Rule 3.8 Special Responsibilities of a Prosecutor
(Proposed Rule Adopted by the Board on November 17, 2016)

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute 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 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 the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, 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 or other criminal proceeding 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 work product protection;

(2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) There is no other feasible 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.

Discussion

[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.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) 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.

[3] The disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although this rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] 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.

[5] Paragraph (f) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is

not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[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. 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. (See rule 4.2.)

[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. Depending upon the circumstances, steps to remedy the conviction could 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.

[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 paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.8
(Current Rule 5-110)
Special Responsibilities of a Prosecutor

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rule 5-110 (Performing the Duty of a Member in Government Service) in accordance with the Commission Charter. Proposed Rule 3.8 (Special Responsibilities of a Prosecutor) amends current rule 5-110 and addresses the duties of government lawyers, including a criminal prosecutor. In particular, the proposed rule states that it is the responsibility of a criminal prosecutor to make timely disclosure to the defense of exculpatory information.

Rule As Issued For 90-day Public Comment

At its November 20, 2015 meeting, the Board considered and granted a Commission request to authorize proposed amendments to current rules 5-110 and 5‑220 (Suppression of Evidence) for a 90-day public comment period, and that the processing of these proposed amendments be prioritized and handled separately from the Commission's comprehensive proposed amendments to the rules. After the conclusion of the 90-day public comment period, which included a public hearing on February 3, 2016, the Commission met on March 31 and April 1, 2016 to consider all of the public comments received. In response to the public comments, the Commission further revised proposed rule 5-110[1] and, at the Board's May 13, 2016 meeting, the Board authorized an additional 45-day public comment period to seek input on these changes.

The 45-day public comment period ended on July 1, 2016. The Commission considered the public comments received at its meeting on August 26, 2016. Following discussion, no changes were made to the proposal and the Commission voted to recommend Board adoption. The Board considered the Commission's recommendation at the Board's meeting on October 1, 2016. After a presentation by the Commission and oral comments from interested persons who attended the Board's meeting, the Board voted to adopt the Commission's proposed rules as recommended. State Bar staff also was directed to prepare a petition for submitting the proposed rules to the Supreme Court of California for approval. Board adopted amendments to the rules do not be binding and operative unless and until they are approved by the Supreme Court of California. (See Business and Professions Code sections 6076 and 6077.) State Bar staff submitted the proposed amended rules to the Supreme Court on January 9, 2017 (Supreme Court case number S239387).

The Board's action to adopt proposed amended rules 5-110 and 5-220 on an expedited basis as rule revisions that fit the framework of the current rules does not obviate the need for the Commission to prepare versions of those rules for inclusion in the Commission's recommendation for comprehensive amendments to the entire rules because the Commission is recommending a new rule numbering system patterned on the Model Rules as well as other formatting and style changes that impact the entire rules.

[1] Proposed amended rule 5-220 was not modified by the Commission following consideration of public comment. That proposal would remain simply the addition of a Discussion section sentence stating: "See rule 5-110 for special responsibilities of a prosecutor."

In addition, the final decision to approve and implement proposed amended rules 5-110 and 5-220 rests with the Supreme Court. The Supreme Court might determine that the proposed amendments to rule 5-110 should be implemented together with the comprehensive rule revisions and not on a separate expedited basis. Accordingly, the Commission has prepared a version of proposed amended rule 5-110 formulated as a proposed rule 3.8 that could be acted on by the Supreme Court and implemented as a part of the State Bar's comprehensive revisions that are presently under consideration. Proposed rule 3.8 is substantively identical to proposed amended rule 5-110 and is summarized in the Board materials at the State Bar website link below.

http://board.calbar.ca.gov/Agenda.aspx?id=11335&tid=0&show=100011596&s=true#10018785

Finally, even if the Supreme Court determines to implement amendments on an expedited basis, at the subsequent time when the State Bar's comprehensive revisions are considered by the Court, a version of amended rule 5-110 renumbered as rule 3.8 (and conformed to the format and style of the new rules) would be appropriate for consideration by the Court.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.8 [5-110]

Commission Drafting Team Information

Lead Drafter: Toby Rothschild
Co-Drafters: George Cardona, Karen Clopton, Joan Croker, Mark Tuft

I.A. CURRENT CALIFORNIA RULE

Rule 5-110 Performing the Duty of Member in Government Service

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.

I.B. CURRENT ABA MODEL RULE

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from 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;

(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 or other criminal proceeding 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;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(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 statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(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. 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.

[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 an uncharged suspect who has knowingly waived the rights to counsel and silence.

[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 client-lawyer relationship.

[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 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).

[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.

[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.

[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.

[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.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 3.8 [5-110]
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 3.8 [5-110]
Vote: 11 (yes) – 1 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.8 [5-110] Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute 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 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 the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, 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 or other criminal proceeding 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 work product protection;

(2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) There is no other feasible 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.

Discussion

[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.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) 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.

[3] The disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although this rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] 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.

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

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[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. 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. (See rule 4.2.)

[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. Depending upon the circumstances, steps to remedy the conviction could 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.

[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 paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

IV.A. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 5-110)

Rule 3.8 [5-110] ~~Performing the Duty of Member in Government Service~~ Special Responsibilities of a Prosecutor

~~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.~~

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute 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 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 the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, 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 or other criminal proceeding 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 work product protection;

(2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) There is no other feasible 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:

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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.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) 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.

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[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 paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

IV.B. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT ABA MODEL RULE 3.8)

Rule 3.8 Special Responsibilities of a Prosecutor

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(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 the prosecutor knows* or reasonably should know* 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 that the prosecutor knows* or reasonably should know* mitigates the sentence, 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 or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:*

(1) ~~the~~The information sought is not protected from disclosure by any applicable privilege or work product protection;

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(3) ~~there~~There is no other feasible alternative to obtain the information;

(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 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~~rule 3.6 ~~or this Rule~~.

(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

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(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~~Discussion

[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 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.~~* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[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 an uncharged suspect who has knowingly* waived the ~~rights~~right to counsel and ~~silence.~~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.

[3] The disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although this rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[~~3~~4] 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 client-lawyer relationship.~~

[5] Paragraph (f) supplements ~~Rule~~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 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~~Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with ~~Rule~~rule 3.6(b) or 3.6(c).

[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~~ Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to ~~law-~~law enforcement personnel and other relevant individuals.

[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~~court authorized delay, to the defendant. ~~Consistent with the objectives of Rules 4.2 and 4.3, disclosure~~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. (See rule 4.2.)

[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~~Depending upon the circumstances, steps to remedy the conviction could 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.

[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~~paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this ~~Rule~~rule.

V. RULE HISTORY

Rule 5-110 originated as rule 7-102 and was adopted effective January 1, 1975. Rule 7-102, titled "Performing the Duty of Member of the State Bar in Government Service," was based on ABA DR 7-103. Rule 7-102, as adopted, provided:

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

In 1986, the State Bar Committee on Professional Responsibility and Conduct ("COPRAC") rules subcommittee studied ABA Model Rule 3.8 but did not recommend it for adoption by the Board. COPRAC noted that California's rule 7-102 already addressed the concept in paragraph (a) of Model Rule 3.8, which prohibits a prosecutor from prosecuting an accused without probable cause. It was also COPRAC's position that the remainder of Model Rule 3.8 addressed the legal and procedural relationship between a prosecutor and the accused. Because this relationship is subject to constant refinement as a result of legislation and constitutional decisions which serve to define it, COPRAC did not recommend adoption of these other provisions.

As part of the comprehensive revision of the Rules of Professional Conduct, rule 7-102 was renumbered 5-110 and became operative on May 27, 1989. No substantive amendments were recommended at that time. The Commission also considered ABA Model Rule 3.8 and again determined that rule 5-110 was preferable to the ABA Model Rule, as it was much broader (the conduct of a member who knows that criminal charges are not supported by probable cause, as well as the conduct of a member who should know such charges are not supported by probable cause, are encompassed by the proposed rule). In addition, rule 5-110 required a member to advise the court of the lack of probable cause after the case was filed, whereas Model Rule 3.8(a) speaks only of prosecuting a charge, which is ambiguous as to a prosecutor's duty if evidence subsequently shows that probable cause no longer exists. The amendments made in 1989 conformed the revised rule to the definition of a "member" in rule 1-100 and removed references to gender.

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

(See enclosure 2, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987.)

The 1987 amendment was the last revision of rule 5-110.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  OCTC refers the Commission to its prior comments to the Commission and the Board of Trustees about this rule. This rule is currently being considered by the Board of Trustees.

