Constitution whereby the discovery given to the defendant resulted in a fair trial. Society should not make prosecutors subject to such a risk because it does not benefit the defendant and unnecessarily results in unwarranted risks of discipline for prosecutors.

Furthermore, the ABA subdivision tilts the playing field set out in Penal Code sections 1054.1 and 1054.3 which provide a level playing field for prosecutors and defense attorneys, taking into account the obligations of each side in a criminal case which necessarily vary by the very nature of the side the attorney represents.

3. Another rule adopted by the Board provides an even-handed approach to discovery, which is contrary to the ABA tilt.

Rule 3.4 as adopted by the Board provides:

“A lawyer shall not . . . (b) suppress any evidence that the lawyer or the lawyer’s client has a legal obligation to reveal or produce”

Thus all attorneys, whether in civil or criminal matters, have the same legal obligations and are subject to discipline if they do not comply with those obligations. This is an even-handed approach to discipline for all attorneys. ABA Rule 3.4 has no similar provision in

that rule or any other rule providing for discipline in discovery violations, other than what is provided in 3.8(d) for prosecutors. Given that California's proposed version of 3.4 already sets forth a standard for which violations of discovery are subject to discipline, the tilt in ABA rule 3.8(d) is contrary to the disciplinary standard of 3.4 by adding additional principles related to only one category of lawyers--prosecutors. (Note that comment [3] of proposed 3.4 makes it clear that this rule does not provide a standard for the resolution of criminal discovery disputes. It only provides a standard for discipline.) **Indeed, given that 3.4 already provides the disciplinary standard for discovery violations, there is no need to adopt 3.8(d) and this subdivision could be deleted, instead of making the amendment suggested above (“statutory or”).** If ABA 3.8(d) is adopted, a prosecutor will be subject to double charging for the same conduct when the failure to provide the discovery required by law violates 3.4 and ABA 3.8(d).

Furthermore, the concept of providing a level field for prosecutors and defense attorneys was the very reason that the last sentence was added to Comment [20] to Rule 4.2. ABA Rule 3.8(d) is contrary to this philosophy by tilting in one direction with regard to something that is a “special responsibility” provided in existing disciplinary rules for all lawyers.

August 24, 2010 Difuntorum E-mail to RRC:

Please review the attached comment from the Los Angeles County Public Defender and Alternate Defender on proposed Rule 3.8(d). The commenters support the proposal but assert that Comment [2A] should be revised to delete the implication that the disclosure obligation of Rule 3.8(d) is limited by “controlling law.” An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [3-8] - Public Comment - Y-2010-540 LA Pub Def (Judge) re 3.8(d) (08-23-10).pdf

August 24, 2010 McCurdy E-mail to RRC:

Over the past two days Randy and I have circulated the comments as we have received them. As promised, I've attached a copy of updated commenter charts including a synopsis of those comments received on the following rules:

- Rule 1.0.1
- Rule 3.3
- Rule 3.8
- Rule 4.2

Attached:

- RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.1 (08-24-10).doc
- RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.3 (08-24-10).doc
- RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.1 (08-24-10).doc
- RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.3 (08-24-10).doc

August 25, 2010 Difuntorum E-mail to RRC re CPDA Comment:

Please review the attached comment from CPDA on proposed Rule 3.8. The commenter supports the ABA Model Rule language used in Rule 3.8(d) which does not limit the prosecutor's disclosure duty to the minimum required by the constitution. In addition, the commenter requests that Comment [2A] be modified in accordance with the comment submitted by the Los Angeles Public Defender and Alternate Defender. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [3-8] - Public Comment - Y-2010-545c CPDA.pdf

August 25, 2010 Difuntorum E-mail to RRC re CDAA Comment:

Please review the attached comment from CDAA on proposed Rule 3.8. The commenter objects to the ABA Model Rule language used in paragraph (d). An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [3-8] - Public Comment - California DA Association.pdf

August 25, 2010 Difuntorum E-mail to RRC re OCBA Comment:

Please review the attached comment from OCBA on proposed Rule 3.8. The commenter supports the adoption of the rule as distributed for public comment. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [3-8] - Public Comment - OCBA (08-18-10).pdf

August 25, 2010 McCurdy E-mail to RRC:

Lead Drafters:

Thanks to those of you who have found time to promptly send e-mails addressing the public comments that have been distributed.

**RRC – Rule 3.8 [5-110]
E-mails, etc. – Revised (8/24/2010)**

As you know, we will also need completed public commenter charts for each of the rules on the agenda. An updated draft of each public commenter chart including a synopsis of all of the comments received by the end of the comment period is attached. You may already have the most recent version of those charts which did not require a recent update, however we are sending all of them with this e-mail for ease of reference.

For the RRC Response column, we encourage you to fill in a tentative response based on your own individual view or the views that you find in the Commission member e-mails that have been sent concerning the comments. This would be preferable to leaving the RRC Response column blank pending final resolution at the meeting.

We request that you submit your draft public commenter charts, and any other rule agenda materials you wish to provide **no later than tomorrow morning, Thursday, August 26th, at 9:00 am.**

Many thanks for your work on this. You're almost there!

Attached:

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.3 (08-25-10)LM.doc
RRC - [2-1] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.2 (08-25-10)LM.doc
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 10 **Agree = 4**
Disagree = 3
Modify = 3
NI = ____

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	California District Attorneys Association	M	Yes	3.8(d)	<p>Proposed Rule 3.8(d), on its face and as interpreted by ABA Opinion 09-454, is at odds with California criminal discovery law as defined by the California Constitution and California statutes. With all due respect, in an area with such detailed and specific statutory provisions, supported by a California constitutional mandate, which incorporate the discovery requirements of the U.S. Constitution, it is not the place of the State Bar to revise the discovery obligations of the prosecution.</p> <p>We urge that the Bar adopt Proposed Rule 3.8(d) as it was originally proposed for California.</p>	
6	California Public Defender's Association	M	Yes	<p>Comment [2A]</p> <p>3.8(d)</p>	<p>CPDA agrees with the points made below by the Los Angeles County Public Defender's Office.</p> <p>CPDA supports the Proposed Rule because it requires lawyers to have high professional standards that go beyond the minimum required by law.</p>	

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 10 **Agree = 4**
Disagree = 3
Modify = 3
NI = ____

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC	A	Yes		COPRAC supports the adoption of proposed Rule 3.8 and the Comments to the Rule.	
3	County of Santa Cruz District Attorney's Office	D	Yes	3.8(d)	<p>The Board of Governors has proposed a new version of subdivision (d) that eliminates important language requiring prosecutors to comply with all constitutional obligations, as defined in relevant case law. If adopted in this form, the rule would no longer be consistent with the constitutional law and could lead to discipline for nondisclosure of even the most inconsequential and immaterial items of conceivably favorable evidence.</p> <p>The Proposed Rule seems to unfairly single out prosecutors for discipline for an unintentional or inadvertent delay in complying with the statutory time limit. However, there appears to be no rule which would subject criminal defense counsel to the same disciplinary consequences.</p> <p>Prosecutors should be governed by the same ethical rules applicable to criminal defense lawyers if they violate a reciprocal discovery time limit applicable to both parties' lawyers.</p> <p>Both the former proposal and the new</p>	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 10 **Agree = 4**
Disagree = 3
Modify = 3
NI = ____

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					proposal go beyond the prosecutor's constitutional duty to disclose mitigating evidence to the defense. The Proposed Rule further requires that the prosecutor then perform defense counsel's job of presenting any such mitigating information "to the tribunal." The language "and to the tribunal" should be deleted from this rule.	
9	Jenness, Evan A.	A	No	3.8(d)	I support Proposed Rule 3.8(d). Rule 3.8(d) properly preserves a meaningful role for State Bar disciplinary authorities in ensuring that both State and Federal prosecutors in California adhere to appropriate standards of professional conduct, advances the goals of protecting the public from prosecutorial lapses, and promotes public confidence in the integrity of the legal profession.	
10	Los Angeles City Attorney's Office	D	Yes	3.8(b) 3.8(d)	The Commission should delete Proposed Rule 3.8(b) because the court is already required by statute to advise the defendant of the right to counsel, there is no need to shift this responsibility to prosecutors. Proposed Rule 3.8(d) is overly broad and places an undue burden upon prosecutors to disclose pre-trial exculpatory evidence. Proposed Rule 3.8(d) does not consider California's unique statutory <i>Pitchess</i>	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 10 **Agree = 4**
Disagree = 3
Modify = 3
NI = ____

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(f)	mechanism designed to access police personnel records and, as such, the Proposed Rule will create confusion, will substantially burden public entities and will cause needless litigation. Proposed Rule 3.8(f) should be deleted because it would improperly subject a prosecutor to discipline for extrajudicial statements made by persons over whom the prosecutor has no supervision or control.	
				3.8(g)	Proposed Rule 3.8(g) is overly broad by placing an undue burden upon prosecutors to disclose post-conviction exculpatory evidence. Proposed Rules 3.8(d) and (g) will cause a significant increase in costs to the City Attorney's Office, which does not have the resources due to devastating budget and personnel cutbacks.	
4	Los Angeles County District Attorney's Office	D	Yes	3.8(d)	The Constitutional and statutory and case law of both the United States and California have long been the guiding touchstones of prosecutorial discovery in our State. The present version of Proposed Rule 3.8	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 10 **Agree = 4**
Disagree = 3
Modify = 3
NI = ____

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>eviscerates these authorities by expanding the scope of a prosecutor's ethical duty to provide discovery to defense far beyond what is required.</p> <p>This is particularly unreasonable in California where the voters of the state have specifically addressed this issue by voting to pass the Crime Victims Justice Reform Act, Proposition 115, on June 3, 1990. Proposition 115 mandated a criminal discovery process.</p> <p>Our current reliance on the constitution, statutes and case law provides clear guidance to prosecutors who are litigating matters before judges who are in the best position to determine if violations occur. Tactical gamesmanship by some defendants will be exacerbated without any improvement to the quality of justice. Trials will be delayed, and the fairness and balance to be accorded to victims and witnesses, and demanded by the voters of California, will be substantially and unnecessarily diminished.</p>	
5	Los Angeles County Public Defender's Office	A	Yes	Comment [2A]	Comment [2A] should be modified regarding its reference to subdivision (d). The Comment states, in relevant part: "The obligations in paragraph (d) apply only with	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 10 Agree = 4
Disagree = 3
Modify = 3
NI = ____

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					respect to controlling law existing at the time of the obligation and not with respect to subsequent law that is determined to apply retroactively." This language is not found in the Comments to Model Rule 3.8, and should not be adopted because it incorrectly implies that the disclosure obligation of Proposed Rule 3.8(d) is limited by "controlling law." In other words, it brings in through the back door what the Proposed Rule has eliminated at the front.	
8	Orange County Bar Association	A	Yes		The OCBA supports the adoption of Proposed Rule 3.8 addressing the special responsibilities of a prosecutor.	
1	Ventura County District Attorney's Office	M	Yes	3.8(d)	The prosecution is obligated to provide the defense in criminal cases with exculpatory evidence if it is <i>material</i> to either guilt or punishment. (<i>Brady v. Maryland</i>) An extensive body of state and federal law defines the parameters of what must be disclosed under <i>Brady</i> . An earlier draft of 3.8(d) incorporated the law in this area by requiring prosecutors to "comply with all constitutional obligations, as defined by relevant case law." This language should be added back into the Rule. Elimination of the materiality requirement would subject prosecutors to discipline for	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 10 Agree = 4
 Disagree = 3
 Modify = 3
 NI = ____

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [2A]	<p>the <i>least serious</i> breaches of discovery, the failure to disclose <i>immaterial</i> evidence or information. It would also result in the development of two inconsistent lines of authority: what prosecutors must disclose to the defense under the constitution, and what they must disclose under the State Bar rules.</p> <p>Proposed Comment [2A] is helpful but confusing. The reference to “controlling law” could be read in two different ways. If it is a reference to the large body of law construing the constitutional obligation to disclose material exculpatory evidence, then the Comment would incorporate the language about “constitutional obligations” that the State Bar no proposes to delete from the Rule. Or the “controlling law” could be read as whatever new decisions of the State Bar Court and other courts develop to interpret the new disciplinary rule.</p> <p>The Proposed Rule would require the prosecutor to disclose information that may mitigate the sentence to the defense <i>and to the tribunal</i>. Providing material mitigating evidence to the defense is required by <i>Brady</i>. But requiring the prosecutor to also provide the information to the court raises practical</p>	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 10 Agree = 4
 Disagree = 3
 Modify = 3
 NI = ____

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>difficulties and is inconsistent with the advocacy roles of both the prosecutor and the defense.</p> <p>The prosecution is required to provide material exculpatory and mitigating evidence to the defense, but is not required to identify <i>which</i> bits of information might be helpful to the defense. (<i>Rhodes v. Henry</i>). The Proposed Rule would require the prosecutor either to glean out and identify for the court all potentially mitigating evidence, or provide the court with a copy of all documents that might include mitigating evidence. If evidence that might mitigate sentence has already been provided to the defense in pretrial discovery, the Rule is unclear as to whether the prosecutor would have to disclose to the tribunal as well.</p> <p>In order to avoid discipline under the Proposed Rule, the prudent prosecutor must err on the side of disclosure, but may be providing the court with information that neither side feels is pertinent to sentencing. Counsel for each side should continue to be free to present the evidence that it feels supports its position.</p>	

Proposed Rule 3.8 [RPC 5-110]

“Special Responsibilities of a Prosecutor”

(XDraft # 11, 7/25/10)

Summary: This amended rule states the responsibilities of a prosecutor to assure that charges are supported by probable cause and addresses when and how a prosecutor must respond to new exculpatory information, including evidence demonstrating the innocence of a defendant who has been convicted, regardless of whether or not the conviction was obtained in the prosecutor’s jurisdiction.

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

RPC 5-110

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

New York

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: Yes No

(See the introduction and explanation of paragraph (g) in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

Prosecutors have appeared at Commission meetings to address the proposed requirements for responding to new exculpatory information.

Very Controversial – Explanation:

See the Introduction and Explanation of Changes for Commission minority positions on paragraph (c) (re seeking waiver of pretrial rights from unrepresented accused) and paragraph (g) (re a prosecutor's response to new exculpatory evidence). In addition, see the public commenter chart for objections received from prosecutors and other commenters concerning these same paragraphs and also concerning paragraph (b) (re reasonable efforts to assure that the accused has been advised of the right to counsel) and paragraph (f) (re reasonable supervision of extra-judicial statements by persons under the supervision or direction of a prosecutor).

Moderately Controversial – Explanation:

Not Controversial – Explanation

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.8* Special Responsibilities of a Prosecutor

July 2010

(Draft rule revised following July 22-24, 2010 Board of Governors Meeting.)

INTRODUCTION:

Proposed Rule 3.8 adopts in substance ABA Model Rule 3.8, as amended in February 2008, which imposes special obligations on prosecutors in criminal cases.

However, Proposed Rule 3.8 clarifies and, in some instances, expands the scope of a prosecutor's duties under the Model Rule to provide greater certainty to prosecutors and greater procedural protection to the criminal defendant, specifically by (1) providing that the prohibition on prosecution of a charge not supported by probable cause applies at all stages of prosecution; (2) clarifying the prosecutor's duties to disclose exculpatory information during a proceeding; (3) adding a new comment explaining the "reasonable efforts" standard used in paragraph (b); and (4) adding a new comment clarifying that paragraph (c) does not prohibit prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing.

In addition, the Commission is recommending the adoption of provisions recently added by the ABA (paragraphs (g) and (h)) to expand the scope of a prosecutor's duty of prompt disclosure of evidence demonstrating the innocence of a defendant who has been convicted, regardless of whether or not the conviction was obtained in the prosecutor's jurisdiction. This Model Rule provision is under consideration in a number of jurisdictions (e.g., Delaware and Michigan) but, to date, only Wisconsin has adopted it.

Solicitation of public comment on revised paragraph (d). In previous versions of the Rule circulated for public comment, paragraph (d) generally followed the Model Rule but clarified that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution, as defined and applied in relevant case law. However, in response to a letter to the Board of Governors from the Los Angeles Public Defender, the Board has decided to solicit comment on whether California should adopt the

* Proposed Rule 3.8, XDraft 11 (7/25/10).

broader scope of duty provided in Model Rule 3.8(d). See ABA Formal Ethics Op. 09-454, available at

<http://www.abanet.org/cpr/pubs/ethicopinions.html>

Minority. A minority of the Commission objects to the inclusion of Rule 3.8(c) which is based upon ABA Model Rule 3.8(c) because it conflicts with California law. Although this portion of the Model Rule may be appropriate for other jurisdictions, it conflicts with Penal Code section 860, as interpreted in *In re Jones* (1968) 265 Cal.App.2d 376, 381. The court in the Jones case held that an accused can only waive a preliminary hearing if represented by counsel. Yet paragraph (c) allows a prosecutor to obtain a waiver of a preliminary hearing if the accused has been permitted to appear in propria persona. Comment [2] correctly states "prosecutors should not seek to obtain waivers of preliminary hearings...from unrepresented accused persons" since California law would not permit them to do this, while the text of 3.8(c) would allow this if the court permits the defendant to appear in propria persona. A minority of the Commission also objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." See Explanation of Changes for paragraph (g), below.