  OCTC's foremost concerns regarding any revisions to the Rules of Professional Conduct are that the rules protect the public and are clearly written so as to be understood by the membership and enforceable by OCTC. This comment is offered with those goals in mind.

  The proposed rule essentially tracks ABA Model Rule 3.8 and is consistent with established California discipline law. Additional clarification within the proposed Rule would enhance notice to the membership and enforcement by this office.

  1. 5-110(B) [3.8(b)] should specify when a prosecutor is obligated to make reasonable efforts to assure that an individual has been advised of his or her right to counsel. In many instances, this responsibility is addressed by police officers at the time of an arrest. A prosecutor may not have knowledge, let alone control, of these events. Police departments in California are generally independent of prosecutors' offices.

     Commission Response: The Commission has not made the suggested change. As the commenter notes, the responsibility is typically addressed by police officers at the time of arrest.

  2. Regarding 5-110(D) [3.8(d)], the requirement that disclosures be made "timely" is addressed in discussion point 3 which states that a "disclosure's timeliness will vary with the circumstances: and the rule "is not intended to impose timing requirements different from those established" by law. It may be advisable to clarify and state this concept in the text of the rule.

Commission Response: The Commission has not made the suggested change. The purpose of the comment is to clarify the application of the rule. That is precisely what Comment [3] does.

3. 5-110(D) [3.8(d)] requires disclosure of all information that "tends to negate" guilt or mitigate an offense. Comment [3] then states that the disclosure obligation is "not limited to evidence or information that is material as defined by Brady . . . and its progeny." The discussion item notwithstanding, language similar to that recommended in the proposed section has been interpreted differently in some jurisdictions. Consequently, it may be advisable to state the Commission's intention within the text of the rule itself, namely, that a prosecutor's duty to disclose is broader than that which is material as defined in *Brady*. Additionally, the section should address whether the evidence and information to be disclosed includes that which may impeach or discredit a witness for the prosecution.

   Commission Response: The Commission has not made the suggested change. As noted in the response to comment #2, above, the purpose of the comment is to clarify the application of the rule. That is precisely what Comment [4] does. It is not necessary to provide the clarification in the black letter, as the black letter does not state the "materiality" standard in *Brady* and its progeny.

4. Finally, section 5-110(D) states that a prosecutor must disclose all evidence or information "known to the prosecutor." It is not clear if this language refers to knowledge of the existence of evidence and information, or knowledge that the evidence and information tends to negate the guilt of the accused. Moreover, the section does not address a prosecutor's duty to search for exculpatory evidence or whether a failure to comply with the section based upon reckless conduct or gross negligence is a basis to find a violation for disciplinary purposes.

   Commission Response: The Commission addressed this issue in a previous draft of the Rule.

- **State Bar Court:** No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, fourteen public comments were received. Eight comments agreed with the proposed Rule, three comments disagreed, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171; *Price v. State Bar* (1982) 30 Cal.3d 537
- *In the Matter of Brooke P. Halsey, Jr.* (2007), case No. 02-O-10196 [hearing department decision], Supreme Court case No. S181620
- *In the Matter of Jon Michael Alexander* (2014) case No. 11-O-12821, [Review Department Opinion, not published], Supreme Court case No. S219597]
- *Kyles v. Whitley* (1995) 514 U.S. 419, 437
- *In re Brown* (1998) 17 Cal.4th 873, 879
- *United States v. Hanna* (9th Cir. 1995) 55 F.3d 1456, 1461
- *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952
- *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not excused merely because the client or a third party suffers no loss]
- *In re Kline* (2015) 2015 A.3d___, 2015 WL 1638151
- *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678

See also, Reports and Recommendations of the California Commission for the Fair Administration of Justice, posted at: http://www.ccfaj.org/rr-pros-official.html [last visited June 16, 2015].

- Official Report and Recommendations on Reporting Misconduct (October 18, 2007).
- Official Report and Recommendations on Prosecutorial Duty To Disclose Exculpatory Evidence (March 6, 2008).

Regarding statistics cited by the Innocence Project, see Kathleen Ridolfi, Tiffany M. Joslyn & Todd Fries, *Material Indifference: How Courts Are Impeding Fair Disclosure In Criminal Cases*, National Association of Criminal Defense Lawyers (2014), posted at: http://www.nacdl.org/discoveryreform/materialindifference/.

B. ABA Model Rule Adoptions

Model Rule 3.8(a), (b), (c) & (f) Adoptions. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor," revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.pdf [Last accessed on 2/7/17].

- Twenty-eight states have adopted Model Rule 3.8, paragraphs (a), (b), (c) and (f) verbatim.[1] Seventeen jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraphs (a), (b), (c), (d), and (f).[2] Six states have adopted a version of the rule that is substantially different from Model Rule 3.8, paragraphs (a), (b), (c), (d), and (f).[3]

Model Rule 3.8(d) Adoptions. Model Rule 3.8(d), which requires a prosecutor to timely disclose to the defense evidence or information that the prosecutor knows "tends to negate the guilt of the accused or mitigate the offense," is of special concern to the Study Group and so is treated separately in this subpart.

- Forty jurisdictions have adopted Model Rule 3.8, paragraph (d) verbatim.[4] Eight jurisdictions have a provision that closely tracks the Model Rule language with non-substantive variations.[5] Two jurisdictions have provisions that employ different language but contain the same substance, or include only part of Model Rule 3.8(d).[6] Only California lacks a counterpart to Model Rule 3.8(d). Attached as

[1] The twenty-eight states are: Arizona, Colorado, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming.

[2] The seventeen jurisdictions are: Alabama, Alaska, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Kentucky, Massachusetts, New Jersey, North Dakota, Ohio, Tennessee, Texas, and Vermont.

[3] The six states are: California, Georgia, Maine, New York, Oregon, and Wisconsin.

[4] The forty jurisdictions are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

[5] The eight jurisdictions are Alabama, Maine, New Jersey, New York, North Dakota, Ohio, South Dakota and Virginia.

[6] The two jurisdictions are D.C. and Georgia. D.C. Rule 3.8(d) and (e) provide that a prosecutor shall not:

> (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;

Georgia Rule 3.8(d) is identical to the first clause of Model Rule 3.8(d) but deletes the remainder. It provides that a lawyer shall:

Attachment 1 is a document showing the variations in the ten jurisdictions that have diverged from the Model Rule.

Model Rule 3.8(e) Adoptions. Model Rule 3.8(e) prohibits a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless three enumerated conditions are satisfied. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(e)," revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.pdf [Last visited 2/7/17]

- Twenty-four jurisdictions have adopted Model Rule 3.8, paragraph (e) verbatim.[7] Nine jurisdictions have adopted a slightly modified version of Model Rule 3.8, paragraph (e).[8] Seventeen jurisdictions have not adopted any version of paragraph (e) of the Model Rule."[9] California also has not adopted any version of paragraph (e).

Model Rule 3.8(g) & (h) Adoptions. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.8(g) (h)," revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.pdf

- Two states have adopted Model Rule 3.8, paragraphs (g) and (h) verbatim.[10] Eleven states have adopted a slightly modified version of Model Rule 3.8, paragraphs (g) and (h).[11] Six jurisdictions are studying Model Rule 3.8, paragraphs (g) and (h)."[12]

(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.

[7] The twenty-four jurisdictions are: Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Carolina, Tennessee, Washington, and West Virginia.

[8] The nine jurisdictions are: Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Rhode Island, South Dakota, Vermont, and Wisconsin.

[9] The seventeen jurisdictions are: Alabama, Arkansas, Connecticut, District of Columbia, Florida, Hawaii, Maine, Maryland, Michigan, Mississippi, New York, Oregon, Pennsylvania, Texas, Utah, Virginia, and Wyoming.

[10] The two states are: Idaho and West Virginia.

[11] The eleven states are: Alaska, Arizona, Colorado, Delaware, Hawaii, New York, North Dakota, Tennessee, Washington, Wisconsin, and Wyoming.

[12] The six jurisdictions are: California, District of Columbia, Nebraska, New Hampshire, Pennsylvania, and Vermont.

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. In paragraph (a), provide that a prosecutor's duty not to prosecute without probable cause includes both a duty not to commence a prosecution as well as not to continue to prosecute.

    - Pros: It clarifies the scope of prohibited conduct under paragraph (a) and carries forward similar language in current rule 5-110. The first Commission proposed similar language.

    - Cons: The change is unnecessary; the word "prosecute" includes both the commencing and maintenance of a prosecution.

2. In paragraph (a), recommend adoption of a knowledge standard, i.e., the prosecutor must know that the prosecution is not supported by probable cause before the duty to refrain from prosecution is triggered.