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>The prosecutor in a criminal case shall:</p> <p>(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;</p>	<p>TheA prosecutor in a criminal case shall:</p> <p>(a) refrain from <u>commencing or</u> prosecuting a charge that the prosecutor knows is not supported by probable cause;</p>	<p>The proposed language of paragraph (a) adopts the language of the ABA Model Rule and adds language to increase client protection. The additional language clarifies that the scope of prohibited conduct includes both prosecuting and the act of <i>commencing</i> a prosecution that a prosecutor knows is not supported by probable cause.</p>
<p>(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;</p>	<p>(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;</p>	<p>The proposed language of paragraph (b) is identical to that of the ABA Model Rule.</p>
<p>(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;</p>	<p>(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, <u>unless the tribunal has approved the appearance of the accused <i>in propria persona</i></u>;</p>	<p>The proposed language of paragraph (c) adopts the language of the ABA Model Rule but carves out an exception to the rule where the accused is not represented by counsel but where the accused is proceeding <i>in propria persona</i> with leave of the tribunal.</p> <p>Minority. A minority of the Commission objects to the inclusion of Rule 3.8(c) due to concerns about a conflict with existing California law. (See Introduction.)</p>

* Proposed Rule 3.8, XDraft 11 (7/25/10). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>	<p>(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>	<p>Paragraph (d) is identical to Model Rule 3.8(d).</p> <p>In previous versions of the Rule circulated for public comment, paragraph (d) generally followed the Model Rule but clarified that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution, as defined and applied in relevant case law. However, in response to a letter to the Board of Governors from the Los Angeles Public Defender, the Board has decided to solicit comment on whether California should adopt the broader scope of duty provided in Model Rule 3.8(d). See ABA Formal Ethics Op. 09-454, available at http://www.abanet.org/cpr/pubs/ethicopinions.html</p>
<p>(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:</p>	<p>(e) not subpoena a lawyer in a grand jury or other proceeding. <u>criminal proceeding, or civil proceeding related to a criminal matter</u> to present evidence about a past or present client unless the prosecutor reasonably believes:</p>	<p>Paragraph (e) largely recommends the Model Rule language. Based on public comments received, the Commission also recommends the addition of a reference to civil proceedings related to a criminal matter. Explanations for any variations are provided next to the subparagraphs.</p>
<p>(1) the information sought is not protected from disclosure by any applicable privilege;</p>	<p>(1) the information sought is not protected from disclosure by any applicable privilege <u>or the work product doctrine</u>;</p>	<p>The proposed language of paragraph (e)(1) is taken from the ABA Model Rule, but the Commission has included an additional reference to the work product doctrine because, under California law, work product protection does not constitute a privilege.</p>
<p>(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and</p>	<p>(2) the evidence sought is essential <u>reasonably necessary</u> to the successful completion of an ongoing investigation or prosecution; and</p>	<p>The proposed language of paragraph (e)(2) is taken from the ABA Model Rule, except that the standard for evidence to be disclosed has been changed from "essential to the successful completion etc." to "reasonably necessary to the successful completion etc."</p>

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>in order to provide greater guidance to the prosecutor. It is a difficult, if not impossible, task to decide <i>ex ante</i> what evidence will be "essential" to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of "evidence reasonably necessary to the successful prosecution" is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution.</p>
<p>(3) there is no other feasible alternative to obtain the information;</p>	<p>(3) there is no other feasiblereasonable alternative to obtain the information;</p>	<p>The proposed language of paragraph (e)(3) is taken from the ABA Model Rule, except that the availability of an alternative that will preclude subpoena to a lawyer had been changed from "feasible" to "reasonable" in order to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If "feasible" means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If "feasible" means that the alternative is reasonable, the more familiar term "reasonable" should be used.</p>
<p>(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial</p>	<p>(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> investigators, law enforcement personnel, employees or other persons</p>	<p>The proposed language of paragraph (f) is taken from the ABA Model Rule, except that the reference to the prosecutor's ability to make statements that serve a legitimate law enforcement purpose, etc. subject to the duty to refrain from making extrajudicial comments with a substantial likelihood of heightening public condemnation of the accused has been deleted as an unnecessary and imprecise re-formulation of the more detailed Model Rule paragraphs 3.6(a) and (b).</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.</p>	<p>assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.</p>	
<p>(g) When a prosecutor 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, the prosecutor shall:</p> <p>(1) promptly disclose that evidence to an appropriate court or authority, and</p> <p>(2) if the conviction was obtained in the prosecutor's jurisdiction,</p> <p>(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and</p> <p>(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.</p>	<p>(g) When a prosecutor 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, the prosecutor shall:</p> <p>(1) promptly disclose that evidence to an appropriate court or authority, and</p> <p>(2) if the conviction was obtained in the prosecutor's jurisdiction,</p> <p>(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and</p> <p>(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.</p>	<p>Paragraph (g) and all of its subparagraphs are taken verbatim from the Model Rule. The ABA amended Model Rule 3.8 in February 2008 by adding paragraphs (g) and (h) to impose on prosecutors a duty to take certain steps when they know of "new, credible and material evidence" that indicates a convicted defendant was innocent of the crime for which the defendant was convicted. The Commission agrees with the policies underlying these paragraphs and recommend their adoption. See also Explanation of Changes for Comments [6A] through [9].</p> <p><u>Minority.</u> A minority of the Commission objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." The minority argues that the way the rule is drafted suggests that if a prosecutor knows of information and it turns out later on that the information was "new, credible and material information creating a reasonable doubt," the prosecutor may be subject to discipline unless the prosecutor always discloses to a court or appropriate authority any information he or she receives.</p> <p>The majority, however, takes the position that rather than create a trap for unwary prosecutors, the "new, credible and material" modifier was specifically added to the proposed New York rule on</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>which paragraph (g) is based to create a higher standard for triggering the prosecutor's duty of disclosure. The language used encourages prosecutors to err on the side of disclosure in close cases, but does not require the disclosure of all exculpatory information of which the prosecutor might become aware.</p>
<p>(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.</p>	<p>(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.</p>	<p>See Explanation of Changes for paragraph (g).</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.</p>	<p>[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty<u>sovereign</u> may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing. <u>Knowing</u> disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.</p>	<p>The deleted language is unnecessary. The final two sentences of proposed Comment [1] to the ABA Model Rule are a sufficient caution that there may be law or standards governing these obligations or imposing additional obligations upon a prosecutor, violation of which could also constitute a violation of Rule 8.4.</p>
	<p><u>[1A] The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.</u></p>	<p>This definition is intended to clarify, but not to expand, the scope of persons covered by the Rule.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. Paragraph (b) does not apply where there is no right to counsel. "Reasonable efforts" include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.</p>	<p>Proposed Comment [1B] is intended to clarify paragraph 3.8(b), which is adopted from the ABA Model Rule. In response to concerns raised by public commenters, a new second sentence was added to make clear that if there is no applicable legal right to counsel, then paragraph (b) imposes no duty on prosecutors.</p>
<p>[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a an uncharged suspect who has knowingly waived the rights to counsel and silence.</p>	<p>[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does itnot forbid the lawful questioning of an uncharged suspect who has knowingly waived the rightsright to counsel and silencethe right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.</p>	<p>Proposed Comment [2] is adopted from Comment [2] to the ABA Model Rule, except that the exception governing an accused who is appearing <i>in propria persona</i> with approval of the tribunal has been moved into the black letter rule and therefore removed from the comment. See paragraph (c).</p>
	<p>[2A] The obligations in paragraph (d) apply only with respect to controlling law existing at the time of the obligation and not with respect to subsequent law that is determined to apply retroactively. The disclosure</p>	<p>The first sentence of proposed Comment [3] has been added to clarify that paragraph (d) is intended to apply in the disciplinary context to prevent discipline being imposed in the situation in which a prosecutor followed</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.</p>	<p>the law at the time the case was pending, but the law was subsequently changed and applied retroactively. Although the new law and court decision will apply to the defendant's case, the prosecutor should not be disciplined because he or she could not have known that the law would change and be applied retroactively.</p> <p>The second sentence in proposed Comment [3] was added at the request of OCTC to clarify that a prosecutor is subject to discipline for failure to fulfill paragraph (d)'s disclosure obligations even if the non-disclosure does not result in actual prejudice to the defendant.</p>
<p>[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.</p>	<p>[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.</p>	<p>Proposed Comment [3] is adopted verbatim from Comment [3] of the ABA Model Rule.</p>
<p>[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.</p>	<p>[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyerclient or other privileged relationship.</p>	<p>Proposed Comment [4] is adopted from Comment [4] of the ABA Model Rule, but the requirement of "genuine need" has been expanded to include situations in which there would be an intrusion into privileged relationships other than the lawyer-client relationship.</p>
<p>[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's</p>	<p>[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's</p>	<p>Proposed Comment [5] is adopted from Comment [5] of the ABA Model Rule, but omits the vague standard that (1) would protect a prosecutor's extrajudicial statements made for a "legitimate law enforcement purpose;" and (2)</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).</p>	<p>extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment <u>This comment</u> is <u>not</u> intended to restrict the statements which a prosecutor may make which<u>that</u> comply with Rule 3.6(b) or 3.6(c).</p>	<p>does not provide adequate guidance to a prosecutor who could be disciplined under paragraph 3.8[f] for extrajudicial statements that “have a substantial likelihood of increasing public opprobrium of the accused.” Instead, the Proposed Comment, like the Model Rule, confirms that paragraph 3.8[f] is not intended to prohibit statements by a prosecutor in compliance with paragraphs (b) or (c) of Rule 3.6, the rule governing trial publicity.</p>
<p>[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.</p>	<p>[6] Like other lawyers, prosecutors <u>Prosecutors</u> are subject to Rules 5.1 and 5.3. Ordinarily, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with <u>standard will be satisfied if</u> the prosecutor from making improper extrajudicial statements, even when such persons are not under <u>issues</u> the direct supervision of the prosecutor <u>appropriate cautions to law-enforcement personnel and other relevant individuals.</u> Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.</p>	<p>The public comment version of Comment [6] was adopted verbatim from Comment [6] of the ABA Model Rule. A public commenter, however, correctly noted that the ABA language of Comment [6] stated that the duty applies “even when such persons are not under the direct supervision of the prosecutor.” This is inconsistent with the language used in paragraph (f) of the rule and, for that reason, the Commission has now deleted much of the ABA language in Comment [6]. The comment now states: “Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.”</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].</p>	<p>Proposed Comment [6A] has been added to clarify that prosecutors are also subject to Rule 3.3, which imposes an obligation upon a lawyer who has offered material evidence that the lawyer later comes to know is false.</p>
<p>[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily 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.</p>	<p>[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of the inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives</p>	<p>Proposed Comment [7] is adopted from Comment [7] of the ABA Model Rule, except for three amendments or additions.</p> <p>First, the first sentence has been revised to clarify that a prosecutor has duties even when the wrongly-convicted person was convicted outside the prosecutor's jurisdiction.</p> <p>Second, a third sentence has been added and the fourth sentence of the Model Rule comment has been revised to provide guidance to prosecutors about the scope of the inquiry they are required to make.</p> <p>Third, the last sentence of the Comment has been added to clarify that the duties imposed on the prosecutor are not dependent upon whether the lawyer of the wrongly-convicted defendant could have discovered the evidence.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily 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. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.</p>	
<p>[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary 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.</p>	<p>[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary 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.</p>	<p>Proposed Comment [8] is adopted verbatim from Comment [8] to ABA Model Rule.</p>
<p>[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.</p>	<p>[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is</p>	<p>Proposed Comment [9] largely tracks Comment [9] to the ABA Model Rule. Additional explanatory language has been added in response to public comments expressing concerns that the Model Rule language on the "good faith" standard is inadequate.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>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.</p>	
	<p>[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]</p>	<p>For guidance, proposed Comment [10] refers to a specific California statutory prohibition applicable to both current and former prosecutors. Comment [10] also includes a cross reference to the Comment [16] of Rule 1.7 that addresses the concept that there may be conflicts of interest to which a client cannot consent because the representation is prohibited by applicable law.</p>

Rule 3.8 Special Responsibilities of a Prosecutor

(Redline Comparison of the Proposed Rule to the Previous Public Comment Draft)

A prosecutor in a criminal case shall:

- (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) ~~comply with all constitutional obligations, as defined by relevant case law, regarding the~~ make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding related to a criminal matter to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;
 - (2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other reasonable alternative to obtain the information;
- (f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (g) When a prosecutor 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, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.

[1A] The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.

[1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. Paragraph (b) does not apply where there is no right to counsel. "Reasonable efforts" include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.

[2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has

knowingly waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[2A] The obligations in paragraph (d) apply only with respect to controlling ~~case~~-law existing at the time of the obligation and not with respect to subsequent ~~case~~-law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).

[6] Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals. Ordinarily, the reasonable care standard will be satisfied if the prosecutor

issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily 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. The post-conviction disclosure duty

applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, or notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a 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.

[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]

Rule 5-110 Performing the Duty^{3.8} Special Responsibilities of Member in Government Service^a Prosecutor
(Comparison of the Current Proposed Rule to Current California Rule)

~~A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.~~

~~A prosecutor in a criminal case shall:~~

- ~~(a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;~~
- ~~(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;~~
- ~~(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;~~
- ~~(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;~~
- ~~(e) not subpoena a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding related to a criminal matter to present evidence~~

about a past or present client unless the prosecutor reasonably believes:

- (1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;
 - (2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other reasonable alternative to obtain the information;
- (f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (g) When a prosecutor 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, the prosecutor shall:
- (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

- (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

- [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.
- [1A] The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.
- [1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. Paragraph (b) does not apply where there is no right to counsel. "Reasonable efforts" include determining, where appropriate, whether an accused has been advised of the right

to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.

- [2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.
- [2A] The obligations in paragraph (d) apply only with respect to controlling law existing at the time of the obligation and not with respect to subsequent law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.
- [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).

[6] Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable

belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily 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. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, or notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a 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.

[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]

Rule 3.8 Special Responsibilities of a Prosecutor
(Commission's Proposed Rule – Clean Version)

A prosecutor in a criminal case shall:

- (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding related to a criminal matter to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;
 - (2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other reasonable alternative to obtain the information;
- (f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (g) When a prosecutor 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, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

- [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.
- [1A] The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.
- [1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. Paragraph (b) does not apply where there is no right to counsel. "Reasonable efforts" include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.
- [2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.
- [2A] The obligations in paragraph (d) apply only with respect to controlling law existing at the time of the obligation and not with respect to subsequent law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.
- [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.
- [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).
- [6] Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals. Ordinarily, the reasonable care standard will be satisfied

if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

- [6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].
- [7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily 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. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.

- [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, or notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.
- [9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a 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.
- [10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]

Rule 3.8: Special Responsibilities of a Prosecutor

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: Rule 5-110 provides as follows:

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

In addition, Rule 5-220 provides that a lawyer “shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.”

Connecticut omits paragraphs (e) and (f).

District of Columbia: Every paragraph of Rule 3.8 differs from the Model Rule. The D.C. version of Rule 3.8 provides that the prosecutor in a criminal case shall not:

(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a *prima facie* showing of guilt;

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating

information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or

(g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.

Florida omits paragraphs (b), (e), and (f) of ABA Model Rule 3.8.

Georgia: In place of Rule 3.8(b) and (c), Georgia substitutes the simple caution that a prosecutor shall "refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel." Georgia also shortens Rule 3.8(d) by eliminating the part that begins "in connection with sentencing." Georgia also limits the application of Rule 3.8(e) to statements the prosecutor would be prohibited from making only under Rule 3.6(g) (as opposed to the entire rule).

Illinois: In the rules effective January 1, 2010, Rule 3.8 adds the following sentence: "The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict." Comment 1A elaborates on this sentence, quoting cases concerning a prosecutor's duties.

Massachusetts: Rule 3.8(c) prohibits prosecutors from seeking waivers of important pretrial rights from unrepresented defendants unless "a court has first obtained from the accused a knowing and intelligent written waiver of counsel." Massachusetts Rule 3.8(f) tracks ABA Model Rule 3.8(e), but adds that the prosecutor must obtain "prior judicial approval after an opportunity for an adversarial proceeding."

Massachusetts also adds paragraphs (h) and (i), which track DR 7-106(C)(3) and (4), and adds a new paragraph (j) providing that a prosecutor in a criminal case shall "not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused."

The Massachusetts federal court version of Rule 3.8(e) — Local Rule 3.8(f) — was declared invalid in *Stern v. United States District Court for the District of Massachusetts*, 16 F. Supp. 2d 88 (1st Cir.), *reh'g and reh'g en banc denied*, 214 F.3d 4 (1st Cir. 2000) (concluding that "the adoption of Local Rule 3.8(f) exceeded the district court's lawful authority to regulate both grand jury and trial subpoenas" in federal courts).

Michigan omits paragraphs (e) and (f).

New Jersey: Rule 3.8(c) prohibits a prosecutor from seeking to obtain from an unrepresented accused a waiver only of important “post-indictment” pretrial rights, and New Jersey Rule 3.8(d) requires timely disclosure to the defense only of all “evidence,” not “information.”

New York: In the rules effective April 1, 2009, Rule 3.8 is substantially similar to DR 7-103(A) of the old Model Code. Rather than adopting Model Rule 3.8(g) and (h), New York endorses similar, but less strict, procedures in Comments 6A-6E.

North Carolina: Rule 3.8(e) adds that the prosecutor shall not “participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer,” unless the conditions stated in ABA Model Rule 3.8(e) are satisfied.

Ohio: Rule 3.8(a) provides that a prosecutor shall not “pursue or” prosecute a charge that the prosecutor knows is not supported by probable cause. (A note by the drafters says the rule is thus expanded to prohibit either the pursuit or prosecution of unsupported charges and thus is broad enough to include grand jury proceedings.) Ohio omits Rule 3.8(b) because (according to a Model Rules Comparison) ensuring that the defendant is advised about the right to counsel is a police and judicial function, and because Rule 4.3 already sets forth duties applicable to all lawyers in dealing with unrepresented persons. Ohio also omits Rule 3.8(c) because that rule has a potential adverse impact on defendants who seek continuances or seek to participate in diversion programs. Rule 3.8(d) deletes the words “and to

the tribunal” in connection with sentencing disclosures. Ohio omits Rule 3.8(f) because prosecutors, like all lawyers, are already subject to Rule 3.6.

Pennsylvania deletes Rule 3.8(e) (governing subpoenas to lawyers) and instead adopts a separate rule, Pennsylvania Rule 3.10, which forbids a prosecutor or other governmental lawyer, absent judicial approval, to subpoena a lawyer before a grand jury or other tribunal investigating criminal conduct if the prosecutor seeks to compel evidence concerning a current or former client of the lawyer.

Texas: Rule 3.09(a) provides that a prosecutor shall refrain from prosecuting “or threatening to prosecute” a charge that the prosecutor knows is not supported by probable cause. Texas Rule 3.09(b) and (c) provides that a prosecutor shall:

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights.

Texas omits paragraph (e) and the first half of ABA Model Rule 3.8(f) but retains in Rule 3.07 the obligation to exercise reasonable care to prevent “persons employed or controlled

by the prosecutor” in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making.

Utah: Rule 3.8(d) eliminates the obligation to disclose unprivileged mitigating information “to the tribunal” in connection with sentencing; Utah omits ABA Model Rule 3.8(e) (regarding subpoenas to lawyers); and Utah’s equivalent to ABA Model Rule 3.8(f) deletes everything up to the phrase “exercise reasonable care.”

Virginia: Rule 3.8, which Virginia calls “Additional Responsibilities of a Prosecutor,” states that a prosecutor shall:

(b) not knowingly take advantage of an unrepresented defendant.

(c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense.

(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; . . .

Virginia omits paragraph (e) and the first half of paragraph (f) of ABA Model Rule 3.8 and replaces the duty to “exercise reasonable care to prevent” in the second half of Rule 3.8(f) with a mandate that a prosecutor not “direct or encourage”

others to make statements that Rule 3.6 would prohibit the prosecutor from making.

Wisconsin has adopted Model Rule 3.8(g) and (h) nearly verbatim effective July 1, 2009, becoming the first state to do so. The Wisconsin version of Rule 3.8(b), however, varies from the Model Rule in that it requires a prosecutor who is “communicating with an unrepresented person in the context of an investigation or proceeding” to “inform the person of the prosecutor’s role and interest in the matter.”

Rule 3.8 – Public Comment – File List

Y-2010-533 Michael Schwartz Ventura DA [3.8]

Y-2010-534c COPRAC [3.8]

Y-2010-535a Bob Lee Santa Cruz DA [3.8]

Y-2010-537 Steve Cooley LA DA [3.8]

Y-2010-540 Los Angeles Public Defender [3.8]

Y-2010-545c CPDA [3.8]

Y-2010-547b California DA Association [3.8]

Y-2010-548b OCBA [3.8]

Y-2010-544b Evan Jenness [3.8]

Y-2010-552 LA City Attorney [3.8]



OFFICE OF THE DISTRICT ATTORNEY

County of Ventura, State of California

GREGORY D. TOTTEN
District Attorney

JAMES D. ELLISON
Chief Assistant District Attorney

MICHAEL K. FRAWLEY
Chief Deputy District Attorney
Criminal Prosecutions

GREGORY W. BROSE
Chief Deputy District Attorney
Special Prosecutions

MICHAEL D. SCHWARTZ
Special Assistant District Attorney

ROBERT A. BRINER
Chief Investigator

August 3, 2010

VIA FACSIMILE (415)-538-2171
AND U.S. MAIL

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

Re: Proposed Rule 3.8(d) of the Rules of Professional Conduct

Dear Ms. Hollins:

The State Bar is soliciting additional comments regarding proposed Rule 3.8(d) of the Rules of Professional Conduct of the State Bar. I have several concerns regarding the proposal.

COMPLIANCE WITH *BRADY* LAW

The prosecution is obligated to provide the defense in criminal cases with exculpatory evidence only if it is *material* to either guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) An extensive body of state and federal law defines the parameters of what must be disclosed under *Brady*. An earlier draft of rule 3.8(d) incorporated the law in this area by requiring prosecutors to "comply with all constitutional obligations, as defined by relevant case law." This language should be added back into the rule.

Elimination of the materiality requirement would subject prosecutors to discipline for the *least serious* breaches of discovery, the failure to disclose *immaterial* evidence or information. It would also result in the development of two inconsistent lines of authority: what prosecutors must disclose to the defense under the constitution, and what they must disclose under the State Bar rules.

Ms. Audrey Hollins
August 3, 2010
Page 2

Proposed comment 2A is helpful but confusing. It is certainly appropriate to limit discipline of any attorney to conduct that was improper based upon the law at the time the conduct occurred. But the reference to “controlling law” in comment 2A could be read in two different ways. If it is a reference to the large body of law construing the constitutional obligation to disclose material exculpatory evidence, then the comment would incorporate the language about “constitutional obligations” that the State Bar now proposes to delete from the rule. Or the “controlling law” could be read as whatever new decisions of the State Bar Court and other courts develop to interpret the new disciplinary rule.

DISCLOSURE OF INFORMATION TO THE TRIBUNAL

The proposal would require the prosecutor to disclose information that may mitigate the sentence to the defense *and to the tribunal*. Providing material mitigating evidence to the defense is required by *Brady*. But requiring the prosecutor to also provide the information to the court raises practical difficulties and is inconsistent with the advocacy roles of both the prosecutor and the defense.

Potentially mitigating evidence is often included in documents that also contain inculpatory information. In a big case such as a homicide, there may be hundreds of pages that contain statements that are potentially mitigating. The prosecution is required to provide material exculpatory and mitigating evidence to the defense, but is not required to identify *which* bits of information might be helpful to the defense. (*Rhoades v. Henry* (9th Cir. 2010) 596 F.3d 1170, 1182; *United States v. Bracy* (9th Cir. 1995) 67 F.3d 1421, 1428-1429.) The proposed rule would require the prosecutor either to glean out and identify for the court all potentially mitigating evidence, or provide the court with a copy of all documents that might include mitigating evidence. If evidence that might mitigate sentence has already been provided to the defense in pretrial discovery, the rule is unclear as to whether the prosecutor would have to disclose it to the tribunal as well. Providing the court with a large volume of information that *might* mitigate the sentence would not well serve the prosecution, the court, or, as discussed below, the defense.

In our adversarial system, each side presents the evidence and arguments that it feels will lead to the appropriate result. For example, in a felony case, the prosecution may file a statement in aggravation and the defense may file a statement in mitigation. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.437.) Whether a particular bit of information would be mitigating or not may depend upon the theory of the defense. For example, the mental illness of a defendant may support an argument that the defendant is morally less responsible for his conduct and should receive treatment or more lenient punishment. But the defendant’s mental illness could also support a prosecution argument that the defendant is more dangerous to the community because he is less likely to control his conduct. A defendant’s early protestations of innocence are potentially mitigating but may also be inconsistent with a defense sentencing strategy of

Ms. Audrey Hollins

August 3, 2010

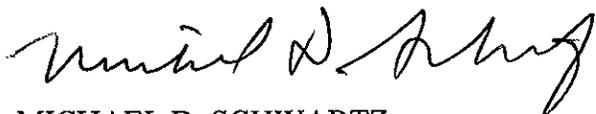
Page 3

remorse and acceptance of responsibility. In order to avoid discipline under the proposed rule, the prudent prosecutor must err on the side of disclosure, but may be providing the court with information that neither side feels is pertinent to sentencing. Counsel for each side should continue to be free to present the evidence that it feels supports its position.

CONCLUSION

I appreciate the opportunity to comment and hope the State Bar will make the changes suggested above.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael D. Schwartz", written in a cursive style.

MICHAEL D. SCHWARTZ
Special Assistant District Attorney

MDS/ck

pc (via email): W. Scott Thorpe, CDAA



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

August 9, 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 3.8

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 3.8 – Special Responsibilities of a Prosecutor. COPRAC supports the adoption of proposed Rule 3.8 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



County of Santa Cruz

District Attorney's Office

701 OCEAN STREET, ROOM 200, P.O. BOX 1159, SANTA CRUZ, CA 95060
(831) 454-2400 FAX: (831) 454-2227 E-MAIL: dao@co.santa-cruz.ca.us

BOB LEE
DISTRICT ATTORNEY

August 16, 2010

VIA FACSIMILE (415-538-2171) & U.S. MAIL

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

Re: Proposed Rules 3.8(d) and 4.2 of the Rules of Professional Conduct

Dear Ms. Hollins:

Rule 3.8(d)

On November 9, 2009, I sent you my comments on proposed Rule 3.8(d) as it then read. I emphasized the importance of the previously-proposed language that required prosecutors to comply with all constitutional obligations, as defined by relevant case law. However, in response to a letter from the Los Angeles Public Defender, the Board of Governors has now proposed a new version of subdivision (d) that eliminates this essential language regarding constitutional obligations. If adopted in this form, the rule would no longer be consistent with the constitutional law and could lead to discipline for nondisclosure of even the most inconsequential and immaterial items of conceivably favorable evidence.

In its current form, the proposed rule would also unfairly single out prosecutors for discipline for statutory discovery violations, even though these statutory obligations have been reciprocal in nature under the California Constitution ever since the voters approved Proposition 115 in 1990. (See Cal. Const., art. 1, sec. 30(c).) The statutory scheme for criminal discovery is found in Penal code section 1054 *et seq.* Due to the constitutional rights and obligations of each party, the items required to be disclosed by the prosecutor and by defense counsel differ. (Cf. Pen. Code §§ 1054.1 & 1054.3.) However, the statutorily mandated timing of the required disclosures is exactly the same for both parties. (See Pen. Code, § 1054.7.)

This proposed rule appears to unfairly single out prosecutors for discipline for an unintentional or inadvertent delay in complying with the statutory time limit. However, there appears to be no rule which would subject criminal defense counsel to the same disciplinary consequences. Proposed Rule 3.4 (as conditionally adopted by the Board on May 15, 2010) is applicable to all lawyers, including criminal defense attorneys. However, it punishes (1) the unlawful obstruction of another party's access to evidence, (2) the unlawful alteration, destruction or concealment of potential evidence, and (3) the suppression of evidence the lawyer has a legal obligation to reveal or

produce. It does not appear to punish mere unintentional delay in violation of a statute. In fact, Comment (3) to this proposed rule states that a violation of another rule or statute does not by itself establish a violation of the proposed rule. Moreover, Business and Professions Code section 6068 (o) (3) has long provided that an attorney need not report the imposition of judicial sanctions for failure to make discovery to the State Bar.

Furthermore, to the extent that the new proposal subjects prosecutors to discipline for inadvertent and unintentional delays in discovery, the rule would be unworkable. It would be particularly unworkable in times like these when government staffing and resources are so limited. Under Penal Code section 1054.1, prosecutors are responsible for disclosing items in the possession of the investigating agencies. Thus, delays may result from the actions of other persons and agencies over which the individual prosecutor has no supervisory control. Sometimes these delays may even be the result of a lack of sufficient staff and resources to keep up with the workload. Although Penal Code section 1054.5 provides a court with discretion to enforce the discovery rules by various measures affecting the case or by means of contempt, contempt generally requires at least a culpable, willful act. The same should be required before a prosecutor is disciplined for a delayed disclosure in violation of section 1054.7. Prosecutors should be governed by the same ethical rules applicable to criminal defense lawyers if they violate a reciprocal discovery time limit applicable to both parties' lawyers.

Finally, both the former proposal and the new proposal go beyond the prosecutor's constitutional duty to disclose mitigating evidence to the defense. (See Brady v. Maryland (1963) 373 U.S. 83 and progeny.) The proposed rule further requires that the prosecutor then perform defense counsel's job of presenting any such mitigating information "to the tribunal." The language "and to the tribunal" should be deleted from this rule.

Rule 4.2

~~In criminal cases, Rule 2-100 of the existing California Rules of Professional Conduct has worked well for many years. To now change the term "party" to "person" will create a plethora of new problems for prosecutors and defense attorneys alike. This is particularly true in light of the voters' adoption of the Marsy's Law in 2008. Under Article 1, section 28 (b), of the California Constitution, crime victims have been granted many new rights. Section 28, subdivision (c), provides that a victim's retained attorney may enforce those rights in the trial or appellate court with jurisdiction over the criminal case. Consequently, victims will more frequently have an attorney to represent their interests in criminal cases, even though a victim is not a "party" to the case. In addition, victims and witnesses who have an interest in a civil recovery related to the charged criminal conduct may have retained counsel. The fact that a witness has retained counsel will present great practical problems for a prosecutor or defense lawyer who needs to speak with that witness in order to prepare a criminal case if speaking with the represented "person" will subject the lawyer to discipline.~~

~~Although proposed Rule 4.2 contains an exception in subdivision (c)(3) for communications authorized by law or court order, the scope of what is "authorized by law" is impossible to determine despite the lengthy accompanying Comment 19. The proposed alternative of obtaining a court order does not appear to exist elsewhere in California law. It does not appear feasible to obtain a court order in the investigatory phase of a criminal prosecution since the court does not have jurisdiction until a case has been filed with the court. It would also be costly and~~

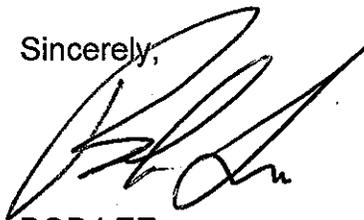
~~burdensome to have to seek court orders in order to speak with represented witnesses. More importantly, it would unconstitutionally grant the judiciary oversight over the prosecution's investigations and case preparation in violation of the separation of powers doctrine.~~

~~In contrast, the current rule is much clearer and more easily applied in criminal cases. If it is decided that there is a compelling need to change the ethical rule in civil cases, the provisions of Rule 2-100 should continue to apply to a lawyer handling a criminal matter.~~

General Observations

As a general matter, the proposed new rules are overly lengthy, complicated and unclear. When lengthy comments are required in order to clarify the meaning of a rule, the rule is obviously unclear on its face. On the other hand, the current rules are reasonably clear, simpler to remember, and have withstood the test of time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bob Lee', written over a white background.

BOB LEE
DISTRICT ATTORNEY



STEVE COOLEY
LOS ANGELES COUNTY DISTRICT ATTORNEY

18000 CLARA SHORTRIDGE FOLTZ CRIMINAL JUSTICE CENTER
210 WEST TEMPLE STREET LOS ANGELES, CA 90012-3210 (213) 974-3501

August 17, 2010

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

RE: Opposition to Proposed Rule 3.8(d) of the California Rules of Professional Conduct

As the elected District Attorney of Los Angeles County, I strongly oppose the current version of proposed Rule 3.8(d) of the California Rules of Professional Conduct ("Rule 3.8(d)") that is being circulated for public comment. The State Bar of California, Board of Governors ("Board") should reinstate the previous version authored by the Commission for Revision of the Rules of Professional Conduct ("Commission").¹

Los Angeles County District Attorney's Office

The Los Angeles County District Attorney's Office ("LADA") is the largest local prosecutorial office in the United States, serving over 10 million people. (LADA Legal Policies Manual (Apr. 2005) p.1.) LADA is responsible for all felony prosecutions in the county and misdemeanor prosecutions in 78 incorporated cities as well as in the County's unincorporated areas. (*Ibid.*) Annually, LADA prosecutes nearly 60,000 felonies, 200,000 misdemeanors and approximately 30,000 juvenile petitions. (LADA, *Office overview* (Feb. 1, 2006) <http://da.la.ca.us/oview.htm> (as of Aug. 5, 2010).)