    - Pros: The knowledge standard, which is found in the Rule 3.8 counterpart in every other jurisdiction is the appropriate standard for imposing discipline on a prosecutor. "Know" is defined in Model Rule 1.0(f) as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." By providing that knowledge can be inferred from the circumstances, the intent is to prevent a lawyer from putting his or her head in the sand and claiming not to have known of the facts when the facts would have been obvious given the surrounding circumstances. That would appear to be a sufficiently rigorous standard for Rule 3.8(a). The same definition was recommended by the first Commission and adopted by the Board, and it is anticipated that this Commission will make a similar recommendation. (See, e.g., Report & Recommendation for Proposed Rule 4.2 [2-100], which also contemplates a similar definition.) The standard in current rule 5-110, "knows or should know," is unnecessary for the same reasons that a "grossly negligent" or "reckless" standard is unnecessary. (See Section IX.B.1, below.)

    - Cons: Current rule 5-110, which similarly addresses a prosecutor's duty not to prosecute criminal charges when probable cause is absent, has a "knows or should know" standard. There is no compelling reason to change that standard.

    - Note: See also Section IX.B.1, below, concerning the recommended rejection of a "reckless" or "gross negligence" standard.

3. Recommend adoption of Model Rule 3.8(b), modified to limit its application to situations where the right to counsel exists.

    - Pros: The revision accurately describes the law, i.e., that the prosecutor's obligation applies when a person has a right to counsel under the Sixth Amendment (when adversary judicial criminal proceedings have been initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment) or (as Texas and Wyoming have made clear) under *Miranda's* prophylactic procedures derived from the Fifth Amendment (when conducting a custodial interrogation). (See Niki Kuckes, *Appendix A: Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Conduct: Special Responsibilities of A Prosecutor the State of Rule 3.8*, 22 Geo. J. Legal Ethics 463, 477-79 (2009).) Limiting the paragraph as indicated is appropriate in a disciplinary rule.

    - Cons: None identified.

4. Recommend adoption of Model Rule 3.8(c), modified to delete a reference to preliminary hearings, and to add a qualification where a court has approved the accused's pro per appearance. This recommendation also includes the recommended adoption of proposed Comment [1], which is based on Model Rule Comment [2], modified to reflect the proposed changes to the black letter.

    - Pros: The *pro per* qualifying language appears in a Comment to the Model Rule; similar to the first Commission, this Commission determined it is an appropriate limitation that belongs in the black letter and not a Comment. Deleting the reference to preliminary hearings is necessary because waiver of a preliminary hearing by an unrepresented accused conflicts with Penal Code § 860, as interpreted in *In re Jones* (1968) 265 Cal.App.2d 376, 381. The court in *Jones* held that an accused can only waive a preliminary hearing if represented by counsel.

    - Cons: None identified.

5. Recommend adoption of Model Rule 3.8(d), which provides a prosecutor must timely disclose to the defense all evidence and information known to the prosecutor that tends to negate guilt or mitigate the offense. This recommendation also includes the recommended adoption of proposed Comment [2], which is intended to clarify that paragraph (d)'s scope is intended to be broader than *Brady's* obligations.

    - Pros: The Model Rule language is intended to impose a duty on prosecutors that is broader than *Brady's* materiality standard. The provision is arguably more closely aligned with the current position of OCTC, which has informed the Commission that it can discipline a prosecutor for failure to disclose exculpatory evidence without proving materiality:

> If a goal of a new rule is to ensure disclosure of all potentially exculpatory or impeachment material, OCTC submits that a new rule should not require proof that the failure to disclose potentially exculpatory or impeachment information impacted the fairness of the criminal proceedings to a degree sufficient to constitute a *Brady* violation. Requiring a level of unfair prejudice is commonly understood as that which is "material" to the outcome of a trial and, consequently, a "materiality" component to a new rule would be irrelevant. Consistent with disciplinary case law, the issue is whether the prosecutor complied with his or her ethical obligations, not whether a failure to do so caused significant harm.[13] (See *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431 [an act of violating professional standards of behavior is not excused merely because the client or a third party suffers no loss].) Some, but not all, jurisdictions share this view. (See *In re Kline* (2015) 2015 A.3d ___, 2015 WL 1638151 and *In re Feland* (N.D. 2012) 820 N.W.2d 672, 678.)

See OCTC April 20, 2015 Memo to Commission, Section H., at p. 4.

> Further, the Model Rule language also aligns with the position taken by the Innocence Project in its submissions to the Commission, the concept being that a prosecutor's determination of whether evidence or information is exculpatory or mitigating should not depend on its materiality under the Constitutional *Brady* standard because materiality often can only be determined after the fact. Instead, the disclosure should occur at the trial court level before a falsely accused defendant suffers the harm of a wrongful conviction. The Model Rule standard, which requires disclosure of evidence and information "that tends to negate the guilt of the accused or mitigate the offense" is intended to accomplish that objective.[14]

Finally, the provision provides for an exception when the prosecutor believes a protective order is required, for example, to protect a witnesses or the public interest.

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[13] The nature and extent of the impact of a failure to disclose required material would remain an issue affecting the level of discipline to be imposed for a violation.

[14] See April 10, 2015 Letter from Professors Laurie Levenson and Barry Scheck to Commission, at page 2 ("Rule 3.8(d) was enacted by the American Bar Association to obviate the cognitively difficult problem prosecutors face in complying with the *Brady v. Maryland* standard which requires them to determine *before* a trial has been held whether undisclosed information will be considered "material" by an appellate court many years later. Rule 3.8(d) is designed to be broader and independent of *Brady,* requiring "timely" and prophylactic disclosure of all information that *could be Brady* or impeachment evidence (anything that "tends to negate guilt or mitigate punishment") in order to make sure *Brady* violations do not occur.")

- Cons: Although the ABA has opined that the Model Rule language is intended to be broader than *Brady*, the jurisdictions that have addressed the issue are split on whether the provision is broader than,[15] or coextensive with *Brady*.[16]

[15] The District of Columbia, North Dakota, and the U.S. District Court for the District of Nevada have evaluated the scope of the pertinent ethical rule in their jurisdiction and concluded it is broader than *Brady*. (See *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) [holding that Rule 3.8(e) requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley, Kyles,* and their progeny]; *In re Disciplinary Action Against Feland* (N.D.2012) 820 N.W.2d 672, 678 [holding that a prosecutor's ethical obligation to disclose evidence to the defense is broader than the duty under *Brady* or the criminal discovery rule]; *United States v. Acosta* (D. Nev. 2005) 357 F.Supp.2d 1228 [ordering the government, over objection, to disclose to the defense 60 days before trial all evidence that negates guilt or mitigates the crime, and concluding that the *Brady* standard of materiality makes sense only in the context of appellate review].) Virginia has issued an ethics opinion to the same effect. (See Virginia Legal Ethics Comm. Op. 1862 (2012) ("Timely Disclosure of Exculpatory Evidence and Duties to Disclose Information in Plea Negotiations").) The New York State District Attorney's Association has issued a best practices manual that clarifies that 3.8(d) disclosure is independent and broader than "materiality." (See The Right Thing: Ethical Guidelines for Prosecutors, DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK at 12 (2012), available at http://www.daasny.com/wp-content/uploads/2014/08/Ethics-Handbook-9.28.2012- FINAL1.pdf/.) The United States Attorney's Manual of the Department of Justice has adopted as an internal policy for disclosure a standard comporting with the ABA's broad interpretation of 3.8(d).

[16] Courts that have found Model Rule 3.8(d) coextensive with *Brady* are: *In re Attorney C* (Colo. 2002) 47 P.3d 1167 [holding that Rule 3.8(d) contains a "materiality standard" and rejecting the hearing board's conclusion that the rule incorporates a "broader and more encompassing" standard]; *In re Riek* (Wis. 2013) 834 N.W.2d 384 [rejecting the Office of Lawyer Regulation's argument that "SCR 20:3.8(f)(1) requires disclosure of favorable evidence or information without regard to its 'materiality'" and instead construing the rule "in a manner consistent with the scope of disclosure required by the United States Constitution, federal or Wisconsin statutes, and court rules of procedure"]; *Disciplinary Counsel v. Kellogg-Martin* (Ohio 2010) 923 N.E.2d 125 [holding that "DR 7-103(B) imposes no requirement on a prosecutor to disclose information that he or she is not required to disclose by applicable law, such as *Brady v. Maryland* or Crim.R. 16"]; *State ex rel. Okla. Bar Ass'n v. Ward* (Okla. 2015) 2015 OK 48 [construing ORPC Rule 3.8(d) "in a manner consistent with the scope of disclosure required by applicable law"]; *United States v. Weiss* (D. Colo 2006) 2006 U.S. Dist. LEXIS 45124 [rejecting defendants' argument that the rules of professional conduct mandate "that the Government's disclosure obligation is higher than the standards set in *Brady* and *Giglio* and holding that disclosure "is only necessary for information that is material"].