The mission statement of the LADA provides that every employee "shall adopt the highest standards of ethical behavior and professionalism." (LADA Office Overview, <http://da.co.la.ca.us/oview.htm> (as of Aug. 5, 2010).) To accomplish the goal, LADA has three deputy district attorneys assigned to its Professional Responsibility Unit ("PRU"), who as part of their duties advise other deputies facing ethical issues. The PRU deputies, along with other prosecutors, regularly provide ethics training and publish an office wide newsletter, *Ethicsline*. Also, the LADA Brady compliance Unit ("BCU") is responsible for coordinating and making available to deputy district attorneys known *Brady* material on peace officers and other governmentally employed expert witness who are part of the "prosecution team." BCU maintains the LADA Brady Alert System, which is the central repository of known *Brady* material, and is charged with providing guidance to deputy district attorneys with questions regarding *Brady* issues. PRU and BCU serve as a model for prosecution offices throughout the state.

¹ The Los Angeles County District Attorney's Office previously objected to Rule 3.8(a) and 3.8(g) in a letter dated November 16, 2009 to Audrey Hollins, Office of Professional Competence, Planning and development, State Bar of California.

Background

The commission proposed a version of Rule 3.8(d) that was a modified version of American Bar Association (“ABA”) Model Rule 3.8(d). It obligated prosecutors to comply with discovery in accordance with their “constitutional obligations.” The Commission explained the change to the ABA version as follows:

The proposed language ... generally follows the ABA Model Rule but further clarifies that the requirement of the prosecutor’s timely disclosure to the defense is circumscribed by the constitution, as defined and applied in relevant case law.

(Proposed Rules of Professional Conduct, Rule 3.8(d), Explanation, Draft 9.1 (Feb. 27, 2010), p.5.)

During the public comment period, a letter was submitted by Michael Judge, the Los Angeles County Public Defender, criticizing the Commission’s proposed Rule and urging a verbatim adoption of the ABA Rule. In response, the Board circulated the ABA version and is soliciting additional comment. The current version of proposed Rule 3.8(d) with redline comparison to the Commission’s version is as follows:

~~comply with all constitutional obligations, as defined by relevant case law, regarding the~~ make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

(Redline Comparison of the Proposed Rule 3.8(d) of the previous Public comment Draft, 11 (July 25, 2010).)

Discussion

The Constitutional and statutory and case law of both United States and California have long been the guiding touchstones of prosecutorial discovery in our State. The present version of Proposed Rule 3.8 eviscerates these authorities by expanding the scope of a prosecutor’s ethical duty to provide discovery to defense far beyond what is required.²

This is particularly unreasonable in California where the voters of the state have specifically addressed this issue. On June 5, 1990, the citizens of the state voted to pass the Crime Victims Justice Reform Act, Proposition 115, commonly known as Proposition 115. (Prop. 115 (1990) <http://library.uchastings.edu/cgi-bin/starfinder/29526/calprop.txt>> (as of Aug.9, 2010).) The intent and purpose of the initiative are clear:

² The ABA Standing Committee on Ethics and Professional Responsibility interprets ABA Mode Rule 3.8(d) to expand a prosecutors’ discovery obligation beyond federal and state constitutional obligations. (ABA, Formal Opinion 09-454, Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense (July 8, 2009) http://www.abanet.org/media/your_ABA/200909/opinion_09454.pdf (as of Aug. 9, 2010).)

SECTION 1. (a) We the people of the State of California hereby find that the rights and crime victims are too often ignored by our courts and by our State Legislature, ... and that comprehensive reforms are needed in order to restore *balance* and *fairness* to our criminal judicial system.

(b) In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the laws as developed in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth.

(c) The goals of the people in enacting this measure are to restore *balance* to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods and schools.

(Pro. 115 (1990) <http://library.uchastings.edu/cig-bin/starfinder/29526/29526/calprop.txt>
(as of Aug. 9, 2010) (ital.added).)

In order to attain these goals, Proposition 115 revamped criminal discovery statutes in Penal Code section 1054 et seq. which enumerated disclosure obligations (Pen. Code, § 1054.1)³ and set forth clear time periods (pen. Code § 1054.7).⁴ Additionally, Proposition 115 added Article I, section 30 of the California Constitution. Section 30, subdivision (c), which states that “[i]n order to provide for fair and

³ Penal Code section 1054.1 states:

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

- (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
- (b) Statements of all defendants.
- (c) All relevant real evidence seized or obtained as part of the investigation of the offense charged.
- (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
- (e) Any exculpatory evidence.
- (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the result of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at trial.

(Pen. Code, § 1054.1.)

⁴ Penal Code section 1054.7 requires that disclosure shall be made at least 30 days before trial or immediately if the information becomes known to the prosecutor within 30 days before trial, unless good cause is shown why disclosure should be “denied, restricted or deferred.” (Pen. Code, § 1054.7.)

speedy trials, discovery in criminal cases shall be reciprocal in nature ... (Cal. Const., art. I, § 30, subd. (c).) The statutory scheme set forth in Penal Code section 1054 et seq. provide a framework for reciprocal discovery. Finally, the statutes themselves again emphasized the point that voters wanted to be clear, that "no discovery shall occur in criminal cases except as provided by th[ese statutes], other express statutory provisions, or as mandated by the Constitution of the United States. (Pen. Code § 1054. subd. (e).)

There is no question that the California Supreme Court has the authority to adopt professional rules of conduct. However, those rules cannot conflict with constitutional and statutory principles.

The Constitution of the State of California provides that:

The powers of the state government are legislative, executive and judicial:

Persons charged with the exercise of one power may not exercise either of the others, except as permitted by this constitution.

(Cal. Const., Art. III, §3.)

As stated above, the People in Proposition 115 mandated a criminal discovery process. Additionally, the United States Supreme Court has refused to require generalized disclosure of all evidence favorable to the accused as creating an impossible requirement for prosecutors. (*United States v. Bagley* (1985) 473 US 667,676, fn. 7.) Prosecutors, as members of the executive branch, must adhere to the federal and state constitutions and relevant statutes. Adoption of the current version of Rule 3.8(d) would require otherwise and violate the separation of powers doctrine.

As the California Supreme Court stated in response to a post conviction discovery request concerning potentially mitigating evidence:

Requiring the prosecution, on its own, to disclose information that might fit some defense theory but is irrelevant to the prosecution evidence or theory of the case is generally not necessary to ensure a fair trial. Because mitigation is often "in the eye of the beholder" (*Burger v. Kemp* (1987) 483 U.S. 776, 794), the defense will know far better than the prosecution what evidence fits its theory of the case and what evidence does not. Because the defense can offer virtually anything about the defendant personally that it considers mitigating, virtually anything regarding the defendant personally that it considers can be exculpatory if the defense consider it so. Thus, evidence whose exculpatory nature is not obvious might become exculpatory whenever the defense so claims. But the duty to disclose evidence cannot extend to evidence the prosecution had no reason to believe the defense would consider exculpatory. Requiring the prosecution to, as the high court put it, "assist the defense in making its case" (*United States v. Bagley, supra*, at p. 675, fn. 6) is unnecessary when it comes to potential mitigating evidence against the defendant personally. It would also be overly burdensome. It is one thing to expect the prosecution to know about its own case and to provide the defense with evidence weakening that case. It is quite different to expect it to be alert to

Ms. Audrey Hollins

Page 5

information unrelated to its case that might support a defense theory, especially given the unlimited range of potentially mitigating evidence.

(*In re Steele* (2004) 32 Cal.4th 682, 699-700, parallel citations omitted.)

Our current reliance on the constitution, statutes and case law provides clear guidance to prosecutors who are litigating matters before judges who are in the best position to determine if violations occur. Tactical gamesmanship by some defendants will be exacerbated without any improvement to the quality of justice. Trials will be delayed, and the fairness and balance to be accorded to victims and witnesses, and demanded by the voters of California, will be substantially and unnecessarily diminished.

Very truly yours,

A handwritten signature in black ink, appearing to read "Steve Cooley", with a stylized flourish at the end.

STEVE COOLEY
District Attorney

ss

c: Scott Thorpe, Executive Director, CDAA



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.

DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 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 links below:

[Rule 1.0.1 \[1-100\(B\)\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 4.2 \[2-100\]](#)

[Rule 5.4 \[1-310, 1-320, 1-600\]](#)

[Rule 8.4 \[1-120\]](#)

[Discussion Draft \[All Rules\]](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

3.8 Special Responsibilities of a Prosecutor [5-110] (Public comment is being solicited only as to paragraph (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.



MICHAEL P. JUDGE
PUBLIC DEFENDER

LAW OFFICES
LOS ANGELES COUNTY PUBLIC DEFENDER

CLARA SHORTRIDGE FOLTZ
CRIMINAL JUSTICE CENTER
210 W. TEMPLE STREET, SUITE 19-513
LOS ANGELES, CALIFORNIA 90012
(213) 974-2801 / FAX (213) 625-5031
TDD (800) 801-5551

EXECUTIVE OFFICE

August 23, 2010

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

Re: Proposed Rule of Professional Conduct 3.8(d)

Dear Ms. Hollins,

The Los Angeles County Public Defender's Office is the oldest and largest office of trial counsel (more than 750 lawyers) representing criminal defendants in the State of California. This letter is informed by the collective experience of handling hundreds of thousands of cases each year which are brought by 10 separate prosecuting agencies. The Los Angeles County Alternate Public Defender's Office was created in 1993 and has more than 200 lawyers, representing criminal defendants in the State of California. This letter is informed by the collective experience of nearly 1,000 lawyers, handling hundreds of thousands of cases each year which are brought by 10 separate prosecuting agencies.

Proposed Rule 3.8(d)

Rule 3.8(d) of the Model Rules of Professional Conduct requires prosecutors to make broad disclosures to the defense in criminal cases. The Model Rule was interpreted last summer, in Formal Opinion 09-454 by the American Bar Association Standing Committee on Ethics and Professional Responsibility, to impose an ethical duty of disclosure that is greater than a prosecutor's constitutional obligation under *Brady v. Maryland* (1963) 373 U.S. 83 [due process requires the government to disclose material exculpatory evidence to the defense in a criminal case] (hereafter "*Brady*"). (A copy of Formal Opinion 09-454 is attached.)

The current version of Proposed Rule 3.8(d) adopts the language of the Model Rule, and provides, in relevant part:

"A prosecutor in a criminal case shall . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all

unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

This office objected to the previous version of Proposed Rule 3.8(d) that was submitted to the State Bar Board of Governors (“Board”) by the State Bar’s Special Commission for the Revision of the Rules of Professional Conduct (“Commission”). (A copy of that objection letter, dated July 22, 2010, is attached.) The Commission had added language to Model Rule 3.8(d) which limited the ethical duty of California prosecutors to only make disclosures which “comply with all constitutional obligations, as defined by relevant case law.” In response to complaints from this office and others about the added limiting language, the Board authorized an additional 30-day public comment period to seek input on a change to paragraph (d) of Proposed Rule 3.8 to delete the Commission’s limiting language and revert to the actual language of the Model Rule.

The Model Rule, as interpreted by Formal Opinion 09-454, instructs prosecutors to disclose *all* information, not just information deemed by the prosecutor to be “exculpatory” and “material,” to the defense in a criminal case. This is because the rule’s goals are different from those of the legal doctrine of *Brady* and its progeny. While the latter provides a post-conviction legal framework for discerning, in hindsight, whether there were harmful non-disclosures in completed criminal trials, Rule 3.8(d) is intended to prospectively encourage candid and timely disclosure of information and to promote the interests of fairness and justice by making prosecutors personally accountable for ensuring that the defense is provided evidence that might tend to exculpate the accused, mitigate the offense, extenuate the sentence, or undermine the prosecution’s case. The *Brady* doctrine is not intended to serve as a rule of ethics; the current version of Rule 3.8 is so intended. Rule 3.8(d) properly preserves a role for State Bar disciplinary authorities in ensuring that State and Federal prosecutors in California adhere to appropriate standards of conduct with respect to their duties to disclose evidence, and advances the goals of protecting the public from prosecutorial lapses and preserving public confidence in the integrity of the legal profession.

Prosecutorial misconduct, including prosecutors’ failure to disclose evidence to the defense, is a well-documented phenomenon in California and nationwide. In 2004, the California Commission on the Fair Administration of Justice was created by the California Senate to study the administration of criminal justice in California, to determine its failures resulting in wrongful executions or convictions of the innocent, and to recommend appropriate safeguards. In the Commission’s Report and Recommendations on Reporting Misconduct, issued October 18, 2007 (available at <http://tinyurl.com/2486qox>), the failure to disclose evidence was identified as a leading ground for reversal of California criminal convictions based on claims of prosecutorial misconduct over a 10-year period. Similarly, the Innocence Project at Benjamin N. Cardozo School of Law reports 258 exonerations of wrongfully convicted persons

since 1989 as a result of DNA testing. Government misconduct, including willful suppression of evidence, has been identified as a cause in many of those cases. (See <http://www.innocenceproject.org/understand/Government-Misconduct.php>.) An abundance of literature and studies document the phenomenon of prosecutorial misconduct, as well as the disproportionate impact it has on minority groups and the poor. (See, e.g., Angela J. Davis, *The Legal Professional Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 175 (2007), available at http://law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v36n02_CC3-Davis.pdf [citing numerous nationwide studies of prosecutorial misconduct].)

California State Bar rulings and judicial decisions have long recognized that prosecutors' ethical obligations to disclose discovery materials are independent of their legal obligations to do so. (See, e.g., *Matter of Benjamin Thomas Field*, 05-O-00815; 06-O-12344 (Cons.) (Rev. Dept., 02/12/10, available at http://members.calbar.ca.gov/search/member_detail.aspx?x=168197) [affirming four-year suspension of deputy district attorney whose ethical lapses included intentionally withholding information from the defense]; *Imbler v. Pachtman*, 424 U.S. 409, 428-429 (1976) [prosecutorial immunity from liability from federal civil rights violations under Title 42 U.S.C. does not leave the public without recourse to censure prosecutorial misconduct because prosecutors remain subject to professional discipline]; *In re Lawley* (2009) 42 Cal. 4th 1231, 1246 [recognizing prosecutors' ethical obligation to disclose exculpatory evidence with respect to post-conviction proceeding].) In this regard, Proposed Rule 3.8 appropriately preserves an important function of State Bar disciplinary authorities.

Various prosecutors' offices have internal protocols and rules intended to enforce appropriate standards of conduct. Internal enforcement is important, but it is not a substitute for Model Rule 3.8(d). First, there is a lack of uniformity in the rules or procedures employed by District Attorney's Offices, and a lack of transparency in the handling of reports of ethics lapses by both State and Federal prosecutors' offices. Even the policies of most District Attorney's Offices do not appear to be publicly available. (Compare, United States Attorney's Manual, Section 9-5.001 (Policy Regarding Disclosure of Exculpatory and Impeachment Information), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.) Second, prosecutors' internal policies regarding ethics lapses have existed in differing forms for many years, and have not prevented the nondisclosure by some prosecutors of evidence exonerating innocent persons or mitigating offenses. Proposed Rule 3.8, and a continued role for State Bar authorities in imposing discipline in matters involving prosecutorial misconduct, are wholly consistent with prosecutors' efforts to enforce internal rules.

Comment 2[A] to Proposed Rule 3.8

Comment [2A] to Proposed Rule 3.8 should also be modified regarding its reference to

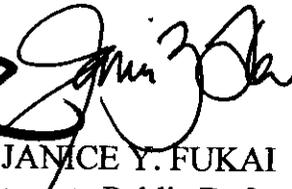
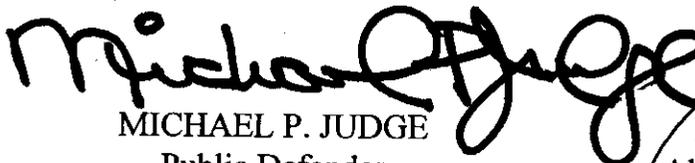
Audrey Collins
Re: Proposed Rule of Profession Conduct 3.8(d)
August 23, 2010
Page No. 4

subdivision (d). The Comment states, in relevant part: "The obligations in paragraph (d) apply only with respect to controlling law existing at the time of the obligation and not with respect to subsequent law that is determined to apply retroactively." This comment is not found in the comments to Model Rule 3.8, and should not be adopted because it incorrectly implies that the disclosure obligation of Proposed Rule 3.8(d) is limited by "controlling law." In other words, it brings in through the back door what the Proposed Rule has eliminated at the front.

Conclusion

Most jurisdictions have adopted the ABA Model Rule without altering the language in a manner that renders disclosure obligations as merely redundant with *Brady* case law. The ethical obligations of California prosecutors should not be less than those of prosecutors in the rest of the country. We therefore respectfully request that Proposed Rule 3.8(d) be adopted in its current form, without modification, and that the portion of Comment [2A] quoted above be deleted.

Very truly yours,



MICHAEL P. JUDGE
Public Defender
of Los Angeles County

JANICE Y. FUKAI
Alternate Public Defender
of Los Angeles County



MICHAEL P. JUDGE
Public Defender

LAW OFFICES
LOS ANGELES COUNTY PUBLIC DEFENDER
19-513 CLARA SHORTRIDGE FOLTZ CRIMINAL JUSTICE CENTER
210 WEST TEMPLE STREET, 19TH FLOOR
LOS ANGELES, CALIFORNIA 90012
(213) 974-2801

July 22, 2010

State Bar of California, Board of Governors
State Bar of California, Regulation & Admissions Committee
Beth J. Jay, Esq, Chief Attorney to the Hon. Ronald M. George

Re: Proposed Rule of Professional Conduct 3.8(d)

The Los Angeles County Public Defender's Office is the oldest and largest office of trial counsel (more than 750 lawyers) representing criminal defendants in the State of California. This letter is informed by the collective experience of handling hundreds of thousands of cases each year which are brought by 10 separate prosecuting agencies.

Brady violations typically come in three forms: Very late discovery after all the cases involving a corrupt officer have been processed through the trial courts, discovery on the eve of trial necessitating a defense continuance as most bench officers are loathe to impose any sanctions, discovery years later via habeas corpus investigations.

American Bar Association (ABA) Rule 3.8(d) of the Model Rules of Professional Conduct requires that prosecutors make broad disclosures to the defense in criminal cases. The Model Rule and was interpreted last summer, in Formal Opinion 09-454 by the American Bar Association Standing Committee on Ethics and Professional Responsibility, to impose an ethical duty of disclosure that is broader than a prosecutor's constitutional obligation under *Brady v. Maryland* (1963) 373 U.S. 83 (a copy of Formal Opinion 09-454 is enclosed herewith.)

The aforementioned ABA committee stated as follows:

“Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*, which held that criminal defendants have a due process right to receive favorable information from the prosecution. This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation.” (Footnotes omitted.)

The ABA Model Rule is intended to encourage candid and timely disclosure of information and promotes the interests of fairness and justice by making prosecutors personally accountable for ensuring that the defense is provided evidence that tends to exculpate the accused, mitigate the offense, extenuate the sentence or undermine the prosecution's case. In stark contrast to the expanded disclosure obligations imposed by the ABA Model Rule, Proposed California Rule 3.8(d) merely makes the prosecutorial responsibility in California only coextensive with *Brady*. The principles developed under *Brady* are not intended to serve as rules of ethics; they are merely discovery standards, which in practice seem mainly to come into play upon appellate review.

California Proposed Rule 3.8 contains language that limits the prosecutor's ethical obligations to require only those disclosures which "**comply with all constitutional obligations, as defined by relevant case law.**" This language eviscerates the ethical standard set by the ABA Model Rule.

The integrity of the justice system depends on the truth-seeking functions of the adversarial process being effective, therefore full and candid disclosure must be encouraged. Candid disclosure depends greatly on the prosecutor's good faith. Violations of *Brady* mandated discovery are usually only uncovered, if at all, many years later after the damage has been done and the defendant has served much or all of the sentence imposed. At most the remedy is to overturn part or all of the judgment and allow a retrial. There is very little, if any, deterrent effect when there is no personal liability for such noncompliance with *Brady*, such a standard is impotent. That is why the ABA Model Rule insists on candid disclosure and greater transparency that will result in more informed pleas, fairer trials and the expeditious processing of cases.

Most jurisdictions have adopted the ABA Model Rule without altering the language in a manner that renders disclosure obligations as merely redundant with *Brady* case law. The ethical obligations of California prosecutors should not be less than those of prosecutors in the rest of the country. Unduly eviscerating the language should be rejected in the interest of justice and fair play. We therefore respectfully request the language of the Model Rule be adopted without modification, otherwise the rule does little to incentivize compliance.

Thank you for consideration of this request for this important change to the Proposed Rule.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael P. Judge". The signature is fluid and cursive, with a large, stylized initial "M".

Michael P. Judge
Public Defender

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 09-454

July 8, 2009

Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution.¹ Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Prosecutors have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct, which provides: "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." This obligation may overlap with a prosecutor's other legal obligations.

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*,² which held that criminal defendants have a due process right to receive favorable information from the prosecution.³ This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule.⁴ Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule.⁵ Finally, although courts

¹ This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² 373 U.S. 83 (1963). See *State v. York*, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J., concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), "merely codifies" *Brady*).

³ *Brady*, 373 U.S. at 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); see also *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*.")

⁴ See Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 2001-03 (2001); Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 94-07 (1994); State Bar of Wisconsin, Comm. on Prof'l Ethics, Op. E-86-7 (1986).

⁵ See, e.g., *Mastracchio v. Vose*, 2000 WL 303307 *13 (D.R.I. 2000), *aff'd*, 274 F.3d 590 (1st Cir.2001) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close

sometimes sanction prosecutors for violating disclosure obligations,⁶ disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

The Committee undertakes its exploration by examining the following hypothetical.

A grand jury has charged a defendant in a multi-count indictment based on allegations that the defendant assaulted a woman and stole her purse. The victim and one bystander, both of whom were previously unacquainted with the defendant, identified him in a photo array and then picked him out of a line-up. Before deciding to bring charges, the prosecutor learned from the police that two other eyewitnesses viewed the same line-up but stated that they did not see the perpetrator, and that a confidential informant attributed the assault to someone else. The prosecutor interviewed the other two eyewitnesses and concluded that they did not get a good enough look at the perpetrator to testify reliably. In addition, he interviewed the confidential informant and concluded that he is not credible.

Does Rule 3.8(d) require the prosecutor to disclose to defense counsel that two bystanders failed to identify the defendant and that an informant implicated someone other than the defendant? If so, when must the prosecutor disclose this information? Would the defendant's consent to the prosecutor's noncompliance with the ethical duty eliminate the prosecutor's disclosure obligation?

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal.⁷ In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law.⁸ The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

to violating [Rule 3.8]".

⁶ See, e.g., *In re Jordan*, 913 So. 2d 775, 782 (La. 2005) (prosecutor's failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); *N.C. State Bar v. Michael B. Nifong*, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm'n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); *Office of Disciplinary Counsel v. Wrenn*, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re Grant*, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state's key witness in murder prosecution). Cf. Rule 3.8, cmt. [9] ("A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.")

⁷ See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 432-35; *United States v. Bagley*, 473 U.S. 667, 674-75 (1985).

⁸ "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. . . . [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (citations omitted); see also *United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001) ("The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.")

impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”⁹ Similarly, Comment [1] to Model Rule 3.8 states that: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”

In 1908, more than a half-century prior to the Supreme Court’s decision in *Brady v. Maryland*,¹⁰ the ABA Canons of Professional Ethics recognized that the prosecutor’s duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused.¹¹ This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: “A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.” The ABA adopted the rule against the background of the Supreme Court’s 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation.¹²

Over the course of more than 45 years following *Brady*, the Supreme Court and lower courts issued many decisions regarding the scope of prosecutors’ disclosure obligations under the Due Process Clause. The decisions establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor’s obligation “to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence,”¹³ and most importantly, “that special precautions are taken to prevent . . . the conviction of innocent persons.”¹⁴ A prosecutor’s timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited

⁹ *Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor’s obligation to seek justice date back more than 150 years. See, e.g., *Rush v. Cavanaugh*, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor “is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.”)

¹⁰ Prior to *Brady*, prosecutors’ disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. See, e.g., *Jencks v. United States*, 353 U.S. 657, 668, n. 13 (1957), citing Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution “is not that it shall win a case, but that justice shall be done.” *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) (“While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.”)

¹¹ ABA Canons of Professional Ethics, Canon 5 (1908) (“The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.”)

¹² See, e.g., OLAVI MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) (“a disparity exists between the prosecutor’s disclosure duty as a matter of law and the prosecutor’s duty as a matter of ethics”). For example, *Brady* required disclosure only upon request from the defense – a limitation that was not incorporated into the language of DR 7-103(B), see MARU, *id.* at 330 – and that was eventually eliminated by the Supreme Court itself. Moreover, in *United States v. Agurs*, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. MARU, *id.*

¹³ Rule 3.8, cmt. [1].

¹⁴ *Id.*

access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d)¹⁵ establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation.¹⁶ The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation.¹⁷

In particular, Rule 3.8(d) is more demanding than the constitutional case law,¹⁸ in that it requires the disclosure of evidence or information favorable to the defense¹⁹ without regard to the anticipated impact of the evidence or information on a trial's outcome.²⁰ The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.²¹

¹⁵ For example, Rule 3.4(a) makes it unethical for a lawyer to "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value" (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is prohibited by law" (emphasis added), and Rule 3.4(c) forbids knowingly disobeying "an obligation under the rules of a tribunal . . ." These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

¹⁶ This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative "materiality" test. See *Cone v. Bell*, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), citing *inter alia*, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* "requires less of the prosecution than" Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny"); PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

¹⁷ The current version provides: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), available at <http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf>. The accompanying Commentary observes: "This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law." *Id.* at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity."

¹⁸ See, e.g., *United States v. Jones*, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the *Brady* line of cases. See *In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")

¹⁹ Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that "mitigates the offense." Evidence or information mitigates the offense if it tends to show that the defendant's level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

²⁰ Consequently, a court's determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). See, e.g., *U.S. v. Barraza Cazares*, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer's statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

²¹ Cf. *Cone v. Bell*, 129 S. Ct. at 1783 n. 15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at 439 (prosecutors should avoid "tacking too close to the wind"). In some jurisdictions, court rules and court orders serve a similar purpose. See, e.g., Local Rules of the U.S. Dist. Court for the Dist. of Mass., Rule 116.2(A)(2) (defining "exculpatory information," for purposes of the prosecutor's pretrial disclosure obligations under the Local Rules, to include (among other things) "all information that is material and favorable to the accused because it tends to [c]ast doubt on defendant's guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.")

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof.²² Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence²³ or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a *de minimis* exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

In the hypothetical, *supra*, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant's guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses' testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor." Knowledge means "actual knowledge," which "may be inferred from [the] circumstances."²⁴ Although "a lawyer cannot ignore the obvious,"²⁵ Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law. Although the rule requires

²² Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

²³ For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

²⁴ Rule 1.0(f).

²⁵ Rule 1.13, cmt. [3], *Cf.* ABA Formal Opinion 95-396 ("[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

prosecutors to disclose *known* evidence and information that is favorable to the accused,²⁶ it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution's proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.²⁷

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.²⁸ Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty.²⁹ Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case,³⁰ timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment.³¹ Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order.³²

²⁶ If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. *Cf.* Rule 3.8, cmt. [9].

²⁷ Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

²⁸ Compare D.C. Rule Prof'l Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof'l Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, *supra* note 17 (calling for disclosure "at the earliest feasible opportunity").

²⁹ See ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

³⁰ In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide "open file" discovery to defense counsel – that is, they provide access to all the documents in their case file including incriminating information – to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. See N.C. GEN. STAT. § 15A-903 (2007); see generally Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

³¹ See JOY & MCMUNIGAL, *supra* note 16 at 145 ("the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner").

³² Rule 3.8, Comment [3].

Defendant's Acceptance of Prosecutor's Nondisclosure

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply.³³ For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client³⁴ or another.³⁵ Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty,³⁶ with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.³⁷

The Disclosure Obligation in Connection with Sentencing

The obligation to disclose to the defense and to the tribunal, in connection with sentencing, all unprivileged mitigating information known to the prosecutor differs in several respects from the obligation of disclosure that apply before a guilty plea or trial.

First, the nature of the information to be disclosed is different. The duty to disclose mitigating information refers to information that might lead to a more lenient sentence. Such information may be of various kinds, *e.g.*, information that suggests that the defendant's level of involvement in a conspiracy was less than the charges indicate, or that the defendant committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness).

Second, the rule requires disclosure to the tribunal as well as to the defense. Mitigating information may already have been put before the court at a trial, but not necessarily when the defendant has pled guilty. When an agency prepares a pre-sentence report prior to sentencing, the prosecutor may provide mitigating information to the relevant agency rather than to the tribunal directly, because that ensures disclosure to the tribunal.

Third, disclosure of information that would only mitigate a sentence need not be provided before or during the trial but only, as the rule states, "in connection with sentencing," *i.e.*, after a guilty plea or

³³ It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may require a defendant entirely to waive the right under *Brady* to receive favorable evidence. In *United States v. Ruiz*, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in *Giglio v. United States*, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure, as already discussed.

³⁴ *See, e.g.*, Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule's protection. *See, e.g.*, Rule 1.7(b)(1).

³⁵ *See, e.g.*, Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial protective order); Rule 4.2 (permitting communications with represented person with consent of that person's lawyer or pursuant to court order).

³⁶ *See* Rules 1.2(a) and 1.4(b).

³⁷ The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.

verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing.³⁸

The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.³⁹ Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure,⁴⁰ and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.⁴¹ To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case.⁴²

³⁸ The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.

³⁹ Rules 5.1(a) and (b).

⁴⁰ Rule 5.1(b).

⁴¹ Rule 5.1(c). See, e.g., *In re Myers*, 584 S.E.2d 357, 360 (S.C. 2003).

⁴² In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). See, e.g., Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312)988-5300

CHAIR: Robert Mundheim, New York, NY ■ Robert A. Creamer, Evanston, IL ■ Edwin L. Felter, Jr., Denver, CO ■ Terrence M. Franklin, Los Angeles, CA ■ Bruce A. Green, New York, NY ■ James M. McCauley, Richmond, VA ■ Susan R. Martyn, Toledo, OH ■ Arden J. Olson, Eugene, OR ■ Mary Robinson, Downers Grove, IL ■ Sylvia E. Stevens, Lake Oswego, OR

CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel

©2009 by the American Bar Association. All rights reserved.



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.

DEADLINE TO SUBMIT COMMENT IS: AUGUST 25, 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 links below:

[Rule 1.0.1 \[1-100\(B\)\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 4.2 \[2-100\]](#)

[Rule 5.4 \[1-310, 1-320, 1-600\]](#)

[Rule 8.4 \[1-120\]](#)

[Discussion Draft \[All Rules\]](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

3.8 Special Responsibilities of a Prosecutor [5-110] (Public comment is being solicited only as to paragraph (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.

The California Public Defenders Association (CPDA) is the largest organization of criminal defense lawyers in California. It has approximately 4,000 members, composed of public defenders, appointed indigent defense counsel, privately retained lawyers, and others. (Address and other contact information is at the bottom of this Public Comment)

The author of this comment, Garrick Byers, is a member of CPDA's Board of Directors, and Chairperson of CPDA's Ethics Committee, and is authorized to make this public comment on behalf of CPDA. (Address and other contact information is at the bottom of this Public Comment.)

CPDA agrees with the most recent iteration of Proposed Rule 3.8(d), which does not limit the prosecutor's disclosure duty to the minimum required by the constitution. CPDA believes that Comment [2A] should be modified.

ENTER COMMENTS HERE.

The California Public Defenders Association (CPDA) is the largest organization of criminal defense lawyers in California. It has approximately 4,000 members, composed of public defenders, appointed indigent defense counsel, privately retained lawyers, and others. (Address and other contact information is at the bottom of this Public Comment)

The author of this comment, Garrick Byers, is a member of CPDA's Board of Directors, and Chairperson of CPDA's Ethics Committee, and is authorized to make this public comment on behalf of CPDA. (Address and other contact information is at the bottom of this Public Comment.)

CPDA agrees with the most recent iteration of Proposed Rule 3.8(d), which does not limit the prosecutor's disclosure duty to the minimum required by the constitution. CPDA believes that Comment [2A] should be modified.

CPDA agrees with the July 22, 2010, letter from Los Angeles County Public Defender Michael Judge (which relied on its attachment, American Bar Association Formal Opinion 09-454), in asking the Commission to omit from Proposed Rule 3.8(d), the phrase "□ comply with all constitutional obligations, as defined by relevant case law."

CPDA also agrees with the August 23, 2010 letter co-authored by Mr. Judge and by Janice Y. Fukai, the Alternate Public Defender of Los Angeles County that further discussing Proposed Rule 3.8(d), and asks for a modification of that Proposed Rule's Comment 2[A]

CPDA does not repeat, here, Mr. Judge's, and Ms. Fukai's reasons, nor those of Form. Op. 09-454; we cannot be more eloquent than they have already been.

But CPDA does add the observation that many of the Proposed Rules require lawyers to have high professional standards that go beyond the minimum required by law.

Indeed, if the Proposed Rules never required more than the minimum there would hardly be any reason to have those Rules, or any Rules of Professional Conduct, at all.

Many of these Proposed Rules are disclosure rules that require the lawyer to disclose a fact that the lawyer might otherwise prefer to keep secret.

For example, Proposed Rule 1.4.1 requires the lawyer to disclose a lack of liability insurance, even though that may sometimes cause the prospective client to walk out the door. No statute or case law, in itself, requires that disclosure. (See, e.g., "The State Bar of California, New Rule 3-410 (Disclosure of Professional Liability Insurance)... FAQs," # 6 (noting that a statute on this subject was repealed in 2000.) (These FAQs are available at the State Bar's web site at the Ethics Information Page, under "Announcements"; click on FAQ New Rule 3-410 (Disclosure of Professional Liability Insurance) [last accessed Aug. 25, 2010]; compare Bus. & Prof. Code §6171, subd. (b), requiring a law corporation to maintain liability insurance, but not requiring disclosure to clients).