See also *In re Jordan* (La. 2005) 913 So. 2d 775 [holding that Respondent violated Rule 3.8(d) by "fail[ing]to produce evidence which was clearly exculpatory" and that Respondent "should have resolved this issue in favor of disclosure"]. *Jordan* case has been cited by courts both for the proposition that a prosecutor's ethical are broader than those imposed by law and that a prosecutor's duty merely parallels that laid out in Brady and its progeny. (See *Riek, supra* at pp. 390, citing *Jordan, Kellog-Martin*, and *Attorney C* for the proposition that "several jurisdictions rendered decisions construing their equivalent of SCR 20:3.8(f) consistent with the requirements of *Brady* and its progeny.") (Compare *In re Kline*, supra, 113 A.3d at p. 211 [disagreeing "that a fair reading of [Jordan] supports the [Riek] court's decision"].)

In addition, the Commission is unaware of any case in which a prosecutor has been disciplined absent a showing of materiality. It is questionable whether Rules of Professional Conduct that are intended to function as minimum standards for discipline should include what is arguably an aspirational standard for the breach of which discipline is not imposed. In addition, as several public comments to the first Commission asserted, an ethical rule that effectively imposes on prosecutors discovery obligations beyond those imposed by statutory and constitutional requirements may conflict with statutory provisions adopted by California Prop. 115, which added Penal Code Chapter 10, commencing with Section 1054, which defines discovery obligations in criminal cases, and which begins with a section (Section 1054) which states that the chapter "shall be interpreted" to, among other things, "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." (Penal Code Section 1054(e).) Penal Code Section 1054.1(e) requires prosecutors to disclose to the defense "any exculpatory evidence" that is "in the possession of the prosecuting attorney or if the prosecutor knows it to be in the possession of the investigating agencies." Penal Code Section 1054.5(a) states that "[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties."

6. Recommend adoption of Model Rule 3.8(e).

   - Pros: It is an important public policy to protect the lawyer-client relationship. (Compare proposed Rule 4.2 [2-100].) Subpoenaing a lawyer to present evidence in a criminal matter about a client will necessarily drive a wedge between them and destabilize the relationship.
   - Cons: First, California has not had a rule similar to this, but to the knowledge of the drafting team unwarranted subpoenas to attorneys have not posed a significant issue, either in civil or criminal cases. Second, the ability to issue subpoenas to attorneys, and the issues posed by such subpoenas are not unique to prosecutors and do not flow from the special obligations or responsibilities of prosecutors, making this an unusual addition to a rule supposedly unique to prosecutors. Third, subparagraphs (2) and (3) of Model Rule 3.8(e) create a unworkable standard that would be virtually impossible

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See also Steven Koppell, *An Argument Against Increasing Prosecutors' Disclosure Requirements Beyond Brady*, 27 Geo. J. Legal Ethics 643 (2014) [arguing that ABA Formal Ethics Opinion 09-454 (Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense) "is in conflict with Brady and should not be implemented in any state."].

to satisfy: the information must be "essential" to the investigation and there must be "no other feasible alternative."

B. Concepts Rejected (Pros and Cons):

1. Include a provision that would specify that reckless or grossly negligent failures to comply with the Rule's proscriptions will support a finding of a violation.

   - Pros: A criminal prosecutor's duty to disclose exculpatory evidence includes the duty to search for exculpatory evidence. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437; *In re Brown* (1998) 17 Cal.4th 873, 879; and *United States v. Hanna* (9th Cir. 1995) 55 F.3d 1456, 1461.) Expressly including acts or omissions involving recklessness and grossly negligent behavior will illuminate the duty to search for exculpatory evidence. In addition, this standard would be consistent with the enforcement of most of the Rules of Professional Conduct. As a general rule, a willful violation of the rules occurs when the attorney acted or omitted to act purposefully. That is, he or she knew what he or she was doing or not doing and intended whether to commit the act or to abstain from committing it. (See *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952.) Mere negligence or inadvertence should not be disciplinable. (See 4/20/15 OCTC Memo, at p. 4 which is available upon request.)

   - Cons: The appropriate standard is "knowledge," not reckless or gross negligence. (See Section IX.A.1, concerning paragraph (a), above.) It is not accurate that a prosecutor has a "duty to search for exculpatory evidence." Rather, the prosecutor has a duty not to ignore evidence that has been revealed during the criminal investigation. A knowledge standard, which recognizes that knowledge can be inferred from the surrounding circumstances, provides the requisite incentive for a prosecutor to pursue an evidentiary thread that could lead to discovery of exculpatory or mitigating evidence.

2. Include a statement in paragraph (d), that the disclosure obligations in paragraph (d) are not limited to those disclosures required by an accused's constitutional rights.

   - Pros: This explanatory provision that delimits the intended scope of proposed paragraph (d), which has been included as proposed Comment [2], belongs in the blackletter.

   - Cons: A provision that explains the intended scope of a blackletter rule provision is more appropriately placed in a Comment.

3. Include in paragraph (e), the first Commission's proposed addition of a "civil proceeding related to a civil matter."

   - Pros: Habeas corpus proceedings are technically civil proceedings that are related to criminal matters.

   - Cons: A habeas proceeding often involves an allegation of ineffective assistance of counsel that would typically require the necessity to take testimony of the defense lawyer in the criminal proceeding. The defense lawyer may not always be willing to cooperate and a subpoena will be necessary. A rule of professional conduct should not interfere with that process.

4. Include as a second sentence in proposed Comment [2] or [2A] (whichever the Commission approves) the second sentence in the first Commission's Comment [2A]: "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."

   - Pros: Clarifies that subsequent events will not excuse a failure of the prosecutor to satisfy the prosecutor's express obligations under paragraph (d) to disclose exculpatory or mitigating evidence or information.

   - Cons: The sentence, which is not found in either the Model Rule or the rules of any of the jurisdictions that have adopted the Model Rule language, is unnecessary surplusage. Whichever version of Rule 3.8(d) is adopted, the Rule itself will impose obligations that must be complied with and will provide no basis for subsequent events excusing a failure to comply with those obligations.

5. Include Model Rule 3.8, Cmts. [3] and [4], concerning paragraphs (d) and (e), respectively.

   - Pros: The Comments provide guidance on applying the referenced paragraphs.

   - Cons: The Comments simply restate the black letter rule.

6. Include the first Commission's proposed Comment [6A].[17]

   - Pros: The Comment does not explain how to interpret or comply with the Rule but merely refers to other duties under Rule 3.3 (Candor To Tribunal).

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[17] The proposed comment provided:

[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].)

- Cons: The Comment provides an important reminder that by withholding exculpatory or mitigating evidence and information, a prosecutor is violating his or her duty to the tribunal.

7. Include the first Commission's proposed Comment [10].[18]

   - Pros: The Comment belongs in a conflict of interest rule, not in a rule concerning a *current* prosecutor's duties.

   - Cons: None identified.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Paragraph (a) substitutes a knowledge standard for current rule 5-110's standard of "knows or should know". (See Sections IX.A.2 and IX.B.1, above.)

2. Paragraph (b) is a new provision in the Rules. (See Section IX.A.3, above.)

3. Paragraph (c) is a new provision in the Rules. (See Section IX.A.4, above.)

4. Paragraph (d) is a new provision in the Rules, but arguably does not change a prosecutor's duties under current law. (See Sections IX.A.5 and V. and OCTC comments, above.)

5. Paragraph (e) is a new provision in the Rules.

6. Paragraph (f) is a new provision in the Rules.

7. Paragraphs (g) and (h) are new provisions in the Rules.

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term "lawyer" for "member."

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by

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[18] The proposed comment provided:

[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].

virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters).

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Although a new provision, paragraph (d) is arguably a non-substantive change under current California law. (See Sections IX.A.7 and V. and OCTC comments, above.)

E. Alternatives Considered:

1. Instead of proposed paragraphs (g) and (h), which are based on Model Rule 3.8(g) and (h), an alternative was proposed.[19]

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[19] The alternative provision would provide:

(g) Upon receipt of evidence that, if true, would show that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose the evidence to the court or the chief prosecutor for the jurisdiction where the conviction occurred;

(2) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and the evidence appears on its face to be new and credible and to create a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Messrs. Cardona and Eaton submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.8 [5-110] in the form attached to this Report and Recommendation.

(i) promptly disclose that evidence to an appropriate court or other authority and to the defendant unless a court authorizes delay in disclosure to the defendant, or

(ii) promptly undertake further investigation or review, or make reasonable efforts to cause an investigation promptly to occur. If the prosecutor determines, after prompt investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in paragraph (g)(2)(i).

If the prosecutor determines that the evidence constitutes clear and convincing evidence establishing that the defendant was convicted of an offense that the defendant did not commit, the prosecutor shall notify the court of that determination and either move to vacate the conviction or request that the court appoint counsel for an unrepresented indigent defendant to assist the defendant in pursuing efforts to remedy the conviction.

Comment

* * *

[#] The requirement for disclosure set forth in paragraph (g)(1) applies even if the prosecutor receiving the information did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction.

[#] Consistent with the objectives of Rules 4.2 and 4.3, disclosure pursuant to paragraph (g)(2)(i) 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 and credible evidence that creates a reasonable possibility that a defendant did not commit an offense regardless of whether that evidence could previously have been discovered by the defense.

[#] A prosecutor's reasonable independent judgment that evidence is not of such nature as to trigger the obligations of paragraph (g), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed amended Rule 3.8 [5-110] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Daniel Eaton, on the Recommended Adoption of Proposed Rule 3.8(d)

California needs a Rule 3.8 dealing with the special duties of prosecutors to disclose exculpatory evidence to the defense, but it needs to be the right Rule 3.8. The version of the rule the Commission adopted takes a wrong turn at a critical juncture that makes the adopted rule aspirational, ambiguous, and beyond the scope of our responsibility. I dissent.

The Commission adopts Rule 3.8, Special Responsibilities of a Prosecutor, to impose a duty on a prosecutor who is subject to the jurisdiction of the California State Bar 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, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

In adopting this version of this new California disciplinary rule of conduct, the Commission rejects alternative language (alternative two) that would subject a prosecutor within the jurisdiction of the California State Bar to discipline who does not "comply with all statutory and constitutional obligations, as interpreted by relevant case law, 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, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

I believe the Commission made the wrong choice between these two alternatives.

I start by expressing the substantial areas in the adoption of this new rule with which I agree with the Commission majority. I agree that California should adopt a new disciplinary rule addressing a prosecutor's obligation to disclose to the defense potentially exculpatory evidence. California is unique among American jurisdictions in not having such a rule. Adding a dimension of discipline to a prosecutor's obligations in this area undoubtedly will "promote confidence in the legal profession and the administration of justice." (Commission Charter, ¶ 1.) Adoption of such a rule will make it less likely that accused individuals will be subjected to punishment that could and should have been avoided by the timely release of information bearing on their culpability or, more precisely, their lack of culpability.

I also agree that this rule should be adopted on an expedited basis. To warrant expedited adoption, a new or revised rule must be "necessary to respond to an ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice" and "where failure to promulgate the rule would result in the continuation of serious harm." (RRC Memorandum of Working Group dated May 11, 2015.) The anecdotal and statistical reports in the Innocence Project's several thoughtful letters to this Commission are alarming and amply justify the adoption of a new Rule 3.8 without delay.

But it should be the right rule 3.8. While my agreement with the Commission is broad, my disagreement with a critical aspect of the rule as adopted is profound. I believe that the Commission departs from most of the mandates of the Commission's charter.

Directive two of the Charter admonishes us to "ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." Rule 3.8 as adopted is aspirational. One member of the Commission argued that the rule as adopted "is not aspirational." That was flatly contradicted by the speaker those who argued in favor of alternative one chose to lead off their presentation to the Commission on October 23, 2015, Dean Gerald Uelmen of the Santa Clara College of Law. In his remarks to the Commission, Dean Uelmen argued that the existing dictates of *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny are inadequate to obtaining prosecutorial compliance with the duty to disclose. Dean Uelmen said that *Brady* does not address standards of professionalism "to which all members of the profession should *aspire*." (Emphasis added.) Dean Uelmen added that a prosecutor's "aspirations" should go beyond doing nothing that may result in the reversal of a conviction on appeal. Dean Uelmen observed that "the primary purpose" of the rule, as the Commission ultimately adopted it, "is aspirational." Toward the end of his remarks, Dean Uelmen framed the question of whether to adopt the alternative the Commission chose as: "Do we want a very simple *aspirational* standard?" (Emphasis added.)

Dean Uelmen is right to characterize the rule as adopted as aspirational. But that is a critical reason why the Commission was wrong to adopt the rule in that form.

Directive Three of the Commission Charter instructs us to "help promote a national standard with respect to professional responsibility issues whenever possible." The version of the Rule adopted by the Commission offends this mandate as well.

Yes, rule 3.8 has been adopted by jurisdictions throughout the nation, but the courts have interpreted that rule differently. The uniformity we supposedly further with the adoption of the rule in the chosen form is illusory. Wisconsin, for example, has determined that this language is "consistent [and coterminous] with the requirements of *Brady* and its progeny." (*In re Riek* (2013) 350 Wis.2d 684, 696.) Wisconsin is not alone. (See *Disciplinary Counsel v. Kellogg-Martin* (2010) 124 Ohio St.3d 415; *In re Jordan* (La. 2005) 913 So.2d 775; and *in re Attorney C.* (Colo. 2002) 47 P.3d 1167.) Other jurisdictions, by contrast, have adopted a more expansive view of what is required under what the Commission has adopted by Rule 3.8. (See e.g., *In re Kline* (D.C. 2015) 113 A.3d 202.)

The version of the rule the Commission adopted not only fails to advance uniformity, it needlessly introduced ambiguity. Directive Four of the Commission's Charter says: "The Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties." The Commission explicitly chooses to reject adoption of a version of the rule that would reflect the existing legal mandates on California prosecutors. The Commission's response to this assertion is that Rule 3.8 in the form the Commission adopted it has been subject to wide body of case law.

There are two responses to the Commission's assertion. First, this extra-jurisdictional authority is not binding on California lawyers. Unlike the alternative adopted by the Commission, alternative two would import a body of law that *is* binding on California prosecutors and that is fully formed -- evolving, to be sure, but fully formed at any given moment. The proponents of the version of Rule 3.8 repeatedly pointed out that existing California law goes beyond the bare mandates of *Brady*. (See, e.g., letter dated October 8, 2015 of the California Public Defenders Association to the Commission at pp. 3 and 7, discussing *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.) That, however, is a reason for adopting alternative two, not rejecting it. Reliance on a definable body of law is preferable in a rule of *discipline* to reliance on the vicissitudes of an ever-shifting, often contradictory body of case law as it is emerging in other places with a rule with substantially the same language.

And that is the second reason why the rule as adopted by the Commission introduces new ambiguities into our rules of professional conduct rather than eliminating them. As set forth above, jurisdictions that have adopted the very language the Commission adopted have interpreted that language very differently. Well, a prosecutor may fairly ask, which is it? Am I subject to discipline only if I violate duties less than those California imposes (*Brady*), the same as those California imposes (*Barnette*), or undefinably more than California imposes (the case law of unspecified other jurisdictions)? It will take years of litigation through our overtaxed disciplinary system to answer these and other questions, litigation that will involve questions of whether discipline under this newly adopted rules contradicts a California prosecutor's obligations under California constitutional and statutory law. (See e.g., Art, 1, § 24 of the California Constitution, rights of criminal defendants no greater under the California constitution than under the U.S. Constitution.)

Why not just acknowledge that a uniform national standard under 3.8 is unattainable and adopt a rule 3.8 that incorporates recognized underlying California law? The only possible rationale is to rewrite the law of the administration of criminal justice through the rules of discipline. One member of the Commission who supported the version of the rule adopted by the Commission said that the new rule is not designed to "regulate the criminal discovery process." But how could it not? The unknown limits of the newly adopted rule will lead conscientious prosecutors to do things existing law does not require, or even allow, them to do. (See letter of California District Attorneys Association dated October 1, 2015 to the Commission.) That kind of law-making goes well beyond the authority of this Commission.

It is simply wrong to say that adopting Rule 3.8 with alternative two would do nothing of importance. Adding a disciplinary component to a prosecutor's legal obligations in this area would concentrate the mind of a prosecutor in a way that the absence of such a disciplinary rule would not. CPDA President Michael Ogul of Santa Clara County correctly conceded as much.