If the lawyer did not disclose a lack of professional liability insurance, the lawyer, by that fact alone, would not be liable to the client (although liability might result if this is coupled with certain further facts). But, because of the Rules of Professional Conduct, the lawyer can still be disciplined for not disclosing.

And so it should be with Proposed Rule 3.8(d). Full disclosure, broader than the minimum required by the constitution and case law, fulfills the purposes of the Rules of Professional Conduct, as stated by Proposed Rule 1.0(a): "(1) To protect the public;...; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession.

If the prosecutor did not disclose more than is required by the constitution and case law, the prosecutor, by the fact alone, would not be liable to anyone, and by that fact alone, a conviction would not be reversed.

But had the prosecutor made a full disclosure, a more just disposition, and one in which the public could have greater confidence, would surely result. And as with the other rules, even though liability, or reversed convictions, would not generally result, still, the prosecutor should be disciplined for not making the full disclosure that is in the letter of the ABA Model Rule, and the letter and spirit of the purposes of California's Proposed Rules of Professional

Conduct.

It cannot be objected that this Rule would be unfairly one-sided because it would subject a prosecutor to discipline for not making disclosures beyond the minimum required by the constitution, statute, or caselaw, but would not similarly subject the defense attorney. The United States' and California's Constitutional protections against self-incrimination forbid the defense attorney from being compelled to make such broad disclosures.

It cannot be objected that it is the job of the defense only, and not of the prosecution, to advise the court of mitigating evidence at sentencing. The prosecution has a duty to insure that sentences are fair.

And it cannot be objected that this would require the prosecution to guess at what the defense might find favorable. Looking at cases from both sides is a critical skill that all law students learn; one cannot pass the California Bar Exam without demonstrating proficiency at that skill. No more is required here.

Thank you for your consideration,

California Public Defenders Association by
Garrick Byers, Member, Board of Directors, Chair, Ethics Committee

Address information:

California Public Defenders Association
10324 Placer Lane
Sacramento, CA 95827
Phone: (916) 362-1690 x 8
Fax: (916) 362-3346
e-mail: cpda@cpda.org

Garrick Byers, Senior Defense Attorney
Fresno County Public Defenders Office
2220 Tulare Street, Suite 300
Fresno, California 93721
Phone: Personal Office (559) 442-6915
Main Office (559) 488-3546
Fax: (559) 262-4104
e-mail gbyers@co.fresno.ca.us



CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

921 11th Street, Suite 300 • Sacramento, CA 95814 • (916) 443-2017 • www.cdaa.org

OFFICERS

President
MICHAEL A. RAMOS
San Bernardino County

First Vice President
GREGORY D. TOTTEN
Ventura County

Second Vice President
CARL V. ADAMS
Sutter County

Secretary-Treasurer
DEAN D. FLIPPO
Monterey County

Sergeant-at-Arms
GILBERT G. OTERO
Imperial County

Past President
GARY LIEBERSTEIN
Napa County

BOARD OF DIRECTORS

MELINDA AIELLO
Amador County

EDWARD BERBERIAN
Marin County

LAWRENCE C. BLAZER
Alameda County

JERRY P. COLEMAN
San Francisco County

GARY FAGAN
San Bernardino County

BIRGIT FLADAGER
Stanislaus County

BARBARA J. GREAVER
Tulare County

KELLY P. KEENAN
Riverside County

PATRICK McGRATH
Yuba County

TONY RACKAUCKAS
Orange County

SOPHIA G. ROACH
San Diego County

CHIEF EXECUTIVE OFFICER
W. SCOTT THORPE

August 23, 2010

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

RE: Proposed Revisions of Rules of Professional Conduct
Discussion Draft of July 2010
Proposed Rules 3.8(d) and 4.2

Dear Ms. Hollins:

This is provided in response to the invitation for public comment to the proposed revisions of the Rules of Professional Conduct (Discussion Draft of July 2010), Proposed Rules 3.8(d) and 4.2.

The California District Attorneys Association is the statewide professional association of California prosecutors, with a membership of over 2,500 prosecutors throughout the state. The Association presents its views on matters of concern to prosecutors before various bodies, including the legislature, the executive, and the courts through amicus curiae briefs. Proposed Rules 3.8(d) and 4.2 are both matters of concern to California prosecutors.

I. Proposed Rule 3.8(d) (Special Duties of a Prosecutor)

This rule deals with the ethical obligation of prosecutors to make known to the defense evidence that is favorable to the defendant. The version originally proposed for California linked the prosecutor's obligations to the constitution and relevant case law. Our organization embraced this proposal in the letter of then CDAA President Gary Lieberstein to the State Bar on November 13, 2009.

According to the Bar’s invitation for comment of July 2010, the Bar received a letter from the Los Angeles Public Defender’s Office which prompted the Bar to put forward a change in Rule 3.8(d). The Bar is now soliciting comment on whether California should adopt a version of Rule 3.8(d) which mirrors the ABA model rule. The difference between the two versions is set out below.

Cal Bar Proposed Rule 3.8(d) [as proposed 9/09]	ABA Model Rule 3.8(d) [now under consideration]
<p>The prosecutor in a criminal case shall... (d) <u>comply with all constitutional obligations, as defined by relevant case law regarding the</u> timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>	<p>The prosecutor in a criminal case shall: ... (d) <u>make</u> timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>

In addition to the language above, in considering the meaning of the ABA Model Rule, that rule was the subject of an ABA Ethics Opinion in July 2009 (ABA Formal Opinion 09-454). As written and as construed by Opinion 09-454, proposed Rule 3.8(d) raises concerns for California prosecutors.

For convenience in the discussion below, I will refer to the proposed California rule put forth in September 2009 (left hand column) as “the original proposed rule,” and the ABA Model Rule now being discussed as “the model rule.”

Initially, I note that the original proposed rule and the model rule differ in two significant aspects. First, because the original proposed rule was tied to applicable case law (which would be *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny), it covered material evidence favorable to the accused. As both the language of the model rule indicates and Opinion 09-454 makes crystal clear, the model rule has no materiality limitation, but covers any evidence that might be considered favorable or mitigating evidence, whether or not it is material. Hence, the model rule calls on the prosecutor to make more disclosure than the original proposed rule required.

Second, again because the original proposed rule was tied to applicable case law, the timing of the obligation to turn over evidence related to the constitutional obligation, as defined under the *Brady* line of cases. Under those cases, it is clear that the *Brady* right is a due process right to a fair trial. *United States v. Bagley* (1985) 473 U.S. 667, 678; *Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1068; *People v. Ainsworth*

(1990) 217 Cal.App.3d 247, 256; *United States v. Coppa* (2d Cir. 2001) 267 F.3d 132, 144. Disclosure is timely for *Brady* purposes so long as it is made in time for the defense to make meaningful use of the material at trial. *United States v. Woodley* (9th Cir. 1993) 9 F.3d 774, 776-777; *United States v. Higgins* (7th Cir. 1996) 75 F.3d 332, 335; *United States v. Higgs* (3d Cir. 1983) 713 F.2d 39, 44; *People v. Carter* (2005) 36 Cal.4th 1114, 1161. The model rule on its face does not specify when disclosure must be made, except to say that it must be timely. However, Opinion 09-454 construes that to mean, "as soon as reasonably practical." To the extent that "as soon as reasonably practical" means something earlier than disclosure made in time for meaningful use at trial, the model rule requires disclosure be made at an earlier time than the original proposed rule.

These two differences between the original proposed rule and the model rule (a greater scope of material to be disclosed, and earlier timing for the disclosure), create a conflict with California statutory and constitutional law.

A. Conflict with California Criminal Discovery Law

For 20 years, California criminal discovery has been governed by a balanced scheme based in constitutional and statutory provisions. California Constitution Article I, section 30(c), provides that criminal discovery shall be reciprocal, as provided by statutes enacted by the legislature, and the people through the initiative process. The statutory provisions are set out in Penal Code § 1054 through 1054.10. Section 1054.1 sets out the disclosures the prosecution is required to make to the defense, including names and addresses of witnesses the prosecutor intends to call, statements of such witnesses, and any exculpatory evidence. Section 1054.7 requires that these disclosures be made at least 30 days before trial. Section 1054 specifically states that no discovery shall occur except as required by express statutory provisions or as required by the U.S. Constitution. See also *In re Littlefield* (1993) 5 Cal.4th 122, 129; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106. The only substantive criminal discovery mandated by the U.S. Constitution is *Brady* discovery. *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 62. The U.S. Constitution does not require any other criminal discovery, either in a general sense, or as to evidence that may be favorable to the accused, but is insignificant. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258; *United States v. Ruiz* (2002) 536 U.S. 622, 628; *United States v. Bagley* (1985) 473 U.S. 667, 676, fn. 7.

To the extent the model rule may require the prosecutor to make greater disclosures than the California statutes or the U.S. Constitution require, and/or make disclosures at an earlier time (since "as soon as reasonably practical" may well be earlier than 30 days before trial), the model rule is directly at odds with the specific provisions of the California criminal discovery statutes. This amounts to the State Bar, through the mechanism of an ethics rule, changing the discovery responsibilities of the prosecutor when the California Constitution decrees that discovery shall be governed by statute. It should not be the role of the State Bar to make this type of change in an area of criminal procedure governed by specific constitutional and statutory provisions.

In this regard, it is worth noting the differences in federal criminal practice. The Jencks Act (18 U.S.C. 3500) affirmatively prohibits the disclosure of the statement of a federal prosecution witness until after the witness has testified on direct examination at trial. If the statement of the witness contains substantial impeaching material, it would certainly be covered by the model rule, and disclosure “as soon as reasonably practical” would be before the witness testified at trial. Assuming federal prosecutors who are members of the California Bar would be excused from the constriction of the model rule as to the timing of their disclosures because of the federal statutory mandate, then they would be disclosing material much later than California state prosecutors (who must disclose their witness statements 30 days before trial). But it is the California prosecutors who would be subject to State Bar discipline if they had the witness statements months before trial, yet failed to disclose them until the 30 days before trial as required by statute.

B. Disclosure Before Entry of Plea

Under United State Supreme Court precedent, a defendant need not be given *Brady* evidence that is merely impeaching of the prosecution evidence before the defendant enters a plea bargain, so long as all evidence of actual innocence has been disclosed. *United States v. Ruiz* (2002) 536 U.S. 622. Opinion 09-454 specifically states that the prosecutor should make all favorable evidence available before a guilty plea. This rule is contrary to the U.S. Supreme Court precedent as to what the constitution requires. Since a guilty plea will often be entered more than 30 days before trial, disclosure of such evidence would not be required under the California criminal discovery statutes (since it would be more than 30 days before trial, and the U.S. Constitution would not compel that the prosecution disclose the evidence before the plea). This would be another instance of the State Bar ethics rule requiring prosecutors to make discovery they are specifically exempted from making under California statutory and U.S. Supreme Court law.

C. Defense Waiver of Compelling Disclosure

Opinion 09-454 specifically states that if the defendant waives any right to receive disclosure of favorable evidence in return for a more favorable plea bargain offer, the prosecutor may not rely on that waiver as relieving the ethical duty under the model rule. The United States Supreme Court has specifically held that, so long as all evidence of factual innocence is disclosed, a defendant may enter such a waiver, and a prosecutor may rely on that waiver in making a plea disposition of the case. *United States v. Ruiz* (2002) 536 U.S. 622. This would be yet another instance of the State Bar ethics rule requiring prosecutors to make discovery that they are exempted from being required to make under California statutory and U.S. Supreme Court law. Further, to the extent that some prosecutors may be willing to make more generous plea bargain dispositions for defendants who enter such waivers, an ethics rule barring such agreements would work to the detriment of those defendants.

D. Disclosure of Sentencing Evidence to “the tribunal.”

The model rule also requires the prosecutor to disclose all unprivileged mitigating evidence on sentencing to both the defense and “the tribunal.” With this requirement, the prosecutor would be subject to discipline if he/she had given the information to the defense, but not the court. But whether or not some evidence is mitigating may be a matter of judgment, and may depend on the defense theory of the case. The defense may have an objection to the prosecutor providing evidence directly to the court which the prosecutor is afraid might be considered mitigating, but the defense does not want to present, because it undermines the defense theory of the case. In such situations, a prosecutor will almost inevitably offend someone, and even have his actions objected to, in attempting to comply with this rule.

E. Obligation of Supervisory Prosecutors

As interpreted in Opinion 09-454, rule 3.8(d) makes it an ethical requirement for supervising prosecutors to ensure that subordinate prosecutors are adequately trained regarding their obligations, and that internal office procedures facilitate such compliance. While it is generally consistent with *Brady* case law to say that the government has an institutional *Brady* obligation (see *Giglio v. United States* (1970) 405 U.S. 150), on pain of sanctions that may be suffered in the criminal litigation (i.e. continuance, prohibiting testimony of a witness, dismissal of the case, etc.), it is both questionable and problematic whether, or to what extent, this can be translated into a personal ethical breach by a supervisory or management prosecutor. In particular, the issue of what supervisory layer the responsibility lies with creates a fundamental dilemma in such an application of the rule. Who does the bar discipline if training and/or discovery procedures are deemed inadequate – the immediate supervisor of the regular prosecuting attorney, a division chief, the office training manager, the chief deputy, or the elected District Attorney? All of the above? Would the Bar be justified in undertaking to discipline an elected District Attorney, the elected Attorney General, and/or that official’s chief deputy, for the failure of an office to have a *Brady* procedure in place? The prospect of such an undertaking raises significant questions as to the authority of the State Bar to interject itself into the discretion of an elected official to allocate resources and administer his or her office, especially if the prosecutor’s office has trained its prosecutors in their obligations under the California statutes and the U.S. Constitution, as discussed above, without training in the model rule obligations that appear at odds with California law. As applied to managing or elected prosecutors, insofar as the State Bar serves as an administrative arm of the judiciary (State Bar Rule 1.2; see also Business and Professions Code § 6008), such application of the rule also raises serious separation of powers concerns.

F. Conclusion as to Proposed Rule 3.8(d)

The discussion above is not meant to suggest that California prosecutors routinely have been, or will be, anything less than generous in making extensive early discovery disclosure. It is likely that most California prosecutors will voluntarily provide broad discovery in the initial stages of the case, if for no other reason than to promote early case disposition. See California Rule of Court 10.953(a). For reasons particular to individual cases or individual prosecution offices, however, such practices may not be universal.

The model rule 3.8(d) now proposed for adoption in California, on its face and as interpreted in ABA Opinion 09-454, is at odds with California criminal discovery law as defined by the California Constitution and California statutes. With all due respect, in an area with such detailed and specific statutory provisions, supported by a California constitutional mandate, which incorporate the discovery requirements of the U.S. Constitution, it is not the place of the State Bar to revise the discovery obligations of the prosecution.

II. Proposed Rule 4.2 (Communication with a Represented Person)

This rule changes those covered by prohibited contacts from “party” under the current California rule to “person.” In the letter of then CDA A President Gary Lieberstein to the State Bar on November 13, 2009, we expressed our concern that this language might impede legitimate law enforcement investigations. The criminal defense bar had similar concerns that the proposal would limit defense investigations and contact with witnesses.

The now proposed rule 4.2(c)(3) states that communications are not prohibited when “authorized by law or court order.” Newly added comments 19 and 20 specify that appropriate law enforcement investigative contacts and communications are not meant to be covered by the rule. It appears that the committee has sought to address the concerns of the criminal bar by writing exceptions into the comments. It would seem a better practice to make the scope of the exception for criminal matters specific and detailed in the rule itself. The alternative will likely be years of litigation over the meaning and application of this rule.

Further, use of the term “person” rather than “party” creates significant potential issues under Marsy’s Law, specifically California Constitution Article I, Section 28(c)(1). Under that provision, a victim may retain an attorney to enforce Marsy’s Law rights. However, since the victim is not a party in a criminal case (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; *People v. Green* (2004) 125 Cal.App.4th 360, 378), under the previous California rule the prosecutor would not be barred from contacting a victim represented by counsel and dealing with such a victim in the preparation and presentation of the case. By expanding the rule to cover any “person” represented by counsel, the proposed rule puts the prosecutor in the position of first having to seek permission of an attorney to deal with the chief witness in a criminal prosecution.

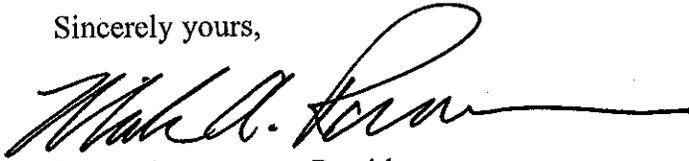
Finally, we note that the division within the Bar Committee itself (this proposal received only seven affirmative votes on a thirteen member committee, and was categorized as “Very Controversial”) suggests there are likely many unanticipated and unintended ramifications of the rule change for both criminal and civil law. That factor alone should counsel against making the change.