In short, alternative two of rule 3.8 advances the first provision of the Commission's mandate to "promote confidence in the legal profession and the administration of justice" without offending three others. By adopting a rule that: (1) is aspirational; (2) purports to

reflect a national uniformity that doesn't exist; and (3) is ambiguous, the Commission decreases the odds that the new rule will be adopted at all and increases the odds that, if adopted, enforcement of the rule will be delayed. That ironically would mean that the action of the Commission in adopting the new rule in this form on an expedited basis would not boost confidence in the legal profession or improve the administration of justice after all. What a shame. What an avoidable shame.

I respectfully dissent.

Commission's Response to Dissent Submitted by Daniel Eaton on the Recommended Adoption of Proposed Rule 3.8(d)

First, Proposed Rule 3.8(d) is not aspirational. In fact, it is an effort to provide a clear articulation of the standard that some of the testifying prosecutors claimed they already follow. A major reason to adopt Alternative #1 for Rule 3.8(d) is to get all prosecutors on the same page and ensure the uniformity in discovery practices that will safeguard the integrity of the criminal process. As was evident at the October 23, 2015 Commission meeting, some District Attorneys' Offices claim that they disclose all evidence or information that would tend to negate the guilt of the accused or mitigate the offense, while others submitted letters arguing that they should be able to consider materiality in deciding what evidence to disclose. Under California law, prosecutors have a duty to disclose all exculpatory information, not just evidence they deem material.[1] Alternative #1 does not "aspire" to have prosecutors fulfill their ethical duties.[2] It plainly explains what that duty is.

For similar reasons, the Commission was not persuaded by the dissent's second argument that Alternative #1 to Rule 3.8(d) should not be adopted because a handful of jurisdictions have been flexible in defining a prosecutor's disclosure obligations. The Charter for this Commission plainly states that it should, among other things: (1) work to promote public confidence in the legal profession and the administration of justice, and ensure adequate protection to the public; (2) not set forth standards that are "purely" aspirational objectives; (3) focus on revisions that are necessary to eliminate differences between California's rules and the rules used by a preponderance of the states to help

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[1] *People v. Cordova* (2015) 62 Cal.4th 104 [194 Cal.Rptr.3d 40] (California Penal Code § 1054.1, subdivision (e) "requires the prosecution to provide all exculpatory evidence, not just evidence that is material under *Brady* and its progeny"). See also *Barnett v. Superior Court*, 50 Cal.4th 890, 901 (2010) (discovery of exculpatory evidence not governed by materiality).

[2] Mr. Eaton takes out of context Dean Gerald Uelmen's reference to "aspirational" standards. In context, Dean Uelmen was referring to his work as Executive Director of the 2008 California Commission on the Fair Administration of Justice. That Commission focused on prosecutors' widespread indifference to their discovery obligations and the need for more compliance. For years, Dean Uelmen, as well as other leaders of the California legal community, have sought to have prosecutors comply with their ethical and legal duties, including those involving discovery. As stated in oral comments at the Commission meetings, Public Defenders continue to face difficulty in getting prosecutors to comply with their discovery obligations. (Comments of Michael Ogul, President of California Public Defenders Association).

promote a national standard wherever possible; and (4) eliminate ambiguities and uncertainties.

Every other state in the nation, as well as the U.S. Department of Justice, has adopted the language of Alternative #1. No other jurisdiction has adopted the language of Alternative #2. This is for good reason. Alternative #2 sends prosecutors into the perpetual morass of trying to continually determine what so-called "relevant case law" might say about how, if at all, they should consider materiality in deciding whether to disclose potentially exculpatory information. Alternative #2 seeks to limit pretrial discovery to only material disclosures as set forth in *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194]. We rejected that standard, as has the California Supreme Court, because it is not a standard that was either designed or intended to govern a prosecutor's pretrial ethical duties for disclosing exculpatory information. To the contrary, it is a standard that governs whether a new trial should be granted after there has been a trial in which necessary disclosures were not made.

The Commission meetings at which stakeholders attended revealed that prosecutors either do not understand, or have been ignoring, their responsibility to provide exculpatory information to the defense. Contrary to what the dissent suggests, we do not expect that years of litigation will be needed to resolve how prosecutors can meet their obligations under Rule 3.8(d). Unlike Alternative #2 that requires perpetual analysis and reference to new case law, Alternative #1 plainly states that if information "tends to negate the guilt of the accused" or "mitigate the offense," it must be disclosed. This is an easy standard to understand and apply, as evidenced by the experience of the vast majority of states that have adopted the rule.

Commission members agreed that the public has lost confidence in our criminal justice system. With case after case of discovery violations that have led to wrongful convictions, there is a pressing need for a rule that does not signal to prosecutors that they should do their own analysis of materiality and case law before deciding whether to turn over potentially exculpatory information. Instead, the rule proposed by the overwhelming majority of the Commission, Alternative #1, will promote public confidence; it will set forth a concrete, not merely aspirational, ethical standard; and it will bring California into line with the rest of the nation. It will also eliminate the ambiguities and uncertainties that have led District Attorney Offices in this state to express conflicting views, like those that surfaced at the Commission meetings, about when they are required to disclose exculpatory information. In fact, written submissions to the Commission from the CDAA and from the Los Angeles County District Attorney both indicate that requiring turning over of information that does not meet the materiality test would be a major change in the law. The Supreme Court has held that the language of Alternative #1 is the current law of California as set forth in Penal Code § 1054.1(e) (requiring the disclosure of "any exculpatory evidence"), *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901 [114 Cal.Rptr.3d 576, 582-83] and *People v. Cordova* (2015) 62 Cal.4th 104 [194 Cal.Rptr.3d 40] (decided 3 days after the Commission adopted Rule 3.8).

Commission Member Dissent, Submitted by George Cardona, on the Recommended Adoption of Proposed Rule 3.8

I agree with the Commission's decision to recommend adoption of a Rule 3.8, thereby bringing California into conformity with every other jurisdiction that already has in place some version of Rule 3.8 addressing the special responsibilities of prosecutors. I also agree with the Commission's decision to expedite consideration of Rule 3.8. There are two aspects of proposed Rule 3.8, however, that I do not believe can be justified. First, I agree with Daniel E. Eaton that proposed Rule 3.8(d) is aspirational, ambiguous, and beyond the scope of the Commission's mandate. I also believe that, as the First Rules Commission concluded, it poses an unnecessary risk of conflict with California's criminal discovery statutes. Second, I also believe that, without any empirical evidence demonstrating a sufficient need, proposed Rule 3.8(e) unduly limits the ability of prosecutors to investigate instances in which clients have used their lawyers to further criminal conduct. From these two portions of the proposed Rule I dissent.

Proposed Rule 3.8(d)

I agree with and join in Daniel E. Eaton's dissent to proposed Rule 3.8(d). I wish to provide additional comment on three points.

First, as Mr. Eaton notes, the uniformity supposedly furthered by adoption of the language of ABA Model Rule 3.8(d) is illusory. While most states have adopted the language of the ABA Model Rule (or something very close), interpretations of that language have varied. The Commission's Report and Recommendation on Rule 3.8 cites three jurisdictions (District of Columbia, North Dakota, and U.S. District Court for the District of Nevada) that have held the Rule to require disclosures beyond Brady's materiality standard; four jurisdictions (Colorado, Wisconsin, Ohio, and Oklahoma) that have held it does not; and one jurisdiction (Louisiana) whose case interpreting the Rule has been cited by different courts both for the proposition that the Rule imposes disclosure obligations beyond Brady and for the proposition that it does not.[3] The Commission, in proposed Comment 3, sides with those jurisdictions that have concluded that the disclosure obligations under the Rule are broader than those imposed by Brady and its progeny. This cannot be said to further any meaningful national uniformity -- California simply joins the less than overwhelming number of jurisdictions that have taken this approach. Moreover, as in these other jurisdictions, proposed Rule 3.8(d) provides insufficient guidance as to the scope of the broader obligation imposed. Far from promoting uniformity, the text of proposed Rule 3.8(d) leaves open, undetermined, and subject to potentially differing determinations by various jurisdictions' disciplinary authorities what standard should be applied by prosecutors in determining whether disclosures not required under substantive law may nevertheless be required by the Rule.