III. Conclusion

Based on the foregoing, the California District Attorneys Association, on behalf of California prosecutors, urges that the Bar adopt Rule 3.8(d) as it was originally proposed

for California. We further urge as to Rule 4.2(c)(3) that the scope of the exception permitting communications with represented persons/parties be made clear in the text of the rule itself. In our view, the best means to accomplish this is to use the term "party" (as the current California rule does), rather than the term "person" in a specific rule or exception that addresses the application of this principle to criminal practice.

Sincerely yours,

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

Michael A. Ramos, President
California District Attorneys Association



**ORANGE COUNTY
BAR ASSOCIATION**

PRESIDENT

LEI LEI WANG EKVALL

PRESIDENT-ELECT

JOHN C. HUESTON

TREASURER

DIMETRIA A. JACKSON

SECRETARY

WAYNE R. GROSS

PAST-PRESIDENT

MICHAEL G. YODER

DIRECTORS

ASHLEIGH E. AITKEN

DARREN O. AITKEN

MICHAEL L. BARONI

THOMAS H. BIENERT, JR.

LYNDA T. BUI

SUZANNE VIAU CHAMBERLAIN

CARLOS X. COLORADO

SCOTT B. COOPER

JOSE GONZALEZ

STEVEN G. HITTELMAN

CLAUDETTE D. KUNZMAN

TRACY R. LESAGE

TIRZAH ABÉ LOWE

PEARL G. MANN

TERESA A. MCQUEEN

LORENA C. PEÑALOZA

SOLANGE E. RITCHIE

ERIC TRAUT

CHERRIE I. TSAI

J. EDWARD WILSON

ABA REPRESENTATIVES

MARTHA K. GOODING

RICHARD W. MILLAR, JR.

**STATE BAR BOARD OF
GOVERNORS DISTRICT 8**

JOSEPH L. CHAIREZ

EXECUTIVE DIRECTOR

TRUDY C. LEVINDOFSKE

AFFILIATE BARS

ASSOC. OF OC DEPUTY

DISTRICT ATTORNEYS

CELTIC BAR ASSOC.

FEDERAL BAR ASSOC.,

OC CHAPTER

HISPANIC BAR ASSOC. OF OC

J. REUBEN CLARK LAW SOCIETY

LEX ROMANA

OC ASIAN AMERICAN BAR ASSOC.

OC CRIMINAL DEFENSE BAR ASSOC.

OC DEPUTY PUBLIC DEFENDERS ASSOC.

OC JEWISH BAR ASSOC.

OC TRIAL LAWYERS ASSOC.

OC WOMEN LAWYERS ASSOC.

MEMORANDUM

Date: August 18, 2010

To: Commission for the Revision of the Rules of Professional Conduct of
the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: Proposed Rule 3.8 – Special Responsibilities of a Prosecutor

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the latest public comment draft of the subject proposed Rule:

The OCBA supports the adoption of proposed Rule 3.8 addressing the special responsibilities of a prosecutor.

LAW OFFICES OF EVAN A. JENNESS

MAIN STREET LAW BUILDING
2115 MAIN STREET
SANTA MONICA, CALIFORNIA 90405
TEL. (310) 399-3259 FAX (310) 392-9029
EVAN@JENNESSLAW.COM

August 25, 2010

Via Email (audrey.hollins@calbar.ca.gov)

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

Re: Comments Regarding Proposed Revision to the California Rules
of Professional Conduct - Proposed Rule 3.8(d)

Dear Ms. Hollins:

I am a criminal defense attorney in private practice, and write in a personal capacity in support of Proposed Rule 3.8(d),¹ and to respond to critics of the proposed rule. Rule 3.8(d) properly preserves a meaningful role for State Bar disciplinary authorities in ensuring that both State and Federal prosecutors in California adhere to appropriate standards of professional conduct, advances the goals of protecting the public from prosecutorial lapses, and promotes public confidence in the integrity of the legal profession.

By way of background, I am the current Chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee; Co-Chair of the National Association of Criminal Defense Lawyers' (NACDL) Ethics Advisory and a NACDL Board Member; Treasurer of the Federal Bar Association's Los Angeles Chapter; and Co-Chair of the

¹ Proposed Rule 3.8(d) adopts the language of the ABA Model Rules, and provides that a "Prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal".

Ms. Audrey Hollins
August 25, 2010
Page 2

Lawyer Representatives of the Judicial Conference of the U.S. District Court, Central District of California.

District Attorney Steve Cooley's August 17, 2010 letter states that "Adoption of the current version of Rule 3.8(d) would . . . violate the separation of powers doctrine." With all due respect, this position is incorrect. There is historical precedent for prosecutors taking the position that rules of professional conduct may not be enforced against them based on constitutional arguments. However, courts and legislators have consistently recognized the important role and authority of state disciplinary authorities. In 1989, then-Attorney General Richard Thornburgh issued a memorandum to federal prosecutors in which he stated that the Supremacy Clause of the United States Constitution exempted federal prosecutors from rules of professional conduct requiring them to contact represented persons through counsel for such persons.² Both Congress and courts rejected AG Thornburgh's position, and it was subsequently replaced by the U.S. Department of Justice. *See* 28 U.S.C. § 530B;³ *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1992) (affirming district court's "trenchant analysis of the inefficacy of the" Thornburgh Memorandum); *United States ex rel O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (Attorney General not authorized by law to exempt federal prosecutors from rules of professional conduct).

California State Bar rulings and judicial decisions have long-recognized that prosecutors' ethical obligations to disclose discovery materials are independent of their legal obligations to do so. *See, e.g., Matter of Benjamin Thomas Field*, 05-0-00815, 06-0-122344 (Rev. Dept., February 2, 2010) (affirming 4-year suspension of deputy district attorney whose ethical lapses included intentionally withholding a defendant's statement favorable to co-defendants in a case, leading the court to dismiss a 25-year enhancement against one co-defendant in one case; and withholding a witness' statement favorable to the defense in a *habeas corpus* proceeding in which the judge found he committed a discovery violation), *citing Imbler v. Pachtman*, 424 U.S. 409, 428-429 (1976) (prosecutorial immunity from liability from federal civil rights violations under Title 42 of the United States Code does not leave the public without recourse to censure prosecutorial misconduct because prosecutors remain subject to professional discipline); *In re Lawley* (2009) 42 Cal. 4th 1231, 1246 (recognizing prosecutors' ethical obligation to disclose exculpatory evidence with respect to post-conviction proceeding); *see also* ABA Formal Ethics

² *See* Richard Thornburgh, Memorandum to All Justice Department Litigators Re: Communications with Persons Represented by Counsel (unpublished office memorandum, June 8, 1989), reprinted as an attachment to *Matter of Doe*, 801 F. Supp. 478, 489 (D. N.M. 1992).

³

Title 28 U.S.C. § 530B provides: "An attorney for the Government shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

Ms. Audrey Hollins
August 25, 2010
Page 2

Op 09-454 (recognizing that ABA Model Rule 3.8(d) imposes an ethical duty that is separate from, and broader than, disclosure obligations imposed by the Constitution, statutes, rules and court orders). In this regard, Proposed Rule 3.8(d) appropriately preserves an important function of State Bar disciplinary authorities.

Various prosecutors' offices in California, including that of the Los Angeles County District Attorney, have internal protocols and rules intended to enforce appropriate standards of conduct. Internal enforcement is important, but it is not a substitute for Proposed Rule 3.8(d) for at least two distinct reasons. First, there is a lack of uniformity in the rules and procedures employed by District Attorney's Offices within California, and a lack of transparency in the handling of reports of discovery violations and ethics lapses by both State and Federal prosecutors' offices in California. Even the policies of most District Attorney's offices do not appear to be publicly available. *C.f.* U.S. Attorney's Manual 9-5.001 (Policy Regarding Disclosure of Exculpatory and Impeachment Information; USAM Criminal Resource Manual, Memo 165 (Guidance for Prosecutors Regarding Criminal Discovery) (Jan. 4, 2010). Second, both state and federal prosecutors' internal policies regarding discovery violations and ethics lapses have existed in differing forms for many years, and have not prevented the nondisclosure by some prosecutors of evidence exonerating innocent persons or mitigating offenses. Proposed Rule 3.8(d), and a continued role for State Bar authorities in imposing discipline in matters involving prosecutorial lapses, are wholly consistent with prosecutors' efforts to enforce internal protocols and practices.

Unfortunately, prosecutorial misconduct, including prosecutors' failure to disclose evidence to the defense, is a well-documented phenomenon in California and nationwide, and California's adoption of Proposed Rule 3.8(d) can help to address a very troubling situation. In 2004, the California Commission on the Fair Administration of Justice was created by the California Senate, and was charged with studying the administration of criminal justice in California to determine its failures resulting in wrongful executions or convictions of the innocent, and to recommend appropriate safeguards. In the Commission's Report and Recommendations in Professional Responsibility and Accountability of Prosecutors and Defense Lawyers, issued October 18, 2007 (*available at* <http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf>), the failure to disclose exculpatory evidence was identified as a leading ground for reversal of California criminal convictions based on claims of prosecutorial misconduct over a ten-year period. Since 1989, the Innocence Project at Benjamin N. Cardozo School of Law has obtained 255 post-conviction exonerations of wrongfully convicted persons through DNA testing. Seventy percent of those exonerated are members of minority groups. Nine of the exonerations involved California convictions, and government misconduct was identified as a cause in four of those cases. *See* <http://www.innocenceproject.org/know/>. An abundance of literature and studies document the phenomenon of prosecutorial misconduct, as well as the disproportionate impact it has on

Ms. Audrey Hollins
August 25, 2010
Page 2

minority groups and the poor. *See, e.g.,* Angela J. Davis, *The Legal Professional Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 175 (2007), available at http://law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v36n02_CC3-Davis.pdf (citing numerous nationwide studies of prosecutorial misconduct). Particularly in light of this evidence, it is critical that State Bar disciplinary authorities retain the right to sanction prosecutors in appropriate situations.

Thank you for considering my views.

Very truly yours,

Evan A. Jenness

EVAN A. JENNESS

EAJ:dfm

City Hall East
200 N. Main Street
Room 800
Los Angeles, CA 90012

(213) 978-8100 Tel
(213) 978-8312 Fax
CTrutanich@lacity.org
www.lacity.org/atty



CARMEN A. TRUTANICH
City Attorney

August 25, 2010

BY FACSIMILE (415) 538-2171

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

Re: Comments to Proposed State Bar Rule No. 3.8

I.

**THE LOS ANGELES CITY ATTORNEY'S OFFICE
IS ONE OF THE LARGEST PROSECUTORIAL
OFFICES IN CALIFORNIA.**

In July 2008, the population estimate for the City of Los Angeles was 3,833,995, which is three times larger than San Diego, California's second largest city, having a population estimate of 1,279,329 residents.¹ The City of Los Angeles is 469 square miles in size, far larger than any other city in California.² The Los Angeles City Attorney's Office Criminal Division alone has 218 assigned prosecutors, which is larger than 53 of California's 58 district attorney offices.

¹ See United States Department of Commerce, Bureau of the Census
<http://www.census.gov/popest/cities/SUB-EST2008-4.html>

² See United States Department of Commerce, Bureau of the Census
<http://quickfacts.census.gov/qfd/states/06/0680000.html>

The Los Angeles City Attorney's Office files thousands of misdemeanor cases each year that in other jurisdictions would be filed as felonies. More specifically, the Los Angeles City Attorney's Office annually reviews well over 10,000 misdemeanor referrals from the Los Angeles County District Attorney, which but for its limited resources, would be filed as felonies. Of the more than 10,000 District Attorney referrals reviewed each year by the City Attorney's Office, the office files over 10,000-15,000 wobbler³ cases. This is in addition to the more than 70,000 misdemeanor cases filed per year. These figures do not include the over 50,000 infractions filed each year by the City Attorney's office. Very few prosecutorial offices in California have a caseload as extensive as the Criminal Branch of the Los Angeles City Attorney's Office.

II.

THE COMMISSION SHOULD DELETE PROPOSED RULE 3(B) BECAUSE THE COURT IS ALREADY REQUIRED BY STATUTE TO ADVISE THE DEFENDANT OF THE RIGHT TO COUNSEL. THERE IS NO NEED TO SHIFT THIS RESPONSIBILITY TO PROSECUTORS.

Proposed Rule 3.8(b) provides:

"A prosecutor in a criminal case shall [¶] make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given a reasonable opportunity to obtain counsel."

³ "The term 'wobbler' does not have a meaning defined by statute or commonly understood by the electorate. Specifically, the term 'wobbler,' as used here, does not appear in the Penal Code or in the Merriam-Webster Dictionary. Instead, 'wobbler' is a legal term of art of recent vintage, and its use is limited primarily to attorneys, judges, and law enforcement personnel who are familiar with criminal law. (See, e.g., *People v. Municipal Court (Kong)* (1981) 122 Cal. App. 3d 176, 179 ["Wobblers" are "those offenses punishable either as felonies or misdemeanors, in the discretion of the court. In the jargon of the criminal law, [such] offenses are known as "wobblers."" (Italics added.)])" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 902, fn. omitted.) The word "wobbler" which is used only in California was first used by the Court of Appeal in *People v. Herron* (1976) 62 Cal.App.3d 643, 647, footnote 3. (*Id.*, at 902, fn. 9) A wobbler is "[a]n offense which is punishable either by imprisonment in the state prison or by incarceration in the county jail is said to "wobble" between the two punishments and hence is frequently called a 'wobbler' offense." (*Ibid.*, citations omitted.) The California Supreme Court first used the term "wobbler" in 1984. (*Ibid.*)

Although the Commission's Comment 1B to proposed Rule 3.8(b) states that the rule "does not change the obligations imposed on prosecutors by applicable law," the City Attorney's Office fundamentally disagrees with this conclusion.

Penal Code section 860 provides in pertinent part:

"At the time set for the examination of the case, if the public offense is a felony punishable with death, or is a felony to which the defendant has not pleaded guilty in accordance with Section 859a of this code, then, if the defendant requires the aid of counsel, the magistrate must allow the defendant a reasonable time to send for counsel, and may postpone the examination for not less than two nor more than five days for that purpose. The magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears, proceed to examine the case; provided, however, that a defendant represented by counsel may when brought before the magistrate as provided in Section 858 or at any time subsequent thereto, waive the right to an examination before such magistrate, and thereupon it shall be the duty of the magistrate to make an order holding the defendant to answer . . ."⁴

Penal Code section 987, subdivision (a) provides:

"In a noncapital case, if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her."

When read together, Penal Code sections 860 and 987 already impose upon the court the duty to advise the defendant of the right to counsel. To shift this burden onto the prosecutor under penalty of ethical sanction is contrary to the Legislature's intent. If the Legislature intended to impose this duty upon prosecutors either concurrently or jointly with the court, it

⁴ The 1998 Law Revision Commission Comment to Penal Code section 860 provides: "[s]ection 860 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). The amendment ensures no change in the availability of counsel in the superior court. Willful or corrupt misconduct in office by a local public official is punishable by removal from office under Government Code Section 3060 et seq. It is a non-felony offense within the jurisdiction of the superior court, for which there is no examination before a magistrate. Criminal cases of which the juvenile court is given jurisdiction are governed by the Juvenile Court Law, Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code. See Welf. & Inst. Code §§ 203 (juvenile court proceedings non-criminal), 245 (superior court jurisdiction), 602 (criminal law violation by minor subject to juvenile court jurisdiction), 603 (juvenile crimes not governed by general criminal law)."

could have easily done so. To impose this duty on prosecutors is redundant and a wasteful use of scarce resources. Proposed Rule 3.8(b) therefore should be deleted.

III.

PROPOSED RULE 3.8(D) IS OVERLY BROAD AND PLACES AN UNDUE BURDEN UPON PROSECUTORS TO DISCLOSE PRE-TRIAL EXCULPATORY EVIDENCE.

Penal Code section 1054.1 provides:

"The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

"(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

"(b) Statements of all defendants.

"(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

"(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

"(e) Any exculpatory evidence.

"(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

In *Brady v. Maryland* (1963) 373 U.S. 83, 87-88, the court held that the prosecutor must affirmatively disclose material exculpatory evidence irrespective of whether the defendant makes a specific request, a general request or no request at all. (*United States v. Agurs* (1976) 427 U.S. 97, 107.) Evidence is exculpatory if it might be helpful to the defendant to establish a defense or attack the prosecution's case, such as by impeaching prosecution witnesses. (*Kyles v. Whitley* (1995) 514 U.S. 419, 434.) Evidence is "material" if there is a "reasonable probability" that had

the matter been known to the defense, a different result or verdict might have been obtained at trial. (*Ibid.*) “A ‘reasonable probability’ of a different result . . . [is] shown when the Government’s evidentiary suppression ‘undermines the confidence in the outcome of the trial.’” (*Ibid.*; *Strickler v. Greene* (1999) 427 U.S. 263, 298.)