Second, the proposed language is problematic when considered against the backdrop of the discovery requirements imposed by California statutory law. Although Comment 3 reflects a wise choice not to leave the timing of disclosure required by the Rule free standing and ambiguous, the Comment does not provide the same clarity with the scope

[3] I note that the District of Columbia Rule has language markedly different from the ABA Model Rule, further undermining any claim of uniformity.

of the disclosures. Comment 3 ties the Rule's timing requirements to "statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions." The proposed alternative Rule 3.8(d) that was rejected by the Commission would have implemented a similar tie to statutory and constitutional standards, as interpreted by relevant case law, for defining what constitutes information that "tends to negate the guilt of the accused or mitigates the offense. . . ." This would have provided guidance based on an existing, and evolving, body of law well known to prosecutors, defense attorneys, and courts. Instead, we are left with no guidance as to the standard that California's disciplinary authorities will apply. Without a tie to substantive law, will prosecutors be disciplined for failing to disclose potential impeachment information even where such disclosure would not be required under Brady and its progeny? Absent a materiality limitation, must the prosecutor disclose all such impeachment information regardless of its triviality or admissibility? Is this the case even if the witness's testimony is of minimal significance, for example, a custodian of records? The Rule itself provides no guidance, leaving ambiguities that should not be present in a Rule intended to provide a basis for discipline, not simply state an aspirational goal.

The First Rules Commission proposed a Rule 3.8(d) that contained a tie to existing law identical to that contained in the alternative rejected by this Commission, requiring prosecutors to "comply with all statutory and constitutional obligations, as interpreted by relevant case law, 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 . . . ." As explained by the First Commission, its addition of the highlighted introductory clause was to clarify "that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution and statutes, as interpreted and applied in relevant case law." This approach was based on the Commission's determination that ABA Model Rule 3.8(d) "was in conflict with California statutory law," in particular, "California statutory law that had been approved with the passage of Proposition 115 in 1991." This approach was a sound one both for this reason and because it provides prosecutors with specific guidance defining the standard to which they are accountable and emphasizes that those prosecutors who fail to adhere to the standard will be held professionally responsible.

The current Commission's proposed Rule 3.8(d) leaves open the potential for conflict with California statutory law. California Penal Code § 1054.1(e) requires the prosecution to disclose "[a]ny exculpatory evidence." The California Supreme Court has explained that this pretrial disclosure obligation is not limited to "just material exculpatory evidence," and that if, prior to trial, a defendant "can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence without additionally having to show its materiality." Barnett v. Superior Court (2010) 50 Cal.4th 890, 901 [114 Cal.Rptr.3d 576, 582-83].[4] For "exculpatory evidence," therefore,

[4] At the same time, the Court recognized the distinction between the statutory standard for pretrial disclosure and

the showing required to demonstrate, post-trial, a violation of the prosecutor's duty to disclose exculpatory evidence: "The showing that defendants must make to establish a violation of the

proposed Rule 3.8(d) and the California statutes appear to align. What constitutes "exculpatory evidence" falling within the scope of this broad pretrial disclosure obligation, however, remains an open question.

For example, in People v. Lewis (2015) 240 Cal.App.4th 257 [192 Cal.Rptr.3d 460, 468], the court recognized that "whether exculpatory evidence includes impeachment evidence may be unsettled." (citing Kennedy v. Superior Court (2006) 145 Cal.App. 4th 359, 378 [51 Cal.Rptr.3d 637].) If California courts ultimately conclude that impeachment evidence constitutes "exculpatory information" within the meaning of Penal Code § 1054.1(e), then the statutory pretrial disclosure obligation would necessarily align with any interpretation of the Commission's proposed Rule 3.8(d). But if California courts conclude otherwise, and interpret the Constitution and/or California discovery statutes as requiring pretrial disclosure of impeachment evidence only when it is material, then the Commission's proposed Rule 3.8(d) confronts disciplinary authorities with a choice: (a) interpret proposed Rule 3.8(d) as requiring prosecutors to disclose impeachment evidence regardless of materiality; or (b) interpret proposed Rule 3.8(d) to accord with the California Courts' interpretation of the Constitution and California discovery statutes and not require prosecutors to disclose impeachment evidence unless material by concluding that evidence that "tends to negate the guilt of the accused" does not encompass immaterial impeachment evidence. The former would pose a direct conflict with the California criminal discovery statutes, which make clear 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." California Penal Code § 1054(e).[5] The latter avoids this conflict, but does so by effectively implementing the very alternative to proposed Rule 3.8(d) that the Commission has rejected. We should recognize now that the latter is the correct choice, and not leave unnecessary uncertainty and potential for conflicts with Constitutional and statutory law for later resolution by disciplinary authorities.

Finally, a primary driver to the Commission's recommendation of proposed Rule 3.8(d) appears to have been a concern that anything less would not send a sufficiently strong message to prosecutors that they should err on the side of disclosure, and not rely on materiality as a basis for withholding exculpatory evidence. The United States Supreme Court has repeatedly emphasized this message, stating clearly its view that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." United States v. Agurs (1976) 427 U.S. 97, 108; see also Cone v. Bell (2009) 556 U.S. 449, 470 n. 15 ("As we

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prosecution's duty to disclose exculpatory evidence differs from the showing necessary merely to receive the evidence…. To prevail on a claim the prosecution violated this duty, defendants challenging a conviction … have to show materiality, but they do not have to make that showing just to be entitled to receive the evidence before trial." Id.

[5] Similarly, California Penal Code § 1054.5(a) states that "[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the cas against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties."

have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); Kyles v. Whitley (1995) 514 U.S. 410, 439-40 ("This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be.") (quotation and citation omitted). As the Commission heard from many of the District Attorneys who spoke at the October 23 meeting in favor of the alternative rejected by the Commission, they have heard this message and adopted disclosure policies that go well beyond that required by the Constitution, and in some instances even beyond that required by California statutes. Similarly, the United States Department of Justice has adopted a policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly, and in particular "requires disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in Kyles v. Whitley (1995) 514 U.S. 419, and Strickler v. Greene (1999) 527 U.S. 263, 280-91." United States Attorneys' Manual § 9-5.001(C).[6] As Mr. Eaton notes, it is simply wrong to say that adopting the alternative Rule 3.8(d) rejected by the Commission would do nothing to buttress this message. Adopting this alternative would still put in place a rule that singles out prosecutors with a clear statement that they may be subject to discipline for failing to comply with any of their Constitutional or statutory obligations to disclose evidence favorable to the defense. As Mr. Eaton notes, such a clear statement of the potential for discipline cannot help but focus prosecutors on the need to comply with all of their legal disclosure obligations.

Proposed Rule 3.8(e)

As recommended, proposed Rule 3.8(e) bars prosecutors from subpoenaing attorneys for information about a past or present client unless the prosecutors reasonably believes all three of the following: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is "essential" to successful completion of the prosecutor's investigation; and (3) there is no other "feasible" alternative to obtain the information. In recommending this Rule, the Commission diverged significantly from the current rules, which have no equivalent. While the interest underlying this proposed Rule, protecting the attorney-client relationship from undue interference, supports adoption of a Rule 3.8(e), I believe the Commission's proposal strikes an inappropriate balance with the need to investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys, a balance unjustified by any empirical evidence of overreaching by prosecutors in either California or any of the significant number of jurisdictions that, like California, have not yet adopted ABA Model Rule 3.8(e).

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[6] In footnote 15 on page 19 of the Report and Recommendation, the Commission states, "The United States Attorney's Manual of the Department of Justice has adopted as an internal policy for disclosure a standard comporting with the ABA's broad interpretation of 3.8(d)." It is true that, as referenced above, the United States Attorney's Manual has adopted an internal discovery policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly. However, the policy is independent from, and does not mention, the ABA's interpretation of its Model Rule 3.8(d).

First, while the Commission's proposed Rule 3.8(e) is, with a variation only in subsection (1), the same as the ABA Model Rule, a significant number of jurisdictions have not adopted the ABA Model Rule. As set forth in the report and recommendation, while 33 jurisdictions have adopted ABA Model Rule 3.8(e) verbatim or in a slightly modified form, 17 jurisdictions (including California) have not. Among the 17 jurisdictions that have not adopted the Rule are some of the largest and most significant for criminal prosecutions in the country, including the District of Columbia, Florida, Michigan, New York, Pennsylvania, and Texas. Yet, to my knowledge, the Commission has been cited no empirical evidence demonstrating any significant problem with prosecutors issuing unjustified subpoenas to attorneys in California or any of these 17 jurisdictions in the absence of Model Rule 3.8(e).