The prosecutor’s duty to disclose exculpatory evidence extends beyond the contentions in the prosecutor’s case file or matter actually known by the prosecutor and encompasses the duty to ascertain and disclose “any favorable evidence known to others acting on the government’s behalf. . .” (*Kyles v. Whitley, supra*, 514 U.S. 419, 437.) “The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government’s investigation.” Irrespective of the prosecutor’s good or bad faith to learn of evidence favorable to the defense, the prosecutor is responsible for failing to disclose the evidence possessed by the “prosecution team.” (*In re Brown* (1998) 17 Cal.4th 873, 879.) The California Supreme Court in *In re Steele* (2004) 32 Cal.4th 682, 699, explained these principles:

“Implicitly, *Brady* requires the prosecution to disclose only evidence that is favorable and material under the prosecution’s evidence or theory of the case. Otherwise, the prosecution effectively would be required to do what *Brady* does not require, that is, to ‘deliver [its] entire file to defense counsel’ (*United States v. Bagley* [1985] 473 U.S. 667 [,]675) in order to avoid withholding evidence that may, or may not, become favorable and material depending on whatever unknown and unknowable theory of the case that the defendant might choose to adopt.”

Proposed Rule 3.8(d) originally imposed upon the prosecutor the duty to “comply with all constitutional obligations, as defined by relevant case law. . .” After the rule was approved by the Commission, at the urging of Los Angeles County Public Defender Michael Judge, the Board of Governors changed proposed Rule 3.8(d) to read:

“A prosecutor in a criminal case shall: [¶] (d) make timely disclosure of all evidence or information that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by protective order of the tribunal.”

Much is wrong with the current proposed rule which is copied from the ABA Model Rules. First, statutory, federal and state decisional authority presently impose upon the

prosecutor a substantial burden to disclose exculpatory evidence. As such, there is no need to impose a greater duty upon the prosecutor to disclose "all evidence or information" which merely "tends to negate the guilt of the accused . . ." To impose an ethically sanctionable duty upon the prosecutor to disclose information that far exceeds the requirements established by both the United States and California Supreme Courts is unwarranted, overly burdensome as a matter of practice and inherently causes conflict and confusion. Indeed, a prosecutor will be required to speculate as to which defenses the defense may present at trial. (*In re Steele, supra*, 32 Cal.4th 682, 699.) If a prosecutor speculates incorrectly and fails to disclose information that he/she in good faith believed to be irrelevant, then that prosecutor could still be disciplined. For an ethics rule to expose a prosecutor to discipline for incorrectly, and in good faith, speculating about irrelevant evidence is indeed an untenable rule.

Second, proposed Rule 3.8(d), as originally submitted to the Board of Governors, takes into consideration California's discovery statutes⁵; the current proposed rule does not consider California law.

Third, in that the proposed rule imposes duties far in excess of those imposed by California law upon prosecutors, unnecessary confusion will be created between the duties imposed upon prosecutors by law and the greater duties imposed by proposed Rule 3.8(d).

IV.

**PROPOSED RULE 3.8(D) DOES NOT CONSIDER CALIFORNIA'S
UNIQUE STATUTORY PITCHESS MECHANISM DESIGNED TO
ACCESS POLICE PERSONNEL RECORDS AND, AS SUCH, THE
PROPOSED RULE WILL CREATE CONFUSION, WILL
SUBSTANTIALLY BURDEN PUBLIC ENTITIES AND WILL
CAUSE NEEDLESS LITIGATION.**

A. Pitchess Motion Principles

Generally, a peace officer's personnel records "are confidential and shall not be disclosed in any criminal or civil proceeding. . . ." (Pen. Code, § 832.7, subd. (a).) The statute provides for an exception by permitting disclosure pursuant to Evidence Code sections 1043 and 1046. (*Ibid.*; *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016; *City of Los Angeles v. Superior*

⁵ Proposed Rule 3.8(d) as originally drafted mandated that a prosecutor "comply with all constitutional obligations, as defined by relevant case law . . ."

Court (2002) 29 Cal.4th 1, 9; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019 [discovery of peace officer personnel records is a "limited right"].) This statutory scheme is a codification of *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1098; *City of Los Angeles v. Superior Court, supra*, 29 Cal.4th 1, 9.) Evidence Code sections 1043 and 1045 in substance provide that a moving party may attempt to discover relevant peace officer personnel records by filing a motion with attached affidavits demonstrating good cause for discovery. (*People v. Hill, supra*, 131 Cal.App.4th 1089, 1097.)

B. California's Unique Statutory Scheme

When it drafted what is now proposed Rule 3.8, the ABA either did not consider California's comprehensive and unique statutory scheme allowing criminal defendants to access police personnel records or the corollary burdens that proposed Rule 3.8(d) will impose upon public entities required to process requests for peace officer personnel records. The State of New York appears to be the only other state that has statutorily created the right of a criminal defendant to access police personnel records. (See N.Y. Civ. R. § 50-a.) Even so, New York's statutory scheme is not as comprehensive as California's Evidence Code sections 1043-1046. (Compare Evid. Code, §§ 1043-1046 to N.Y. Civ. R. § 50-a.) Other jurisdictions, however, permit access to police personnel records on a case by case basis (see, e.g., *State v. Hawaii* (1987 Hi.) 738 P.2d 812; *Stinnett v. State* (1990 Nv.) 789 P.2d 579; *State ex rel. Portland v. Keys* (1989) 96 Or.App. 669), but the majority of the cases involving the discovery or inspection of police personnel records "has been denied more often than allowed." (86 A.L.R. 3d 1070, fn. 42 "Accused Right to Discovery or Inspection of records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case.")

C. Proposed Rule 3.8(d) Conflicts with the *Pitchess* Standards Which Will Cause Needless Confusion and Litigation

California Evidence Code sections 1043 and 1045, in substance, provide that the petitioner may attempt to discover relevant peace officer personnel records by filing a motion with attached affidavits demonstrating good cause for discovery. (*People v. Hill, supra*, 131 Cal.App.4th 1089, 1097.) Good cause is a "relatively low threshold." (*Warrick v. Superior Court, supra*, 35 Cal.4th 1011, 1019; *People v. Hill, supra*, 131 Cal.App.4th 1089, 1097.) Even

so, there are two elements for the required showing: 1) the criminal defendant must establish materiality of the information; 2) and there must be a reasonable belief that the police agency has the desired records or information. (*Ibid.*) If the criminal defendant establishes materiality, then the court will conduct an in-chambers inspection to ascertain what, if any, relevant information should be disclosed. (*Warrick v. Superior Court, supra*, 35 Cal.4th 1011, 1017 [citations omitted]; *People v. Hill, supra*, 131 Cal.App.4th 1089, 1098.)

In contrast to the *Pitchess* standard, proposed Rule 3.8(d) imposes upon the prosecutor the mandatory duty to give to the defense "all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Proposed Rule 3.8(g) further imposes the mandatory duty upon the prosecutor the duty to disclose "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."

The conflict between the *Pitchess* standards and the proposed new ethical duties imposed upon prosecutors is both patent and substantial. On the one hand, the *Pitchess* standard requires a showing of materiality coupled with a reasonable belief that the police agency has the desired records. In contrast, proposed Rule 3.8 requires the prosecutor to turn over to the defense "all evidence" that negates or mitigates guilt, as well as imposing upon the prosecutor the ongoing post-conviction duty to disclose information that negates the defendant's guilt. These conflicting standards will no doubt cause unnecessary litigation to reconcile these standards.

V.

PROPOSED RULE 3.8(F) SHOULD BE DELETED BECAUSE IT WOULD IMPROPERLY SUBJECT A PROSECUTOR TO DISCIPLINE FOR EXTRAJUDICIAL STATEMENTS MADE BY PERSONS OVER WHOM THE PROSECUTOR HAS NO SUPERVISION OR CONTROL.

Proposed Rule 3.8 (f) provides:

"A prosecutor in a criminal case shall [¶] exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6."

The Commission's Comment 5 to proposed Rule 3.8(f) "supplements Rule 3.6 which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding." The Commission's Comment 6 to proposed Rule 3.8 (f) states in pertinent part "[o]rdinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals."

Proposed Rule 3.8(f) is wholly unworkable to the extent that prosecutors would be subject to discipline for failing to exercise "reasonable care" over persons whom the prosecutor has no supervision or control. Over the course of a year, the Criminal Branch of the Los Angeles City Attorney's Office has contact with literally hundreds of thousands of individuals, e.g., witnesses, victims, police, who in some manner, "assist or who are associated" with the more than 120,000 cases filed each year, and over whom the prosecutor has no ability whatsoever to supervise or control their speech. The rule is particularly unworkable in the context of the hundreds of thousands of victims or witnesses, who in the absence of a court order, have the First Amendment right to make any extrajudicial comments they so choose.

VI.

PROPOSED RULE 3.8(G) IS OVERLY BROAD BY PLACING AN UNDUE BURDEN UPON PROSECUTORS TO DISCLOSE POST-CONVICTION EXCULPATORY EVIDENCE.

A prosecutor's duty to disclose material exculpatory evidence extends to post-conviction matters. If a prosecutor discovers information that "undermines confidence in the verdict" even after trial, the prosecutor is obligated to disclose it. (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427; *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.) The obligation is particularly relevant when the defendant raises a challenge to a conviction in a habeas corpus proceeding. (*Thomas v. Goldsmith* (9th Cir. 1992) 979 F.2d 746, 749-750; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261.)

Proposed Rule 3.8(g) provides:

"When a prosecutor 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, the prosecutor shall:

"(1) promptly disclose that evidence to an appropriate court or authority,
and

“(2) If the conviction was obtained in the prosecutor’s jurisdiction,

“(i) promptly disclose that evidence to the defendant unless the court authorizes delay, and

“(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.”

Much is also wrong with this proposed rule. First, this proposed section is highly controversial among the members of the Commission. The minority correctly stated that proposed Rule 3.8(g)(1) creates a lack of clarity as to how a prosecutor located in a jurisdiction that did not obtain a conviction would know whether the information is “new, credible, and material creating a reasonable likelihood . . .” The majority of the Commission erroneously responded that this provision was added to create a higher standard and to cause prosecutors to err on the side of disclosure. The majority’s reasoning is further flawed because the rule does not appear to take into consideration the practical realities of both the geographic size and population of California. For example, in California, there are 58 counties⁶ and 480 cities.⁷ To impose a sanctionable ethical burden upon prosecutors requiring them to know of exculpatory post-conviction evidence in stranger jurisdictions is simply unrealistic. This is especially true where a prosecutor, who is a stranger to a case, can have no meaningful way of evaluating the importance of the supposedly exculpatory evidence.

Second, the Commission’s Report concerning “Proposed Rule 3.8, Special Responsibilities of Prosecutor,” State Variations, at 102-105, notes that only two smaller states, Wisconsin and Delaware, have adopted this rule. The New York Court of Appeals rejected a proposal to adopt a rule based upon proposed Rule 3.8(h). The North Carolina State Bar Ethics Subcommittee similarly voted to reject the proposed rule in its entirety. This proposed rule has thus garnered little support throughout the United States.

⁶ See California State Association of Counties
(http://www.csac.counties.org/images/public/CA_County_Map_High_Res.pdf)

⁷ See California League of Cities
(http://www.cacities.org/resource_files/20455.city%20list.pdf)

Third, as a general rule, a member of the State Bar has no ethical obligation to act on a case to which the member is a stranger. There is no reason why prosecutors should be singled out for this unduly burdensome and unfair treatment.

Fourth, in order to avoid the risk of ethical sanctions, prosecutors will cause an "evidence dump" whenever any potentially exculpatory evidence comes to their attention that may question the defendant's guilt, no matter how remote that evidence is to the case. This will result in the receiving prosecutors or courts giving little consideration to the "evidence dump." If, however, the "evidence dump" is always treated with studious follow-up, this will cause a waste of precious scarce prosecutorial and judicial resources, given that in most instances the, "evidence dump" will have no meaningful value.

Fifth, proposed Rule 3.8(g) greatly expands the duties of a prosecutor for post-conviction discovery. In *In re Steele, supra*, 32 Cal.4th 682, 700, the Supreme Court pragmatically rejected an expansive duty to disclose post conviction evidence:

"The duty of disclosure exists to avoid 'an unfair trial to the accused' (*Brady, supra*, 373 U.S. at p. 87) or 'to ensure that a miscarriage of justice does not occur' (*United States v. Bagley, supra*, 473 U.S. at p. 675). Requiring the prosecution, on its own, to disclose information that might fit some defense theory but is irrelevant to the prosecution evidence or theory of the case is generally not necessary to ensure a fair trial. Because mitigation is often ""in the eye of the beholder"" (*Burger v. Kemp* (1987) 483 U.S. 776, 794) the defense will know far better than the prosecution what evidence fits its theory of the case and what evidence does not. Because the defense can offer virtually anything about the defendant personally that it considers mitigating, virtually anything regarding the defendant can be exculpatory if the defense considers it so. Thus, evidence whose exculpatory nature is not obvious might become exculpatory whenever the defense so claims. But the duty to disclose evidence cannot extend to evidence the prosecution had no reason to believe the defense would consider exculpatory. Requiring the prosecution to, as the high court put it, 'assist the defense in making its case' (*United States v. Bagley, supra*, at p. 675, fn. 6) is unnecessary when it comes to

potential mitigating evidence regarding the defendant personally. It would also be overly burdensome. It is one thing to expect the prosecution to know about its own case and to provide the defense with evidence weakening that case. It is quite different to expect it to be alert to information unrelated to its case that might support a defense theory, especially given the unlimited range of potentially mitigating evidence.”

VII.

PROPOSED RULES 3.8(D) AND (G) WILL CAUSE A SIGNIFICANT INCREASE IN COSTS TO THE CITY ATTORNEY'S OFFICE, WHICH DOES NOT HAVE THE RESOURCES DUE TO DEVASTATING BUDGET AND PERSONNEL CUTBACKS.

Proposed Rules 3.8(d), (g) both impose a new, heavy fiscal strain upon the Los Angeles City Attorney's Office Criminal Branch and the office as a whole. Proposed Rule 3.8(d) will burden City Attorney prosecutors with substantial pre-trial discovery, including the filing of *Pitchess* motions. Proposed Rule 3.8(g) will burden our prosecutors with significantly greater, and frequently superfluous, obligations to disclose post-conviction exculpatory evidence.

This Office's fiscal resources have been severely strained due to budgetary cutbacks over the last 24 months. Specifically, the City Attorney's overall budget in the last 24 months has been cut by 28%. In the last 13 months alone, the total staff of the City Attorney's Office has been reduced by 15%, *i.e.*, 150 employees. The number of attorneys assigned to the Criminal Branch in the last year was reduced by 27%, from 290 attorneys to the current 218 attorneys. At the same time, the City Attorney's Criminal Branch caseload remains exceedingly high.

Bluntly stated, the Los Angeles City Attorney's Office does not have the resources to both protect the People of California at the present high level of service, and meet the new burdensome obligations under both proposed Rules 3.8(d) and (g). The adoption of proposed Rules 3.8(d) and (g) will force the City Attorney's Office into a completely unacceptable Hobson's choice of choosing between maintaining the highest level of ethical practice and reducing its high level of public protection. This devastating choice is one which the City Attorney's Office should not be forced to make.

In the context of *Pitchess* motions, the Los Angeles City Attorney's Office processes as many as 5,000 *Pitchess* motions per year, the vast majority of which are filed by criminal defendants. Rule 3.8 will cause an increase in the number of *Pitchess* motions filed by prosecutors that will further strain the City Attorney's scarce resources. Due to budgetary cutbacks in the last year, there was a 23% reduction in full time *Pitchess* motion attorneys, from nine to seven attorneys.

The prospect of prosecutors filing more *Pitchess* motions and further taxing the scarce resources of both the City Attorney's Office and courts is especially painful when those motions are filed by City Attorney prosecutors and defended by City Attorney *Pitchess* motion attorneys. When this occurs, there will be a conflict of interest and the City Attorney's Office will be forced to retain very expensive outside counsel, with resources it does not possess, to defend against the *Pitchess* motions. For proposed Rules 3.8(d) and (g) to force the City Attorney's Office to pay for very expensive outside counsel to defend against *Pitchess* motions brought by the City Attorney's Criminal Branch will further cut deep into the bone of the City Attorney's budget. As a practical matter, the City Attorney will be forced to divert budgetary allocations from already overtaxed and unfunded City Attorney services in order to pay for the conflicts unnecessarily created by proposed Rules 3.8(d) and (g). Accordingly, the Commission should substantially revise both proposed Rules 3.8(d) and (g) as recommended herein.

CONCLUSION

Based upon the foregoing, the Los Angeles City Attorney's Office respectfully requests that the Commission substantially revise proposed Rules 3.8(d) and (g) because the subdivisions conflict with California law, place undue burdens on prosecutors already strained resources and will cause needless confusion and litigation. The Los Angeles City Attorney's Office further requests that the Commission delete proposed Rules 3.8(b) and (f) in their entirety.

Sincerely,



WILLIAM W. CARTER
Chief Deputy
Los Angeles City Attorney's Office