Second, despite the absence of any empirical evidence suggesting the need for such a stringent limitation on prosecutors' use of attorney subpoenas, the Commission follows the ABA in imposing the most stringent limitation possible, one requiring that the information sought be "essential" to the investigation and that there be "no other feasible alternative" for obtaining that information. In my view, this tips too far in the opposite direction, unduly limiting prosecutors' ability to thoroughly investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys. That such criminal conduct is not unusual is demonstrated by California Evidence Code Section 956, which provides that information is not subject to protection under the attorney-client privilege where "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." Indeed, there have been cases in which attorneys have been used by their clients to make false representations to regulators, courts, and investors, and to assist in laundering money by moving it through attorney trust accounts. The public interest in enabling full and complete investigation of these crimes must be considered as a counterbalance to the public interest in protecting the attorney-client relationship. The First Rules Revision Commission struck the appropriate balance between these two interests in proposing a Rule 3.8(e) that made two relatively minor changes to ABA Model Rule 3.8(e). The First Commission modified subsection (2) by substituting "reasonably necessary" for "essential." As the First Commission explained, this strikes the appropriate balance while providing clearer guidance to prosecutors seeking to evaluate whether their conduct will comply with the Rule: "It is a difficult, if not impossible, task to decide *ex ante* 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." The First Commission also modified subsection (3) by substituting "reasonable" for "feasible," explaining that this was "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." Again, the First Commission's proposal struck the appropriate balance between competing public interests, while at the same time providing clearer guidance to prosecutors seeking to comply with the Rule.

Finally, as was raised during one of the Commission's meetings, if there is uncertainty whether the First Commission's or ABA's balancing of interests is the correct one, this uncertainty should weigh in favor of taking the incremental step of moving from the current California rules (which impose no limitation on attorney subpoenas issued by prosecutors), to the less stringent limitation recommended by the First Commission. If under the First Commission's recommended Rule there is no indication that prosecutors are abusing the issuance of subpoenas to attorneys, this would provide empirical evidence that the balance has been appropriately struck, empirical evidence that can be gathered without the potential for unduly chilling appropriate investigative steps posed by the ABA's more stringent limitation.

For all these reasons, I dissent from the Commission's recommendation of its proposed Rule 3.8(e).

Commission's Response to Dissent Submitted by George Cardona on the Recommended Adoption of Proposed Rule 3.8

As noted above, the majority of the Commission believes that it is important to clarify that the standard for disclosure does not include prosecutors deciding the extent to which evidence that "tends to negate the guilt of the accused or mitigates the offense" is material to the case. Only Alternative #1 makes that clear. This dissent demonstrates exactly why it is necessary to set forth a clear standard for disclosure. Mr. Cardona poses questions of whether disclosure is required even if the prosecutor assumes that the evidence is trivial or of "minimal significance." California law has answered that question; it requires the disclosure of any exculpatory evidence, even if prosecutors do not believe it is of significance. As became evident in stakeholder input at Commission meetings, prosecutors are not in the best position to determine what evidence is or is not important to the defense. Thus, a clear rule of disclosure will prevent prosecutors from making erroneous assessments of the exculpatory potential of evidence, as has occurred in the many cases brought to the Commission's attention. Contrary to what the dissent suggests, Proposed Rule 3.8(d) provides very clear guidance. The only problem is that some prosecutors do not like the guidance it provides.

Furthermore, the Commission determined that adoption of Proposed Rule 3.8(d) does not violate Proposition 115. As noted, California law already requires disclosure of "any exculpatory evidence" and the California Supreme Court has held that a defendant is entitled to such evidence without having to show its materiality. *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901 [114 Cal.Rptr.3d 576, 582-83]. *See also People v. Cordova* (2015) 62 Cal.4th 104 [194 Cal.Rptr.3d 40]. The dissent argues that a conflict *may* develop between a prosecutor's duties under the rule and under case law, but none exists at this time and there is no reason to believe that one will develop in the future.[7]

[7] In fact, there is no reason to believe that such a conflict will develop. Even before *Barnett*, *supra*, the California Supreme Court recognized in the case of *In re Steele* (2004) 32 Cal.4th 682, 701-702 [10 Cal. Rptr. 3d 536], that exculpatory evidence under California's discovery statutes includes evidence that "weakens the strength of" prosecution evidence. As developed, California

California is, therefore, free to adopt Proposed Rule 3.8(d), a rule that best protects the integrity of the criminal justice system.[8]

Finally, this dissent argues that Rule 3.8(d) is not needed because prosecutors have gotten the message and promise to abide by their disclosure obligations in the future. While we take in good faith the representations made by a handful of prosecutors who attended the meeting, we note that the problem with discovery violations has been ongoing and, in the eyes of some judges, has escalated significantly. The former Chief Judge of the United States Court of Appeals for the Ninth Circuit recently wrote of the "epidemic" of *Brady* violations. *United States v. Olsen* (9th Cir. 2013) 737 F.3d 625, 626. Several stakeholders provided oral comments at Commission meetings regarding the ongoing problems with discovery from prosecutors. Surprisingly, even though fellow prosecutors admitted that they should not be determining materiality before making discovery disclosures, even as late as the Commission's last consideration of this proposal, the Los Angeles County District Attorney was still arguing that it is the prerogative of her prosecutors to make materiality determinations before providing discovery.

Proposed Rule 3.8(d) is not intended to punish prosecutors. It is a responsible measure to address preventable miscarriages of justice. Adopted across the nation, it has not been used as a tactical weapon to give the defense an advantage in criminal proceedings. Rather, it is an ethical standard that guides prosecutors in ensuing that defendants receive fair trials. It is time for California to adopt it.

Proposed paragraph (e).

Mr. Cardona also finds fault with paragraph (e), which prohibits a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding unless the prosecutor reasonably believes that the information sought is not protected by a privilege, the evidence is essential to the ongoing investigation or prosecution, and there is no other feasible alternative to obtain the information. The Commission continues to believe that this provision, adopted by 33 jurisdictions, sets the appropriate standard for a subpoena that can only serve to drive a wedge between lawyer and client.

Paragraph (e) was adopted by the ABA House of Delegates in 1990 after two separate Resolutions issued by the ABA during the 1980's had failed to stem the tide of federal subpoenas that had been served on criminal defense lawyers. (See *ABA Report 118 to House of Delegates recommending that new paragraph (f) be added to Model Rule 3.8* (Feb. 1990). [Paragraph (f) was re-lettered (e) in 2002 as part of the ABA Ethics 2000 revision of the Model Rules].) The proposal was prompted "by the effect these subpoenas might have on the adversary system and the attorney-client relationship – the trust placed by the clients in their attorneys and the confidentiality implicit in that relationship itself." (*Id*. at page 2.)

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law equates "exculpatory" with evidence that impeaches prosecution witnesses or detracts from the strength of prosecution evidence.

[8] The reference to the first Rules Revision Commission's work does not reflect that its work was completed before the *Barnett* and *Cordova* cases.

Mr. Cardona makes three arguments. First, he suggests the fact that some of the largest jurisdictions are among the minority of 17 jurisdictions that have not adopted paragraph (e), apparently implies that there is no problem with subpoenas being issued in these jurisdictions. That there are populous jurisdictions that have not adopted the provision does not necessarily demonstrate that there is no problem or that such a problem might not reasonably be anticipated. The Commission notes that in the 1980's, the precipitating cause of the ABA's resolutions and ultimately, rule amendment, was the increasing incidence of *federal* subpoenas.

Second, Mr. Cardona takes issue with the use of the term "essential" in subparagraph (2) of paragraph (e), stating his view that it "unduly limit[s] prosecutors' ability to thoroughly investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys." He further suggests the substitution of the first Commission's term "reasonably necessary" for "essential." The Commission disagrees with Mr. Cardona's assessment. The Commission believes that a subpoena served on a criminal defense attorney will inevitably lead to the deterioration of the attorney-client relationship which lies at the heart of our adversary system. Requiring that the prosecutor "reasonably believe" that the evidence sought is "essential" in effect prohibits the prosecutor from going on a fishing expedition for "merely peripheral, cumulative or speculative" information. (See ABA Report 118, at page 11.) Further, Mr. Cardona urges that the first Commission's term "reasonable" be substituted for the proposed term "feasible" in subparagraph (3). Again, the Commission believes that in light of the destructive effect such a subpoena will have on the attorney-client relationship, its use should be limited to those situations where the prosecutor has tried all other alternatives. A subpoena should be used only as a last resort.

Third, Mr. Cardona appears to rely on the fact that the first Commission revised the ABA Model Rule as supporting the conclusion there is no indication that prosecutors are misusing the subpoena power. The Commission does not believe that the first Commission's language supports any such conclusion. The Commission is unaware that the first Commission conducted an empirical study to support its proposed changes to the Model Rule. It again notes that the problem the ABA was addressing in 1990 was with the increased incidence of attorney subpoenas in *federal* proceedings. Given the current social and political climate, with California's position on several issues in conflict with the position of the federal government, there is a real potential for the renewal of federal attorney subpoenas. They should not be used except in the most compelling of cases. The history of Model Rule 3.8(e) demonstrates that only a rule of professional conduct with stringent standards will be effective in protecting the attorney-client relationship.